Judicial Intervention and Processes: Nigeria's Perspective on International Commercial Arbitration- One Step Forward, Two Steps Backward.

Nimisore Miriam Akano.

Submitted for the Degree of Doctor of Philosophy

School of Law
University of East Anglia

November 2022

ABSTRACT

This thesis examines the inherent issues and challenges involved in the judicial intervention in Nigeria seated international commercial arbitration in Nigeria. Nigeria as the pioneer African jurisdiction to adopt the UNCITRAL Model Law on International Commercial Arbitration is expected to take the lead as the regional preferred arbitral seat. Yet, owing to the inadequate legal framework, insufficient judicial support as well as institutional and structural challenges, Nigeria has not been able to establish itself as a preferred and attractive seat for arbitral proceedings. The thesis argues that for Nigeria to emerge as a favoured seat for international commercial arbitration, a holistic approach that examines not only the legal framework and judicial process, but also institutional and structural issues must be critically addressed. This thesis advances the need for a holistic reform to demonstrate to the international community that Nigeria has or is ready to put in place the necessary legal and institutional frameworks as well as structural and infrastructural frameworks in order to successfully position the jurisdiction as an attractive seat and one of the key international commercial arbitration players, especially within sub-Saharan Africa. It is argued that judges must sway from a jealous approach to a more constructive approach which will foster the development of arbitration in Nigeria. The thesis proffers recommendations for reforms toward enhancing Nigeria's attractiveness as an efficient and attractive seat for international commercial arbitration.

Table of Contents

List of Abbreviations

AAA American Arbitration Association

ACA Arbitration and Conciliation Act

ADR Alternative Dispute Resolution

AG Attorney General

All NLR All Nigerian Law Reports

C.A Court of Appeal

CIArb Chartered Institute of Arbitration

CJN Chief Justice of Nigeria

CLRN Commercial Law Report of Nigeria

CRCIA Cairo Regional Centre for International Commercial Arbitration

EFCC Economic and Financial Crimes Commission

EAA English Arbitration Act

EWHC High Court of England and Wales

EWHC civ High Court of England and Wales Civil Division

FACA Federal Arbitration and Conciliation Act

FCT Federal Capital Territory

FHC Federal High Court

HKIAC Hong Kong International Arbitration Centre

IBA International Bar Association

ICC International Chamber of Commerce

ICCA international council for commercial arbitration

IMF International Monetary Fund

ICC International Chamber of Commerce

JSC Justice of the Supreme Court

JUSUN Judiciary Staff Union of Nigeria

LCA Lagos Court of Arbitration

LCIA London Court of International Arbitration

LPELR LAW PAVILION ELECTRONIC LAW REPORTS

LSAL Lagos State Arbitration Law

NAC National Arbitration Centre

NACCIMA Nigerian Association of Chambers of Commerce, Industries, Mines and Agriculture

NASME Nigerian Association of Small and Medium Enterprises

NBA Nigerian Bar Association

NIAL Nigerian Institute of Advanced Legal Studies

NIC National Industrial Court

NJC National Judicial Council

NJI National Judicial Institute

NLR Nigerian Law Reports

NMLR Nigerian Monthly Law Report

OHADA Organisation pour l'Harmonisation en Afrique du Droit de Affaires

SC Supreme Court of Nigeria

SCJN Supreme Court of Nigeria Judgement

SIAC Singapore International Arbitration Centre

SLR Singapore Law Report

QB Queens Bench

UNCITRAL United Nations Commission on International Trade Law

UNICEF United Nations Children Fund

USAC Uniform State Arbitration and Conciliation

List of Key Legislation

Nigeria

Admiralty Jurisdiction Act 1991

Admiralty Jurisdiction Act 2004

Arbitration Law Cap A18, Laws of Cross Rivers State 2004

Arbitration Law Cap 10, Laws of Lagos State 1973

Arbitration Law Cap 7, Laws of Northern Nigeria States 1993

Arbitration Law Cap 7, Laws of Western Region 1959

Arbitration and Conciliation Act 1988, Chapter 19. Laws of the Federation of Nigeria 2004.

Arbitration and Conciliation Bill

Arbitration and Mediation Bill 2022

Arbitration Ordinance of 1914.

Arbitration Ordinance of 1958, Chapter 13 of the Law of the Federation of Nigeria and Lagos 1958.

Constitution of the Federal Republic of Nigeria 1999

Constitution of the Federal Republic of Nigeria (as amended) 2011

Draft Uniform Arbitration and Conciliation Bill 20

Evidence Act, Chapter 112, Laws of the Federation of Nigeria 2011.

Federal High Court Civil Procedure Rules 2009.

Federal Revenue Court Act No 13 of 1973.

Foreign Judgements (Reciprocal Enforcement) Act, Chapter C35, Laws of the Federation of Nigeria 2004.

High Court of Lagos State Civil Procedure Rules 2012

High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2004.

Interpretation Act, Chapter 192, Laws of the Federation of Nigeria 2004

Laws of Federation of Nigeria 1990

Laws of Federation of Nigeria 2004

Laws of Lagos State 1994

Lagos State Arbitration Law 2009.

Legal Practitioners Act, Chapter 207, Laws of the Federation of Nigeria 2004.

Limitation Act of Lagos State of Nigeria 2003

National Judicial Council Guidelines and Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria 2014.

National Judicial Institute Act, Chapter N55, Laws of the Federation of Nigeria 2004.

National Industrial Court of Nigeria Act 2006

Supreme Court (Additional Original Jurisdiction) Act 2002, Chapter 424, Laws of the Federation of Nigeria 2004.

United Kingdom

Arbitration Acts 1950-1979.

Civil Procedure Rules 1998.

English Arbitration Act 1889.

English Arbitration Act 1996

Other Jurisdictions

Chinese Arbitration Law 1994.

Egypt Arbitration Law (Law No. 27 of 1994, as amended)

Federal Arbitration Act (USA)

French Code of Civil Procedure

Ghanaian Alternative Dispute Resolution Act 2010.

Hong Kong Arbitration Ordinance 2013 Indian Arbitration and Conciliation Act 1996.

Kenya Arbitration Act 1995 (as amended in 2010)

Mauritian International Arbitration Act 2008 (as updated in 2016)

Rwanda Arbitration Law 2008

Singapore International Arbitration Act 2012

South Africa Arbitration Law 2017

Swiss Private International Law

Swiss Civil Procedure Code 2008.

UAE Federal Arbitration Law on Arbitration No. 6 2018

Ugandan Arbitration Law 2000.

International Treaties, Conventions and Laws

African Charter on Human and Peoples Right 1986.

Brussels 1 Regulation (Recast) on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters 2012.

Brussels Regulation, (EC) No 44/2001.

European Convention on Human Rights 1950.

European Enforcement Order (EEO) Regulation (EC) No 805/2004.

Lugano Convention 21 December 2007 (L339/3).

Rome 1 Regulation (EC) No 593/2008.

Rome Regulation 1980.

The Convention of the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958.

UNCITRAL Model law 1985.

UNCITRAL Model Law 2006.

Uniform Act of Arbitration of OHADA 1999.

Vienna Convention 1980.

Institutional Rules

Arbitration Rules First Schedule to the Arbitration and Conciliation Act 2004.

Hong Kong International Arbitration Centre Rules 2018.

IBA Guidelines on Conflict of Interest in International Arbitration 2014.

International Centre for Dispute Resolution Rules 2014.

International Chamber of Commerce Arbitration Rules 2021.

London Court of International Arbitration 2020.

Lagos Court of Arbitration Rules 2018

Singapore International Arbitration Centre Rules 2013.

Swiss Rules of International Arbitration (Swiss Rules) 2021

UNCITRAL Arbitration Rules 2010

Vienna International Arbitration Rules 2021

List of Cases

Nigerian Cases

A Savoia Ltd v Sonubi [2000]12 NWLR (Pt.682)539 (SC)

AG of Abia State & Ors v AG of the Federation [20026 NWLR (Pt763) 239 (SC)

AG of Ogun State & Ors v Bond Investment Ltd [2021] LPELR-54245(CA).

AG of Anambra State v. A.G. Federation (1993) 6 NWLR(Pt.302) 692 (SC)

Adamen Publishers (Nig.) Ltd v. Abhulimen [2015] LPELR -25777 (CA)

Adisa v Oyinwola [2000] 10 NWLR (Pt.674) 116 (SC)

Aeronautical Engineering & Tech. Services Ltd v Northwales Military Aviation Services Ltd (2020) LPELR- 52267 (CA)

Ahmadu Bello University v. VTLS Inc. [2021] 10 NWLR (PART 1783) 33 C.A

AIC v Sundersons Limited & Milan Nigeria Limited v Cruiser Shipping PTE Limited & Universal Navigation PTE Limited [2014] LCN/6835(CA)

Amadi v N.N.P.C [2000] 10 NWLR (Pt 674) 76.

Araka v. Ejeagwu [2000] 15 N.W.L.R. (Pt. 692) 684 (SC)

Arbico Nigeria Limited v Nigeria Machine Tools Limited [2002] 15 NWLR (Pt. 789) 1 (CA)

Aye- Fenus Ent. Ltd v Saipem Nig. Ltd [2009] 2 NWLR (Pt.1126)483 (CA)

Backbone Connectivity Network Nigeria Limited and Others v Backbone Technology Network Incorporated [2015] 14 NWLR (Pt 1480) 511 (CA)

Baker Marine (Nig.) Ltd v Chevron (Nig.) Ltd [2000] 12 NWLR (pt. 681)393 (SC)

Bendex Engineering Corporation & Anor v Efficient Petroleum Nigeria Limited [2008] NWLR (Pt715) 333 (CA)

Bill Construction Co. Ltd v Imani & Sons Ltd. [2006] 19 NWLR (Pt. 1013)1 (SC)

BUA Int'l Ltd Sketchyz Consulting Ltd [2019] LPELR -4734 (CA)

Candide-Johnson & ORS V. NPA & ORS (2017) LPELR-45357(CA)

CELTEL Nigeria BV v. ECONET Wireless Ltd & Ors, [2014] LPELR – 22430 (CA)

Charles Mekwunye v. Christian Imoukhuede [2019] LPELR-48996 (SC)

Chief Felix Ogunwale v. Syrian Arab Republic, [2002] 9 N.W.L.R. (part 771) (CA)

CITEC International Estates Ltd v. FHA (2019) LPELR-48066(CA).

City Engineering Nigeria Ltd v Federal Housing Authority [199] 9 NWLR (Part 520), 224 (SC)

UBA PLC v Onuoha & Ors [2013] 12 NWLR (Pt.13).

United Bank for Africa Plc v Trident Consulting Limited [2013] 4 CLRN 119 (CA)

Wema Bank PLC v Arison Trading & Engineering Company [2015] [2015] LPELR-40030 (CA).

Zenith Global Merchant Ltd v Zhongful Int'l Investment Ltd (Nig) FZE & Ors. [2017] 7 CLRN 69

United Kingdom Cases

A v B [2006] EWHC 2006.

ABB Lummus Global Ltd v Keppel Fels Ltd [2009] 2 All ER (Comm) 477

AB International (HK) Holdings Plc and another v AB Clearing Corporation Ltd and others, [2015] EWHC 2196 (Comm), 165

Abuja International Hotels Ltd v Meridian SAS 920120 EWHC 87 (COMM

Achonu v National Employers Mutual & General Insurance [1971] 1 ALR Comm.449.

AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant [2013] UKSC 35

Africa Finance Corp v Aiteo Eastern E & P Co Ltd [2022] EWHC 768

Ahmad Al-Naimi v Islamic Press Agency Inc. [2000] 1 Lloyd's Rep. 522

AIC Ltd v The Federal Airports Authority of Nigeria [2020] EWCA Civ 1585

AIC v FAAN [2022] UKSC 16

Albion Energy Ltd v Energy Investments Global BRL [2020] EWHC 301 (Comm

Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd [2007] EWHC 665 (Ch)

Aldcroft v International Cotton Association Ltd, [2017] EWHC 642 (Comm)

Alegrow SA v Yayla Argo Gida San ve Nak A.s [2020] EWHC 1845

ASA v TL [2020] EWHC 2270 (Comm).

Associated British Ports v Tata Steel UK Ltd [2017] EWHC 694 (Ch)

Atlas Power v National Transmission [2018] EWHC 1052 (COMM

A T & T Corp. v Saudi Cable Co [2000] 2 All ER (Comm) 625

Bank Mellat v Helliniki Techniki [1984] QB 291

Barnwell Enterprises Ltd v ECP Africa FII Investments LLC [2013] EWHC 2517

Benaim (UK) Ltd v Davies Middleton & Davies Ltd [2005] EWHC 1370 (TCC)

Berkeley Burke SIPP Administration LLP v Charlton [2018] 1 Lloyd's Rep 337

Itochu Corp v Johann MK Blumenthal GmbH & Co KG [2012] EWCA Civ 996

IS Prime Ltd v TF Global Markets (UK) Ltd and others [2020] EWHC 3375 (Comm)

Joint Stock Company “Aeroflot-Russian Airlines” v Berezovsky [2013] EWCA Civ 784

Kabab Ji S.A.L (Lebanon) v Kout Food Group [2021] UKSC 48

Koninklijke Philips NV v Guangdong Oppo Mobile Telecommunications Corp Ltd [2022] EWHC 1703

Kruppa v Benedetti [2014] EWHC 1887 (Comm)

Kutner v Philips [1891] 2 QB 267 (QB)

Laker Airways Inc v FLS Aerospace Ltd [1999] 2 Lloyd’s Rep 45

Lesotho Highlands v Impreglio SpA [2003] EWCA Civ. 1159

Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43

Maass v Musion Events Ltd & Ors [2015] EWHC 1346 (Comm)

Malaysia Development Berhad v International Petroleum Investment Company and Aabar Investments PJS, [2021] EWHC 2949 (Comm]

Maximov v OJSC Novolipetsky Metallurgichesky Kombinat,

Merthyr (South Wales) Ltd v Cwmbargoed Estates Ltd and another [2019] EWHC 704 (Ch)

Midgulf International Ltd v Groupe Chimique Tunisien [2010] EWCA Civ 66.

Minister of Finance (Incorporated) and 1 Malaysia Development Berhad v International

Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007] UKHL 40

Petroleum Investment Company and Aabar Investments PJS [2019] EWCA Civ 2080

Naviera Amazonica Peruana S.A. v Compania International de Seguros del Peru [1988] 1 Lloyd's Rep 116

Newcastle United Football Co Ltd v Football Association Premier League Ltd and Others [2021] EWHC 349 (Comm)

Nigerian AGIP Exploration Ltd v GEC Petroleum Development Co Ltd [2021] EWHC 1412

P v D [2014] EWHC 2355 (Fam)

Patel v Patel [2000] QB 551

Permasteelisa Japan KK v Bouyguesstroi [2007] EWHC 3508 (QB)

Porter v Magill [2001] UKHL 67

Process & Indus. Devs. Ltd v. Nigeria [2019] EWHC 2241

Process and Industrial Developments Ltd v Nigeria [2019] EWHC 2241 (Comm); [2019] 2 Lloyd's Rep. 361

Sabbagh v Khoury [2018] EWHC 1330 (Comm)

Shagang South –Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics [2015] EWHC 194 (C0MM)

Shashoua v Sharma [2009] EWHC 957 (Comm), [2009] 2 All E.R. (Comm) 477

Sierra Fishing Company &Ors. v Farrant& Ors. [2015] EWHC 140 (Comm)

Soleimany v Soleimany [1998] 3 WLR 811, [1999] QB 785 (CA), [1999] QB 785.

Specialised Vessel Services Ltd v Mop Marine Nigeria Ltd [2021] EWHC 333 (Comm)

Star Shipping AS v. China Nat'l Foreign Trade Transp. Corp. [1993] 2 Lloyd's Rep. 445, 452.

Stretford v The Football Association Ltd and Another [2007] EWCA Civ 238

Sulamerica Cia Nacional de Seguros SA v. Enesa Engenharia SA [2012] EWCA Civ. 638 (English Ct. App.).

The Deposit Guarantee Fund for Individuals (as Liquidator of National Credit Bank PJSC) v (1) Bank Frick & Co AG (2) Eastmond Sales LLP, [2021] EWHC 3226 (Ch)

Thoburn v Sunderland City Council [2003] QB 151 (Div. Ct).

Toyota Tsusho Sugar Trading v Prolate [2014] EWHC 3649 (Comm).

TTML SARL v STAT Oil [2011] EWHC 1150 (comm)

Union of India v. Mcdonnell Douglas Corp. [1993] 2 Lloyd's Rep. 48 (QB) (English High Court).

U&M Mining Zambia Ltd v Konkola Copper Mines Plc [2013] EWHC 260 (Comm.)

VTB Commodities Trading DAC v. JSC Antipinsky Refinery [2021] EWHC 1758 (Comm)

Vynoir case [1609] 77 Eng. Rep. 595, 598-600 (K.B.)

W Ltd v M SDN BHD ([2016] EWHC 422

West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor) [2007]1 All E.R (Comm) 794

Yukos Capital SARL v OJSC Rosneft Oil Company [2014] EWHC 2188 (Comm)

Other Jurisdictions

Amore Pte Ltd v Otto Marine Ltd, [2014] 1 SLR

BCY v BCZ (2016) SGHC 249

BGS SGS SOMA JV v. NHPC Ltd., (2020) 4 SCC 234.

Bharat Aluminium Co vs. Kaiser Aluminium Technical Service Inc. (2012) 9 SCC 552

CBS v. CBP [2021] SGCA 4

Chromalloy Aero Service Inc. v. Ministry of Defence of the Republic of Egypt. (1996) 939 F. Supp. 907 (D.D.C

Compagnie de Navigation et Transports SA (France) v MSC- Mediterranean Shipping Co. SA (Switzerland) (1990) XXL Ybk Comm Arbn 690-8.

China Ocean Shipping Co. v Whistler International Ltd. [1999] HKCFI 693.

Enercon GmbH v Enercon (India) Ltd, [2014] 2 S.C.R. 85

First Options of Chicago v Kaplan 514 US 938

Hamilton ltd v Omnium de Traitement et de Valorisation [1997] XXII Ybk Comm. Arb 696 (Cour de cassation, June 10, 1997

Houston v Moore [1820] 18 US 1 (SC)

L. Capital Jones Ltd v Maniach Pte Ltd [2017] SGCA 3

Microtec Securi-T Inc. Quebec National and International Commercial Centre, CLOUT case \No. 516, Canada Quebec Superior Court, confirmed by the Quebec Court of Appeal in Microtec Securi-T Inc V CACNIQ, 14 March 2003 available online at https://www.uncitral.org/clout/clout/data/can/clout_case_516_leg-1741.html

Montpelier Reinsurance Ltd. v. Manufacturers Property & Casualty Limited [2008] BDA LR 24 (SC) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mal-digest-2012-e.pdf

Popack v. Lipszyc, CLOUT Case No. 385, Ontario Court of Justice, Canada, 8 June 1995.

Prima Paint Corp v Flood & Conklin Mfg. Co [1967] 388 US 395

Progressive Career Academy Pvt. Ltd v FIIT JEE Ltd [2011] 5 RAJ 7 Delhi

PT Tugu Pratama Indonesia v Magma Nusantara Ltd [2003] SGHC 204

Reliance Industries Ltd & Anor. V Union of India (2014) 7 SCC 603, 57

TCL Air Conditioners (Zhongsan) Co. Ltd. v The Judges of the Federal Court of Australia [2013] HCA 13

Dedication

I dedicate this thesis to the loving memories of my darling mother, Anna Ugboma, my father in-law, Chief Olusola Akano, my sister in-law Olujenyo Akano-Akinremi, eternal rest grant unto then O Lord, and let perpetual light continue to shine upon their beloved souls. Amen.

and

To the three men in my life, Olabode, my darling ever supportive husband, Olusegun and Oladimeji my beloved sons, without your love and support, this would never have happened. To my lovely daughter in-law Jeannie, thank you for giving us Anjolaoluwa and making us grandparents. This is dedicated to you all.

Acknowledgement

It is never too late to pursue one's dream, but for God that gave me the strength, wisdom and knowledge, to him be all the Glory and adoration. It has been a great research journey filled with hard work, sweat, a deep search for knowledge, skill acquisition and self-development. My gratitude is extended in great measure to the following rare personalities whose immense contributions and assistance towards my doctoral degree dream was achieved.

I must express my profound appreciation to my wonderful supervisory team, my primary supervisor, Dr Hakeem Seriki, and Dr Yousef Farah for providing useful, speedy and very constructive feedback throughout the course of my PhD. They both made the PhD journey as stress free and enjoyable as it could ever be and for this, I will always be grateful. I am most grateful for the opportunities you both gave me to acquire skills and self-development.

My appreciation goes to the National Open University of Nigeria for giving the opportunity and granting me study leave to undertake the doctoral programme. To my colleagues and friends at the Faculty of Law, National Open University of Nigeria, I say thank you all for your encouragement and support. To Fatai Lawal, thank you so much for all your support and kindness.

I am most grateful to Kelly Foyster who made her home another home for me in Norwich, you are the best Landlady anyone could ever have, for your love and understanding I am ever grateful. I am grateful to fellow doctoral colleagues that have become friends – Bernadette Numan, Anush Ganesh, Valentine Kunuji, and Ellie Dobbyne, I cherish all the fellowship, encouragement and hangouts we shared. To Bolaji Owoseni, a doctoral colleague from the Faculty of Humanities, Sainsbury Research Unit, my reading partner in the main library, you made this PhD journey less lonely. You have become a true friend and a younger sister. I am

eternally grateful for all your support in times of need, I sincerely appreciate the unique experiences and bond we shared, and I will forever be grateful.

To my second Mother Emilia Ugboma, thank you so much for filling the gap, for always being there for me and my brother right from childhood till now, words cannot do justice to how grateful I am to you for your motherly love, prayers and encouragement. Thank you. To my brother Dr Marshal Prebo Barango and my sister-law Abimbola Barango, you have been a pillar of support, thank you so much for all you do for me and the boys. To my wonderful brother-in-law and his lovely wife Oluseyi and Lawunmi Akano, I appreciate you both now and always. To my wonderful in-laws Alahji Bolaji and Alhaja Ajetunmobi, I am most grateful for all your support. To Elizabeth Oyelami thank you for holding forth, you are indeed appreciated and to my darling Peace, thanks dear. To my friends like sister, Timidi Igali, Funke Aje-Famuyide, Toyin Olokose, thank you so much for the love, prayers and encouragement.

Finally, on a personal level, to my darling husband, my number cheerleader, thank you so much, but for your love support and understanding this PhD journey wouldn't have been easy. To my darling sons thank you for your encouragement, love and support. You three are my everything

Chapter One: General Introduction

1.1 Introduction

Nigeria is Africa's largest economy and a destination of a significant number of international commercial transactions, trade, and investments.[1] Nigeria as one of the developing economies in sub-Saharan Africa has experienced continuous growth in the last 25 years.[2] The remarkable improvement in the macroeconomic environment has made the region very attractive. The attraction of Nigeria lies not only in its abundance of natural resources but in demographic dividends[3] which have attracted and encouraged foreign investments across the various sectors of the economy in African jurisdictions and globally. Given the huge commercial transactions and investments and the complexity of such investment and commercial activities, the likelihood of disputes between parties is inevitable. Various Alternative Dispute Resolution (ADR) mechanisms are available to facilitate the settlement of such disputes. International commercial arbitration would normally be the preferred dispute settlement mechanism for any dispute that may arise. International commercial arbitration is a quasi-judicial dispute resolution method, whereby parties to a dispute agree to submit their disputes to an independent tribunal for a final and binding resolution.[4] Hence, international commercial arbitration offers a suitable dispute mechanism for international commercial parties as it provides an efficient and effective means of resolving international commercial disputes tailored to their disputes

[1] Nigeria with an estimate population of 184 million, has been rated the largest African Emerging Economy though the economy is Oil driven, there is expanding growth in manufacturing, telecommunication, construction, energy and transport. See www.worldbank.org/Nigeria last accessed 23 April 2019.
[2]UNCTAD, World Investment Report, Investment and Digital Economy (2017), seen at https://unctad.org/system/files/official-document/wir2017_en.pdf > 23 April 2019.
[3] IMF Regional Economic Outlook, 2015, 'Sub- Saharan Africa; How Can Sub-Saharan Africa Harness the Demographic Dividend? www.imf..org accessed 28 April 2019.
[4] Blackaby, N., and Partasides, C., Redfern, A., and Hunter, M, Redfern and Hunter Law and Practice of International Commercial Arbitration, (6th edn Oxford University Press 2015) 1.04.

and needs. The attraction for international parties involved in international arbitration lies in the efficiency of arbitral proceedings tailored to the needs of a particular dispute in addition to the binding and finality of the arbitral decision (awards).[5] In addition, the neutrality of the international commercial arbitration process as parties have the autonomy to choose their arbitrators (who are expected to be impartial and independent), governing laws, and, seats of arbitration are some of the main attraction to arbitrate their disputes instead of litigation before national courts.[6]

Although, there are scarcity of surveys or studies of the direct impact of international commercial arbitration on the economic growth or revenue of a country, however, the economic implication of international commercial arbitration cannot be overemphasised. The huge amount involved in most international commercial disputes surely has economic benefits for the global economy. For instance, it was reported that the aggregate value of pending cases before the ICC Court as of 2019 was said to be USD 230 billion.[7] Also of recent the Law Commission Consultation Paper 2022, stated in its report that an estimate of at least five thousand (5000) domestic and international arbitrations are held in England and Wales every year and these potentially are worth nothing less than £2.5b (if not higher) to the economy of the UK[8]. This has economic implications and benefits for the arbitral institution, law firms, arbitrators as well as countries (taxes that will be generated). The attraction of the economic

[5] The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 is the most widely accepted international treaty with over 157 countries as signatories to the convention. The convention facilitates the recognition and enforcement of both arbitration agreements and awards.
[6] Redfern & Hunter (n4) 1.97.
[7] See ICC 2019 Dispute Resolution Statistics seen at www.iccwbo.org/dr-stat2019 accessed 30 July 2020.
[8] The Law Commission Consultation Paper September 2022: Review of Arbitration Act 1996 available at https://www.lawcom.gov.uk/project/review-of-the-arbitrationact-1996 p.1.see also Prof. Dr. Jordi Paniagua 'The Economic Impact of International Commercial Arbitration paper presented at the 3rd Regional International Arbitration Conference, Sydney on March 17, 2021. Available at www.events.development.asia/systes/files/material/2021/03/202103-jordi-paniagua-presentation.pdf

benefits, as well as political benefits, are the key reasons that many cities in the world are competing to promote themselves as the choice seat for arbitration.[9]

Nigeria, as Africa's largest economy and population, has the attractiveness to foreign investments that include the oil and gas industry, and the non-oil economy in the telecommunication and construction industries[10]. Nigeria's reputation as a potential preferred arbitral seat is blighted by challenges associated with the legislative framework, the judicial system as well as institutional and structural framework.[11] In Nigeria, litigation is still the prevalent dispute resolution mechanism, hence litigation overshadows and to an extent shapes the approach to arbitration. The legal framework of a jurisdiction is one of the key yardsticks in measuring whether a jurisdiction is an attractive and preferred seat for the conduct of international commercial arbitration. The current arbitration legislation in Nigeria is the Arbitration and Conciliation Act 2004 of Nigeria (ACA 2004)[12] which is based on the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration.[13] However, it is argued that some provisions of the dated ACA, dealing with the internal process of the arbitration and external relationship with the courts when compared with UNCITRAL Model Law on International Commercial Arbitration, the New York Convention on Foreign Arbitral Award 1958 (NYC,) and other modern national arbitration laws suggest some grey areas that need urgent reforms.[14] Nigeria is a Constitutional Republic, however, the legal system is based

[9] Loukas Mistelis, Seat of Arbitration and Indian Arbitration Law, Arbitration Law, 4 Indian J. Arb. L. 1 (2016) 4-13.

[10] Nigeria's population as of 2017 was estimated at 190.9 million https://data.worldbank.org accessed 15 December 2020.

[11] Seats for International Arbitration in Africa and in Nigeria particularly are regarded as London, Paris, Singapore, and Hong Kong. See 'The Current State and Future of International Arbitration: Regional Perspective' IBA 2015 Arb 40 www.ibanent.org accessed 21 April 2020.

[12] Arbitration and Conciliation Act (1990) Cap 19 (Nigeria) now in Arbitration and Conciliation Act, (2004) Cap 18A (Nigeria) [hereinafter "ACA"] was enacted as a Military Decree in 1988 as the 1988 Arbitration and Conciliation Decree (ACD).

[13] UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006), Nigeria adopted the 1985 version.

[14] Some of these grey areas impact the effectiveness and adequacy of the ACA to provide efficient law for international commercial arbitration. For instance, the sections provide for the power of the court to stay legal proceedings in favour of the court, see sections 4 and 5 ACA 2004. the power of the court.

on the English Common Law[15] and most areas of Nigerian law, draws considerable inspiration from the English case law. This thesis therefore shall where it is necessary make comparison between Nigeria courts and English courts approach to arbitration. Aside the common law link with England, the LCIA Annual Casework Report 2019 shows that Nigeria has the chunk size of arbitration references amongst the African arbitration cases.[16] This indicates the preference of London as the seat of Arbitration and therefore the thesis will be drawing lessons for the way forward for Nigeria.

The ACA 2004 adopts the Model Law flexible approach to international commercial arbitration, as it allows parties, to internationalise their disputes without any obvious reason or any foreign link. Parties, despite the nature of the contract, under the ACA can expressly agree that any dispute arising from the commercial transaction shall be treated as international arbitration.[17] This approach has been criticised as being too broad[18], hence some Model Law jurisdictions[19] omitted this internationality in their laws. In the same Interpretation Section, of the ACA in defining commercial embraces all types of trade and business.[20] The implication of this is that only contractual commercial relationships and commercial matters are necessarily capable of being settled by arbitration.[21]

Nigeria as a constitutional jurisdiction, and a federal state made of thirty-six states and a Federal Capital City (FCT). The issue of supremacy of the constitution over every other law, the ACA inclusive, has raised constitutional questions over some aspects of the ACA. Particularly,

[15] Though a common law country and with the influence of English law characterizes the legal system. Nigeria has a written Constitution. The Constitution of the Federal Republic of Nigeria 1999 (as amended). Nigeria has a presidential system of government which is a democratic and a republic system of government where the head of state leads the executive branch of the government which is different from the legislative and judicial arms of government.

[16] See The London Court of International Arbitration, 2019 Annual Casework Report seen at www.lcia.org/LCIA/reports accessed 26 September 2022.

[17] ACA 2004 section 57(2)(d), see also Model Law 1985, Article 1 (3) (c).

[18] Julian D. M Lew et al 'Comparative International Commercial Arbitration (Kluwer Law, 2003) 61.

[19] Ibid, see Hungarian Act LXXI 1994, Canadian International Commercial Arbitration Act.

[20] ACA 2004 section 57 (1).

[21] 'Commercial Reservation' is also provided under the New York Convention 1958.

constitutional challenges over the right of parties of access to court and appellate courts. Also, constitutional issues have been raised over the dual existence of the federal arbitration law, the ACA as the primary arbitration legislation, and State arbitration laws.[22] The ACA 2004 provides for a unified legal framework for the settlement of commercial disputes by arbitration, component states have their own arbitration laws or have enacted their own arbitration legislation. The overlapping legislative regimes generated constitutional concerns as regards the competence and legitimacy of the continued existence and enactment of state arbitration laws. There are likely potential areas of conflict by the dual existence of two arbitration regimes within a country without any express scope of their application. Particularly, the enactment of the Lagos State Arbitration Law 2009 (LSAL 2009)[23] generated fierce constitutional debates regarding the competency of the State to legislate on arbitration matters. Interestingly, some provisions of the ACA have also received constitutional challenges on the basis that it extinguishes the right of access to court and appeal as constitutionally guaranteed by the constitution of Nigeria.

International Commercial Arbitration is a process of resolving disputes arising out of international commercial contracts, as an alternative to settling disputes in court. A neutral arbitration tribunal whose decision is final and binding resolves disputes. As with international arbitration agreements,[24] the efficiency and efficacy of arbitral proceedings depend largely on a friendly-arbitration framework of modern arbitration law and a supportive and efficient judicial system. In international commercial arbitration, most modern arbitration legislation concedes and recognizes the role of the national courts in international arbitration, in terms of

[22] Lagos State Government in 2009, enacted new arbitration legislation, The Lagos State Arbitration Law (LSAL) 2009.
[23] Lagos State Arbitration Law No 18, 2009.
[24] There can be no arbitration tribunal without an agreement from both parties to submit to arbitration, the pro-enforcement regime of an international arbitration agreement by national courts is of fundamental importance to the efficacy of arbitral process.

support and supervision of the arbitral proceedings.[25] The core of this thesis examines the efficacy and efficiency of the legal framework, judicial support, and institutional structure applicable to international commercial arbitral proceedings in Nigeria. In particular, the concept and importance of arbitral seats and their legal consequences and how it enhances the attractiveness of a jurisdiction as a choice arbitration seat. The widespread economic implication for benefits of 'pro-arbitration' jurisdictions, has created an incentive for international cities and arbitral institutions to compete in the lucrative international arbitration market.[26] This thesis explores whether these economic activities match with better recognition of Nigeria's ability to serve as a seat for arbitration in the continent. For a jurisdiction to be attractive and desirable as a seat for international arbitration, it must possess a combination of features of effective and modern arbitration law, and a judicial system experienced in international commercial arbitration. Arbitral institutions as well as other stakeholders described by Gaillard as 'service providers[27] such as legal practitioners are key players in the field of international commercial arbitration.

The growth of arbitration as a dispute resolution mechanism for an international commercial transaction, and the economic benefits because of globalization have fuelled the development of international arbitration all over the world.[28] This has also resulted in competition among major cities and the last couple of years have witnessed the emergence of new arbitration centres.[29] Major international commercial players in global business have become more

[25] English Arbitration Act 1996, UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006), Arbitration and Conciliation Act of Nigeria 2004.
[26] Stephan Wilske, 'The Global Competition for the 'Best' Place of Arbitration for International Arbitrations—A More or Less Biased review of the Usual Suspects and Recent Newcomers' (2008) 1 Contemporary Asia Arb J. 21.
[27] Emmanuel Gaillard, 'Sociology of International Arbitration, (2015) Arb Int'l (31)1 l, 1.
[28] Bernard Hanotiau 'International Arbitration in a Global Economy: The Challenges of the Future, (2011) 28 Journal of International Arbitration 2, 89.
[29]The global rankings of Singapore and Hong Kong has in the last decade according to the QMUL 2018 International Arbitration Survey: soared and they have emerged amongst the five most preferred seats with the famous cities/seats of London, Paris and Geneva. http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf accessed 18 June 2020.

sophisticated in their understanding and appreciation of dispute resolution mechanisms. Thus, several jurisdictions seeking recognition as desirable international commercial arbitration seats have either enacted and or reformed their legal and institutional frameworks to attract users of international commercial arbitration from different locations around the world.[30] This is evident in jurisdictions such as Singapore and United Arab Emirate (UAE) who have over a short period of time have been recognised as seats of arbitration.

The challenges that undercut the critical and important part of Nigeria's desirability as a seat for international commercial arbitration needs a holistic reform towards making Nigeria attractive and a desirable international seated arbitration jurisdiction if not globally at least within sub-Saharan Africa.

1.2 Objectives of the Thesis

The main purpose of this thesis is to examine the existing legal regime of law and practice of international commercial arbitration, including the role of stakeholders in Nigeria, by critically analysing the issues and challenges of Nigeria in becoming an attractive seat for arbitration. The court of the seat of arbitration exercises substantial control over the functions of the arbitral process seated within the jurisdiction, albeit in line with modern arbitration law minimal judicial intervention. The current Nigerian arbitration regime including judicial control of the arbitral process leaves much to be desired. This study examines how Nigeria can strengthen its role as a seat of international commercial arbitration. Before going to the country-specific perspective, the study examines and analyses the theoretical and conceptual framework that supports the relationship between the courts and international commercial arbitration. In addition, it illustrates the debate as to the role of the seat in international commercial arbitration.

[30] Examples are UAE (Federal Law No. 6 of 2018 on Arbitration (the Arbitration Law) and South Africa (International Arbitration Act No. 15 of 2017), the arbitration laws of these countries were amended recently in line with modern arbitration law and practice with the aim of becoming an attractive seat for international commercial arbitration.

The seat of arbitration is one of the most important concepts in international commercial arbitration, as it determines the link between arbitration and the law governing the arbitration procedure and the court with supervisory power.[31] The objective is specifically based on the recognition that the current legal framework, judicial attitude, as well as institutional and structural issues are not adequate to position Nigeria as an attractive seat for international commercial arbitration. The efficacy of international commercial arbitration depends largely on arbitration legislation, support and the attitudes of the courts as well as institutional, structural and infrastructural factors.[32] Nigeria embraces arbitration along with other dispute resolution mechanisms as providing a viable alternative to litigation, which has hitherto dominated dispute resolution in Nigeria.[33] The thesis examines the legal and regulatory framework within the context of instituting a competent system of arbitration to promote Nigeria as a seat for arbitration within the region and beyond. The defects of the dated ACA 2004, and the attitude of the court in judicial intervention and support are some of the challenges that this thesis will critically examine. The role of the court in international commercial arbitration is vital particularly as a seat of arbitration, the court must demonstrate a pro-arbitration stance by supporting the arbitration process. The thesis goes further to argue that in a seat of arbitration where judicial intervention is inconsistent with the intention of parties to have their disputes resolved by arbitration, the role of the court does not enhance the effectiveness of the arbitral process. Inadequate judicial infrastructure as well as unnecessary bureaucratic bottlenecks and the timescale of court proceedings in general and for arbitration

[31] *Process & Industrial Developments v Federal Government of Nigeria* [2019] EWHC 2241(Comm).
[32] George A. Bermann, 'What Does it Mean to be Pro-Arbitration' (2018) 34 Arb. Int'l (3) 341.
[33]For instance, an empirical study carried out in 2012 indicated an increase in the use of alternative dispute resolution mechanisms like mediation and arbitration in Lagos State with the establishment of the first court-connected Alternative Dispute Resolution Centre in Africa, The Lagos Multi-Door Courthouse in 2002. See Emilia Onyema, 'The Multi-Door Court House (MDC) Scheme in Nigeria: Case Study of the Lagos MDC. (2013) Apogee Journal of Business, Property & Constitutional law, 2 (7) 96-130. http://eprints.soas.ac.uk/14521 accessed 27 September 2017, see also Andrew Chukwumerije, 'Salient Issues in the Law and Practice of Arbitration in Nigeria' (2006) A.J.I.C.L., 14(1), 1

matters would not portray Nigeria as a jurisdiction ready to become a desirable international arbitration seat.[34]

The thesis in examining the role and capacity of key stakeholders and service providers as well as infrastructural arbitral institutions in Nigeria evaluates its role in enhancing the practice of international commercial arbitration as well as promoting Nigeria as a preferred choice of arbitration seat within the region. It is argued that the proliferation of arbitral institutions in Nigeria has not aided in placing Nigeria as a lead arbitration player within the African region. For a jurisdiction to be classified as a 'pro-arbitration' seat for modern international commercial arbitration proceedings, the institutional and structural infrastructural frameworks must be adequate to provide efficient and effective administration and conduct of the international commercial arbitration process and proceedings.[35] The legal, judicial, and institutional frameworks for international commercial arbitration cannot effectively function to guide and support arbitration in Nigeria where service providers for and in arbitration are functioning at cross purposes. The thesis aims to address the issues and challenges that are hindrances to the desirability of Nigeria as a preferred seat for international commercial arbitration.

1.3 Research Questions

In the light of issues raised in the introduction, the thesis identified issues besetting judicial intervention and processes in international commercial arbitration law and practice in Nigeria,

[34] Cases of arbitration for support of courts' curial powers or for enforcement of arbitral powers see *AIC Ltd v Federal Airports Authority of Nigeria*, [2019] EWHC 2212 (TCC); *IPCO v NNPC* [2005] EWHC 726; [2017] UKSC 16; *NNPC v Clifco Nigeria Limited*, (2011) 10 NWLR (Pt. 1255) 209*; The Vessel MV Naval Gent & Ors. (Naval Gent & Ors.) v Associated Commodity International Limited* (2015) LPELR-25973(CA) *2.* The case *of A. Savoia v Sonubi* is an excellent example of a case that has suffered a delay of more than 19 years before the courts in Nigeria.

[35] See George A. Foreman (n32), see also Thomas E. Carbonneau, Arguments in Favour of the Triumph of Arbitration, (2009) 10 Cardozo J. Conflict Resol. 395.

and these pose challenges to Nigeria being an attractive arbitral seat, the following sub- research questions have been addressed in the thesis:

i. Can the current ACA as it stands, be said to provide a comprehensive legislative framework that would make Nigeria a regional frontrunner and attractive arbitration seat? What are the weaknesses of the existing legislation and instruments?

ii. What are the judicial infrastructural challenges (the court system, the court rules, and the judiciary) facing Nigeria as a seat for international commercial arbitration? Are the court systems in Nigeria adequately well equipped to provide effective judicial support for Nigeria seated international commercial arbitration?

iii. What quality of the institutional, structural and expertise, facilities, and support services are needed to make Nigeria an attractive seat for international commercial arbitration? Is there adequate institutional and professional support for the practice of international commercial arbitration in Nigeria?

1.4 Importance of the Thesis

The significance of this research is that it generally evaluates the current legal, judicial, institutional, and structural framework of international commercial arbitration. The thesis does not replicate the literature on the main subject but examines and critically analyses key and peculiar challenges facing the law and practice of international commercial arbitration in Nigeria. It examines the judicial intervention and processes of international commercial arbitration in Nigeria from an entirely different perspective, first the adequacy of the judicial support, second, the effectiveness of the legal framework, and lastly the efficacy of the institutional and structural framework. The thesis identified the gap in the literature concerning the judicial intervention in international commercial arbitration in Nigeria, especially in books and journal articles that cover the law and practice of international commercial arbitration in

Nigeria.[36] While it is acknowledged that, there is extensive legal and scholarly literature on judicial intervention in international commercial arbitration, this thesis does not intend to replicate the literature on the main subject. How these issues impact on the desirability of Nigeria as a preferred arbitration seat have not received the attention it ought to have. Most arbitration commentators in the field of arbitration in Nigeria have paid little attention to the issues of judicial infrastructure, corruption perception of Nigeria and the judiciary and the role of arbitral institutions and stakeholders, as factors militating against Nigeria emerging as a popular regional seat of arbitration. It is indeed argued that most of the literature lacks a comprehensive examination of issues and challenges mitigating against Nigeria becoming a preferred arbitration seat. Most of the literature also canvas the potential of the attraction of Nigeria as a seat of arbitration on the basis that the arbitration law of Nigeria is based on the UNCITRAL Model Law. However, the now over 30 years of arbitration legislation in some important respects lacks modern arbitration practice which has apparently because of its weaknesses impacted the attractiveness of Nigeria as an arbitral seat. The thesis examines the shortcomings of the current arbitration law as well as the potential weakness of the recent arbitration reforms.

The originality of this work further lies in two vital respects. First, the thesis also makes a novel contribution by analysing the yet to be executed Draft Bill for the amendment of the arbitration legislation, the Arbitration and Mediation Bill 2022 (Bill). The process to reform the current thirty -four years old arbitration law the ACA had taken over seventeen years to get to being passed by the upper legislative arm. The thesis provided detailed analyses of salient provisions of the Draft Bill for the purpose of evaluating whether the reforms reflect the needed

[36] Current Nigerian Text on International Commercial Arbitration, such as Adedoyin Rhodes-Vivour Commercial Arbitration Law and Practice in Nigeria Through the Cases, (LexisNexis 2016); Paul Idornigie, 'Commercial Arbitration Law and Practice in Nigeria (Law Lords 2017); Fabian Ajogwu Commercial Arbitration in Nigeria (Law & Practice Centre for Commercial Law Development, 2013).

development in international commercial arbitration that will enhance the attractiveness of Nigeria as an arbitral seat. It is argued that the Bill in many respects is in line with modern arbitration law and if finally enacted into law, it is an opportunity for Nigeria to reform and position itself in the global international commercial market.

Secondly, most studies in the field have not extensively dealt with issues and challenges facing Nigeria as a desirable seat for international commercial arbitration. A supportive court and an effective legal framework are not the only factors that influence the choice of a seat of arbitration or that determine the arbitration friendliness of a jurisdiction. International commercial arbitration process involves the services of legal representatives and arbitral institutions. Given that Nigeria is an arbitration developing jurisdiction, these two players are major stakeholders in the success of an arbitral process and transformation of arbitration practice in Nigeria. What makes this thesis significant is that it addresses the challenges of the role of key stakeholders and structural issues of developing Nigeria into an attractive seat for international commercial arbitration which is generally missing in most of the literature. The role of key stakeholders such as arbitral institutions is vital in promoting the development of arbitration as well as positioning Nigeria to take a clear lead in the arbitration community within the region. It has been canvassed that the establishment of several arbitral institutions in Africa and in Nigeria inclusive signifies the development of arbitration for the continent.[37] It is argued in this thesis that the proliferation of arbitral institutions has not increased the arbitration references in these arbitral institutions. Indeed, the focus should not be about the quantity of arbitral institutions rather on their quality. Most importantly, are the reputation and general

[37] See Emilia Onyema, 2020 SOAS Arbitration in Africa Survey available at https://eprints.soas.ac.uk/ accessed 15 September 2022, see also, Muigua, Kariuki. "Effectiveness of Arbitration Institutions in East Africa." (2016). https://scholar.google.co.uk/scholar accessed 15 September 2022, Onyema, Emilia (2015) The Role of Arbitration Institutions in the Development of Arbitration in Africa. In: Arbitration Institutions in Africa Conference, 23 July 2015, Addis Ababa, Ethiopia. (Unpublished) available at https://eprints.soas.ac.uk/20421 accessed 18 September 2022.

perception of the corruption of Nigeria, the judiciary, and arbitrators which hinder the recognition as an attractive seat for arbitration. The thesis provided insight and tangible evidence that the issue of the corruption index might not really be a perception but a reality. Additionally, the dwindling state of security and inadequate infrastructures are issues that pose challenges that bear on the attractiveness of Nigeria as a preferred seat of arbitration.

1.5 Methodology

The methodology employed in this thesis is mainly qualitative research based on doctrinal and critical study. The doctrinal research is library-based research, while the critical study entails a critical analysis of the legal and structural framework of the law and practice of international commercial arbitration as regards arbitral seats in the Nigerian context. To achieve the aim and objective of the thesis, an in-depth examination of the legislation and practice of international commercial arbitration is undertaken. Accordingly, the thesis examines primary and secondary sources relevant to the theme of the research. Related arguments in these sources are discussed and where appropriate, are critically analysed. The method adopted in this research evaluates the preparedness and adequacy of the legal system and other relevant structures to develop Nigeria as a desired arbitration seat in the Africa sub-region. To address and redress the many legal and procedural issues hampering the promotion and development of Nigeria as a desired arbitration seat, the thesis also adopted a comparative analytical study to highlight the resemblance and differences in internationally recognized arbitration seats.

1.6 Thesis Outline

This thesis is organised into six chapters. Following from this introductory chapter as chapter one. Chapter Two provides theoretical and conceptual foundations for a critical analysis of the approach adopted by both the arbitration legislation and national courts in international commercial arbitration. It examines the juridical nature of arbitration by looking at the theories of arbitration and how they influence national arbitration law. The chapter further examines the

concept of the arbitral seat and the legal significance of international commercial arbitration. The chapter focuses on how the location of the arbitral seat can have legal and practical consequences for international commercial parties as well as economic benefits of arbitral seating jurisdiction. The chapter further examines the framework for evaluating the best arbitral seats as set out and developed by the London Principles to assess and provide insights into developing Nigeria into an attractive arbitration seat. The chapter identifies and analyses the key characteristics that come into play in making a particular jurisdiction a preferred arbitral seat.

Chapters 3, 4, and 5 provides the core context within which the analysis and thesis is based. The core question, whether Nigeria is an attractive seat for the conduct of international commercial is further explored and critically analysed in these three chapters.

Chapter three discusses the background and development of legal framework of arbitration in Nigeria. The chapter analyses the ACA and the Federal Republic of Nigeria Constitution, as well as the constitutionality of State arbitration legislation and the federal arbitration legislation are addressed. The argument that some of the provisions of the ACA violate the Constitution and restrict parties from their constitutional rights to access to courts is examined. The chapter explores whether the present arbitration legislation in Nigeria is fit for purpose, in other words, the extent to which the ACA advances the desirability of Nigeria as attractive seat for international commercial arbitration. In answering this question, the chapter illustrates that some of the deficiencies of the ACA. It further demonstrates that some aspects of the ACA have not matched -up with the growth of international commercial developments and the ever-evolving international arbitration systems. It is interesting to note that even the English Arbitration legislation the Arbitration Act 1996, which has been noted for been one of the best in class is up for review in order to remain one of the best and improve its law relating to

arbitration[38]. The chapter further critically analyses key and salient provisions of the proposed Draft Bill to amend the current ACA. It examines the extent to which the proposed amendments seek to cure the lacuna as well as the innovations of the bill. In the light of modern arbitration legislation, the perspective adopted in this chapter generally explores whether the ACA provides a clear, effective and modern legal environment that can facilitate fair and just resolution of international commercial disputes and enhance the attractiveness of Nigeria as a preferred seat for the conduct of international commercial arbitration.

The fourth chapter extensively explores the role of the courts in international commercial arbitration by examining judicial intervention and processes in international commercial arbitration in Nigeria. The chapter examines and analyses the issues and challenges facing judicial intervention and processes about international commercial arbitration. The key question in this chapter is whether judicial intervention for support or supervision of international commercial arbitration before Nigerian courts receives optimum judicial support that promotes efficient and effective arbitration processes. The chapter examines the judicial system with regards to the competent courts with jurisdiction for support and supervision of arbitration in Nigeria. The chapter argues that the unnecessary court intervention in arbitration as well as the inconsistent judicial attitudes for support of arbitration matters are causes why Nigeria is yet to become an attractive seat of arbitration. The court system indulges parties in arbitration matters to go all the whole hog of litigation from the High Court up to the Supreme Court hence making arbitration become like litigation. The thesis argues that for Nigeria to earn the reputation of an arbitration-friendly jurisdiction, there is also the need for a paradigm shift in the judicial approach towards arbitration.

[38] Twenty -five years after the enactment of the Arbitration Act 1996, the Law Commission in following up with the stakeholders suggestion to review the Arbitration Act 1996, and after the 14th program of the Law Reform the Commission undertook the review of the Arbitration Act 1996 in January 2022 and came up with the Consultation paper, Law Commission Consultation Paper 257; Review of the Arbitration Act 1996, A consultation paper September 2022 . available at https://www.lawcom.gov.uk/project/reviewof-the-arbitration-ac-1996

Chapter Five considers the often overlooked but equally important institutional and structural issues which pose as challenges facing Nigeria as an attractive seat for international commercial arbitration. The chapter examines the role of key stakeholders such as arbitral institutions, legal practitioners as main drivers in promoting a jurisdiction as a preferred arbitration seat. The chapter analyses the role of legal practitioners and arbitral institutions in Nigeria in the development and promotion of the use of arbitration as well as a preferred arbitration seat. important role which arbitration institutions play in fostering a jurisdiction as an attractive and preferred seat of arbitration. The thesis argues that proliferation of arbitral institutions in Nigeria, has not transformed the arbitration landscape in Nigeria. The chapter further examines other soft factors such as general infrastructure, state of security of the country as well as challenges of power supply, good roads and transportation, telecommunication and public services that bear weight against the reputation of Nigeria as an attractive seat.

Chapter Six draws the curtain on the research, by summarising the research of all the chapters and submitting several general conclusions about the core issues of the thesis. The thesis argues that not only is there the need to urgently execute the Bill on the reform of Arbitration legislation but also the judiciary and the legal community in Nigeria to develop a deeper understanding of arbitration and embrace an aggressive pro-arbitration policy that would project the jurisdiction as an attractive seat for international commercial arbitration.

Chapter Two

Significance of Seat of Arbitration.

2.1 Introduction

This chapter discusses the importance of the seat of arbitration in international commercial arbitration. The evolution of the attitude of national legal systems towards arbitration and parties' autonomy coupled with the harmonization of international commercial arbitration has further enhanced the development and growth of the use of arbitration.[39] In international commercial arbitration, the seat of arbitration is one of the determinants of arbitration, as it determines key issues in international arbitration. Important issues, such as arbitrability, applicable law whether substantive or mainly in procedural issues, challenge and recognition of the arbitral award, and more so, the choice of a seat of arbitration engages the court with supervisory jurisdiction over these essential aspects of arbitration. It is argued that delocalised arbitration is far removed from the reality of international arbitration. The use of international commercial arbitration has not only become the preferred method for international commercial disputes but also has economic implications on the market for arbitration.[40] Consequently, the associated economic benefits[41] of arbitration propel the fierce contest of major international

[39] The New York Convention on Recognition and Enforcement of Foreign Awards 1958, UNCITRAL Arbitration Rules 1976, and the adoption of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) by both developed and developing jurisdictions have notably marked the acceptance and advances made by international commercial arbitration as dispute resolution method for cross-border commercial disputes. See Gary B. Born International Commercial Arbitration (3rd edn Kluwer law 2020), Giuditta Cordero- Moss 'International Arbitration is not only International in International Commercial Arbitration: Different Forms and their Features (ed) Giuditta Cordero-Moss (Cambridge 2013).

[40] Mikall Schinazi, 'The Three ages of International Commercial Arbitration (2022 Cambridge) 3.

[41] Arbitration practice is a service industry that generates financial benefits not only to the arbitrators, but also to the arbitral institutions, lawyers, other service providers, interpreters, and hotel services. This invariably increases economic activities and attracts socio-economic benefits within the jurisdiction where arbitration occurs. See Christopher R. Drahozal, 'Regulatory Competition and the Location of International Arbitration Proceedings, (2004) 24 International Review of Law and Economics 3, 371.

cities to become the desirable seat of international commercial arbitration.[42] Some jurisdictions in Africa,[43] Nigeria inclusive,[44] are also vying to become choice cities for international commercial arbitration. This chapter provides theoretical and conceptual foundations for a critical analysis of the approach adopted by both the arbitration legislation and national courts in international commercial arbitration. Furthermore, it provides a basis to analyse and evaluate arbitration law and practice in Nigeria. A richer grasp of the understanding of the nature of arbitration will help to understand the relationship between national courts and international arbitration and whether a national court adopts a friendly and non-interventionist attitude or otherwise.

The chapter is divided into two main parts, the first part, critically discusses the theoretical framework of international commercial arbitration by examining the juridical nature of the arbitration. This writer without particularly patronising any of the theories critically examined these competing theories and their implications on national arbitration laws and on the role of the seat in international commercial arbitration.

The second section of this chapter examines the concept of seat (jurisdictional/territorial theory) arising from the interplay between a State's power and the freedom of parties to choose how their disputes are resolved (contractual). It further examines the meaning of the seat and the misconception concerning the seat of arbitration and conflicting terminologies as regards the true definition of the seat of arbitration. It is the argument of this writer a that the seat of arbitration may lead to legal and practical consequences. It answers the question of why and to what extent the legal framework of a jurisdiction influences the effectiveness and efficacy of

[42] World's most notable and prominent arbitration seats are London, Singapore, Hong Kong, Paris, and Geneva. These cities and countries were adjudged as preferable arbitration seats according to the recent Queen Mary University Arbitration Survey 2021. See https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey assessed 5 September 2022.
[43]Examples are, South Africa, Rwanda and South Africa.
[44]In the last 10 years, Nigeria has hosted International and Regional Arbitration Conferences all in the bid of promoting arbitration and advertising the jurisdiction as a choice arbitral seat.

the arbitral process and in general the outcome of the arbitration. It also considered the general guidelines and the key characteristics that come into play in making a particular jurisdiction a preferred arbitral seat. The chapter further examines the framework for evaluating the best arbitral seats as set out and developed by the Chartered Institutive of Arbitration (CIArb) known as the London Principles[45] to assess and provide insights into developing Nigeria into an attractive arbitration seat.

2.2. Juridical Nature of International Commercial Arbitration

In interpreting international commercial arbitration, several approaches to the nature and legal basis of arbitration have evolved over the years. An analysis and understating of these approaches are of importance. This is because the scope and limit of national court intervention in the arbitral process are largely influenced by the approach adopted in a particular jurisdiction. To answer and explain the juridical nature of arbitration, theories have been suggested namely, Jurisdictional theory, Contractual theory, Mixed or Hybrid theory, and Autonomous theory. The first three were formulated as far back as 1937, while the fourth was only developed in 1967[46]. These four theories are aptly summarised by Chukwumerije in the following words.

"*a contractual theorist would necessarily advocate unhindered party autonomy, whereas a jurisdictional would argue for substantial judicial supervision of arbitration. An adherent of the mixed or hybrid theory is likely to favour an effective mixture of autonomy and regulation, whereas an autonomist would focus on what is necessary to ensure that arbitration meets the needs and objectives of the parties"*[47]

[45] Commemoration of 100years celebration, CIArb in 205 developed 10 series of elements of effective seats for international arbitration. https://www.ciarb.org/resources/features/a-framework-for-evalauting-the-best-arbitral-seat.accessed 15 March 2021

[46]Julian D. M Lew., Applicable Law in International Commercial Arbitration. New York: Oceana Publications, Inc., 1978, 51-52.

[47]O. Chukwumerije, Choice-of-Law in International Commercial Arbitration (Quorum Books, Westport, Connecticut and London, 1994), pp. 9–15.

According to Born[48], the practical implication of the debate of these theories is unclear, nevertheless, none of the arguments has received universal support in theory or practice. However, the study of these theories and their effect on contemporary international arbitration law is necessary in order to understand the practical consequences for a jurisdiction to follow one rather than another.

a. Jurisdictional Theory.

The cardinal focus of the jurisdictional theory is that arbitration operates within the structure of the law. Hence the theory postulates that the state has the power to regulate and control all arbitration, which takes place within its jurisdiction. The basis for the state's control over arbitration is because arbitration is adjudicatory and therefore resembles litigation. State law allows parties to have recourse to arbitration because the law empowers arbitration to function in a court-like manner. Such power, according to the theory is delegated to the arbitrator by the state and not by the parties. In other words, jurisdictional theory though respects that arbitration takes its origin from disputing parties' agreement to arbitrate but insists that the state retains regulatory function over the arbitration. It means, therefore, that there is a connection between the arbitration agreement and the state law. Unless the state law recognizes the arbitration, agreement and enforces the decisions of the arbitrators, arbitration is 'ineffective and meaningless. Arguably, the theory ignores the important aspect of arbitration, which is, the will of the parties to submit their disputes to international commercial arbitration.

In addition, jurisdictional theory analysis of the legal nature of arbitration finds that adjudication is essentially a sovereign function exercised by national courts established by the state to administer justice. The role of arbitrators resembles that of judges of national courts, as

[48]Gary B. Born (n39) 184.

power is delegated to arbitrators by the state (not by the parties) using the rules of law.[49] The difference between arbitrators and judges is that arbitrators are principally appointed by the parties whilst judges are appointed by the state. Like judges, arbitrators are required to apply the rules of law in the process and procedure of arbitration. It makes for a natural extension therefore that the status of the arbitrator as quasi-judge, the arbitral awards made are held as having the same effect with a national court judgment.

Jurisdictional theory also places emphasis on the influence of the court at the seat of arbitration. Mann, a protagonist of the jurisdictional theory commented that:

> *Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law. The lex arbitri cannot be than that of the arbitration tribunal's seat. No act of the parties can have any legal effect except as the result of the sanction given to it by a legal system. Hence, it is unavoidable to ascertain such a system before the act of the parties can be upheld. When we say in the conflict of laws: 'contracts are governed by the law chosen by the parties,' we do so, and can do so, only because the rule is part of the law of a specific legal system*".[50]

Supporters of this theory proffer a strong basis for the exercise of supervisory jurisdiction over the arbitration by the courts of the arbitral seat. The concept of national court supervision of arbitration proceedings synergies with the New York Convention. Particularly, Article V provides that in absence of the express choice of the parties, the validity of the arbitration agreement,[51] the arbitral awards,[52] the composition of arbitral jurisdiction, and arbitral

[49]Yu Hong-Lin,' Theoretical Overview of the Foundation of International Commercial Arbitration (2008) Contemp Asia Arb. J Int'l 262.
[50]Francis A. Mann, *Lex Facit Arbitrum*, 2(3) (1983) 2Arb. Int'l 3, cited in Yu Hong-lin (ibid).
[51] New York Convention 1958 Article V 1(d).
[52] New York Convention Article V 2 (d).

procedures[53] are all to be determined by the law of the seat of arbitration. The recognition and enforcement of arbitral awards are also determined by the law of the place of enforcement.[54]

The author argues that the theory fails to account for the importance of the laws and courts of other states outside those of the seat of arbitration. The rationale behind international commercial arbitration is to divert commercial disputes away from the legal system. Parties can agree on the application of other laws or rules of the legal system of a third country that has no connection with the parties or their transaction. For instance, the arbitration clause in international commercial contracts is recognized as being an independent agreement that can distance itself from the risk of domestic judicial bias.[55] Also, the enforcing jurisdictions will have to apply their national laws and protect their mandatory laws and public policy. The theory also neglects the reality of party autonomy that gives parties the liberty to decide the incidence of their arbitration, such as the selection of arbitrators and applicable law.

Indeed, it is argued that jurisdictional theory contention that arbitration derives its power from the law of the state is biased.[56] Arbitration has become more international, as modern types of arbitration have emerged such as sports arbitration and online arbitration. Modern types of arbitration have made the jurisdiction where the arbitration takes place to become less significant. The jurisdictional theory may not very well fit with the reality of globalized law and society.

b. Contractual Theory

[53] New York Convention Art V.
[54]Article V (2) gives the national court of the place of recognition and enforcement, the discretion to refuse to recognise or enforce an arbitral award if the court finds that the subject matter of the arbitral award is outside the scope of arbitrability or that the recognition and enforcement would be contrary to the public policy of that country.
[55]The doctrine concept of separability in an arbitration clause for instance gives an arbitrator the basis upon which to decide its own jurisdiction.
[56]Chukwumerije (n47).

The contractual school of thought is the opposite of the jurisdictional theory. The contractual theory views arbitration from the perspective of a contract, the theory posits that it is the express agreement of the parties that gives existence to arbitration.[57] Accordingly, the consensual agreement of the parties is essential to determine the validity of the arbitral process, independent of the law of the place of arbitration. Thus, the arbitration agreement between parties to have their dispute settled using international commercial arbitration allows them to determine, the place of arbitration, choice of arbitrators, choice of laws to govern both substantive and procedural issues. The theory views all arbitral processes from a contractual perspective,[58] parties have the freedom to choose the relevant issues in respect of arbitration proceedings without interference from the state.[59] As much as parties have agreed to abide by the outcome of the arbitral process and the award to that extent, is binding as a contract. The contractual theory recognizes the influence of national laws on parties' arbitration agreements, nevertheless, the contractual theory argues that there is no strong link between the law of the seat and arbitration practice.

The early supporters of a contractual theory known as classical contractual theorists promoted the contractual nature of arbitration as a foundation for the general theory of arbitration.[60] While agreeing that the functions of the arbitrators may resemble that of judges, they reject the notion that arbitrators pose the jurisdiction in the ordinary sense of the term. They argue that arbitrators do not perform a public function or exercise any state power, but that arbitrator's decision-making power and the process are entirely dependent on the will and consent of the parties. In

[57]Martin Domke, Commercial Arbitration, (Prentice-Hall Inc. America 1965) p. 31.
[58]Chukwumerije (n47) at 10.
[59]Yu Hong-Lin (n49) 26.
[60]M Merlin Recueil Alphabatique de Questions de Droit (4th edn Tarlier Brussels 1829) and J FoelixT nraite du Droit International Prive (2nd edn Joubert Paris 1847), cited by Hong-lin-Yu, A Theoretical Overview of the foundation of International Commercial Arbitration, (2008) Contemporary Asia Arbitration Journal, 1 (2), pp. 255-286.

addition, classical theorists had at one time, described arbitrators as agents of the parties.[61] The notion of agency/principal relationship between a party and arbitrator was strongly criticized by authors.[62] While an arbitrator must render an impartial and unbiased award, the agent must act and conform to the interest of the principal.[63] Furthermore, agents represent the principal within the scope of the principal's authority and the decision of the agent is a contract between the agent and the principal. The relationship between disputant parties and the arbitrators is not the same as an agency relationship. The arbitrator is not an agent neither is he/she acting for and in the stead of the party selecting him, the arbitrator m performs his/her duty impartially and independently.[64]

The core emphasis of the contractual theory is the role of the party's autonomy in any arbitral process. However, party autonomy is not absolute, as it is still subject to a set of regulations and inherent limitations like public policy restrictions and mandatory laws.[65]

In Nigeria, the concept of the contractual theory is well recognized. Parties' agreement to arbitrate is central and it determines the disputes that are to be submitted to the jurisdiction of the arbitral tribunal. For instance, in the *MV Lupex v Nigeria Overseas Chartering & Shipping Ltd*, the Supreme Court held that:

"*The law is settled that the mere fact that a dispute is of such a nature eminently suitable for trial in a court is not a sufficient ground for refusing to give effect to what parties have by their*

[61] This view could be traced back to some judicial decisions like *Vynior's case* 8 Coke Report 81b;77 ER 595, Kill v Hollister 1 Wilson King's Bench 129, 95 ER 532.
[62]Adam Samuel Jurisdictional Problem in International Commercial Arbitration: A study of Belgian, Dutch, English, French Swedish, Swiss, US and West Germany Law' (Schulthess Polygraphischer Verlag 1989)43; O Chukwumerije 'Choice of Law in International Commercial Arbitration' (Quorum Books 1994) 10. E Gaillard and J Savage (ed) Fouchard, Gaillard and Goldman on International Commercial Arbitration (Kluwer Law International the Hague 1999) para 1115 at 605.
[63] Adam Samuel (n61).
[64]Independence and impartiality of arbitrators are fundamental requirements in international commercial arbitration that every arbitrator must be and remain independent of the parties and the dispute. See Model Law, art 12 (1), e Arbitration Act 1996 Section 24(1)(a), ACA 2004 Section 8(1).
[65] Different arbitration regimes include mandatory laws from which parties cannot derogate and public policy issues, see for example Arbitration Act 1996 Schedule 1, Part 1 which contains all the mandatory sections.

contract expressly agreed to. So long as an arbitration clause is retained in a contract that is valid and the dispute is within the contemplation of the clause, the court ought to give due regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed by them"[66]

It is the argument of this author that the contractual theory can be subject to some objections, particularly about the rejection of the significance of the law of the state. The contractual nature of arbitration is not entirely free from the law of the state. An arbitral award is not enforced as a contract, unlike a contract, an award can be challenged by a setting aside procedure in the place where it was made. Judicial intervention and the importance of the national legal system in promoting an attractive arbitration seat is of great significance, indeed, the author argues that judicial intervention is essential even if only to give international arbitration legitimacy.

c. Hybrid Theory

The Hybrid theory also known as the mixed theory combines both elements of the jurisdictional and contractual theory that are found in modern law and the practice of international commercial arbitration. The jurisdictional and contractual theories did not provide a logical and satisfactory explanation for the modern-day framework of international commercial arbitration, hence the creation of compromise theory with mixed character.[67] The theory is built on the view that both the jurisdictional and contractual theories as failing to describe the nature of arbitration in its entirety. The main proposition of the hybrid theory is that arbitration, in one perspective, comes into existence by the agreement of the parties. And on the other angle an adjudicative exercise results in an award that becomes enforceable by the state court.

The theory propounds that both the judicial powers of the state as well as party autonomy in contractual matters exist in a workable mix and are not adversaries but complementary to one

[66][2003] 15 NWLR (Pt.844]469, per Iguah JSC at 21.
[67]The theory was created by Professor Sauser-Hall in his report to *the Institut de Droit International* in 1952, see J.D.M Lew et al (n18)79-80

another.[68] Accordingly, arbitration is a private justice system created by a contract.[69] The major feature of the mixed theory is that it agrees that it distinguished arbitration agreement from the arbitration procedure. While an arbitration agreement is a contract, the theory argues that arbitration proceedings remain subject to national law. The hybrid theory sits well with the nature of arbitration, as it acknowledges the interaction of contract and the legitimacy offered by the support of the national legal systems. Though the mixed theory seems closet to the nature of arbitration it is still criticized for failing to fill the existing gap or explain the basis for reform of arbitral law. The theory fails to offer a clear framework for the process of international commercial arbitration as well as a complete separation of its element components.

d. Autonomous Theory

This theory looks at arbitration from the standpoint of its purpose and use. The theory was developed as the tendency to emancipate arbitration from the seat and the law of the seat. The theory was first proposed by Jacqueline Rubellin – Devichi.[70] She argues that arbitration should be treated according to its functions. The theory rejects jurisdictional and contractual theories as failing to connect with reality. The theory posits that it cannot strictly be characterized as either contractual or jurisdictional. According to this theory, arbitration evolves in an emancipated regime and thus is autonomous.[71] The theory is based on the premise that arbitration is a legal order on its own distinct from the legal order of individual states. Parties according to the theory should have full autonomy to conduct the arbitration and not be restrained by the law of the place of arbitration. Therefore, the arbitral order has no national legal order that confers the juridical nature of the arbitration.[72] Some commentators have

[68]O. Chukwumerije, (n47) 12
[69]J.D.M Lew, (n46).
[70]J Rubellin-Devichi L *'Arbitrage: Nature Juridique, Droit Interne et Droit International Prive (Librarie Generate de Droit et de Jurispru*dence Paris 1965) 17.
[71]J.D.M Lew et all (n18).
[72]Dominique Hasher, 'The Review of Arbitral Awards by Domestic Courts –France, in Emmanuel Gaillard (ed.), (2010) IAI Series on International Arbitration, The Review of International Arbitral Awards (6)97.

accepted this theory with one, describing it as 'being in tune with modern forms of non-national, transitional and delocalized arbitration'.[73] Another finds it unclear what doctrinal or practical consequences result from the analysis of the autonomy theory.[74] The autonomy theory of arbitration is debatable, as arbitration cannot be detached from any municipal legal order. Almost all international arbitration laws, rules, and conventions recognize the principle of party autonomy. Hence all arbitration agreements must include clauses with choices of law and in recognition of party autonomy the party's choice of law is applied by the arbitral tribunal. Nevertheless, party autonomy is not unfettered as arbitration is rooted in a national legal order. National laws and even international laws and conventions recognize that a party's autonomy is subject to national laws and public policy. Regardless of the autonomy theory's stance on detachment from the arbitration seat and its law, the autonomy theory reflects the advantage of being compatible with the different modes of transnational arbitration.

2.2.1 Delocalisation versus Territoriality

Over the last decades, there has been a debate between the theory of delocalization and localization, and this debate seems yet unsettled. While territoriality constrains international commercial arbitration, delocalization is focused on liberating arbitration from all constraints. This section analyses the debate between delocalization and seat theories. The debate mainly focuses on the extent to which international arbitration can be detached from the peculiarities of domestic law or the legal system. While these two theories are not necessarily an issue before national courts, they may, nevertheless influence legislation and affect the attitude of the national courts towards international commercial arbitration.

i. Delocalisation Theory

[73]J.D.M Lew et all (n18) 81.
[74]Born (n39) 187.

Delocalisation theory moves autonomous theory to the extreme as it suggests that parties' agreement prevails over domestic arbitration laws. Delocalisation of international commercial arbitration involves freeing of international commercial arbitration from the constraints of the law of the place of arbitration. It has been described as "a specie of international arbitration that is not derived from any national law or municipal legal order."[75] Proponents of delocalization advocate for a stateless, floating, or anational arbitration.[76] An arbitration procedure that is not controlled or anchored on any national law. Parties having chosen arbitration as a method of dispute resolution should have the freedom to have their disputes settled by arbitration without any interference from the control of the national law or courts in the place where arbitration is conducted (seat).[77] In essence, delocalization suggests that since parties are from different countries, for neutrality to be maintained, possible interference and application of the laws from the respective courts must be eschewed. Furthermore, the arbitral procedure and any award are regarded as originating independently of the national legal systems.[78] More so, supporters of delocalization are of the view that national court supervision or oversight functions in international commercial arbitration are in total contradiction with the core principles of arbitration.[79]

The delocalization theory is applied in two ways. First, by delocalization of the arbitration procedure. This means that the law of the place of arbitration (*lex fori*) is discarded. Thus, an arbitration proceeding may not be rendered invalid on the ground that it was conducted independently of both the laws and the courts of the place of arbitration. What is essential is

[75] Olakunle O. Olatawura, 'Delocalized Arbitration under the English Arbitration Act 1996: An Evolution or a Revolution' (2003) 30 Syracuse J Int'l L & Com 49-74.
[76] Paulsson J, "Delocalisation of International Commercial Arbitration: When and Why It Matters" (1983) 32 International and Comparative Law Quarterly 53.
[77]Jan Paulsson Arbitration Unbound: Award Detached from the Law of its Country of Origin, (1981) 30 International and Comparative Law Quarterly 358.
[78]Roy Goode (n37) 128.
[79]See Jie Li, The Application of the Delocalisation Theory in International Commercial |Arbitration, (2011) I.C.C.L.R 1.

that the fundamental norms of international arbitral procedures are observed by the arbitrators.[80] Parties to the arbitration can choose another law or construct their own rules of the arbitral procedure. Secondly, the delocalization of arbitral awards is used in justifying the enforcement of awards that have been set aside at the place of arbitration. Accordingly, the supervisory powers of the court at the place of arbitration over an arbitral award are rendered invalid and such an award could be enforced. Delocalisation theory seems to be attractive to the French,[81] as most delocalization proponents and French law and courts adopt delocalized arbitration.[82] The French legislation,[83] and its conception of art. VII NYC, for instance, provides for the enforcement of international awards outside grounds for its refusal as provided for under the New York Convention. Hence, the annulment of an award in the courts of the seat cannot be grounds for refusing recognition and enforcement of the arbitral award under French Law.[84] The French law provides for limited grounds for refusing the enforcement of an award, hence the French courts have long held that an award which has been annulled at the seat can still be enforced in France, as was illustrated by *the Hilmarton v Omnium* case where the *Cour de Cassation* permitted enforcement of an arbitral award that has been set aside in Switzerland.[85] The view of one of the notable proponents of delocalization theory Gaillard[86] is that, arbitration should be detached from the bounds of national law and in its place, should be an arbitral legal order that is founded on the national legal system while at the same time transcending any individual national legal orders.

[80]Jan Paulsson (n76) at 57.

[81]Some other civil law jurisdictions like, Portugal, Netherlands, Switzerland Egypt, and Algiers consider arbitration to be delocalised from the seat of arbitration.

[82]See *Götaverken v. GNMTC,* see also Park William Arbitration of International business disputes: Studies in Law and Practice. (2nd edn. OUP, 2012) 129.

[83]Code of Civil Procedure- Book IV Arbitration in Force 1981

[84]See *Société PT PutrabaliAdyamulia v. Société Rena Holding et Société Moguntia* Cour de cassion [2007]; *Société Hilmarton Ltd. v. Société Omnium de traitement et de valorisation* (OTV) (19940*,*

[85] ibid.

[86] Emmanuel Gaillard, Transcending the National Legal Order for International Arbitration, (2012) ICCA Congress Series, 17, Wolters Kluwer, 373.

One aspect that makes delocalization theory to be contentious is the strife for the elimination of the court at seat of arbitration of their jurisdiction to set aside arbitral awards. Paulsson, in justifying delocalization, admitted that it would be wrong to conclude that delocalization seeks to escape from national jurisdictions, in his words, "international arbitral system would ultimately break down if no national jurisdictions could be called upon to recognize and enforce awards"[87] The only control that is permissible as argued by the delocalization proponents is control by the national legal order or court at the place of the recognition and enforcement of the arbitral award. Consequently, an arbitral award can be recognized and enforced by the court of an enforcement jurisdiction irrespective of whether or not it has been accepted or set aside by the court of the country of origin. On the contrary, the English courts will ordinarily respect and recognize a foreign decision annulling an arbitral award. The exception will be if the arbitral award is found to be contrary to the basic principles of natural justice or against domestic public policy. In *Yukos Capital SARL v OJSC Rosneft Oil Company,*[88] several arbitral awards were recognized and enforced by the English courts notwithstanding that they had been set aside in Russia. The English court rejected an argument that the awards no longer existed legally because they had been annulled. The court found that the annulment was a result of a "partial and dependent judicial system" and should, therefore, be disregarded in the enforcement proceedings. There were however rather extreme factual circumstances. However, a different approach and outcome were reached in the case of *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat*,[89] the English court refused to recognize and enforce an arbitral award that had been set aside in Russia. The test the English court applied was whether the Russian courts' decisions were so extreme and incorrect that the courts could not have been

[87]Jan Paulsson, (n76), see also J. Li, "The Application of the Delocalisation Theory in Current International Commercial Arbitration" [2011] I.C.C.L.R. 1, 4, cited in Zahera Saghir & Chrispass Nyombi in Delocalisation in international commercial arbitration: a theory in need of practical application (2016) 27 Int' Company & Commercial Law Review, 8, 279.
[88][2014] EWHC 2188(Comm).
[89][2017] EWHC 1911 (Comm).

regarded as acting in good faith. On the absence of cogent evidence of actual (rather than apparent) bias, the English court refused enforcement of the annulled award.

It is indeed the argument of the author that arbitration in general, even online arbitration,[90] cannot be fully delocalised, if it is held within and legitimised by a state. The state's involvement in arbitration is not based on the consent or agreement of parties, the state as a sovereign need to regulate as well as protect disputes and or substantive laws that are based on the state law. The involvement of the court in international commercial arbitration is the performance of a public duty, and as explained by Mance LJ (as he then was) stated that the courts act as a branch of the state and not merely as an extension of the consensual arbitration process and, as such, the court 'acts in the public interest to facilitate the fairness and wellbeing of a consensual method of dispute resolution.[91] More so, every arbitration must be subject to the legal order of the seat where arbitration is deemed to have been made. The author, while supporting the argument that undue interference of the national court may impede the effectiveness of the arbitral process, argues that the assistance of the national courts during arbitral process is necessary and important to ensure fairness, due process, and justice.

ii. Delocalisation and Party Autonomy

There is no doubt that the concept of party autonomy is a fundamental feature in international commercial arbitration. Parties in arbitration have substantial autonomy to control the process of arbitration. The procedure of delocalized arbitration took as its starting point the autonomy of the parties. The detachment of arbitration from the national legal order is at the heart of the principle of party autonomy in arbitration, free from the constraints of the *lex arbitri.* Party

[90] The law that is applicable to Online arbitration determines the seat of arbitration Online Dispute Resolution (ODR) in international arbitration is defined as a mechanism for resolving disputes using electronic communications and other information and communication technology. See UNCITRAL Technical Notes on Online Dispute Resolution 2017.

[91] See the case of *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314.

autonomy allows parties to international arbitration to choose the law applicable to the arbitration procedures and rules. Parties are therefore able to detach the arbitral procedures and rules from the law of the seat of arbitration. Almost all arbitration laws, rules, and conventions ensure that the principle of party autonomy prevails. The core of international commercial arbitration is party autonomy as parties themselves agree and choose all aspects of the dispute resolution mechanism. The fundamental principle of the decision in Chromalloy's case confirms party autonomy by the enforcement of the free choice of parties to a final, binding, and enforceable international arbitration.[92] The basic principle of party autonomy as reflected in art 19(1) Model Law is also enshrined in the ACA 2004.[93] In addition, party autonomy is endorsed by the NYC, particularly art V(1)(d) provides that an award may be refused recognition if the procedure was not by the agreement of the parties. In describing party autonomy, the Nigerian Supreme Court, in *Owners of MV Lupex v Nigeria Overseas Chartering & Shipping Ltd*,[94] held inter alia that an arbitration clause is a written submission agreed by the parties to the contract and that, like other written submissions, must be construed according to its language and the circumstances in which it is made.

Party autonomy is the cornerstone of arbitration, its practicability is subject to mandatory rule and public policy of national arbitration laws jurisdiction. For instance, an arbitration agreement may not be enforceable for the failure of the agreement not valid under the law to which the parties have subjected it.[95] The doctrine of party autonomy provides delocalization with its basic features, as arbitration is based on parties' agreement to arbitrate otherwise, the award could be rendered unenforceable. More importantly, though under the New York

[92] Sampliner G. H, 'Enforcement of Nullified Foreign Arbitral Awards- Chromalloy Revisited' (1997) 14 Journal of International Arbitration. 141-165, p. 141.
[93]Most of the sections of the ACA respects and recognises the principle of party autonomy, it confers on parties the freedom to resolve by agreement the number of arbitrators and their appointment (s.6 and 7), place of arbitration (s.6) and language to be used in arbitral proceedings (s.18).
[94][2003] 15 NWLR (Pt.844]469.
[95] Article 34 UNCITRAL Model Law. Section 48 ACA 2004,

Convention and the UNCITRAL Model law, national courts are obliged to enforce arbitration agreements and awards, but only if such disputes are arbitrable under the *lex loci arbitri*.[96] The power of the parties to act as the drivers of the arbitral proceedings is not absolute, meaning that party autonomy is limited. Almost all state has legislation permits their court to have supervisory functions over the arbitration process. There is no doubt that the concept of party autonomy is a fundamental feature in international commercial arbitration, and that the arbitration agreement is the foundation of almost every arbitration, however, to argue that arbitration depends only on the agreement of the parties would be stretching the argument too far.

iii. Territoriality (Seat Theory).

The territoriality or seat theory approach to international commercial arbitration is based on a complete concept and the opposite objectives of delocalization. The territorial approach takes its basis from the jurisdictional theory. The traditional theory of territoriality takes origin from the general principles of international law that a state has the exclusive power to control the activities that take place within its territory.[97] This traditional approach is a counterpart to delocalization, in that every arbitration that takes place in a specific territory must conform to the law of the seat of arbitration (*lex loci arbitri*). Territoriality or seat theory offers arbitration a home base from which arbitration is governed by the law of the place where the arbitration is held. In other words, any arbitration that occurs within a specific territory is subject to their laws, the *lex fori*. Mann,[98] a fundamentalist supporter of the seat theory, emphasized the relevance of the seat of arbitration, he contends that the rights of parties in arbitration are derived and subject to domestic law. The main proposition of the seat theory is that the juridical

[96] See, Article V (2) (b) New York Convention, Article 34 (2) Model Law, and section 48 ACA 2004.
[97]William Park, Arbitration in International Business Disputes (2nd edn, Oxford 2012) 50.
[98]F Mann, Lex Facit Arbitrum, International Arbitration, Liber Amicorum for Martin Domke (P. Sanders ed, The Hague, Martinus Nijhoff 1967) 157.

place where the arbitration takes place dictates the law of the arbitration (*lex arbitri*) it is further expanded to give the national courts the jurisdiction to support the arbitral tribunal and supervise the arbitral processes, as it may be called upon to so act. In addition, the seat theory dictates that the mandatory laws to be applied by the arbitrators are those of the seat of arbitration.

The wide acceptance of the seat theory is said to be due to the reference to "territory" in the Geneva Protocol,[99] New York Convention[100], and UNCITRAL Model Law.[101] Article 1(2) of the Model Law expresses the territorial principle that 'the Model Law as enacted in a given State applies only if the place of arbitration is in the territory of that State'[102] However, the author argues that the acceptance could also be because of its emphasize on courts' support and its curial powers.

The basic principle of English law and its approach to arbitration adopts the jurisdictional approach and therefore endorses the seat theory. The English courts do not recognize floating or delocalized or stateless arbitration. *Keer L. J* succinctly stated this position in the *Bank Mellat v Helliniki Techniki* "our jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law"[103] One of the basic justifications of the seat theory is that all arbitration must be entrenched in the law of the seat of arbitration. In fact, Mann, professes that there is no international arbitration as every arbitration is a national arbitration.[104] The seat theory proponents find support in the decision of the English Court of Appeal case of Naviera *Amaazonica Peruana SA. v Compania*

[99]Geneva Protocol on Arbitration Clauses 1923, art 2.
[100]Article V.
[101] UNCITRAL Model Law Article 1(2).
[102] The Model Law, however, recognises certain exceptions to territoriality. For instance, the principle of territoriality does not apply in, (a) the context of arbitration agreements and court actions, (b) the context of the 2006 amendments regarding interim measures, and (c) the context of recognition and enforcement of arbitral awards
[103][1984] 1 QB 291.
[104] F. Mann (n96).

Internacional de Seguros de Peru, in this case the English Appellate Court in finding that London was the seat of arbitration so that the English courts would have jurisdiction stated that English Law does not recognise the concept of a delocalised arbitration or arbitral proceedings, the principles of English law, rest upon the "territorially limited jurisdictions" of our courts.[105]

The ACA 2004[106] and as well as the Nigerian courts[107] adopts seat- driven approach to international commercial arbitration. This is not surprising, as the Nigerian judicial system is influenced by the English common law and the arbitration legislation is Model Law based. The seat–driven approach of the Nigerian courts is well illustrated in the *Lupex case.*[108]

The seat theory may have numerous attractions, which include the relative ease of determination of the applicable law to arbitration once the seat is established, the review of arbitral awards either by way of challenge proceedings to set aside an award or by appeal on point of law as provided under the EAA.[109] In addition to the finality of awards as in most cases when an award is annulled at the seat, it may be unenforceable in another jurisdiction.[110] However, one of the most touted criticisms against the theory is the imposition of its mandatory rules and laws of the seat of arbitration. The imposition of mandatory laws regardless of parties' agreement, revolts against the freedom of the parties to exercise their autonomy on the arbitral process. As earlier stated, one of the features that make international commercial arbitration attractive is party autonomy. However, it can be argued that the imposition of mandatory rules and public policy of the seat of arbitration is developed to safeguard the adherence of principles of natural justice in the arbitral proceedings and to avoid the disregard of public policy.[111] For

[105][1988]1 Lloyds Rep. 116. CA.
[106] ACA section 16.
[107]*NNPC v. LUTIN INV LTD* [2006] 12 NWLR (96) 504*; Zenith Global Merchant Limited v Zhongfu International Investment (Nigeria) FZE & ANOR* [2017] 7 CLRN 69.
[108][2003]15 NWLR (PT.844) 46.
[109]See sections 70 and &71.
[110] NYC 1958 art. (e); Model Law art 36(1)(a) (v), ACA s. 52(2)(a)(viii).
[111]See ACA s52 (3), EAA s. 103(3).

instance, the English court in *Soleimany v Soleimany*[112] did not enforce a valid arbitration award on the grounds of English public policy where the award was based upon a contract which was illegal under the English law. The English court would not ordinarily refuse to enforce a valid arbitration award but for the fact that in the Soleimany's case represents an exceptional nature as the underlying contract was illegal under the English law or was to be performed in England. In the instant case, the award could not be enforced in England as the award dealt with an illicit enterprise which was contrary to the English public policy. The English Court of Appeal reversed lower court's leave to enforce the award and allowed the appeal to set aside the award.

Likewise, mandatory laws of Nigeria would prevail over any agreement of parties that is contrary to public policy or that will amount to a contravention of another relevant law within the jurisdiction. For instance, a choice of foreign law as the law governing the contract which is perceived to be intended to evade tax laws, or as an outright breach of constitutional provisions may not be upheld.[113] Similarly, as a matter of public policy, courts in Nigeria even in applying foreign law as the law chosen by the parties, are not obliged to apply provisions of foreign law that contravenes Nigeria mandatory rules or those of another country with which the contract is closely connected.[114]

The choice of foreign law as the law governing a contract perceived to be intended to evade tax laws, or as an outright breach of constitutional provisions will not be upheld by the court in Nigeria.[115]

iv. The Impact of Seat and Delocalisation Theories

[112][1999] QB 785.
[113] *Shell Nigeria Exploration& Production & 3 Ors. v Federal Inland Revenue Services and Anor* (unreported) CA/A208/2012; S*tatoil (Nigeria) Ltd. And Anor. V Federal Inland Revue Services* [2014] LPELR 223144 (CA)
[114] M*.V. Panormos Bay v. Olam Nig.* Plc [200] 5 NWLR (Part 855) 1 at 14*; Tawa Petroleum v. M.V. Sea Winner* 3 NSC 25.
[115]See the cases of *Shell Nigeria Exploration& Production & 3 Ors. v Federal Inland Revenue Services and Anor* (unreported) CA/A208/2012*; Statoil (Nigeria) Ltd. And Anor. V Federal Inland Revue Services* [2014] LPELR 223144 (CA)8

Delocalisation of arbitration may seem an ideal concept, however, nevertheless it falls short of dealing with certain issues. Delocalisation has been wholly unrealistic as it places arbitration in a legal vacuum.[116] The view of this thesis is that international commercial arbitration must be provided with a home base. Arbitration must be provided with the legal framework and court supervision that will guarantee the arbitral process with greater support for party autonomy and limitation of court interference. The supervisory function of the court of the seat ensures that arbitration as a private system of dispute resolution is not tainted with irregularity, undue process, and corruption. The delocalization supporters' reason that *lex arbitri*[117] should have relevancy only at the enforcement stage and by the enforcing territory. The NYC is employed by the delocalized theorist as the legal basis for the development of the theory.[118], particularly Article V (1) (e).

From the delocalization perspective, the interpretation of these provisions is that it establishes the right of the court at the place of enforcement to enforce an award regardless of the status of the award at the seat of arbitration. This position is well illustrated by the case of *Chromalloy Aero Service Inc. v. Ministry of Defence of the Republic of Egypt.*[119] In this case, the court concluded that the decision of the Cairo Court of Appeal nullifying the award did not have a res judicata effect in the United States. It also found that recognizing the decision of the Egyptian court would violate United States public policy in favour of the final and binding arbitration of commercial disputes. The decision of the Chromalloy's expectedly was hailed by delocalized theorists as dared in applying Article V11 to enforce an award that has been set aside by the supervising court.

[116]See W. Park, 'The *Lex Loci Abitri* and International Commercial Arbitration (1983) 32 International & Comparative Law Quarterly 21.
[117] The *lex arbitri,* is the basic framework of arbitration, the procedural law of the seat of arbitration, the role and relevancy of lex arbitri is examined later in this chapter.
[118] See New York Convention Article V (1) (e).
[119][1996] U.S. District Court for the District of Columbia - 939 F. Supp. 907; see also *Hamilton ltd v Omnium de Traitement et de Valorisation* [1997] XXII Ybk Comm. Arb 696 (Cour de cassation, June 10, 1997.

Indeed, it is argued that, if, delocalization in its complete form becomes the norm, lack of court supervision at the seat of arbitration may erode the confidence parties may have in the international commercial arbitration process. This is well illustrated with the Belgium experience, when in response to the delocalization movement, Belgium's Arbitration Law[120] embraced delocalization in its radical form. The law provided that arbitration parties in Belgium who were not Belgium citizens nor have a business located in Belgium would not be allowed to apply to the Belgian court to set aside an arbitral award. The 'hands-off attitude[121] of the Belgian radical delocalization proved to be counterproductive. Rather than increase the number of arbitrations in Belgium as envisaged, businesses and arbitration parties avoided Belgium as the seat of arbitration. This prompted the amendment of the Belgian Arbitration Law 1998 to provide for parties without the Belgian link could apply to its court to have an arbitral award set aside. Though parties could enter into an agreement opting out of the court review.

Though the delocalization theory of arbitration has received considerable support it has also received considerable rejection mainly for ostracizing the role of the seat of arbitration. Delocalisation is perceived to have party autonomy as its core objective, as it arguably empowers parties to resolve their dispute without any interference from national courts. Hence, the delocalization of arbitral processes and awards would mean that parties will not be affected by unforeseen and undesirable domestic arbitration laws. Although courts of other countries are likely to be involved respectively in the arbitral process at various stages, the courts of the seat play the predominant role in terms of supervision of the arbitral process. More so, the involvement of the courts at the seat is needed in protecting the national commercial and

[120]Belgian Judicial Code, Article 1717(4).
[121] See Redfern and Hunter (n4) at pg. 108.

jurisdictional interests.[122]. It is indeed submitted that every arbitration process is generally subject to the legal order of the seat where arbitration is deemed to have been made. However, unnecessary interference by the national court may be an issue but the concern should be more on the quality of judicial support and respect for minimal intervention by the national court. The use of anti-suit injunctions by national courts to protect the State jurisdiction or disrupting parties from proceeding with arbitration are some examples used by the supporters of delocalized theorists to advance their ideas.[123] It is submitted that, while supporting the argument that undue interference of the national court may impede the effectiveness of the arbitral process, it is also submitted that the assistance of the national courts may be necessary and important to ensure fairness, due process, and justice. More so, the outcome of the arbitral process is a final and binding award, and therefore the need to ensure the fairness of the process that produces the award should not be ignored. On the issue of delocalized arbitral awards, the finality of arbitral awards is one of the distinct features that justifies the preference for arbitration over conventional court proceedings. While this finality of an arbitral award is desirable, to a certain extent judicial control of an arbitral award at the seat of arbitration cannot be isolated. Indeed, it is argued that the best outcome of the entire process of arbitration is one with a balance between finality and fairness. Parties should be allowed to challenge an arbitral award that is tainted by undue arbitral process.

Although the basis of delocalization is that arbitration should not be fettered by the domestic law where arbitration is seated and that the seat theory is an obstacle to the principle of party autonomy. However, it is submitted that seat theory is not an obstacle to the principle of party autonomy. It is further submitted that delocalization restricts the national law of the place of

[122]Julian D. M Lew, "Does National Court Involvement Undermine the International Arbitration Process? (2009) 24 American University International Law review 489,494.
[123]Emmanuel Gaillard, 'Anti-suit Injunctions in International Arbitration' (2005) Institute of International Arbitration (IAI).

arbitration chosen by the parties, thus limiting and disregarding the courts of the place of arbitration to supervise the arbitral proceeding. The court's curial powers of the national legal order whether at the seat of arbitration or the enforcing stage, are integral and indispensable parts of the arbitration. As stated by a commentator, party autonomy will be in danger of becoming an anachronism only if judicial intervention in international commercial arbitration goes past mere support.[124]

The seat theory has numerous attractions, which include the relative ease of determination of the applicable law to arbitration once the seat is established. However, of concern may be the liberal approach of challenging proceedings to set aside an award. This concern, especially for a developing arbitration seat like Nigeria, and in addition the ease or prolonged judicial process of setting aside arbitral awards proceeding may be one of the key elements that affect the desirability of Nigeria as a seat of arbitration. In today's ever-globalizing world, the objectives of business communities' preference for arbitration are to provide a flexible and informal, and reasonably speedy method of dispute resolution. The seat theory remains significant and offers a balance between the efficiency of the arbitration method and justice. It cannot be assumed that parties having chosen arbitration have abandoned the right to ask the court to exercise a supervisory role and correct errors, especially where an arbitral process is improper or lacks due process.

2.3. The Significance of Seat in International Commercial Arbitration

2.3.1 Definition and Concepts of Seat of Arbitration:

[124]Ahmed, Masood (2011) 'The Influence of the Delocalisation and Seat Theories Upon Judicial Attitudes Towards International Commercial Arbitration' Arbitration Volume 77 Issue 4 pp 406-422 at p.406.

Seat/Place/Venue/Forum – Inconsistent or Misconstruction of Terminology?

Different terminologies used in this concept make it necessary to clarify and understand the concept and the meaning attached to it in law. This is so since the expressions 'seat' place' and 'venue; are used differently and distinctly by different national arbitral laws and rules. The location where arbitral hearings and meetings are held does not generally connote the arbitral seat. The concept of a seat of arbitration is a legal concept and not a geographical one. It is simply the jurisdiction in which arbitration takes place legally. The difference between the geographical and legal location lies mainly in the juristic seat or place of arbitration and the location where proceedings meetings and hearings are held.[125] In legal terms, the seat or place of arbitration refers to the system of law that governs the arbitration proceedings.[126] Place of arbitration and seat of arbitration is commonly used synonymously. Some notable authors use situs,[127] venue[128], and forum to refer to the concept of seat of arbitration. The inexactness of terminology is attributable to the different expressions used by various arbitration laws,[129] arbitration rules, and institutional arbitral rules.[130]

The UNCITRAL Model Law (as amended in 2006),[131] without offering any definition, uses the expression 'Place of Arbitration, whereas the EAA 1996 is more instructional as it uses the expression 'Seat 'of Arbitration and went further to define it as *"the juridical seat of the arbitration…"* [132] The EAA 1996 further in s.2.(3) (a) and s43 confirms the distinction between the legal domicile of the arbitration and the geographical location where the court grants the

[125] *Process & Industrial Developments Ltd v The Federal Republic of Nigeria* [2019] EWHC 2241 (Comm).
[126] Gary B. Born, International Arbitration: Cases and Materials 28 (2nd ed. Kluwer Law 2015).
[127] William W. Park, Arbitration of International Business Disputes: Studies in Law and Practice (2nd edn Oxford 2012) 325.
[128] The usage of venue generally, points directly to the location of where oral hearing or the location for the examination of evidence. See *Enercon GmbH v Enercon (India) Ltd* [2012] EWHC 689 (COMM).
[129] English Arbitration Act 1996, UNCITRAL Model Law (as amended in 2006), section 985, ACA 2004.
[130] UNCITRAL Arbitral Rules (2013) and ICC Rules 2021 adopt the use of Place to refer to the juridical location of the arbitration, while LCIA 2020 and SIAC Rules 2021 adopt the use of the terminology 'seat' as the juridical seat.
[131] See Art.20.
[132] English Arbitration Act 1996 Section 3.

permission to secure the attendance of witnesses in the United Kingdom provided arbitral proceeding takes place in the UK even if the seat of arbitration is outside the UK.[133] The definition offered by the English Arbitration Law leaves no room for misconstruction or confusion, given the fact that the phrase 'place of arbitration' also means where the arbitration proceedings take place. In fact, as rightly pointed out by Hill,[134] the UNCITRAL Model law[135], use of place in the context of both juridical and location,[136] potentially adds to the confusion on which expression is universally acceptable when referring to the juridical location of arbitration and the location of the proceedings from time to time.[137]

The London Court of International Arbitration (LCIA) Rules 2020,[138] adopts a clear distinction between seat and place. While it provides that parties are free to choose their seat of arbitration (legal place)[139] it also recognises and provides that arbitration proceedings or meetings could be held at any convenient place in consultation by the parties.[140] The author disagrees with Jill, that the LCIA Rules are potentially confusing by the use of the term "seat with (legal place) to refer to the juridical arbitration and at the same time using place to describe the physical location of hearings".[141] It is indeed the argument of this writer that the LCIA Rules are more explicit, as they went further to clarify and distinguish between the juridical seat (legal place) and the physical location of where arbitration proceedings take place. This line of argument is

[133] Gabrielle Kaufmann-Kohler, 'Identifying and Applying the Law Governing the Arbitration Procedure- The Role of the Law of the Place of Procedure' in AJ van den Berg (ed), Improving the Efficiency of Arbitration Agreements and Awards: 40 years of the Application of the New Year Convention (1999 Kluwer Law International).
[134]Jonathan Hill, Determining the Seat of An International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements (2014) 63 International and Comparative Law Quarterly 517.
[135] UNCITRAL Model Law (with amendments adopted in 2006) Art 20(1) provides that parties are free to agree on the place of arbitration (indicating juridical seat0 while 20(2) provides arbitral tribunal may meet at any 'place' it considers appropriate for hearing witnesses (indicating geographical location) see also UNICITRAL Arbitration Rules Article 18.
[136] The ACA 2004 s. 16 (1) (2) adopts the same provision as the Model Law without any modification and uses the phrase 'place' to connote both the juridical and geographical location.
[137] RM Merkin, Arbitration Act 1996: An Annotated Guide (LLP 1996) 18.
[138]Art. 16, ICC Rules 2017 art. 18. see also LCIA Rules 2020, art.16
[139] Art 16.1.
[140] Art.16.3.
[141]Jonathan Jill (n132) 521.

in line with the opinion of Redfern and Hunter, which states that both terminologies are often used interchangeably, but that 'seat of arbitration' is defined and designated as the legal place of the proceedings (juristic place), whereas 'place of arbitration' means the place of hearings (the place where the arbitral proceedings take place)[142]. By way of conceptual distinction, usage of the seat as the juridical location may preclude ambiguity, but the use of 'place' to indicate both the physical and legal domicile in the same provision might bear a rather confusing and misconstrued meaning.[143] This line of argument aligns with the suggestion of the recent Law Commission Consultation Paper, that "Seat" as provided under section 3 EAA 1996 has an understanding meaning, and that "place" is not a clearer alternative. It further suggested that defining further words like "venue" might add to the confusion. Strict definitions might also cause problems when parties themselves misuse words in their arbitration agreement. The use of "venue" anyway might be problematic, for example with remote hearings.[144] The need to distinguish the seat of arbitration from the place where hearings or meetings take place is germane, as Jill points out, "*that the variety of interpretational problems can be caused by a combination of terminological inexactness and drafting inconsistency".*[145]

The seat of arbitration is rather a legal notion connoting where the international arbitration has its legal or judicial home.[146] In the case of *PT Garuda Indonesia v. Birgen Air,*[147] the court distinguished between the place or legal seat of the arbitration, and the venue of the hearing. The court held that the seat of the arbitration remains the same place as initially agreed by the parties even though the tribunal holds meetings or even hearings in a place other than the designated place of arbitration, either for its convenience or for the convenience of the parties

[142]Redfern & Hunter (n4).
[143]See also *Shashoua v Sharma* [2009] EWHC 957(COMM) where the court addressed the issue of whether the selection of a venue for arbitration implies the choice of the seat of arbitration.
[144] See The Law Commission Consultation Paper September 2022: Review of Arbitration Act 1996 available at https://www.lawcom.gov.uk/project/review-of-the-arbitrationact-1996/ p115 accessed 20 November 2022.
[145]Jonathan Jill (n132) 521.
[146]See *Dubai Islamic Bank PJSC v Paymentech Merchants Sers. Inc*. [2001]1All E.R (Comm)514.
[147][2002] 1 S. L.R 393 (CA).

or their witnesses. In this case, the parties had agreed that Indonesia was the seat of arbitration, but because of political unrest hearings were held in Singapore. The Singaporean Appellate Court confirms the distinction between the place and the venue of the arbitration hearings.

In the Nigerian case of *Zenith Global Merchant Limited (Zenith Global) v Zhongfu Int'l Investment (Nig.) FZE &Ors (Zhongfu),*[148] Zenith Global, sought an Order of the Ogun State High Court restraining the *Zhongfu* from participating in arbitration proceedings, at the Singapore International Arbitration Centre (SIAC) in respect of a Joint Venture Agreement (JVA) between the parties. *Zenith Global* posited that *Zhongfu* is estopped from referring the matter to arbitration having waived its right by instituting an action at the Federal High Court in Abuja. *Zhongfu* responded that *Zenith's* application is struck out for lack of jurisdiction, on the ground that the Ogun State High Court is not a court in the seat of the arbitration. *Zhongfu* contended that the court, therefore, could not exercise supervisory jurisdiction and lacked sufficient jurisdictional nexus to be competent to grant the anti-arbitration injunction sought by *Zenith Global*. In determining the issue of the seat of arbitration, the court made a difference between seat and venue and held that the seat of arbitration is where arbitration has its legal domicile and symbolizes the jurisprudential connection between the arbitration process and the laws of the nation regarded as the seat. On the other hand, the venue refers to the physical or geographical place where parties have chosen for arbitration proceedings or meetings to be conducted.

The usage of seat' of arbitration outshines place' of arbitration, as the seat connotes a status represented by it, it gives the impression of permanency, given that in the legal sense, the seat represents the jurisprudential link between the arbitration and the national law of the

[148][2017] 7 CLRN 69.

jurisdiction regarded as the seat of arbitration.[149] Born supports the view that the use of the seat of arbitration is preferable: *"the better term for the legal domicile of arbitration is the arbitral seat. The term avoids arguably geographical connotation of the place of arbitration*"[150]

The problem of the inconsistency in terminology by national arbitration laws and arbitral intuitional rules may well be the source of the inelegantly drafted arbitration agreement or clauses that fail to properly designate the seat of arbitration. Whereas it is typical for the terms seat and place to either be used as synonymous[151], or as a substitute, the expressions 'venue and forum usually do not pose such confusion, as they straightaway connote the geographical location of arbitration. However, the expression 'forum' may be awkward in arbitration as it is closely associated and connected with the traditional court proceedings. The venue connotes a core geographical sense and gives no doubt as to the intention or meaning to be associated with it. This argument is further buttressed by Born, when he noted that, the concept of the seat of arbitration is a 'legal construct' because of the legal consequences attached to the seat of arbitration, or the legal system, or where the arbitration is attached to or has a legal domicile.[152] The place of arbitration, on the other hand, is the physical or geographical location where arbitration may take place. While the geographical location (place) of arbitration where hearings are held and the juridical location (seat) where arbitration is tied, though related but distinct. National arbitration laws and arbitral institutional rules recognize that arbitration hearings and proceedings may be conducted outside the territory chosen as the seat of arbitration. For instance, art. 20(2) UNCITRAL Model Law provides "*Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may unless otherwise agreed*

[149]*Naviera Amazonica Peruana S.A. v Compania International De Seguros Del Peru* [1987] EWCA Civ J1110-6, [1988] 1 Lloyd's Rep 116.
[150]Gary Born, International Commercial Arbitration (n39) 1250
[151]Some notable employs the use of 'place' of arbitration for both geographical and legal meaning, see Alain Hirsh, The Place of Arbitration and the *Lex Arbitri'*, [1979] 34 Arb. J. 43; Gabrielle Kaufmann-Kohler(n126)345 A. Redfern& M. Hunter (eds) Law and Practice of International Commercial Arbitration.
[152] Gary G. Born (n 39).

by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents"[153]

In practice, it is possible to have more than a venue in more than one country, however, where parties in their arbitration agreement fail to indicate in clear terms, the choice of seat, the court in a plethora of cases[154] have held the venue to constitute the seat.[155] In *Process & Industrial Developments Ltd v Nigeria,*[156] the issue of the legal seat arose in the enforcement proceedings before the English court. Nigeria argued that the arbitral seat was Nigeria. And the 'venue' as stated in the arbitration agreement was intended to refer only to the physical location of hearings. Nigeria further argued that since arbitral proceedings had been legally seated in Nigeria, Nigeria's court had set aside the award rendering it incapable of enforcement in England. Conversely, *P&ID Ltd* maintained that the seat of arbitration was England and that the 'venue' in the arbitration agreement referred to the legal seat of arbitration. The English High Court in its reasoned decision dismissed Nigeria's objection and held that the language in the arbitration clause 'venue of the arbitration shall be London, England' meant that the arbitration was legally seated in England and not merely that the proceedings would be conducted in England. The court in coming to this conclusion made a comparison between the arbitration agreement referred to as the venue of the arbitration and the language used in the ACA. Specifically, s.16 (2) ACA provides that.

[153]See also section 16(2) ACA 2004.
[154]*Shagang South –Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194 (C0MM); *Enercon GmbH v Enercon (India) Ltd* [2012] EWHC 689 (COMM); *Bharat Aluminium Co vs. Kaiser Aluminium Technical Service Inc*. (2012) 9 SCC 552*; Shashoua v Sharma [2009] EWHC 957 (Comm),* [2009] 2 All E.R. (Comm) 477, *Braes of Doune Wind Farm (Scotland) Ltd v Alfred MacAlpine Business Services Ltd* [2008] EWHC 426 (TCC),
[155]David St John Sutton; Judith Gill; Matthew Gearing, 'Russell on Arbitration 24 edn, Sweet & Maxwell 2015).
[156][2019] EWHC 2241 (Comm).

"Notwithstanding subsection (1), the arbitral tribunal may, unless agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property".

The English court reasoned that the arbitration agreement provides that the venue of the arbitration shall be London or otherwise as agreed between parties. The agreement did not use the language in s.16 (2) ACA that states; 'where the tribunal may "meet" or may "hear witnesses' experts or the parties". The court, therefore, stated that if the reference to venues were simply where the hearing was to take place, the court held that this would have been an inconvenient provision and one which the parties would have unlikely intended. The English court rejected Nigeria's argument that the venue, as referred to in the arbitration agreement, was in the sense as decided in Nigeria's case of *Zenith Global.* The court further stated that the *Zenith* case was decided long after the conclusion of the agreement between the parties and therefore, cannot be used to support their argument.

It is submitted that the *P &ID* case illustrates the fundamental principle of international commercial arbitration that seat provides the legal domicile for the arbitration. The physical location of arbitration does not have the same legal significance as the judicial location. The geographical location of arbitration is decided based on the convenience of the arbitral tribunal and parties, and it does not necessarily have to be the same as the legal seat of arbitration. Additionally, the case underlines the advantages of the use of clear terms to designate the intended choice of the legal seat in the arbitration agreement to avoid unnecessary procedural disputes.

2.3.2. Determination of the Seat of Arbitration

Generally, parties in line with party autonomy have the choice either expressly or impliedly to select their choice of arbitral seat. Both national laws[157] and institutional arbitral rules[158] recognises parties' autonomy to determine their choice of arbitral seat. Parties may explicitly select a seat of arbitration by designating a particular place as a seat of arbitration. For instance, 'seat of arbitration shall be Lagos, Nigeria'. An implied selection of a seat of arbitration may be by parties' selection of an international arbitral institution rule which provides for a default seat of arbitration.[159] Failing agreement by parties to choose the seat of arbitration, the arbitrator or arbitral tribunal shall determine the seat of arbitration, taking into consideration, the circumstances of the case, including the convenience of the parties".[160] It is advantageous for parties to determine in clear terms the seat of arbitration in their arbitration agreement or at the beginning of the arbitral proceedings. Otherwise, if the seat of arbitration changes during arbitral proceedings, parties may become uncertain of the court that would exercise supervisory jurisdiction.[161]

In a situation where the choice of seat is neither explicit nor implied, nor where the choice of seat is ambiguous, a national court may be called upon to interpret the parties' agreement or the choice of arbitral seat. Most often such a situation arises either where parties are challenging an arbitral award or refusal of recognition of an award.[162] Where parties refer only to the rules

[157] See Model Law Art 20, this should be read in line with the territoriality principle in art.1 model Law, see section also ACA 2004 16(1), EAA 1996 section 3(c), *Star Shipping AS v. China Nat'l Foreign Trade Transp. Corp.* [1993] 2 Lloyd's Rep. 445 (English Ct. App.*); Shagang South-Asia (H.K.) Trading Co. Ltd v. Daewoo Logistics* [2015] EWHC 194, 29-30 (Comm) (English High Ct.); *PT Garuda Indonesia v. Birgen Air*, [2002] 1 SLR 393, at 36 (Singapore Ct. App.).

[158] Article 18(1) of the 2013 UNCITRAL Rules; 2020 LCIA Rules, Art. 16(2); 2018 HKIAC Rules, Art. 14(1); 2021 ICC Rules, Art. 18(1).

[159] In institutional arbitrations, the administering institution or the tribunal determines the seat in the absence of agreement by the parties.

[160] Art.20 (1) Model Law; section 16(1) ACA 2004.

[161] Hakeem Seriki, 'Injunctive Relief and International Arbitration', (Informa Law 2014) 16. See *also Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc*. [2000] supra at (n146).

[162] An award may be set aside or refused recognition if the arbitral proceedings were not in accordance with the parties' agreement. See Model Law Art 34(2)(a) (i).

of an arbitral institution in the absence of a choice of a seat by the parties the court will treat such designations as having chosen the seat where the arbitral institution is domicile.[163] In *VTB Commodities Trading DAC v JSC Antipinsky Refinery,*[164] the court in reviewing the clause "shall be referred to and finally resolved by arbitration under the arbitration of the London Court of International Arbitration" held London to be the seat of arbitration.

Regardless of the distinction made between the venue and the seat of arbitration,[165] there are instances where parties are silent on the seat of arbitration but designates the venue. In such instances, national courts have had to decide whether such designation amounts to the choice of the seat of arbitration. As discussed above, the general principle is that the venue of arbitration is not the same as the seat of arbitration.[166] However, the attempt by some national courts in interpreting and determining whether venue as designated by the parties can be construed as seat has resulted in divergent decisions. Under section 3(1) of the EAA 1996, the parties have the right to determine the seat, it could also be determined by an arbitral institution if parties (had selected a particular arbitral institution rule, and by the tribunal if authorised by the parties. In the absence of any of these the seat is determined by the arbitration agreement and the circumstances of each case. The English Courts at different occasions had used different criteria to determine whether the parties have agreed on a "venue" but not a "seat" in their arbitration agreement or vice versa. In *Shashoua's case*, an ICC administered arbitration where both parties were Indians and in an ICC arbitration, parties had provided London as the venue of arbitration and had provided Indian Law to govern their substantive contract. In deciding

[163] UNCITRAL Rules Article 18(1); 2020 LCIA Rules, Art. 16(2); 2018 HKIAC Rules, Art. 14(1); 2017 ICC Rules, Art. 18(1). See also SIAC Rules 2016 r.20 which gives the tribunal power to determine the seat, unless otherwise agreed by the parties.

[164][2019] EWHC 3292,34 (Comm)., see also *U&M Mining Zambia Ltd v Konkola Copper Mines* Plc [2013] EWHC 260 (Comm.)

[165] In *ABB Lummus Global Ltd v Keppel Fels Ltd* [2009] 2 All ER (Comm) 477, the court drew a distinction between, the legal or juridical place of the arbitration and, 'the venue or place of the arbitration and held that the 'provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat'.

[166] See page 41.

whether the English Court had supervisory jurisdiction to grant an anti-suit injunction, the court held that in the absence of any reference to the seat of arbitration in the arbitration agreement and any significant contrary indication that England was intended as their seat of arbitration.[167]

In the *P &ID* case, the arbitration clause is like that of Enercon *(India) Ltd v Enercon GmbH*[168] interestingly, but the national courts of Nigeria, India and England approached the question of determining the seat of arbitration differently. In both cases the arbitration clauses were silent on the seat of arbitration but provided that the 'venue of arbitration shall be London' And like the *P& ID case, in Enercon,* it provided that the Indian Law will apply, (in *the P & ID* the ACA applied). Although the English court stated it would not determine the issue of the arbitral seat as the same was already pending before the Indian court in which the claimants had engaged fully in the Indian proceedings, and because of the comity between England and India. Nonetheless, the English court still went ahead to hold that the objective intention of the parties was for London to be the seat, and further held that there were no significant contra indicia to this. Interestingly, the Indian Supreme Court, on the issue of whether venue in this instance could be construed as the seat of arbitration found that the seat was India for three reasons, first, Indian law was the substantive law governing the contract, and secondly, Indian law was the law governing the arbitration agreement and thirdly Indian law was the law governing the conduct of the arbitration.[169] In another case, where the arbitration clause only indicated that the venue shall be in Kuala Lumpur and made reference to the UNCITRAL Model Law, the award was signed and delivered in Kuala Lumpur. The India lower court in an application filed to set aside the arbitral award, found that the arbitral award was a foreign award and therefore Kuala Lumpur was the seat of arbitration. On appeal to the Supreme Court of India, the Apex

[167] This principle was also applied in *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194 (COMM); *see also U&M Mining Zambia Ltd v Konkola Copper Mines* Plc [2013] EWHC 260 (Comm).
[168] *Enercon GmbH v Enercon (India) Ltd,* Civil Appeal No.2087 of 2014 India*; see also, the English decision* (2012) EWHC 689 (Comm).
[169] [2012] EWHC 689 (Comm).

Court in locating the seat of arbitration, adopted and applied the closet and intimate connection principle laid in *Naviera Amazonica Peruana v Comania International De Seguros Del Peru*.[170] The court noted that an arbitration clause must be read holistically to understand its intentions in order to determine the seat of arbitration.[171] The Apex Court interpreted the arbitration agreement between the parties and the reference to the UNCITRAL Model Law on International Commercial Arbitration 1985 (Model Law) to determine the seat of arbitration. The Apex Court of India further held that although the award was signed in Kuala Lumpur, there was no express determination of the place of arbitration by the arbitral tribunal in accordance with article 20 (1) Model law. The Indian Supreme Court, therefore, concluded that India was the seat of Arbitration and had supervisory jurisdiction to entertain the setting aside application.[172]

In the *P &ID case*, the arbitration clause was silent on the seat of arbitration but it provided that the "The venue of the arbitration shall be London, England or otherwise as agreed by the Parties." The Nigerian Court assumed jurisdiction based on the parties' agreement and on the basis that venue' is within the meaning of section 16(1) of the ACA[173] and that Nigeria therefore is the seat of arbitration.[174] However, the English court interpreted the reference to venue in the arbitration agreement referred to legal seat and confirmed the arbitral tribunal decision and contention that the seat of arbitration as London, England.

---

[170] [1988] 1 Lloyd's Rep 116. *See also Braes of Doune Wind Farm (Scotland) Ltd v Alfred Mcalpine Business Services Ltd* ([2008] EWHC 426.

[171] See also the case of *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc (BALCO*) (2012) 9 SCC 55. In this case, the Indian Supreme Court held, amongst others that a detailed examination … is required by the court to discern from the agreement and the surrounding circumstances the intention of the parties as to whether a particular place mentioned refers to the 'venue' or 'seat' of the arbitration. Inc.

[172] *Union of India v Hardy Exploration and Production (India) Inc* (2019) 13 SCC 472, see also, *BGS SGS SOMA JV v NHPC Ltd* (2020) 4 SCC 234., the Indian Supreme Court held that the venue designated by the parties was the seat. *Sharad Bansal, "BGS SGS SOMA JV Ltd. V NHPC Ltd and the Internalisation of Domestic Arbitration", https://Lawanthology.com Accessed 17 July 2022].*

[173] ACA 2004 Section 16 deals with two types of situations in the arbitral proceedings, first, subsection (1) deals with determining the 'place' (seat) of arbitration, and subsection (2) the place (venue) geographical location for the purposes of meetings, for example, hearing evidence of the parties.

[174] This was the contention of the Nigerian Government both at the arbitral tribunal and before the national courts in Nigeria and in England.

In the light of the forgoing cases, it is indeed argued that there is no doubt that the national courts are on common ground as regards distinction between venue and seat of arbitration. However, where the parties are silent on the seat but have agreed on a "venue" in their arbitration agreement, national courts in this situation, have divergent approaches which has created uncertainty as to the criteria in determining whether or when venue can be construed as seat of arbitration. For instance, the conclusion reached in the Indian cases, Indian Apex Court in its decisions considered laws chosen by the parties and the closest and connection approach both of which favoured India rather than London as the seat. The English courts approach has not also been consistent because different criteria has been used where parties have been silent on the choice of seat but has indicated the venue of the arbitration. For instance, in *Enercon and P & ID* cases, there was contrary indication, notably the choice of another country's procedural law still the courts in both cases came to different conclusions. In the *P & ID case* particularly, both the law applicable to the substantive contract and *lex arbitri* were Nigerian, laws, it has been argued that based on the closest connection test the arbitral tribunal and the English court should have presumed that parties had intended the seat of arbitration to be Nigeria. [175]

2.3.3 Consequences and Importance of Choice of Seat of Arbitration

Considering that the NYC and the Model Law have led to increased uniformity in law and practice among national arbitration legislatures, it then beggars the question of whether the arbitral seat has any practical importance. Nevertheless, the choice of a seat of arbitration has far-reaching significant implications for the parties to the arbitral process.[176] The choice of a seat of arbitration in a specified country establishes a legal relationship between the arbitration

[175] The author is not unmindful of the fact that *in the P &ID case*, there was evidence that "evidence of prior and contemporaneous transactions and, in particular, the conduct of the parties to come to the conclusion that London was the seat". See Professor Bagoni A. Bukar, 'Twists and turns in the choice of arbitral seat: the P&ID Ltd v Nigeria saga', (2021) Int. A.L.R. 2021, 24(4), 281-29.
[176] *C v D* [2007] EWCA Civ 1282.

on one hand and the arbitral law and the national courts of that country on the other hand. Despite the misconception that the seat of arbitration is declining in importance because most laws regulating their international arbitration laws conform with international conventions, which is significantly facilitated by the New York Convention. The choice of seat in international commercial arbitration is so important that it should not be regarded as "just another detail of a dispute resolution."[177] It is an important aspect of the arbitration agreement or clause in international commercial arbitration and the parties' choice of arbitration seat.[178] The seat continues to play vital role in international arbitration for several reasons. In the words of Born, "…**arbitral seat can have profound legal and practical consequences for the parties to an international arbitration, and can materially alter the course and outcome of the arbitral process" (emphasis mine)[179]**

The seat of arbitration plays a dual role, first, it is determinative of the scope of the application of the *lex arbitri* and secondly the courts at the seat are conferred with the supervisory powers and jurisdiction to review awards[180] rendered in their territory. Generally, the seat chosen by the parties determines the national law that will direct the arbitral process and the extent to which the national courts will intervene in the arbitral process.

a. The *lex arbitri:* One of the consequences following the selection of a seat of arbitration is that it generally determines the procedural law (lex arbitri) of the seat of arbitration.[181] The lex arbitri has been described as the totality of national law provisions that apply generally to

[177] Per Philips J in *Atlas Power v National Transmission* [2018] EWHC 1052 (COMM).
[178] Arbitral seat is selected by the parties, or by the arbitral tribunal in the absence of the agreement by the parties, or an arbitral institution selected by the parties and sometimes by the court. See art. UNCITRAL Model Law Art.11, section 7 ACA 2004, AA 1996 sections 16-18.
[179] Gary G. Born (n39) 1676.
[180] Under the ACA 2004 there are no grounds for the review or appeal of an award, unlike under the English Arbitration Act where an award may be reviewed on points of law see EAA 1996 s.69
[181] It is technically possible to separate the law of the place of arbitration (lex loci arbitri) from the law governing arbitration (lex arbitri) to the extent that it is acceptable for the governing law of arbitration to be different, or arbitration proceedings "delocalized", from the law of the "seat" of the arbitration.

arbitrations.[182] Therefore, the *lex arbitri* can be said to be the general framework for international commercial arbitration, this may include not only the national arbitration law but also other statutes, rules, and case laws. Although these may not particularly deal with arbitration but may relate to arbitration. For instance, the ACA 2004 will apply to arbitration having its seat in Nigeria. The Nigerian arbitration law will govern issues such as arbitrability of a dispute and capacity of parties, appointment, and removal of arbitrators, interim relief measures, and challenge procedure of an arbitral award (setting aside). The *lex arbitri* could also involve other statutes,[183] as well as rules and case laws, that relate to arbitration seated in Nigeria. Notwithstanding the increased uniformity in the laws and practice of international commercial arbitration owing to the adoption of the International Model Law and international conventions like the New York Convention 1958, the *lex arbitri* will vary from jurisdiction to jurisdiction. The significance of the role of the seat in international commercial arbitration is made more evident by the reason that an arbitral award can be refused recognition or enforcement where the arbitral procedure was not in accordance with the law of the country (seat) where the arbitration took place.[184] The relevance and the extent to which a *lex arbitri* involvement in the arbitral process and arbitration, is one of the main reasons why the selection of an arbitral seat is of critical importance in international commercial arbitrations. The various arbitration surveys conducted in the last ten years show that one of the most important considerations of parties in their choice of seat is the *lex arbitri o*f a jurisdiction.[185] Parties

[182]Alastair Henderson, Lex Arbitri, 'Procedural Law and the Seat of Arbitration' (2014) 26 Singapore Academy of Law Journal 886.
[183] Examples are the Constitution of the Federal Republic of Nigeria, the Evidence Act of Nigeria and Statutes of Limitation Act.
[184] See Model Law Art. 48 (a), ACA section 52 (2) and New York Convention articles V 1(d).
[185]See Arbitration surveys conducted between 2006 to 2021, by Queen Mary University of London and White and Case- 2021 International Arbitration Survey: Adapting Arbitration to a Changing World ; 2019 International Arbitration Survey: International Construction Disputes; 2018 International Arbitration Survey: The Evolution of International Arbitration; 2016 International Dispute Resolution Survey: An insight into resolving Technology, Media and Telecoms Disputes; 2015 International Arbitration Survey 'Improvements and Innovations in International Arbitration Corporate Choices in International Arbitration: An Industry Approach; 2012 Current and Preferred Practices in the Arbitral Process: International Arbitration Survey; 2010 International Arbitration Survey 'Choices in International Arbitration; Corporate Attitudes and Practices: Recognition and Enforcement of Foreign

would be more inclined to select jurisdictions with modern *lex arbitri* that regulates and provides safeguards for the arbitration proceedings. It is most unlikely that parties will choose their arbitration seat jurisdictions with weak legal arbitration frameworks.[186] Conventionally, while the choice of a seat of arbitration may determine the *Lex Arbitri,* it is also true that the *lex arbitri* of jurisdiction may also influence the choice of an arbitration seat.

b. **Supervisory Jurisdiction of the Court at the Seat of Arbitration**: In international commercial arbitration it is well established that the court at the seat of arbitration will generally have the supervisory jurisdiction over the arbitral process.[187] The extent of the supervisory role of the court at the seat of arbitration is well defined by the domestic arbitration law of the seat. In most jurisdictions with modern arbitration regimes, the role of the court at the seat of arbitration is to be kept at the minimum as it aims to give support and when required to give assistance and supervision for the effective conduct of arbitral proceedings.[188] Where parties have expressly selected a seat of arbitration, the effect of the agreement as to the seat of arbitration would be a strong presumption that the parties have agreed to the supervisory role of the court at the seat of arbitration. In the case of *Enka Inasaat ve Sanayi AS v OOO Insurance Co Chub*[189] the English Supreme Court brought clarity to the English Law approach to determining the law governing an arbitration agreement and the English courts' supervisory role in granting anti-suit injunctions in support of arbitration. The Supreme Court ruled that if parties to a contract have not expressly or impliedly specified in their arbitration agreement,

---

Awards; 2006 International Arbitration Study: Corporate Attitudes and Practices. Seen at https://arbitration.qmul.ac.uk/research/.Accessed 27 April 2022

[186] In the next chapter the author explores the important and salient issues regarding the procedural laws of arbitration in Nigeria assessing its practical implication in Nigeria as a seat of international commercial arbitration

[187] *Minister of Finance (Incorporated) and 1 Malaysia Development Berhad v International Petroleum Investment Company and Aabar Investments PJS* [2019] EWCA Civ 2080.

[188] For example, the UNCITRAL Model Law, limits the intervention of the court by identifying the situations in which the court is empowered to intervene, the e English Arbitration Act 1996 also identifies the situations where the courts are permitted to intervene.

[189] [2020] EWCA Civ 574*, see also Minister of Finance (Inc) v International Petroleum Investment Co (n179); Atlas Power v National Transmission and Despatch Company Ltd* [2018] EWHC 1052*; West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* [2007]1 All E.R (Comm) 794*; C v D* [2007] EWCA Civ 1282.

then the governing law of the contract if specified would apply. This is even if the seat of arbitration is different to the governing law of the contract. The Supreme Court further ruled that however, if the governing law of the contract is not specified whether expressly or impliedly the arbitration agreement will be governed by the law most closely connected with the arbitration agreement. In general, that will be the law of the seat of arbitration. In essence, it is submitted that, the default position is that the chosen seat of the arbitration will govern the arbitration agreement and the court at the seat of arbitration will exercise the supporting and supervisory jurisdiction necessary to ensure that the arbitral procedure is effective. The majority of the Supreme Court held that in granting an anti-suit injunction, the English courts are seeking to uphold and enforce the parties' contractual bargain as set out in the arbitration agreement. Therefore, in principle it should make no difference whether that agreement is governed by English law or by a foreign law. The decision in the *Enka v Chubb* is now the leading authority in respect of the governing law of an arbitration agreement.

Generally, in most jurisdictions, the judicial intervention needed or required before the commencement and during the arbitral proceedings can only be made by the court at the seat of intervention. However, there are some exceptions in some jurisdictions that take a different position, in Germany, the connecting factor that determines judicial support is not the seat of arbitration but the law applicable to the arbitral proceeding.[190] However, this may not make much difference, as in most cases, the law applicable to arbitral proceedings is the law of the seat.

The supervisory role of the court at the seat of arbitration is often required, before the commencement of the arbitration, for instance, where parties fail to agree on the mode for the appointment of the arbitral tribunal or an arbitrator, the court at the seat has the jurisdiction to assist in appointing the arbitral tribunal or arbitrator.[191] The courts at the seat of arbitration

[190] See Filip De Ly, The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning (Northwestern Journal of International Law & Business) Vol. 12, Issue 1 Spring, 1991.
[191] See Model Law Art.11; ACA 2004 section 7; English Arbitration Act 1996 section 18.

exercise supervisory jurisdictions, for instance, by enforcing valid arbitration agreement arbitration[192] and granting interim reliefs.[193] The court at the seat also functions as a safety valve to ensure due process and fairness in arbitration when it is called upon to intervene to decide on challenges as to the independence and impartiality of an arbitrator.[194] One of the major significances of the seat of arbitration is the judicial control of the arbitral award by the court. The selection of an arbitral seat has implications on the arbitral award, particularly for annulment and review of the arbitral award. It is established in international commercial arbitration, that the court at the seat (where the award was made) will have exclusive jurisdiction over challenges in respect of an arbitral award.[195] In other words, where the seat of arbitration is in Nigeria, then the competent court to set aside the arbitral award shall be the High Court in Nigeria. Under the Model Law regime, setting aside an award is permitted and once an award has been set aside it will not be enforced.[196]

The attitude of the court at the seat towards arbitration is critical in determining whether a jurisdiction is pro -arbitration or not. It is argued that court at the seat of arbitration with supportive attitude and adherence to limited judicial intervention and interference are pointers to an arbitration friendly jurisdiction.

---

[192] See sections 4 and 5ACA 2004; Article 8 Model Law 2006; section 9 AA 1996, Article II (3) NYC 1958. See also, *Carpatsky Petroleum Corporation v PJSC Ukrnafta* [2020] EWHC 769 (Comm); *Albion Energy Ltd v Energy Investments Global BRL* [2020] EWHC 301 (Comm); *BNP Paribas v Trattamento Rifiuti Metropolitani SpA* [2019] EWCA Civ 768*; Sul América Cia Nacional de Seguros SA and Ano. v Enesa Engenharia SA and Ors* [2012] EWHC 42 (Comm)

[193] See *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch); *Barnwell Enterprises Ltd v SCP Africa FII Investments LLC* [2013] EWHC 2517 (Comm); *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 610

[194] See Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd), [2020] UKSC 48, [2021] AC 1083; Aldcroft v International Cotton Association Ltd, [2017] EWHC 642 (Comm), [2018] QB 725; see also Nigerian cases, *Global Gas and Refinery Limited v Shell Petroleum Development Company (Nig) Ltd; Gobowen Exploration & Production Limited v. Axxis Petro Consultants Limited (Unreported Case*, Suit No. FHC/L/CS/1661/2013); *NNPC) v. Total E&P Nigeria Limited & 3 Ors. (Unreported Case Suit No.* FHC/ABJ/CS/390/2018); *Shell Triana Ltd. v. U.T.B Plc*. [2009] LPELR-8922(CA).

[195] See article 34 Model Law, sections 29 and 30 ACA 2004; section *Enka Insaat Ve Sanayi A.S v OOO Insurance Company* Chubb [2020] EWCA Civ 574.

[196] This is in line with Article V (c) of the New York Convention, however by a rival interpretation of Art. V (1) (e) some jurisdictions like France, the court allows an annulled award to be enforced, while in some jurisdictions an arbitral award that has been set aside is a ground for refusal for enforcement of the award. See also discussions on delocalised arbitration on page 26.

2.3.4 Role of the Seat in the Determination of the Law Applicable to the Arbitration Agreement.

Party autonomy in international commercial arbitration provides parties with the freedom to determine the applicable laws to the substantive matter, as well as the parties' choice of the arbitral seat.[197] The law applicable to the arbitration agreement regulates the validity, form, capacity of parties to the agreement, scope, and interpretation of the arbitration agreement and enforcement of the arbitration agreement, as well as challenges and enforcement of the arbitral award. Generally, it is expected that parties in their arbitration agreement will select the arbitration seat, the number of arbitrators, governing law of the substantive contract as the law applicable to the arbitration agreement. However, parties hardly make the choice of the governing law to the arbitration agreement, which as observed by the English Supreme Court in the case of *Enka v Chubb*, is an important item if added to the agreement could save parties from unwarranted litigation.[198]

The issue of choice of law governing arbitration agreements has become a crucial important issue in international commercial arbitration.[199] The issue of the applicable law to the arbitration agreement is generally not complicated only if one is not chosen or parties have not chosen an applicable law. It becomes even more complicated when parties have not chosen a seat of arbitration or governing law.[200] In the absence of a choice of the law to govern the arbitration agreement itself, national courts have approached the analysis of determining the governing law in different forms or approaches. Where parties fail to expressly make a choice as to the law applicable to their arbitration agreement there has been debate as to which law will be applicable in determining the arbitration agreement. Different approaches have been

[197] Most international arbitration institutions, like the ICC and the LCIA, recommend that parties in drafting arbitration clauses should include four important items, the seat of arbitration, the number of arbitrators, the language of the arbitration and, the law governing the contract. See the ICC standard arbitration clause https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause accessed 15 April 2021.
[198] *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38; [2020] 1 W.L.R. 4117.
[199] Gary B. Born International Commercial Arbitration 3rd edn Kluwer Law) p508.
[200] Margaret L. Moses, Principles and Practice of International Commercial Arbitration (Cambridge 2017) p68.

adopted by different legal system in determining the applicable law to arbitration agreement. Four approaches have been identified for determining the law applicable to the arbitration agreement, the law of the seat approach, the contract approach, the national approach, and the validation approach. Of all the approaches in determining the applicable law to the arbitration agreement, the seat of arbitration approach is the most relevant in determining the law applicable to the arbitration agreement. In the absence of choice of the law to govern the arbitration agreement, the New York Convention Art. V (1) (a) supports the law of seat as the applicable law to the arbitration agreement.[201] In the absence of a choice of law to govern the arbitration agreement, but where parties have expressly chosen the seat of arbitration, there is a strong presumption that the parties have implied the law of the seat to govern the arbitration agreement.[202] However, owing to the diverse interpretation of this provision, this has resulted in a lack of uniformed approaches in determining the law applicable to the arbitration agreement.[203]

According to the English Law general approach, there are typically a three-stage test to determine the choice of law principles. First, the court will determine whether the parties have made an express choice of governing law, secondly, in the absence of an express choice, whether there is an implied choice and the third stage, where there are no express or implied choice then the closet and most real connection to the arbitration agreement will be applicable?.[204] The approach of the English seems to crystalise into two of the three stages in

[201]Article V (1) (a) provides that an arbitral award may be effused recognition or enforcement on the ground that …. "The parties to the agreement referred to in article II were, under the law applicable to them. under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made; or"

[202] *Minister of Finance (Incorporated) and 1 Malaysia Development Berhad v International Petroleum Investment Company and Aabar Investments* PJS [2019] EWCA Civ 2080

[203] The use of discretionary power to refuse ('may') an arbitral award as used in Art V New York Convention is interpreted by delocalised theorists to establish the right of the court at the place of enforcement to enforce an award regardless of the status of the award at the seat of arbitration. See Hakeem Seriki, "Enforcing Annulled Arbitral awards: Can the Unruly Horse be Tamed" (2018) Journal of Business Law 8, 679, Zaherah Saghir, Chrispas Nyombi, "Delocalisation in International Commercial Arbitration: A theory in Need of Practical Application. (2016) (n87).

[204] This is usually the seat, *see Abuja International Hotels Ltd v Meridian SAS* [2012] EWHC 87 (COMM*).*

the absence of an express choice of the law governing the arbitration agreement, then the court will apply the implied approach.[205] The English authority of the implied choice, *Sulamerica*, has been widely followed and by most common law jurisdictions.[206] However, with the case of *Kabab Ji S.A.L (Lebanon) v Kout Food Group*, the English Court has favoured the presumption of the law of the contract. In this case, the Court of Appeal held that when faced with the law of the contract and the law of the seat, the law of the contract would constitute an express choice of law to govern the arbitration agreement.[207]

The English Supreme Court in *Enka v Chubb*[208] clarifies the approach when determining the governing law of the arbitration agreement. The Supreme Court ruled that where parties have not specified what law governs the arbitration agreement but have specified the law governing the contract containing the arbitration agreement, that choice will generally apply to the arbitration agreement even if a different country or national system of laws has been nominated as the "seat" of the arbitration. Where, as in the *Enka* case, the parties have not expressly or impliedly chosen any law to govern the contract, the arbitration agreement will be governed by the law with which it is most closely connected, and typically this would be the law of the seat.[209] This according to the English approach does not negate the principle of separability.

In the absence of both the governing law of the contract and the governing law of the arbitration agreement, the arbitration agreement will be governed by the most closely connected, in most times it is usually the law of the seat. This was the position of the Supreme Court in *Enka v Chubb.* The position of the French court is different, but it is argued that the result will still

[205] *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia Sa* [2012] EWCA Civ 638 (CA).
[206] *See the cases of BCY v BCZ (2016) SGHC 249 (Singapore); FirstLink Inv. Corp Ltd v GT Payment Pte Ltd & Ors (2014) SGHCR 12; Reliance Industries Ltd & Anor. V Union of India* (2014) 7 SCC 603, 57 (Indian Supreme Court).
[207] [2020] EWCA Civ 6 (CA).
[208] (n198).
[209] According to the Supreme Court the exception will be where there the law of the seat provides that the arbitration agreement shall be treated as governed by the country's law, or where there is a risk that if the same law as the main contract is applied, the arbitration agreement would be ineffective.

favour the law of the seat. The French Court instead of the closest connection test, in the absence of both the express choice of the governing law of the contract and the seat, will apply the common intention of the parties to assess the law governing the arbitration agreement. Under the French approach, the seat will determine the law applicable to the arbitration agreement. In the enforcement proceedings in *KFG v Kabba -Ji case*, the French court applied the common intention test of parties to hold that the Paris seated arbitration clause will be applied to and hence the law of the seat will govern the law of the arbitration agreement.[210]

It is the argument of this writer that national courts tend to tilt the balance in favour of their jurisdiction. This is well illustrated by English Court decision in both *Enka v Chubb* and that of French Court decision in *KB*L. Nigerian courts have not specifically considered this issue; however, it will be expected that if such case should come before the courts, the courts would primarily seek to give effect to the intention of the parties as evidenced by their agreements and, possibly, the surrounding circumstances.[211]

2.4 Becoming an Attractive Seat- The London Principle as Yardstick

Given the significance of the seat of arbitration, making the right choice of the seat of arbitration is an important decision that parties to international commercial arbitration, corporate lawyers often, in consultation with external lawyers must make.[212] Established seat of arbitrations, such as Paris, London, Vienna, Hong Kong, and Singapore already have the recognition and reputation of pro-arbitration jurisdictions within the international commercial arbitration community. To gain reputation as arbitration friendly jurisdictions, emerging and developing arbitration jurisdictions within the African region are also making arbitration legislative reforms to ensure that their jurisdictions are preferred seats for international commercial

[210] *CA Paris, 23 June 2020, n°17/22943].*
[211] It is expected that in the likelihood of the *Enka v Chubb* situation in Nigeria- where the substantive law is unclear then the conflict of law rules would be applied – choice of law agreed by the parties.
[212] Loukas Mistelis, 'Seat of Arbitration and Indian Arbitration Law' (2016) 4 Indian J Arb L 1.

arbitration.[213] However, it is submitted that adopting the Model law as the arbitration legislation is not the only criteria for evaluating whether a jurisdiction is attractive to become a seat of arbitration. In choosing a seat of arbitration scholars and commentators have identified essential characteristics of an attractive arbitration seat that serves as guides in the choice of a seat.[214] However, in 2015, the Chartered Institute of Arbitrators (CIArb) developed key principles known as "The London Principles."[215] These Principles sets out ten elements for the evaluation of a 'safe' seat for the conduct of international arbitration. The word 'safe' was used in identifying several characteristics of jurisdiction that will attract arbitration.[216] These ten principles are not only a yardstick to evaluate choice seats but serve also as a blueprint for emerging and developing arbitration jurisdictions.

The characteristics as complied by the London Principles are not novel, they only summarise the well-established factors that influence the choice of an arbitral seat. The London Principles relate to the legal framework of arbitration, the judiciary, legal expertise and rights of representation, accessibility of the seat, the enforceability of arbitration agreements and arbitral awards, and immunity of arbitrators. Of the ten principles, the most critical principles to Nigeria becoming an attractive seat are highlighted below.

a. **Law**: for a jurisdiction to be safe for the conduct of arbitration, the jurisdiction must have a modern and efficient international arbitration law, which must respect parties' choice of arbitration as the method for settlement of their disputes by (a) providing the necessary framework for facilitating the fair and just resolution of disputes through the

[213] Kigali and Mauritius Arbitration for examples of showing good growth and developing their reputations as emerging African seats for international commercial arbitration. see the School of Oriental and African Studies (SOAS) Arbitration in Africa Survey 2020 Report: Top African Arbitral Centres and Seats authored by Emilia Onyema available at https://eprints.soas.ac.uk. Accessed 18 August 2021.
[214] See Gary B. Born, International Commercial Arbitration (3rd edn Kluwer Law 2020) pp. 2205-2282.
[215]The CIARB London Centenary Principles, available at http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-principles.pdf last accessed 13 April 2022.
[216] Lord Peter Goldsmith, 'The London principles 2015, 2015 Arbitration 81 (4) CIARB) 407-412 at 408.

arbitration process; and (b) limiting court intervention in disputes that parties have agreed to resolve by arbitration, subject to permitting appropriate court support for the arbitration process.[217] One of the critical aspects of the selection of a seat of arbitration is a seat with supportive national arbitration law. Having a modern arbitration regulatory framework that controls the legal status and effectiveness of arbitration in a national and international legal environment, can never be over-emphasized. The Model Law has played a major role in influencing the choice of seat for international commercial arbitration, given the many jurisdictions that have adopted the Model Law as their national arbitration law.[218] The attitude of the judiciary towards arbitration is one of the yardsticks in which it has been argued that jurisdictions which adopt the Model Law as the national arbitration law are more likely to meet this threshold of modern arbitration law in Principle 1.[219] It is indeed the argument of this writer that the "Model Law is a model piece of legislation and like the new York Convention a success in international persuasive legislation."[220] This do not mean that the Model Law is not without its weaknesses.[221] For instance the default appointment of arbitrator under Art.11 other than providing that a court shall appoint an arbitrator where a party fails to do so within the time allowed, does not provide any statutory guidance on the criteria for the courts to make a default appointment.[222] Other jurisdictions that have not adopted the Model Law but have arbitration legislation that provides the needed legal infrastructure for an efficient arbitration process and procedure. For instance, the

[217] Principle 1.
[218] For international commercial arbitration, the UNCITRAL Model Law is the most important statutory instrument that has been adopted by a number of jurisdictions, the number of jurisdictions that have adopted is over 110 see https://uncitral.un.org/en/text/arbitration/modellae/commercial_arbitration/status
[219] Lord Peter Goldsmith (n207) at408., see also Janet Walker, The London Principles and their Impact on Law Reform, (Brekoulakis (ed.) (2018) 84 (2) Int'l J Arb, Med &Dispute Management, pp.174-181
[220] Andrew Okekeifere, Appointment and Challenge of Arbitrators under the UNCITRAL Model Law: Part 1: Agenda for improvement" (1999) Int'l ALR 2(5/7) pp. 167-174.
[221] See Menon & Chao, 'Reforming the Model Law Provisions on Interim Measures of Protection, (2006) 2 Asian Int'l Arb, J 1.
[222] Model Law Article 11 (3) (b) (c).

English Arbitration Act contains clear and effective provisions for the conduct of a fair and just resolution of disputes by arbitration. [223]

The lack of clarity in some of the provisions of the ACA is a cause for concern as most often they have been open to different and conflicting interpretations.[224] Disparities in the provisions of the ACA will be unsuitable for advancing the causes of attracting arbitration to Nigeria.

b. **The Judiciary**: Principle two of the London Principles calls for a safe and efficient seat to have an independent judiciary with expertise in international commercial arbitration and one that is respectful of the parties' choice of arbitration as their method for settlement of their disputes.[225] The legal system of a jurisdiction plays an important role in giving effect to the desires of parties to have their disputes resolved by arbitration. To this end, the courts give support and supervision as may be permitted under the national arbitration laws and international conventions. Accordingly, the effectiveness of an international arbitration process and proceedings is said to be directly linked with the quality of a judicial system.[226] According to Paulsson, "a legal system is unlikely to function very long with 'good arbitration' and 'bad courts. When public justice is subverted, that subversion will ultimately reach most forms of arbitration as well. If it is perceived that the important functions of control and enforcement are no longer carried out properly by the judiciary, the arbitral process may easily be manipulated for corrupt ends."[227] To this end, a court in providing support and assistance to international arbitration should uphold the arbitration agreement between parties and

[223] See section 18 (2) which provides detailed directions on how the courts should deal with the application of an arbitrator where the other party fails to appoint an arbitrator.
[224] This will be discussed in detail in Chapter 3 of this thesis.
[225] See principle 2 London Principle.
[226] Dominique Hascher, ''The Courts as Collaborators in the International Dispute Resolution Project (2015) Arbitration International,81(4), 443-445
[227] Jan Paulsson, Why Good Arbitration Cannot Compensate for Bad Courts' (2013) J Int'l Arb (30) 4, pp 345-369 at page 352.

provide access for the protection of due process in the arbitral proceeding, and guarantees the rule of law.[228] As regards expertise in international commercial arbitration, it is the argument of this writer, that the court may not necessarily have expertise in international commercial arbitration but should be one with good knowledge and understanding of the workings of international commercial arbitration. Lack of knowledge of international commercial arbitration by the courts will produce decisions that are inconsistent with global arbitration jurisprudence. For instance, a Nigerian court held that an arbitrator is obligated to recuse himself once his appointment was challenged.[229] This decision is inconsistent with international practice standards and does not have a basis in legal arbitration jurisprudence.

c. **Expert Legal Practitioners**: In terms of legal practitioners with expertise in international commercial arbitration, the issue is not the lack of legal expertise as Nigeria is recognized as having the largest number of legal practitioners and arbitrators in Africa as highlighted by the SOAS Arbitration in Africa Survey Report.[230] The availability and efficacy of legal infrastructures, like legal practitioners' services, translators, interpreters, and competent arbitration practitioners with international exposure and affiliations are available in Nigeria. However, this writer argues that the issue is with the ingrained litigation mentality of some of the legal practitioners in dealing with arbitration matters. Legal Practitioners rather than encourage the speedy court supervision of arbitration matters, apply delay tactics to protract court supervision of arbitration matters.[231]

---

[228] Dominique Hascher (n226 at page 445.

[229] *Global Gas Refinery Ltd v Shell Petroleum Development Company [2020(unreported)* Suit No: LD/1910GCM/2017.

[230] See SOAS Arbitration in Africa Survey Report 2018 seen at https://eprints.soas.ac.uk/25741/1/SOAS%20Arbitration%20in%20Africa%20Survey%20Report%202018.pdf last accessed April 27, 2022.

[231] The ingrained culture of litigation by some legal practitioners in representing parties either as party representatives for the court's support of arbitration or as arbitrators forget that arbitration is another dispute

2.5 Conclusion

This chapter examined the significance of the seat of arbitration, in international commercial arbitration. It started by first exploring the juridical nature of arbitration. The four main theories were examined namely, the juridical, contractual, hybrid, and autonomous theories. It is concluded that aside from the hybrid theory all the other three theories failed to consider that arbitration is a mixture of all the theories. The chapter illustrated that each of the theories has implications on how the legislation will treat arbitration as a dispute resolution mechanism. The chapter demonstrated that the arbitration legal regime in Nigeria supports the jurisdictional theory, however, it also recognises the contractual theory of arbitration. A valid arbitration agreement and award must comply with the mandatory provisions of the ACA and other laws and treaties of Nigeria. Hence, the writer will approach the thesis taking a jurisdictional approach to justify judicial intervention in international commercial arbitration, albeit with minimal court control as allowed by the arbitration legislation. The chapter also discussed the debate between delocalisation and territoriality and concluded that the idea of delocalized arbitration with little or no judicial control at the seat of arbitration is likely to put parties in substantial control of processes that seek to resolve their dispute. The race for total autonomy by delocalization theory might very well push parties back to the hands and supervision of the courts. The chapter concluded that jurisdictional theory and the seat theory seems to conform with the foundation of judicial intervention in arbitration.

The significance of the role of the seat of arbitration in international commercial arbitration was examined. It is important that parties do not confuse the concept of the seat of arbitration with the geographical place or venue where arbitral meetings are to be held with the juridical location. The lack of consistency in the terminology regarding the definition by various arbitration legislation regarding seat, place and venue gives rise to the misconstruction of the

resolution and not litigation. See for instance the case of *A.G Ogun State & Ors v Bond Investment & Holdings Ltd.* (2021) LPELR-54245(CA).

seat of arbitration. It is argued that the English Arbitration Act remains a good modern arbitration legislation as it clearly defines and designates seat as the juridical home of arbitration. Seat and place are interchangeably used, and they may not always connote the same meaning in the light of some judicial decisions. However, it is the interpretation of venue in determining the seat of arbitration that has become contentious and there is yet a universal approach to interpreting when venue would be construed as seat of arbitration, Given the judicial decisions by the different national courts the confusion between the place, seat and venue of the arbitration proceedings persists. This is due to not only poor arbitration drafting but also lack of exact definition of seat, venue and place by national arbitration legislation. It is argued that the national courts are inclined to favour or prefer their law and seat in determining the choice of applicable law and seat.

CHAPTER THREE: Nigerian Legal Framework for International Commercial Arbitration

3.1 Introduction

The present arbitration legislation in Nigeria, Arbitration and Conciliation Act (ACA) 2004 a federal legislation, and the principal arbitration legislation was made to replace the Ordinance-based law of 1958, a legacy of the British colonization of Nigeria. Ever since its enactment in 1988, the ACA has never been amended, this does not translate to mean that the ACA is a perfect piece of legislation nor that they have not been an attempt to make necessary amendments to this legislation. The ACA though based on the UNCITRAL Model Law, (1985 version) contains some significant differences and most interestingly, some of the provisions of the old ordinance-based law still found their way into the ACA 2004. The viability of a country as a seat for international commercial arbitration depends on its political, economic, and legal developments and stabilities. Arbitration legislation and a legal system that will be supportive of an enforceable and neutral dispute resolution mechanism are beneficial for participation in the global economy and socio-economic growth.[232] As desirable as it may be wished by Nigerian parties to international commercial arbitration that Nigeria is chosen as the arbitral seat, are the many counterparties to Nigerian parties keen on doing so? Is the ACA still fit for purpose and or do they contain barriers that may be detrimental to the development of international commercial arbitration in Nigeria? Are there adequate provisions in the ACA that empower the courts in Nigeria to give the needed support and where and if necessary, to intervene in aspects of the arbitral process? The ACA is 32 years old legislation, though, once a highly praised milestone for laying the foundation for the development of arbitration practice

[232]Thomas E. Carbonaeu, 'National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard or Manifest Error' in Richard B Lillich and Charles N Brower (eds) International Arbitration in the 21" Century: Towards "Judicialization" and Uniformity? (Transnational Publishers, (1993) 115, 116.

in Nigeria,[233] the ACA has become unable to keep up with current modern arbitration legislation and the efforts to review the dated legislation has not been fruitful. While other countries in sub-Saharan Africa are ensuring that their arbitration legislation is modernized to be an attractive international arbitration seat,[234] Nigeria is still battling to revamp its arbitration legislation. The current legal framework has aroused much criticism and calls for its review to reflect international best practices.[235] While some of these concerns are well-grounded others are arguably overstated.[236] The fact remains clear that the ACA is in dire need of reform. There is no doubt that the current federal legislation is out of date and arguably a hindrance to the development of arbitration in Nigeria and by extension the choice of Nigeria as a seat for international commercial arbitration. The much-anticipated review and reform of the ACA had gone through several failed legislative processes in the last seventeen years, the current Bill, Arbitration and Mediation Bill 2022 is the outcome of the National Reform Committee set up to look into the reforms of alternative dispute resolution laws and the ACA.[237] The Bill was passed by the Nigerian Senate in May 2022, and it is yet to get the final assent by the President before it is passed into law. It is expected that the political will by the legislature and policymakers to bring to fruition the efforts at updating a pro-arbitration legislative regime will not suffer the same fate as other legislative attempts at reforming the ACA.

[233]Asozu A. Amazu, 'The Legal Framework for Commercial Arbitration and Conciliation in Nigeria' (1994) 9 Foreign Investment Law Journal, 214-236.

[234] Rwanda Arbitration Law was established in 2008 Rwanda law No 005-2008 on Arbitration and Conciliation Matters is based on the UNCITRAL Model (as amended in 2006); The Mauritian International Arbitration Act 2008 (as amended in 2013 is a so also based on the Model Law (as amended in 2006); The Kenya Arbitration Act 1995 (as amended in 2010) is based on Model Law 2006 edition.

[235] See, Mustapha M Akanbi Challenges of arbitration Practices under the Arbitration and Conciliation Act 1988, Some Practical Consideration (2012) Int'l J Arb & Med, and Disp. Mgmt. (78) 4, 331, see also, AA Asozu, (n227).

[236] For instance, the issue of the Arbitration legislation (ACA) and the Nigerian Constitution as regards provisions that are said to oust the jurisdiction of the courts.

[237] In 2005, the Federal government of Nigeria set up a national committee known as the National Committee, National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria, (The Committee) for the purpose of reviewing alternative dispute resolution and arbitration legislation and submit the proposal for the reform of Nigeria's arbitration and ADR laws. For further discussion on the background of the Bill see section 3.6 of this Chapter.

Structure:

This chapter firstly discusses the historical development of arbitration legislation, the purpose of which is to examine how and why the arbitration legislation in Nigeria has changed. An overview of the background, development as well as the present, and future tendencies of international commercial arbitration in Nigeria are examined.

The second part of the chapter analyses the issue of The ACA and the Federal Republic of Nigeria Constitution, as well as the constitutionality of the co-existence of State arbitration legislation and federal arbitration legislation, are addressed. The argument that some of the provisions of the ACA violate the Constitution and restrict parties from their constitutional rights to access courts is also examined.

The core question is whether the present arbitration legislation in Nigeria is fit for purpose, in other words, to what extent can the ACA be said to be to advance the achievement of international commercial arbitration to such an extent as to be considered arbitration-friendly? Can the current ACA as it stands, be said to provide a comprehensive legislative framework that would make Nigeria a regional frontrunner and attractive arbitration seat? The third part of this chapter attempts to answer these questions by addressing some of the deficiencies of the ACA. Particularly the provisions of the ACA that may arguably be inconsistent with modern arbitration jurisdiction of limited judicial intervention and the extent to which it promotes international standards and norms for the enforcement of arbitration agreements and awards.

A modern international commercial arbitration statute not only curbs judicial hostility towards arbitration but also aims to enhance the efficiency and expediency of the arbitration process and procedure, first, to legitimate arbitration, second to support arbitration, and lastly to

promote arbitration venue.[238] The deficiencies of the ACA highlighted in this chapter, demonstrate that the ACA has not matched -up with the growth of international commercial developments and the ever-evolving international arbitration systems. Thirdly, this chapter explores the key and salient provisions of the proposed draft bill to amend the ACA. It examines the extent to which the proposed amendments seek to cure the lacuna as well as the innovations of the bill. Lastly, in light of modern arbitration legislation, the perspective adopted in this chapter generally explores whether the ACA provides a clear, effective, and modern legal environment that can facilitate the fair and just resolution of international commercial disputes and an attractive seat for the conduct of international commercial arbitration.

3.2 Historical Development of Legislative and Regulatory Framework of International Commercial Arbitration in Nigeria.

3.2.1 Ordinance–based Arbitration Act

The evolution of international commercial arbitration in Nigeria could be traced back to Nigeria's English colonial heritage.[239] The English common law and equity including the statutes of general application that were in force in England on the 1st day of January 1900, were introduced to Nigeria as a British colony. As a result, the Received English Law which included rules and legal principles of England was adopted in Nigeria by Ordinance No. 4 of 1874. Nigeria's first arbitration law was the Arbitration Ordinance 1914, which was a replica of the English Act of 1889 and this was applicable throughout Nigeria.[240] With the regionalization of Nigeria in 1954 into three regions Western, Northern and Eastern, and Lagos

[238] See Gabrielle Kaufmann-Kohler, 'Global Implications of the U.S. Federal Arbitration Act: The Role of Legislation in International Arbitration, ICSID Review - Foreign Investment Law Journal, Volume 20, Issue 2, Fall 2005, Pages 339–356, https://doi.org/10.1093/icsidreview/20.2.339

[239] B.A Bukar, 'Legal Framework for the Resolution of International Commercial Disputes: An examination of Nigeria's Arbitration Laws' (1999) 16(1) Journal of International Arbitration 47.

[240]Nigeria under the British Colonial Rule was governed and administered as a unitary administration after the amalgamation of the Southern and Northern Protectorates in 1914. See also, A.O Obilade, Nigerian Legal System (1979 Spectrum Publishing Ltd).

as the Federal territory, each of these regions as Lagos adopted the Ordinance as their respective arbitration laws.[241] This Act was later to be incorporated into the Laws of the Federation of Nigeria, in 1958 as this was the year Nigeria had the first set of organized laws.

As at the time of Nigeria's independence in 1960, the extant arbitration law was the Arbitration Act, this Ordinance-based arbitration legislation applied to Lagos[242] while the regions (now States) still had their Arbitration Laws. These are found in the Arbitration Law of Northern Nigeria 1963, Arbitration Law of Western Nigeria 1959, and Arbitration Law of Eastern Nigeria 1963. When states were eventually created out of these regions, the states continued and operated the Ordinance-based arbitration law as the applicable arbitration laws in their respective states.[243] Thus the English Law of arbitration of 1889 became applicable in Nigeria. The Ordinance-based arbitration law mainly provided statutory protection to arbitration, as it enshrined the rule of irrevocability for arbitration agreements for both existing and future disputes.[244] The Ordinance was sketchy, as it did not provide international arbitration nor mention foreign arbitral awards and their enforcement in Nigeria.[245] For example, in *Murmansk State Steamship Line v The Kano Oil Millers Limited*,[246] a 1974 case, the action for enforcement of foreign arbitral award failed because the applicable Arbitration Law did not recognize foreign arbitral awards.[247] The Ordinance relegated most of the important provisions of the Act to a Schedule and made them part of every arbitration agreement unless the parties

[241]The Arbitration Ordinance of 1914 was amended and re-enacted as the Arbitration Ordinance 1958.
[242] Lagos was the Administrative Head of the Colonial Administration.
[243]For instance, the then Western Region (now comprising of Ekiti, Ogun, Oyo Ondo, and Osun States) enacted it as, Arbitration Laws, Cap 13, and Laws of Western States 1959; Laws of the Federation of Nigeria, 1958 applicable to the Federal Capital Territory; Arbitration Law, Cap 7, Laws of Northern Nigeria, 1963; Laws of Eastern Nigeria, 1963. The states that were created out of these former regions adopted the Arbitration Laws applicable in their states before their creation.
[244]See Amazu Asouzu, Developing and Using Commercial Arbitration and Conciliation in Nigeria, (1990) Lawyer Bi-Annual Journal, (1) 1.
[245]Though by 1972 Nigeria had acceded to the NYC 1958 but the then extant law on Arbitration law in Nigeria did not deal with reciprocal recognition and enforcement of foreign arbitral awards.
[246][1974] ALL N.L.R 893; [1974] 12 S.C. 1.
[247] The case was decided based on the Cap 7 Laws of the Northern States of Nigeria 1963 which is based on the 1958 Arbitration Ordinance.

make contrary provisions. The Act contained nine provisions that were deemed to be embodied in every submission unless contrary provisions were made therein. For example, paragraphs 1 and 2 of the Schedule provided that if no other mode of reference was provided in the submission the reference was to be to a single arbitrator and that if the reference was to two arbitrators, the two could appoint an umpire at any time within the period they had the power to make an award.

Whilst this law remained the extant arbitration law in Nigeria, England which bequeathed Nigeria with the arbitration legislation have gone light-years ahead by repealing the Arbitration Act.[248] The ordinance-based obsolete arbitration law remained unchanged and interestingly, still so remains in the statute books of some states in Nigeria as the state arbitration law.[249]

The initial inroad of Nigeria into international commercial arbitration came in 1970 from Nigeria's ratification of the United Nations Convention on Recognition and Enforcement of Foreign Arbitration Awards in 1958.[250] The coming into force of the New York Convention in Nigeria was because Nigeria was a colony of the British at the material time. The NYC 1958 empowered imperial states to extend the Conventions to all or any of the territories for the international relations of which it had responsibility, it provided that;

Any State may at the time of signature, ratification, or accession declare this Convention shall extend to all or any of the territories for the international relations to which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.[251]

[248]The Arbitration Act of 1889 Act repealed by Arbitration Act 1950, s 44(3).
[249]For instance, States making up the old western region comprising of Oyo, Ogun, Ondo, Osun, and Ekiti States and states in the old Eastern and Northern Regions still retain this old arbitration laws in as their respective arbitration law.
[250]Nigeria became a signatory to the NYC in March 1974 see https://www.newyorkconvention.org/countries
[251]Art. X New York Convention 1958.

Though Nigeria acceded to the NYC in 1970, the Convention was not immediately operational. The non-operational of the Convention was because a constitutional requirement was essential for any treaty to be domesticated by local legislation before the Treaty or Convention for it to become binding law,[252] the NYC only became domesticated in 1988.[253]

3.2.2 The Arbitration and Conciliation Act 2004

Before 1988, Nigeria had no legislative instrument on international commercial arbitration, as previously stated, the arbitration law in Nigeria was the obsolete colonial government arbitration law. The need for a legal framework for international commercial arbitration in Nigeria evolved from the deficiency of the provisions of the previous legislation on arbitration. This is in addition to the recognition of an effective means of dispute resolution as an indispensable element in attracting and encouraging international investment and trade. When the United Nations Commission on International Trade Law 1985, enacted a Model Law on International Commercial Arbitration, it was a great step in the promotion of international arbitration.[254] The General Assembly, in its resolution, recommended: "that all States give due consideration to the Model Law on International Commercial Arbitration given the desirability of uniformity of the law, arbitral procedures and the specific needs of international commercial arbitration practice"[255]. Member states were encouraged to consider adopting the Model Law as their national legislation on International Commercial Arbitration.[256]

The then Federal Military Government recognized the need to overhaul the age-longed colonial arbitration laws which had existed in Nigeria's statute books since 1914. The inadequacies of

[252]Section 12, 1999 Federal Constitution of Nigeria.
[253]It was domesticated by the promulgation of the Arbitration Decree 1988, by the then Military Government. See Paul Idonigie, Commercial Arbitration Law and Practice in Nigeria (2015) LawLords pp 6-22.
[254]The Model Law provides a law consistent with both UNCITRAL Arbitration Rules 1976 and the NYC 1958.
[255]UN Document A/40/17 of December 11, 1985, and United Nations General Assembly Document A/CN.9/WG. II/WP.113 https://www.un.org/en/docs/ last accessed 27 February 2020.
[256]To this date the Model Law 1985 (with the amendment as adopted in 2006) has been adopted in 80 States in a total of 111 jurisdictions; https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

the old arbitration law coupled with the prevailing government policies geared towards liberalization and promotion of international trade and investment made the enactment of the Model Law desirable. As stated by *Asouzu,* international commercial arbitration may well serve as a facilitator of commercial activities and as an instrument of economic development and prosperity in Africa.[257] In a developing economy like Nigeria, it is recognized that the availability of prompt, effective, and economic means of dispute resolution is an indispensable element for the growth and encouragement of international investment and trade. To achieve this end, Nigeria, became the first African country to adopt the UNCITRAL Model Law in 1988.[258] It was promulgated as a military decree as the 1988 Arbitration and Conciliation Decree (ACD).[259] The ACD provides for both domestic and international arbitration as well as the resolution of the dispute by conciliation.[260] Though Nigeria had earlier acceded to the NYC,[261] the ACD implemented and incorporated the 1958 New York Convention as part of the legislation. The arbitral legislation (decree) provides for a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation promulgated to be applicable throughout the territory of Nigeria and like every decree promulgated by the then Military Government, it superseded all state arbitration legislation.[262]

With the return of democracy to Nigeria in 1999, most of the decrees promulgated by the Military Government including the Arbitration and Conciliation Decree of 1988 by s.315 of the Constitution of the Federation of Nigeria became an Act, and its validity as an existing law

[257]Amazu A. Asouzu Asozu A. Amazu, 'The Legal Framework for Commercial Arbitration and Conciliation in Nigeria' (1994) 9 Foreign Investment Law Journal, 214-236.
[258]The Decree adopting the Model Law was largely significant as it provided for rules governing international and domestic arbitration and made provisions for conciliation, which was not present in the Arbitration Ordinance of 1958.
[259]Arbitration and Conciliation Decree No 11, 1988.
[260] The ACD, for the first time in Nigeria, made provision for the resolution of the dispute by conciliation.
[261]Nigeria ratified the Convention on 17 March 1970. The Convention constitutes the second schedule to the Arbitration Act.
[262]This was made possible because of the unitary legislative arrangements under the military regime; accordingly, the Federal Government Military was competent to legislate on any subject for the entire federation.

remains as a law enacted by the federal government of Nigeria. Thus section 315 of the Constitution provides;

1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be

> *(a) an Act of the National Assembly to the extent that it is a law concerning any matter on which the National Assembly is empowered by this Constitution to make laws*[263]

Hence, the ACD became referenced as Arbitration and Conciliation Act (ACA) 2004, the 2004 date may seemingly give the impression and assumption that the ACA is a recent piece of legislation. ACA 2004 is merely a re-enactment of the Arbitration and Conciliation Act (Chapter 19 Laws of the Federation of Nigeria 1990), which itself was a re-enactment of the ACD 1988. With the update of the codification of the entire Laws of the Federation in 2004, the Arbitration and Conciliation Act became referenced as Arbitration and Conciliation Act (ACA) 2004.[264]

Interestingly, despite the 2004 date, the governing legislation that provides the framework for both domestic and international arbitration in Nigeria is almost 32 years old. The ACA as it is, made no express provision repealing the old arbitration laws. Idornigie,[265] commented that the ACA as published in the Official Gazette in 1988 had an s.58 (2) which provides that "The Arbitration Act (Cap 13) is hereby repealed" strangely this subsection was omitted in the 1990 Revised Laws of the Federation and in the subsequent codifications of the Laws of the Federation. There are arguments that the coming into force of the Act in 1988 repealed the

[263]See s315(1) Constitution of the Federation of Nigeria, C23, L.F.N. 2004
[264]Cap A18, L.F. N, 2004.
[265]Paul Obo Idornigie, 'The 1988 Nigerian Arbitration and Conciliation Act: need for Review? (2003) International Arbitration Law Review Int. 50-58.

Ordinance albeit by implication.[266] The provision of s.58 stating that 'this Act may be cited as the Arbitration and Conciliation Act and shall apply throughout the Federation" accordingly intends the unified application of the ACA throughout Nigeria. The poser is, can it rightly be stated that the ACA has impliedly repealed the old arbitration law? The argument of implied repeal is a traditional constitutional doctrine to which later statutes imply that earlier and inconsistent statutes are repealed.[267] This doctrine of implied repeal was applied by the Nigerian Supreme Court in *Jombo United Co. Ltd v Lead Way Assurance Co. Ltd,*[268] where the apex court held that it is trite, that, where two acts make conflicting or contrary provisions, the implication is that the earlier statute is repealed.[269] However, whether this doctrine of implied repeal can suffice to support the argument that the ACA impliedly repealed the old arbitration law in Nigeria is yet to be settled. The ACA as a federal enactment was intended to have territorial application throughout Nigeria and it is assumed to supersede all state arbitration laws.[270] While the efforts of updating the ACA are still pending,[271] this thesis submits that the reality is that both the states and federal laws on arbitration still co-exist. This submission is seemingly supported going by the judicial authority of the Court of Appeal decision in *Stabilini Visinoni v Mallinson & Partners Ltd.*[272]

Beyond question, Nigeria's adoption of the Model Law by the enactment of ACA 2004 was the first step in modernizing arbitration legislation and the major international commercial arbitration law in Nigeria. Nigeria is a constitutional law country founded on the principles of

[266]See Amazu Asouzu, 'International Commercial Arbitration and African States, Practice, Participation and Institutional Development' (Cambridge 2001).
[267]*Kutner v Philips* [1891] 2 QB 267 (QB*); see also Thoburn v Sunderland City Council* [2003] QB 151 (Div. Ct).
[268](2016) LPELR-40831(SC) SC. 8/200.
[269] Ibid per Amiru Sanusi, J.S.C.
[270]This was because it was promulgated as a Military Decree and the then Federal Military Government operated a unitary style of government coupled with the fact that the Federal Military Government was competent to legislate on any subject matter for the entire federation.
[271]The much-awaited Arbitration and Mediation Conciliation Act (Repeal and Re-enactment) Bill 2017 which has been aborted and replaced with Arbitration and Mediation Bill 2022 (Bill) are yet to be passed into law after 17years of the outcome of the Reform Committee. This thesis shall analyse some salient provisions of the Bill in a later section of this chapter.
[272][2014]12 NWLR (Pt. 1420)134.

the supremacy of the constitution and rule of law. Any law that purports to or has the effect of ousting the jurisdiction of any constitutional rights or courts is unconstitutional. To this end, some of the provisions of the ACA have been challenged as being unconstitutional.

3.3. Arbitration and **Constitutional Rights.**

The Constitution of a state deals with and makes provisions for the distribution of power amongst the tiers of government, the relationship between the federal and state governments, the relationship between government and individuals as well as civil rights of individuals.[273] In a constitutional democratic state, the Constitution is the fundamental *grundnorm* of all laws, and it provides for disputes to be resolved through the state apparatus of the judicial process.[274] The judge derives his appointment and authority from the state. On the other hand, international commercial arbitration is a private dispute resolution method between international commercial parties. Arbitrators derive their nomination and appointment upon the agreement of the parties.

The question is whether, the parties' voluntary agreement to settle their disputes by arbitration, clearly indicates a volitional forfeiture of legal rights including constitutional rights. Modern arbitration laws recognise the right of parties to agree to resolve their disputes by arbitration rather than litigation. In the Australian case of *TCL Air Conditioners (Zhongsan) Co. Ltd. v The Judges of the Federal Court of Australia*,[275] it was the contention that an arbitral award that contained an error of law in the face of it was in breach of the Australian constitutional requirement that only courts could exercise judicial power and that the arbitral tribunal was unlawfully exercising judicial power. The court made a distinction between the exercise of arbitral tribunal power and judicial power. It stated that judicial power operates regardless of

[273] Zekos Georgios I. 'Constitution, Arbitration and the Courts Laws and Legislation' (Nova Science 2013)
[274] Edward Brunet, 'Arbitration and Constitutional Rights' (1992) 71(1) N.C. L. Rev. 81. Pp.81-120. Available at: http://scholarship.law.unc.edu/nclr/vol71/iss1/1 last accessed 27 April 2021.
[275] [2013] HCA 5.

the consent of the parties whereas arbitral power is dependent upon it. In this case, the court held that it was merely enforcing the agreements which the parties had voluntarily entered.

The notion that international commercial arbitration may violate constitutional rights is incorrect as, arbitration makes provision for procedural protection.[276] Arbitration is a private dispute resolution method, and the constitution appears at one glance not to be compactible.[277] However, a close examination of the process and procedures of international commercial arbitration will show otherwise. It is argued that although there may be seemingly concerns for constitutional issues, however, there is no constitutional risk as the arbitral process has constitutional foundations. The principles of arbitration are based on due process, procedural fairness,[278] and fair hearing which are provided under international law[279] and convention,[280] national arbitration laws, and arbitral rules.[281] Procedural fairness and due process of the arbitral procedure are essential mandatory requirements in international arbitration. Parties may use the lack or abuse of procedural fairness and due process as a sword or shield in challenging an arbitral award and an award may be refused recognition and enforcement for breach of the requirement of natural justice.[282] For instance, an arbitral tribunal's refusal to hear the contending evidence of a party even when the evidence was necessary to the key issue of the case was held to be a breach of the requirement of natural justice.[283]

The consensual and private nature of arbitration makes it vital that the entire arbitral process and the arbitrators be credible and have the trust and confidence of the parties and the public

[276] Gary Born, International Commercial Arbitration, (3rd edn 2021) pp 1238.
[277] Peter B. Routledge, Arbitration and the Constitution (2013) Cambridge.
[278] According to Born, the terminology 'procedural fairness' is preferably used in international arbitration to distinguish it from domestic procedural standards, see G. Born page 2300.
[279] Model Law Article (as amended in 2006) art.18.
[280] New York Convention 1958, art. V.
[281] ACA, 2004 section 9; English Arbitration Act 1996 section 33 (1)(a); ICC Rules 2021 art. 22 (4); LCIA Rules 2020 art.14; UNCITRAL Rules 2013 art.17; article 15.1 UNCITRAL Rules 2010 art 15.1.
[282] See G. Born ibid, see also See, L Reed, 'Ab(use) of due process: sword vs shield,' (2017) Arbitration International, Volume 33, Issue 3, Pages 361–377.
[283] *CBS v. CBP* [2021] SGCA 4, Civil Appeal No. 30 of 2020; see also *Fleetwood Wanderers Limited (t/a Fleetwood Town Football Club) v. AFC Fylde Limited* [2018] EWHC 3318 (Comm).

and users of arbitration. Parties in arbitration should trust that the arbitral process will be fair, just, and equitable and that it will result in an impartial and unbiased award. To ensure such an outcome, the requirements of impartiality and independence of arbitrators are of paramount significance. This is essential and fundamental so that the entire arbitral process is trusted and retains its credibility. To safeguard the entire arbitral process, international arbitration legislation, as well as national laws and arbitral rules, require arbitrators to be neutral, impartial, and independent in the discharge of their duties. Not only are arbitral tribunals or arbitrators obliged to be independent and impartial, but it is a fundamental principle of international commercial arbitration that arbitrators must remain so all through the process.[284] This is in line with the fundamental principle of justice under various international laws and conventions that stipulate that everyone is entitled to an impartial tribunal in the determination of rights and liabilities.[285] The private nature of and other features of arbitration may seem to conflict or be difficult to reconcile with the principles of 'fair and public hearing' as stipulated under the various international laws.[286] However, it has been argued that the consensual process and in particular, the right to a fair hearing within a reasonable time is far more achieved with arbitration than with courts.[287] The English Court of Appeal in *Stretford v The Football Association Ltd and Another*[288] held that where parties have voluntarily agreed to have their disputes resolved by arbitration it does not conflict with Article 6 of the European Convention on Human Rights 1950.

It is argued that in Nigeria, the Constitution recognises arbitration as an alternative dispute resolution mechanism, albeit expressly and impliedly. Section 16 of the Constitution expressly

[284] Person appointed as arbitrators should be and must remain impartial and independent throughout the arbitral proceedings. See ACA 2004 section 8; EAA 1996 sections 24(1) (a) and 33(1) (a); Model Law Article 12.
[285] For example, Universal Declaration of Human Rights 1948 Article 10.
[286] Article 10, Universal Declaration of Human Rights 1948; Article 6 European Convention on Human Rights and Fundamental Freedoms 1950.
[287] Andrew I Chukwuemerie, 'Arbitration and Human Rights in Africa', (2007) 7 African Human Rights Law Journal, 103-141.
[288] [2007] EWCA Civ 238.

provides that as a matter of foreign relations law, state authorities as well as judicial authorities shall seek and enforce international disputes by arbitration among other peaceable settlement methods[289]. Section 19(d) of the Constitution also provides that for the "respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration, and adjudication."[290] Impliedly, this forms the legal framework upon which the Nigerian Arbitration and Conciliation Act 2004 stands concerning international commercial arbitration. The constitution plays a major vital role in the interpretation, validation, and application of statutes, the arbitration law inclusive.[291]

It is argued that the ACA provides for due process, fairness, and other constitutional rights in the arbitral processes and procedures in international commercial arbitration to ensure that the arbitral process and the arbitrators are credible and have the trust and confidence of the parties and the general public. To protect access to court as means of settling disputes, the Constitution prevents any national legislature from enacting any law that purports to oust the jurisdiction of the court. It is against this backdrop, that the question of the constitutionality of some provisions of the ACA has been challenged.[292]

Supremacy of the Constitution Over the ACA:

Nigeria's Federal Constitution is supreme and validates supra-laws. Its provisions override any contrary legislation. Section 1 of the Constitution of the Federal Republic of Nigeria provides that;

[289] This clearly indicates the application to government commercial interest and relations and, investments.
[290] Constitution of the Federal Republic of Nigeria.
[291] Ola O Olatawura, 'Constitutional Foundations of Commercial and Investment Arbitration in Nigeria, (2014) Commonwealth Law Bulletin (40)4 657-689.
[292] For instance, section 34 ACA which limits courts intervention in arbitration has been challenged on the ground of constitutionality as it deprives parties of the right to access to court as constitutionally guaranteed.

1) This Constitution is supreme, and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.

(2) The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except by the provisions of this Constitution.

(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.[293]

Furthermore, under the constitution, the courts and Judges are constitutionally endowed with jurisdiction and duties to hear and determine disputes between parties.[294] Section 6 (b) further provides that judicial powers of the courts 'shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to civil rights and obligations of that person" [295] In effect, the courts are traditionally and constitutionally has the jurisdiction to hear and determine disputes. Any law or legislation that purports to ousts the jurisdiction of the court or makes a provision that is contrary to the constitution is frowned upon as been unconstitutional. The ACA in line with the Model Law jurisprudence of limited court intervention, allows the court where there is a provision in the ACA that permits courts to so intervene.[296] The courts as defined by the ACA are the State High Courts and Federal High Courts.[297] This provision has been challenged on the ground that it curtails parties' access to court as guaranteed by the constitution.[298] It has been argued that section 34 ACA has an

[293]Section 1 Constitution of the Federal Republic of Nigeria.
[294] Section 6 Constitution of the Federal Republic of Nigeria, Laws of the Federation (LFN) 2004.
[295] See also section 36(1) of the Constitution.
[296] Section 34 ACA is an adaptation of Article 5 Model Law.
[297] See section 57 ACA
[298] See Akanbi, "Examining the Effect of Section 34 of the Arbitration and Conciliation Act of 1988 on the Jurisdiction of Courts in Nigeria" (2009) 2 Nigerian Journal of Public Law 306; Nwakoby, "The Constitutionality of Sections 7(4) & 34 of the Arbitration and Conciliation Act: Chief Felix Ogunwale v Syrian Arab Republic Revisited" (2003) 1(3) Nigerian Bar Journal 352, 355 and 358.

implication on the long-established principle that any legislative provision that seeks to deprive one of his rights, whether personal or proprietary is unconstitutional. The courts in Nigeria have affirmed in a plethora of cases that section 34 only limits courts intervention to only matters that are statutorily provided for under the ACA.[299] The purpose for limited court intervention in arbitration as provided under the ACA is not lost on the courts. The aim is to safeguard arbitral proceedings from unnecessary judicial interruptions and only permitting courts' role for the purpose of supporting and supervising arbitration.[300]

ACA and Constitutional Right of Appeal:

One of the provisions of the ACA that has been mostly subjected to constitutional challenges both by scholars[301] and in a plethora of cases[302] is the rule of finality of the court appointment as provided under default appointment of an arbitrator by the court. ACA in Section 7 reflects the Model Law precept of party autonomy by providing that parties are free to determine the number of arbitrators[303] and the procedure for the appointment of arbitrators. Section 7(1) of

[299] *Statoil Nigeria Limited v Nigerian National Petroleum Corporation* (2013) 14 NWLR (Pt 1373) 1; *Nigerian Agip Exploration Limited v Nigerian National Petroleum Corporation* (2014) 6 CLRN; *Statoil Nigerian & Agip Exploration Limited v. Nigerian National Petroleum Corporation and Oando OML 125 & 134 Ltd; Shell Petroleum Development Company of Nigeria Limited v Crestar Integrated Natural Resources Limited.*

[300] The next chapter will analyze the challenges of judicial intervention and processes in international commercial arbitration in Nigeria.

[301]See E.O Wingate and PN Okoli, 'Judicial Intervention in Arbitration: Unresolved Jurisdictional Issues Concerning Arbitrator Appointments in Nigeria' [2021] 65(2) Journal of African law 223-243; O.O Olatawura, Arbitration, and Conciliation Act 1988, Sections 7(4) and 34" (2011) 28 (5) Journal of International Arbitration 493; P.O ldornigie "The default procedure in the appointment of arbitrators: is the decision of the court appealable?" (2002) 68(2) The International Journal of Arbitration, Mediation and Dispute Management, (CIArb) pp. 397 -403; Nwakoby, "The Constitutionality of Sections 7(4) & 34 of the Arbitration and Conciliation Act: Chief Felix Ogunwale v Syrian Arab Republic Revisited" (2003) 1(3) Nigerian Bar Journal 352, 355 and 358.) see also Joseph Mbadugha J., 'Section 34 of the Arbitration and Conciliation Act: Issues Arising' (2017) 8(1) The Gravitas Review of Business and Property Law 88, 95, David Ike, 'Arbitration in Nigeria: A review of Law and Practice' (2016) 7(3) The Gravitas Review of Business and Property Law 57,62., Ola O. Olatawura, Constitutional Foundation of Commercial and Investment Arbitration in Nigeria Law and practice (2014) 40 Commonwealth Law Bulletin 4, 857, Olatawura O, 'Nigeria 's Appellate Courts, Arbitration and Extra-Legal Jurisdiction: Facts, Problems, and Solutions '(2012) 1(28) Arbitration International 63.

[302] See A.*G Ogun State & Ors. v Bond Investment Ltd*, [2021] LPELR-54245(CA); *Magnum Int'l Ltd v Enercon (Nig) Ltd* [2020] LPELR 49501 (CA); *Bendex Engineering Corporation & Anor v Efficient Petroleum Nigeria Limited* [2008] NWLR (Pt715) 333 (CA); *Chief Felix Ogunwale v. Syrian Arab Republic*, [2002] 9 N.W.L.R. (part 771); *Nigerian Agip Oil Co. Ltd. v. Kemmer and others,* [2001] 8 N.W.L.R. 506.

[303] Article 11(2) Model Law provides that "the parties are free to agree on a procedure of appointing the arbitrator or arbitrators."

the ACA provides: "Subject to subsections (3) and (4) of this section, the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator." Where parties fail or cannot agree on the procedure for appointment of an arbitrator, the ACA like most arbitration legislation[304] provides for a default procedure. The courts have jurisdiction to be involved in the appointment of arbitrators only as a default mechanism where the parties' have not agreed on a procedure or where the agreed mechanism has failed to function.[305] Sections 7 (2) and (3) of the ACA contemplate a situation where courts will intervene to appoint upon the failure to make procedure for appointment or where one party fails to appoint or agrees on the appointment of an arbitrator.[306] For the purpose of court default appointment in section 7 of the ACA, the court with jurisdiction in this regard is defined in Section 57 ACA as the State High Court or the Federal High Court or the Federal Capital Territory High Court. The primary role of courts regarding the default mechanism of appointment process is to ensure that the undue delay of the constitution of the arbitral tribunal and the arbitral process.[307]

The constitutionality of Section 7(4) of the ACA also came up in *Bond Investment & Holding Ltd*.[308] The Nigerian Court of Appeal dismissed the appeal in this case on the ground that the Appellate Court lacked jurisdiction to entertain the appeal pursuant to Section 7(2), (3) and (4) of the ACA. The Appellate Court relied on the decision of the Court of Appeal in Be*ndex*

[304] See Model Law Art. 11(3); Section 18 (2) and (3) English Arbitration Law 1996; French Code of Civil Procedure Article 1452; Kenya Arbitration Act, 1995 (as amended in 2010) section 12(3 Ugandan Arbitration Law 2000 section 11(4); Article 17 Egypt Arbitration Law (Law No. 27 of 1994, as amended)

[305] See Paul Idornigie, 'The Default Procedure in the Appointment of Arbitrators is the Decision of the Court Appealable?', (2002) 68(2) The International Journal of Arbitration, Mediation and Dispute Management, (CIArb) pp. 397 -403.

[306] This is in consonance with Article 11 of the Model Law.

[307] Gary B. Born, International Commercial Arbitration (3rd Edition) 2020 Kluwer Law International, at pp. 1857; see also *Montpelier Reinsurance Ltd. v. Manufacturers Property & Casualty Limited, Supreme Court, Bermuda, 24 April 2008,* [2008] BDA LR 24 seen at UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mal-digest-2012-e.pdf, Last accessed 16 May 2022.

[308] The question of constitutionality was also dealt with in the following cases: *Magnum Int'l Ltd v Enercon (Nig) Ltd* [2020] LPELR 49501 (CA); *Bendex Engineering Corporation & Anor v Efficient Petroleum Nigeria Limited* [2008] NWLR (Pt715) 333 (CA); *Chief Felix Ogunwale v. the Syrian Arab Republic,* [2002] 9 N.W.L.R. (part 771)*; Nigerian Agip Oil Co. Ltd. v. Kemmer and others,* [2001] 8 N.W.L.R. 506.

Engineering Corporation & Anor v Efficient Petroleum Nigeria Limited.[309] In that case it was held that the deprivation of the right to appeal is confined to issues of procedure of appointment specified under Section 7 (2) and (3) of the ACA. For section 7(4) to be applicable, the Appellate Court held that the court must satisfy itself that "*the grounds for appeal and issues formulated from grounds relates to appointment procedure* ***as laid down by sub-sections (2) and (3)*** *and not just matters peripheral to those specified therein" (emphasis mine)*.[310]

The consequence of this provision is that it operates to bar appeals from the lower court to the Court of Appeal, a right that is constitutionally guaranteed. Section 241 (2) of the Constitution of Nigeria states that an "appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal as of right in the instances enumerated in subsections 1(a) to (f)."

The purpose of making the decision of the court final in respect of default appointment is to prevent endless litigation at a time when an arbitral tribunal has not even been constituted, especially in a jurisdiction where litigation is characterised by severe delays. [311] However, as discussed above legislative provision that seeks to deprive one of access to the court is seen as unconstitutional. The ACA was promulgated as a Decree during the Military rule, and like all decrees promulgated by the then Military Government, it was superior to the Constitution. Thus, it has been argued that it is doubtful whether this provision would be valid under a civilian regime.[312] The case of Nigerian *Agip Oil v Kenner*[313] seems to support this view, as the Appellate Court declared that by virtue of Section 241 of the 1999 Constitution (which provides for appeals as of right from the decisions of the High Courts to the Court of Appeal) the decision of a High Court appointing an arbitrator is appealable despite Section 7(4) of the ACA.

[309] Ibid.
[310] Per Sule Aremu Olagunju, JCA paras E - D).
[311] See G. C Nwakoby "The Constitutionality of section 7(4) and 34 of the Arbitration and Conciliation Act: Chief Felix Ogunwale v the Syrian Arab Republic revisited" (2003) 1/3 Nigerian Bar Association Law Journal 345 at 353.
[312] See Paul Obo Idornigie, Commercial Arbitration Law and Practice in Nigeria (n35) at pp. 402
[313][2001] 8 N.W.L.R. (Pt. 716) 506.

It is the argument of the writer, that if or where the finality rule of section 7 infringes on the procedural or constitutional rights of any party, the ACA provides for the challenge of the appointment of the arbitrator under section 8 ACA. However, given that the Constitution is the highest law of the land, which confers powers, and creates rights and limitations, aggrieved parties may still challenge the provision on the ground that the Constitution is supreme and any law that is inconsistent with the provisions of the constitution cannot survive. The justification of the finality rule in 7(4) of the ACA notwithstanding, it will continue to receive constitutional backlash, until there is a judicial pronouncement by the Supreme Court on the finality or legislative reform of the provision.[314]

3.4. The Federal Arbitration Legislation (ACA) and State Arbitration Laws

Nigeria runs a federal system, having thirty –six states and a Federal Capital Territory (FCT). As stated earlier, each of these states from the time of the Arbitration Ordinance 1958, had its arbitration legislation.[315] In 1988, when the ACA was enacted, its objectives were amongst others, to provide for a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation. As at the time, the Federal Military Government had the legislative competence to make laws over any matter.[316] The States under the then Military Government had the legislative competence to legislate over only matters which the Federal Military Government had not legislated or to the extent that such laws were not inconsistent with the law passed by the Federal Military Government. Hence the constitutionality of the ACA or the legislative competence of the states to enact its arbitration law was not an issue. With the return of democracy under a constitutional rule that allocated

[314] The Theis later in this chapter (see 3.6) discusses the proposed amendment of this provision in the 2022 Bill.
[315] Examples of such state arbitration laws are Arbitration Law, cap 10, Laws of Eastern Nigeria, 1963, vol 1, (the Arbitration Law of former Eastern Nigeria and re-enacted as the State arbitration law of Abia State, Ebonyi State, Enugu State, and Imo State), Arbitration Law of Northern Nigeria applicable in Kano State and the other Northern States, Arbitration Law, cap 12, Laws of Cross River State, 1981, (also applicable in Akwa Ibom State).
[316] The legislative power of the Federal Military Government then included the power to abrogate any provision of the constitution, see s. 2(1) of the Constitution (Suspension and Modification) Decree, No. 1, 1984, as amended ('Decree No. 1'). See also *A.G. Anambra State v. A.G. Federation* (1993) 6 NWLR(Pt.302) 692.

legislative competence to each tier of the government, the Nigerian Court of Appeal was faced with the question of the applicability of the ACA over state arbitration law in the case of *Compaigne Generale De Geophysique v Etuk*[317] Also, the issue became complicated by the fact that the country's federal system has produced a situation wherein 2009, when Lagos State,[318] enacted its own Arbitration Law (Law No. 10 of 2009), which is a modern piece of legislation based on the current UNCITRAL Model Law. The complication arises from uncertainty as to the legislative competence of a state to purport to enact legislation about interstate and international arbitrations. The details of this debate are worthy of analysis.

3.4.1 The Debate

Nigeria as a federation operating federal constitution, jurisdiction and legislative competency is defined by the Constitution.[319] As discussed earlier, at the time of enacting the current arbitration law, the ACA, the various state legislation on arbitration were not expressly repealed. Hence, it can be argued that there is a dual arbitration legislation in Nigeria, the primary federal legislation ACA and the various state arbitration laws. The choice of which of the arbitration laws will be applicable is not made easy because of the uncertainty of the constitutional legislative competence of the state to legislate is yet to be settled. Given that Nigeria is a federation coupled with the spate of arbitration laws, the question of which state is the place of arbitration in Nigeria and the applicable *lex abitri* generated a fierce debate with the judicial decision in the case of *Compaigne Generale De Geophysique* and the enactment of the Lagos State Arbitration Law.[320]

---

[317] *Compaigne Generale De Geophysique v Etuk* (2004) 1 NWLR (pt.853) 20.

[318] One of Nigeria's 36 states (there is also the Federal Capital Territory) renowned to be the commercial capital of Nigeria.

[319] Components states within the federation of Nigeria have legislative capacity on subject areas enumerated under the Concurrent list and Residual list. The former is subject matters which both the National and State Assemblies could legislate upon, and the former is any subject matter which is not under the exclusive and concurrent lists, see Schedule of the Constitution of the Federal Republic of Nigeria

[320] The Lagos State House of Assembly became the first state of the Federation to adopt the draft uniform arbitration and conciliation bill and promulgated the Lagos State Arbitration Law (LSAL) which was signed by the Executive Governor of the state and became effective on 18 March 2009.

In the case of *Compaigne Generale De Geophysique,* the Court of Appeal had to decide whether the lower court was right in applying s.7 of the Cross-River State Arbitration Law instead of s.7(2)(b) of the ACA in dismissing the motion to set aside the arbitral award. The Court of Appeal held that the ACA 2004 has covered the whole 'field of arbitration 'and that Cross Rivers State Arbitration Law was null and void. This decision raised two germane questions; firstly, the question of the extent and scope of the doctrine of covering the field as regards the federal structure of governance practiced by Nigeria under the constitution. Secondly, the constitutional issue of the extent of legislative competence of the federal and state legislatures under the constitution. The 'doctrine of covering the field' has been used to argue and analyse the position of legislative competence of the federal arbitration act as against the state arbitration.[321] The doctrine is a constitutional theory doctrine,[322] applicable in federal constitutions where legislative competence is shared between the federal legislature and the states under the concurrent legislative list.[323] The doctrine postulates that where a federal legislature has exhaustively legislated on a subject matter, any state legislative provisions on the same subject which are inconsistent with the federal law shall be null and void to the extent of the inconsistency.[324]

Under the Exclusive List of the Nigerian Constitution 1999 (a subject matter upon which the federal legislature has exclusive legislative competence to legislate) arbitration was not listed. It is not listed also in the Concurrent List which both the federal and states could legislate upon.

[321] Amazu Asouzu, 'Arbitration and Judicial Power in Nigeria (2010 Journal of International Arbitration 18(6) 617–640.

[322] The doctrine originated and derived from the US 'covering the same ground; Houston v Moore [1820] 18 US 1, see also *Lakanmmi v A, G Western States* [1971] 1 UILR *201*, was the first case that this doctrine was established followed by the Nigeria Supreme Court case of *A.G Ogun State & Ors. v F. G Federation* [2002] 13 NSCC (1*)* 11; Vivian C. Madu, 'Judicial review of Legislation' (2012) Nigeria Institute of Advanced Legal Studies (NIALS) International Journal of Legislative Drafting 1(1) 157.

[323] The doctrine applies when both the federal and state legislature under the constitution has legislative competence to legislate on the same subject areas enumerated on the concurrent list, however where there is a conflict between the laws, the inconsistent provisions of the state legislature will be null and void.

[324] See *Attorney General of Abia State v. Attorney General of the Federation* [2002] 6 NWLR (Pt.763) 264, 389

Can it be said then to fall on the Residual Lists?[325] Asouza[326] argued that the legislative competence of the National Assembly in respect of arbitration could be found under Item 62 and Item 31 of the Exclusive list of the Nigeria Constitution 1999. Item 61 gives the federal legislature the power to legislate on trade and commerce, international trade, and trade between states within Nigeria. Item 31 deals with the implementation of treaties on subject matters referred to in the Exclusive list. Therefore, by implication, the arbitration falls under the legislative competence of the National Assembly as it deals with commerce, trade and domesticated the New York Convention 1958. Adaralegb*e*[327] agrees with Asouz*a* but for a different reason. Adaralegbe is of the view that the National Assembly has the legislative competence to enact laws only in respect of domestic arbitration. While he concedes that section 12(2) of the Constitution would only constitute a legal basis for enacting laws in respect of international commercial arbitration, being the form of arbitration that the New York Convention awards would arise from, he argues that the combined effect of item 67 and the supplementary powers in item 68 of the Exclusive Legislative List gives the National Assembly the power to enact laws on domestic arbitration. In the opinion of Idornigie, in enacting the ACA, the federal government of Nigeria has not covered the field of arbitration "completely, exhaustively and exclusively". He argued that, the ACA legislates only on commercial arbitration, and that state laws dealing with non-commercial arbitration are valid.[328] The Committee of the State Government of Nigeria on justifying the enactment of the Lagos State Arbitration Act 2009, rejected the opinions that wholly or partially favour the ACA and stated

[325] States have legislative capacity on subjects' areas enumerated under the Concurrent list and Residual list. The former being subject matters which both the National and State Assemblies could both legislate upon and the former being any subject matter which is not under the exclusive and concurrent lists, see Schedule of the Constitution of the Federal Republic of Nigeria www.nigeria-law.org/constitution.

[326] Amazu Asouzu, 'Arbitration and Judicial Power in Nigeria (2010 Journal of International Arbitration 18(6) 617–640.

[327] Adebayo G. Adaralegbe, 'Challenges in Enforcement of Arbitral Awards in the Capital Importing States, The Nigerian Experience, 2006 Journal of International Arbitration (230) 401.

[328] Idornigie P.O The Doctrine of Covering the Field and Arbitration Laws in Nigeria" in Arbitration, (2000) 66 The Journal of the Chartered Institute of Arbitrators, 3, 193.

that the power to legislate on arbitration is residual having not been listed in the Legislative Lists in the Constitution and reserved, therefore, for the federal legislature.[329]

Olawoyin agreeing with Adaralegbe to some extent, however, contends that the doctrine of covering the field, strictly speaking, has no role to play in resolving any argument about legislative competence to enact laws on the subject matter of arbitration or the validity of such laws"; stating categorically also that this position applies to either side of the jurisprudential divide in Nigeria on legislative competence in respect of the subject matter of the arbitration.[330] Other commentators[331] conversely have argued based on the concurrency principle of the constitution itself. The reality is that both the states and federal laws on arbitration still co-exist,[332] as the ACA 2004 did not expressly repeal the Arbitration Ordinance 1958.[333]

However, all the divergent views on the issue are still uncertain, the Appeal Court in the *Stabilini Visinoni v Mallinson & Partners Ltd*[334] had the opportunity to lay the matter to rest but unfortunately refused to give an authoritative ruling, rather the appellate court took the half-way approach to the debate, by not following the decision in *Compaigne Generale De Geophysique's*. The ruling of the Court of Appeal decision seems to support the view that there are no provisions in the ACA 2004 to suggest that respective States' laws on arbitration have been repealed. It also favours the argument that as party autonomy is the underlying feature of arbitration parties are free to choose between the substantive Federal Act or State Arbitration

[329] The 2005 National Committee on the Reform and Harmonisation of Arbitration and ADR Laws Committee produced a draft federal arbitration and conciliation bill and a draft uniform state arbitration and conciliation bill for states.' The Lagos State House of Assembly became the first state of the Federation to adopt the draft uniform arbitration and conciliation bill and promulgated the Lagos State Arbitration Law (LSAL) which was signed by the Executive Governor of the state and became effective on 18 March 2009.
[330] Adewale Olawoyin, 'Charting New Waters with Familiar Landmarks, The Changing Face of Arbitration Law and Practice in Nigeria, (2009) 26 (3) Journal of International Arbitration, 373-400.
[331] [2014] 12 NWLR (Pt. 1420) 134.
[332] The States that emerged from the regions enacted arbitration laws still maintained the laws in their statutes and none of those arbitration laws.
[333] The Arbitration Ordinance 1958 was based on the Arbitration Ordinance 1914, and it remains in the Statute books of most States in Nigeria.
[334] [2014]12 NWLR (Pt. 1420)134.

Laws as applicable law and *Lex abitri to* their arbitration. Accordingly, a federal arbitration regime that exists side by side with states regimes enhances the choice of the parties.[335] The Court of Appeal further commended the Lagos State legislation for making it possible for parties within Lagos State to have the choice of another arbitration law.

While the constitutionality of the legislative capacity of the state to enact state arbitration laws is yet to be settled, the innovations introduced in the LSAL 2009 are commendable.[336] However, this thesis argues that apart from some of its provisions which may be contentious, as long as there are both judicial and statutory uncertainty over the legitimacy and competence of the state to legislate on arbitration, potential conflicts between state and federal arbitration will remain unresolved.[337] For instance, the Lagos State Arbitration Law provides that where the seat of arbitration is in Lagos except where the parties have expressly agreed otherwise the LSAL shall be the *lex loci arbtri.*[338] The concern is whether in a Lagos seated international arbitration where the arbitration agreement is silent on the choice of applicable law, will LSAL or ACA be the applicable law? This raises fundamental jurisdictional questions, as to which of the laws will be applicable. The LSAL 2009 purports to apply also to international arbitration, however, the then Draft Uniform Arbitration and Conciliation Bill[339] on which the LSAL is based expressly provides for domestic arbitrations only. While one can argue that as regards domestic arbitration the co-existence of both laws can be anchored on the constitution, however, the thesis argues that in a situation where there is any inconsistency between the ACA

[335] Gbenga Bamodu, 'A Field Not Covered: Arbitration and the Nigerian Constitution' (2016) Gravitas Review of Business and Property Law 7 (2).
[336] The Lagos State Arbitration Law 2009 is a more modern statute, brings much-needed clarity to the law, and fills some of the gaps left in the AC 2004, an example is the writing formality which in the LSAL incorporates modern form of communication.
[337] Invalidity of the law under which arbitration is undertaken is a ground for an appropriate Nigerian court to set aside a resultant arbitral award, refuse to recognise it or to invalidate the arbitration agreement
[338] See s 2 LSAL, it gives parties the option to subject their arbitral reference to another law. Such law must remain subject to the mandatory provisions of the LSAL when read in conjunction with s l(b) LSAL.
[339]Upon the completion of its mandate, the Committee came up with two drafts of arbitration laws; the Federal Arbitration and Conciliation Act and the Uniform State Arbitration and Conciliation Law, the latter was put in place to administer domestic arbitration.

and any State arbitration law, the Constitution provides that the law made by the National Assembly shall prevail and the other State law shall to the extent of its inconsistency be void.[340] Since federal laws constitutionally take precedence over state laws where there are conflicts, parties are better off choosing the ACA as the procedural law.

The uncertainty stemming from the dual regimes of arbitration laws will not augur well for the advancement of arbitration practice as a viable alternative to litigation, as the entire process may be bogged down with the genre of jurisdictional challenges witnessed in *Compagnie Generale De Geophysique.* Until clear judicial pronouncements are made by the courts or decisive legislative reform action is taken by the National Assembly, the confusion and uncertainty would be most unsuitable for advancing the causes of attracting trade and investment to Nigeria generally, of attracting arbitration business to Nigeria, and for advancing the long-pursued goal of presenting Nigeria as an arbitration-friendly jurisdiction and viable international commercial arbitration seat.

3.5. Overview of the ACA 2004

The UNCITRAL Model Law on international commercial arbitration is mostly used as the yardstick by which to judge the quality of existing arbitration law, as they serve as a useful legislative guide for both domestic and international commercial arbitration procedures.[341] This is so even though there are notable jurisdictions said to be pro-arbitration seats but yet the arbitration legislation is not based on the UNCITRAL Model Law.[342] Nigeria is a Model Law jurisdiction as the ACA is designed after the UNCITRAL Model Law, with some variations, [343] as the Model Law is not in itself binding, it only provides member states with the foundation

[340] 1999 Constitution of the Federal Republic of Nigeria, section 4.
[341] Gary B. Born International Arbitration: Law and Practice (3rd edition 2020 Wolters Kluwer) 23
[342]For example, England, United States, Sweden and Netherlands to mention but a few.
[343] The Model Law serves a model for national legislations to adopt and aims at flexibility and uniformity to certain extent. Individual States arbitration legislations may modify it, but it is expected to be in conformity with the basic principles of the Model law.

for interpreting national legislation. The ACA 2004 is based on the 1985 Model Law albeit, with some modifications and regulates both domestic and international commercial arbitration. It contains four Parts and three schedules with the main objective of 'providing a unified legal framework for the fair and efficient settlement of disputes by arbitration and conciliation.

Part 1 contains arbitration provisions, which deal with domestic arbitration. Part II contains provisions relating to conciliation, while Part III has additional provisions dealing with international commercial arbitration and conciliation. Part IV contains miscellaneous provisions relating to the interpretation and receipt of written communication. The ACA 2004 is modelled on the UNCITRAL Model Law 1985; it contains main tenets of international arbitration such as party autonomy,[344] separability, competence/competence,[345] the enforceability of arbitral agreements and awards, and limited intervention of the courts.[346]

The three schedules contain the UNCITRL Arbitration Rules 1976,[347] Convention on the Recognition and Enforcement of Foreign Arbitral Award New York Convention) 1958 and the UNCITRAL Conciliation Rules. While this thesis does not intend an analysis of all provisions of the ACA, however, for reasons of scope, time and space, the thesis shall be examining and touch on salient provisions of the legislation that touches on judicial support for international commercial arbitration. Consequently, the following section shall discuss some of the provisions which fall short of providing adequate solutions to contemporary issues which are of great importance in judicial intervention and processes in international commercial arbitration and affecting the ability of Nigeria as a pro-arbitration jurisdiction.

[344]Non-Mandatory sections of the ACA 2004.
[345]Section 12 ACA 2004.
[346]Section 34 ACA 2004.
[347] The UNCITRAL Arbitration Rules was amended in 2010, however it is curious that the drafters of the ACA made the arbitral rules part of the enactment.

3.5.1. Defects in the ACA 2004

Arbitration legislation plays an important role as it ensures that each element of the arbitration process and procedure functions effectively. Notably, the ACA since its inception has been and still receiving several criticisms[348] for being inelegantly drafted, containing technical/typographical errors, irregularities, and lacunas. The ACA 2004 as it stands today seems no longer fit for purpose to some extent, especially on some of the handful of defects that are analysed below.

a. Arbitration Agreement: The Writing Requirement.

The existence of a valid arbitration agreement is fundamental to the arbitration process. Most arbitration regimes require that an arbitration agreement must be in writing and for this purpose defines what constitutes writing.[349] An arbitration agreement is the foundation stone of every international arbitration and the most fundamental requirement of arbitration.[350] The essence of having an arbitration agreement in writing is not only to record the consent of parties to arbitrate their future or present disputes, it is the basis of the arbitral tribunal's source of jurisdiction and existence.[351] In other words, there can be no arbitration without an arbitration agreement. The question of what constitutes writing and its effects under some of these arbitration regimes are seemingly similar but with a notable difference. The reason is that the

[348] See, David Ike Arbitration in Nigeria- A Review of Law and Practice' (2016) Gravitas Review of Business & Property Law 7; Oyeniyi O. Abe, The Legal Framework for The Institutionalisation of International Commercial Arbitration in Nigeria: A Critical Review, (2013) 1 Journal of Sustainable Development Law and Policy, 132; Andrew Chukwuemerie, "Salient Issues in the Law and Practice of Arbitration in Nigeria," (2006) African Journal of International and Comparative Law (14) 1; Paul Obo Idornigie, 'The 1988 Nigerian Arbitration and Conciliation Act: need for review? (2003) Int. A.L.R. 2003, 6(2), 50; A. Asouzu, The Adoption of the UNCITRAL Model Law in Nigeria: implications on the Recognition and Enforcement of Arbitral Awards, Journal of Business Law (1999) 185, Gaius Ezejiofor, 'The Nigerian Arbitration and Conciliation Act: A Challenge to The Courts' (1993) Journal of Business Law 82.

[349] Model Law art.7, section 5 and s. 6 EAA 1996, s.1 ACA.

[350] See, G. Herrmann, 'The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts', in A. Berg (ed.), International Arbitration in a Changing World, ICCA Congress Series, No.6, Balmain, Deventer: Kluwer Law and Taxation Publishers, 1993, p 41.

[351]Under art. V (1) (c)NYC, an arbitral award will be refused recognition and enforcement if the award does not fall within the scope of the submission to arbitration.

approach to the scope and legal significance of the writing requirement may not be the same. For instance, for the enforcement of an arbitration agreement, it is necessary under the New York Convention that the agreement must be in writing. Article II (1) provides that each contracting state shall recognize an agreement in writing, it also provides that written form requirement on the validity of international arbitration agreements, is only applicable to 'agreements in writing. Furthermore, Article II (2) of the NYC in requiring a written record of the parties' agreement to arbitrate, requires a contract that is either 'signed by the parties or contained in 'an exchange of writings' that record the parties' agreement, excluding agreements that are entered into orally or tacitly. The application of the EAA 1996 will only be possible if the arbitration agreement is in writing.[352] Under the English Arbitration Act 1996, an arbitration agreement is defined in section 5 as an agreement to submit to arbitration present or future disputes whether contractual or not. To constitute an arbitration agreement to which the English Arbitration Act 1996 applies, the agreement must be in writing or evidenced in writing (section 5), for instance, where the parties agree orally or impliedly to terms which are themselves in writing the parties are deemed to have made an agreement in writing for the purpose of the AA 1996.[353] In particular section 5(3) it provides that Part 1 of the Act applies to oral agreements that make reference to the terms that are in writing or by making reference to written arbitration rules.[354]

Importantly, to protect and ensure parties honour their agreement arbitration laws[355] and the NYC[356] prohibits intervention of the national courts in disputes covered by the arbitration agreement of parties.

[352] Section 5 (1) EAA 1996.
[353] See Bony v Kacou [2017] EWHC 2146(Ch); Midgulf International Ltd v Groupe Chimique Tunisien [2010] EWCA Civ 66.
[354] An oral agreement to arbitrate also known as parole submission falls outside Part 1 of the EAA 1996 but is valid as a matter under the English common law which is acknowledged under s81(1)(b) AA 1996.
[355] Model Law Art.8, see also ACA 2004 s.4 and s.5, English Arbitration Act s.9.
[356] New York Convention 1958 Article 11 (3).

The concept of an arbitration agreement is clearly defined by some arbitration laws. The English Arbitration Act provides that;

> *(1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).*[357]

The Model Law's definition of arbitration agreement provides that) '*Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or the form of a separate agreement."*[358] The Model law definition is in line with art. II (1) of the NYC definition of an arbitration agreement which provides *that 'the term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*'[359]

In Nigeria, the arbitration legislation, ACA, does not define an arbitration agreement but provides the format which an arbitration agreement should take, 'every arbitration agreement shall be in writing'. Other than requiring that an arbitration agreement is in writing or to be contained in some form of documents by way of correspondence or in exchange for claim and defence, it does not provide for any definition.[360] In *Owners of M. V. Lupex v. N .O. C. & S Ltd*.[361] the Nigerian Supreme Court defined an arbitration clause as follows "an arbitration clause is a written submission agreed by the parties to the contract and, like other written

[357] English Arbitration Act 1996 section 6.
[358] Model Law Article 7 (1).
[359]The signature requirement is not necessary under most national arbitration laws, for instance, see s.5 (2(b) EAA 1996 section 5(2)(b), ACA 2004 s.1.
[360] See ACA section 1, see *also Fidelity Bank Plc v Jimmy Rose Co. Ltd & Anor* [2012] 6 CLRN 82 (CA) 87.
[361] (2003) 15 NWLR (Pt. 844) 469 at 487, paras. A-B.

submissions, it must be construed according to its language and in the light of the circumstances in which it is made."

While an agreement in 'writing' may seem relatively easy to define and understand, however, what constitutes a writing requirement may not be easy to define, this is so considering the ever-evolving technological revolution and the wide use of electronic commerce in international commercial trade. The UNCITRAL Model Law in 2006, saw it expedient to go further than the New York Convention definition of means of communication of telegrams and telex when it reviewed its laws to reflect modern means of communication.[362] The Model Law (2006 as amended) contains two different options regarding the writing requirement for an arbitration agreement. Option one provides that the arbitration agreement must be in writing, and this is satisfied whenever the arbitration agreement is recorded in any form, even though it may have been concluded orally, by conduct, or by other means. Specifically, Model Law art 7 (4) states that the writing requirement of arbitration will be met by.

"*An electronic communication if the information contained therein is accessible to be useable for subsequent reference; "electronic communication" means any communication that the parties make using data messages; "data message" means information generated, sent, received, or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy"*

For Option 1 therefore, the requirement of writing is satisfied where there is a record 'in any form of the content of the arbitration agreement. Conversely, Option 11 of Article 7 does not contain any form requirement and only defines the content of such an agreement. This aligns

[362] In 2006, the UNCITRAL issued a recommendation that New York Convention Art. II (2) be applied 'recognizing that the circumstances described therein are not exhaustive. Subsequently, on 4 December 2006, the Model Law was amended pursuant to General Assembly Resolution 61/33 to include notable changes to Art. 7 on the writing requirement. See http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatory last seen 29 January 2021.

with a liberal approach to writing requirements and has not been implemented in many jurisdictions.[363] While Option 1 redefines the concept of 'agreement in writing' to include modern, electronic means of communication, Option 2 aims at the complete liberalization of form requirements in arbitration agreements, allowing for, for example, the enforcement of oral agreements. The main purpose for revising article 7 Model Law is for an arbitration agreement to conform to modern international contract practice which reflects modern communication.[364]

Some developing arbitration jurisdictions have recently reviewed their arbitration laws to reflect modern communication in international commercial contract practice.[365] For instance, South Africa Arbitration Law 2017, following the Model Law (as amended in 2006) provides specifically in art 7 as follows:

> *(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.*
>
> *(4) The requirement that an arbitration agreement be in writing is met by electronic communication if the information contained therein is accessible to be useable for subsequent reference*

The writing requirement of the arbitration agreement under the ACA gives a limited meaning and understanding to the term 'agreement in writing as well as limited scope of what constitutes writing. The question remains, whether the development of different forms of electronic communication like Fax and emails communication, for instance, will satisfy the requirement

[363] Some of the jurisdictions that apply this liberal formal validity requirement are Belgium art. 1681 of the Code *Judiciaire,* Scotland, s. 4 of the Arbitration (Scotland) Act 2010.
[364] The writing requirement under the Model Law is generally the same as the writing requirement under the NYC art. II but the difference is that the Model Law reflects modern communication and leis ss demanding as that of the NYC 1958.
[365]See National Arbitration Law of Rwanda 2008; Arbitration and Conciliation Act 2010 Uganda; Kenya Arbitration Act, Act No. 4 of 1995 (Arbitration Act) (as amended in 2010); Ghana Alternative Dispute Resolution Act 2010; UAE Federal Arbitration Act (Law No. 6 of 2018); India Arbitration & Conciliation (Amendment) Act, 2019 which amended the Indian Arbitration Act 1996.

of writing under the ACA. In comparison, the EAA by section 5(6) provides that writing includes its being recorded by an means, this can include electronic document and exchange statements of case."[366] This gives a broad meaning to the word 'writing' and can very well accommodate the rapidly evolving electronic technology.[367] The evidence in writing in s.5 EAA, will suffice for one party or a third party to record the agreement if so authorized.[368] The Lagos State Arbitration Law (2009) though retains the ACA writing provision however, it extends the definition to include a modern form of communication by providing that writing includes data that provides a record of the arbitration agreement or is otherwise accessible to be useable for subsequent reference.[369] It further provides that 'Data' includes information generated, sent, received, or stored by electronic, optical, or similar means, such as but not limited to Electronic Data Interchange (EDI), electronic mail, telegram, telex, or telecopy.[370]

Under the ACA, the essential legal agreement for an arbitration to be valid is that every arbitration agreement shall be in writing or must be contained in a written document signed by both parties. Further in s.1 (2), the ACA provides that any reference in a contract containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make the clause part of the contract. Consequently, under ACA, an arbitration agreement may be based on the written correspondence or pleadings exchanged between parties.

Given the writing requirement under the ACA, does it then mean that an arbitration agreement that does not conform to the ACA writing requirement will not be enforced? For instance, it is doubtful that an exchange of emails that referred to arbitration would satisfy the writing

[366]See Robert Merkin, Louis Flannery QC, Merkin and Flannery on Arbitration Act 1996 (6th edition Informa Law Routledge 2019) p54), see also *Carpatsky Petroleum Corp v PJSC Ukrnafa* [2020] EWHC 769 (C0mm).
[367] The EAA provisions for writing are far wider in scope than the UNCITRAL Model Law and the 1958 New York Convention.
[368] See EAA section 5(4), *Toyota Tsusho Sugar Trading v Prolate* [2014] EWHC 3649 (Comm*).*
[369]LSAL 2009 s, 3(4).
[370]LSAL 2009 s.3 (5).

requirement of the ACA in the strict sense as it did in the English case of *TTML SARL v STAT Oil.*[371] Where it was held that the writing requirement as provided under the EAA[372] was satisfied since one of the emails exchanged by the parties expressly referred to the charter party form containing the arbitration clause and the defendant agreed to it by its "notation of OK." Electronic commerce is rapidly becoming an integral part of global commercial trade transactions. There are now several emergences of the virtual marketplace which has now become the platform of all commercial communication that is happening over computer networks.[373] As at the drafting of the Model Law 1985 which the ACA 2004 adopted, it could not envisage the influence of electronic communication.[374] However, the Model Law in 2006 revised the writing requirement to accommodate modern technological innovations in communication and, international trade and commerce. Nigeria Federal arbitration legislation (ACA) is presumably expected to take the lead in the reform of legislation; however, the legislation is yet to avail itself with modernizing its writing requirement by adopting wording inspired by the 2006 UNCITRAL Model Law on electronic commerce.

The author acknowledges that there may be a paucity of cases dealing with arbitration agreements by email there is scarcity of jurisprudence regarding contractual agreements and by email. Electronic contracts in Nigeria are still governed and regulated by the traditional common law rules of contract and statutes such as the Sales of Goods Act and the Statute of Fraud.[375] Whether an arbitration agreement in an email form will suffice as writing and be regarded as a valid arbitration agreement within the meaning of section 1 of ACA and the Statutes of Fraud is another question. Presently, there is a lack of a statutory framework that

[371][2011] EWHC 1150(Comm*).*
[372]See EAA 1996 section5 (2) (b).
[373] Yousef Farah, 'Electronic Contracts and Information Societies under the E-Commerce Directives (2009)12, Journal of Internet Law. 3
[374] Pieter Sanders, UNCITRAL's Model Law on International Commercial Arbitration, (2007) 23 Arbitration International (1) 105.
[375] See section 4 Statutes of Fraud, which require certain contracts to be in writing and be duly executed to be enforceable.

regulates electronic transactions and contracts in Nigeria. Nevertheless, electronic contracts are not invalid or unenforceable in Nigeria. For instance, the Evidence Act 2011 recognises electronic signature and provides for various methods by which an electronic signature maybe proved.[376] However, it is argued that this may not in itself achieve the intended writing aim of including electronic and other forms of modern-day technology as a constituent of writing as envisaged by Article 7 Model Law as regards an arbitration agreement between parties. However, it can be argued that an arbitration agreement is a contract and under the Nigerian Law, an electronic signature of a contract will be valid if all the elements of a valid contract are present. Section 1 ACA requires not only that the arbitration should be in writing but also it is in the document signed by both parties.[377] Both the Statute of Fraud and the ACA implies the contract to be in tangible form and it is argued that an email and other modern electronic communications can be preserved in printing form and therefore satisfy writing requirement of the ACA. The likely problem may be the requirement of signature, this requirement can be satisfied in the case of an arbitration agreement by email or other modern forms of modern digital communication as section 93 (2) of the Evidence Act 2011 Nigeria, recognises electronic signature. Case law on the electronic contracts and signatures in Nigeria remains scarce as Nigeria is still lagging in developing its legal framework in e-commerce and electronic contract.[378] It is indeed the argument that, for the arbitration landscape in Nigeria to be attractive as a seat for international commercial arbitration, the need to review and amend the law to conform to the demands of present-day international trade and commerce, cannot be over-emphasized.

[376] See section 83 Evidence Act of Nigeria 2011, E14, Laws of the Federation of Nigeria
[377] ACA 2004 section 1(a).
[378] The Electronic Commerce (Provision of Legal recognition) Bill 2015 and the Electronic Transaction Bill 2017 which seek to regulate electronic commerce and contracts are yet to be enacted.

Another shortcoming aspect of ACA s.1 (2) is that it leaves out the Model Law definition of the arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not"[379] and states that it may be in the form of an arbitration clause in a contract or the form of a separate agreement. This casts doubt as to whether a dispute arising out of a non-contractual relationship by parties will be covered by the ACA. Going by the definition of commercial arbitration in s.57 (1) ACA, the non-contractual relationship between the parties is not covered. Section 57(1) defines arbitration only as "a commercial arbitration" and then goes ahead to define "commercial." The definition is seemingly general and non-exhaustive, the term commercial indicates only contractual relationship. It suffices therefore to conclude that non-contractual disputes arising out of tortious wrongs or disputes are not and cannot be covered by arbitration agreement under the ACA. In essence, though the ACA did not specifically and expressly exclude certain aspects of the dispute, nevertheless, where such disputes do not qualify as commercial under the ACA, such dispute is not arbitrable because it cannot be treated as an arbitration agreement. However, the Model Law does not require that the dispute submitted to arbitration must arise from a contractual relationship but only provides that if the relationship is legal, the requirements of art.7 (1) are satisfied. The Model Law definition of an arbitration agreement is in line with the NYC definition of the arbitration agreement.[380] The only difference between the definition of an arbitration agreement of the Model Law and the NYC is that the latter does not include 'concerning a subject matter capable of settlement by arbitration'[381] Both under the Model Law and NYC, disputes regarding tort or other non-contractual legal claims may also be submitted to arbitration.

[379]Model Law art.7 (2).
[380] NYC 1958 Art. II (1).
[381]Stavros Brekoulakis; John Ribeiro; Laurence Shore, Concise International Arbitration (Mistelis ed) (Second Edition 2015 Kluwer Law, 489-490.

Another curious provision regarding arbitration agreement under the ACA is s.2 which provides that; "Unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of parties or by leave of the court or judge." Just as an arbitration agreement requires the consent of both parties, so also does revocation of an arbitration agreement require the express consent of parties. However, s.2 ACA further empowers a party by leave of court to revoke an arbitration agreement. By this provision, it suggests that an arbitration agreement can be revoked by a party by obtaining leave from the court. This is even more worrisome, considering that the meaning ascribed to a party in s.57 ACA includes a party to the arbitration agreement, or any person claiming through or under the party or parties shall be construed as a party accordingly. The defect in this provision is that it fails to specify the grounds upon which parties can apply for the leave of the court to renege their agreement to arbitrate. Section 2, therefore, invariably permit judicial interference which the Model Law seeks to limit. The revocation of the arbitration agreement by leave of the court as provided in the ACA is a relic of the old Arbitration Ordinance 1958, which provides thus, *"A submission unless a contrary intention is expressed therein, shall be irrevocable, except by* ***the leave of the court or a judge*** *or by mutual consent …… (emphasis mine). "*[382] The power of courts' intervention in arbitral proceedings under the Ordinance was without any statutory limitation. The courts under the old arbitration law had the power to even stop arbitral proceedings amongst other powers. This was because, under the old arbitration regime, the rationale for such intervention was one of the ways that the supremacy of the courts over arbitration was established. The statutory jurisdiction of the court under the then repealed English Arbitration Act 1889 was seen as a provision of paramount importance in the interest of the public as described in the case of *Czarnikow v Roth Schmidt & Co.*[383]

[382]Arbitration Ordinance Cap 13, Laws of the Federation 1958 section 3.
[383] (1922)2 KB *478.*

The current arbitration law providing that the court may by leave of the court revoke an arbitration agreement without providing for conditions under which the court may revoke the agreement leaves nothing to be desired for a jurisdiction inspiring to be an attractive seat. However, the Lagos State Arbitration while providing for instances when an arbitration agreement could be revocable omitted the power of the court to revoke an arbitration agreement.[384] It provides that an arbitration agreement is irrevocable except by the express or written agreement of the parties. Modern-day arbitration law and practice have realized that when parties have by their free will enter into an arbitration agreement, the court should not indulge parties to renege from their agreement but rather ensure that they honour and comply with their agreement.[385]

b. Stay of Proceedings- Mandatory vs Discretionary Power of Sections .4 and 5.

Parties, having expressed a positive selection of international commercial arbitration by their arbitration agreement, have committed to submit their disputes to be resolved by arbitration rather than to be resolved by national courts.[386] When a dispute arises, one of the parties in breach of the arbitration agreement in the underlying contract may decide to commence an action in court rather than submit the dispute to arbitration as agreed. Most modern arbitration laws contain provisions that empower the courts at the instance of the other party to the contract, stay further proceedings in the court and refer parties to arbitration by parties' arbitration agreement. This is one of the ways through which the court supports the arbitral process and ensures that parties respect their agreement to arbitrate. Where a party insists on the right to have all the matters resolved using arbitration as agreed, the accepted standard obligation by most national arbitration laws is that it is the courts' responsibility to ensure that the parties'

[384] Lagos State Arbitration Law, 2009 section 4.
[385] *SCOA (NIG) PLC vs. Sterling Bank PLC* (2016) LPELR-40566(CA).
[386] *Sino-Afric Agriculture &Ind Company Ltd & Ors. V. Ministry of Finance Incorporation Anor* [2013 LPELR].

agreement is enforced by referring them to arbitration.[387] With a valid arbitration agreement, the NYC,[388] Model Law,[389] including other national arbitration laws[390] oblige the national court to refer parties to the arbitration. The NYC provides that;

> *"The court of a Contracting State when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void inoperative or incapable of being performed."*[391]

The Model law replicates the NYC in this regard by making a similar provision in Article 8 (1) which provides as follows:

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

However, the position of the arbitration law in Nigeria is that it has two contradictory provisions that deal with this issue. The ACA under sections 4 and 5 empower the court to stay proceedings when a party seeks to undermine an arbitration agreement by instituting a matter in a court. This clearly shows that the Nigerian arbitration legal regime is in favour of arbitration.

Section 4(1) provides:

[387]The disposition of the Nigerian courts towards the stay of litigation proceedings in favour of commercial arbitration will be fully discussed in chapter 5.
[388] NYC 1958 Art. II (3).
[389] Model Law (with amendments as adopted in 2006) Art. 8.
[390]An example is EAA 1996 section 9.
[391]Art. II (3).

'…. a court which an action which is the subject matter of an arbitration agreement is brought, if any party so request not later than when submitting his first statement on the substance of the dispute, order or stay proceedings and refer parties to the arbitration.'

While section 5 ACA 2004 provides that;

> *'If any party to an arbitration agreement commences any action in any court concerning any matter which is the subject of an arbitration agreement, any party to the arbitration agreement, at any time after appearance and before any pleadings or taking any other steps in the proceedings apply to the court to stay the proceedings*

The ACA s.4 is identical with the Model Law but differs slightly from the provision as it provides thus" … *refer the parties to arbitration unless* ***it finds that the agreement is null and void, inoperative or incapable of being performed"***[392] *(emphasis added).*

To a large extent, s.4 mirrors article 8 Model Law, which in turn follows Art. II (3) of the New York Convention. Art. II NYC provides a global perspective in which state courts are obliged to refer the parties to arbitration when seized of an action in defiance of arbitration agreement at the request of one of the parties unless the arbitration agreement is found to be null, void and inoperative or incapable of being performed.[393] As a signatory and a New York Convention member, Nigeria is, therefore expected to recognise and enforce arbitration agreement as part of its binding international law. Section 5 ACA interestingly on the other hand, adopts verbatim the old Arbitration Law 1914 provision. Curiously, the drafters of the ACA decided to re-enact the old legislation alongside a new one. There is a great deal of inconsistency in these two sections dealing with the same matter but with origin from two different legislative texts. These two sections have attracted scholarly criticisms as well as different interpretations over these

[392] Article 8 (1).
[393] See NYC 1958, Art. II (3).

two similar provisions yet with contradictory considerations of the provision in the same legislation[394] This thesis observes that the dichotomy between the histories of the two sections may partly account for the contradictions and difficulties in the interpretation as well as their application by the courts, and scholars. The contradictory considerations of these two provisions are, first, section 4 makes it mandatory for a stay of proceedings using the word 'shall', in another breath in section 5 it gives the court discretion either to stay or not to stay proceedings using the word 'may'. Secondly, an applicant for a stay of proceedings under section 4 of the ACA may do so not later than when submitting his first statement on the substance of the dispute, on the other hand, section 5 provides that the application must be made after appearance and before delivering any pleadings or taking any other steps in the proceedings.

The criticism against section 4 ACA, is to the effect that it mandates the court to refer parties to the arbitration[395] and thus leaves no room for the courts' discretion.[396] This thesis argues that section 4 ACA is simple and straightforward, it reflects Article 8 Model Law, which seeks to delimit national courts intervention in the arbitral process. If anything, this thesis suggests that s.4 should be amended to include the omitted part of Art.8 of the Model Law, which is, "if the agreement is null and void, inoperative or capable of being performed." It is further argued that by s.4 the court is statutorily obliged to grant a stay of proceedings on two conditions. Firstly, that where there is the existence of an arbitration agreement and secondly, that the application

[394]Paul. O Idonigie, Commercial Arbitration Law and Practice in Nigeria (n35) at 268-270; Festus Onyia. 'Stay Of Proceedings Pending Arbitration: An Appraisal of the Decision in Dr Charles Mekwunye V Lotus Capital' (2018) 9 Gravitas Rev of Business& Property Law, 4.; Ola O. Olatawura 'Stay of Proceedings in Nigerian Law of Arbitration-An analysis of its Functions and Problems' (2012) Arbitration International 28 (4) 68: Edwin Obinna Ezike, 'The Validity of Section 34 of the Nigerian Arbitration and Conciliation Act' 2000-2001 The Nigeria Juridical Review (8) 140; Andrew I Okekeifere, Stay of Court Proceedings Pending Arbitration in Nigerian Law, 13 (1996) Journal of Int'l Arbitration 119

[395]Orojo and Ajomo, Law and Practice of Arbitration and Conciliation in Nigeria (Mbeyi & Associates Nig. Ltd 1999) at 317; Ola Olatawura ibid.

[396]Greg Chukwudi Nwakoby, The Courts and The Arbitral Process in Nigeria' 2007 Unizik Law Journal, 27 (4)1, see also Gaius Ezejiofor 'The Law of Arbitration in Nigeria (Longman Nigeria 1997) at 352.

is brought timely (before submitting the first statement of the substance of the dispute). Notably, aside from recognizing and respecting the sanctity of contract which the parties have willingly entered, one of the main purposes of a stay of proceedings in favour of arbitration is to delimit the intervention of the national court in arbitral processes. It is the opinion of this thesis that the administration of justice in Nigeria is already overrun with a plethora of challenges resulting in excessive prolonged delay among others. For this reason, making the grant of a stay of proceedings in favour of arbitration discretionary would further worsen the over-crowded dockets of the courts. This thesis is of the view that, where a party has timely come before the court, and it is established that there is an existence of an arbitration agreement, the court should grant a stay of proceedings and refer parties to arbitration. The refusal to grant a stay of proceedings or advocating that the grant of stay of proceedings in favour of arbitration, in all cases should rightly be discretional as provided under s.5 ACA would be inconsistent with Nigeria's obligation under the NYC 1958.[397] When a court of competent jurisdiction is empowered to order a stay of proceedings in a matter brought before it and to direct parties to pursue arbitration as contractually agreed, the court by so doing and in under section 4 ACA will be affirming its pro-arbitration stance.

The use of the word 'may' in s.5 ACA empowers the Nigerian court to exercise discretion in granting or refusing a stay of proceedings in favour of arbitration. The circumstances that the court will consider in the exercise of its discretion are listed in s.5 (2) (a) and (b).[398] Going by the several judicial decisions in Nigeria, shows preference for section 5 ACA.[399] This indicates

[397] See 1958 NYC art II (3).

[398] Sub-section 5(2) (b) contains the problematic issue of showing the steps that a party has taken to commence arbitration. See the cases of *Crestar Integrated Natural Resources Limited v Shell Petroleum Development Company of Nigeria Limited & Ors; United Bank for Africa Plc v Trident Consulting Limited* [2013] 4 CLRN 119; *MV Panormos Bay V OLAM* [2004] 5NWLR PT 865, 1; compare with the case of *Dr. Charles Mekwunye v Lotus Capital.* [2018] LPELR-46646 (CA).

[399]See the cases of *Enyelike v. Ogololma* (2008) 14 NWLR (Pt. 1107) 247, *Onward Ent. Ltd. v. Mo "Matrix"* [2010] 2 NWLR (Pt.1179) 530; *O.K.S.M.H. v. M.I.E.E.* (2012) 3 NWLR (Pt. 1287) 258; *Statoil (Nig.) Ltd. v. N.N.P.C.* [2013] 14 NWLR (Pt. 1373) 1; *S.A. & Ind. Co. Ltd. v. Ministry of Finance Incorp.* [2014] 10 NWLR (Pt. 1416) 515; *R.C.O. & S. Ltd. v. Rainbowned Ltd.* [2014] 5 NWLR (Pt. 1401) 516; *B.C.N.N. v. Backbone Tech.Net.*

the attitude and perception of the Nigerian courts towards arbitration as they seem to jealously protect their jurisdiction as it seems to them that arbitration agreement 'robs the court of its jurisdiction and influence'.[400]

The argument that s.4 ACA on account of its Model Law origin is contemplated and should apply to international arbitration, [401] is deeply faulted. There is nothing in the ACA that so specify or indicates that different scope of operation should apply to each of these two sections.[402] Further, the primary objective of the UNCITRAL Model Law is to make the law flexible and to be generally applicable with or without adaptations to domestic arbitration. It has also been contended that s.5 ACA is restrictive on the ground that under this section, an application for a stay of proceedings must be by a party to the arbitration agreement and applicable only to domestic arbitration.[403]

The conflicting judicial interpretations of these two provisions by the Nigerian courts have not helped to clear the lacuna (some of the decisions of the court will be discussed in the next chapter).[404] Meanwhile, the court in interpreting these two contradictory provisions ought to consider the legislative intention. Is the court by either of the two provisions mandated to stay court proceedings and refer parties to arbitration or is it at liberty to do so? While s.4 already using the word 'shall' the court is mandated when the conditions are right to grant a stay of proceedings, section.5 on the other hand, seemingly gives the court the power to exercise its discretion whether to grant a stay of proceedings. Judicial interpretation and decisions are

Inc. [2015] 14 NWLR (Pt. 1480) 511*; Onyekweluye v. Benue State Government* [2015] 16 NWLR (Pt. 1484) 40; *Neutral Proprietary Ltd. U.N.I.C.Ins. Plc* [2016] 5 NWLR (Pt. 1505) 374.

[400] Ola Olatawura (n298) at 690. The jealous approach towards arbitration in Nigeria is dealt with in the next chapter of this thesis.

[401]*Gaius Ezejiofor(n393).*

[402] Ibid.

[403]Orojo and Ajomo, (n395).

[404]It will be shown in the next chapter that, the attitude of the Nigerian courts in respect of these two provisions has not been proactive as there has been a preference for refusing a stay of proceedings. For example, the decision of the Court of Appeal in *UBA v. Trident* (2013) 4 CLRN 119 and MV *Panormos Bay v. Olam (Nig.)* Plc (2004) 5 NWLR (Pt. 865) 1 is at variance with the decision of the Court of Appeal in *LSWC v. Sakamori Const. (Nig.) Ltd.* (2011) 12 NWLR (Pt. 1262) 569.

expected to fill in the gap of the lacuna. However, the judicial interpretations of these two provisions have not been helpful as there have been different interpretations and decisions as regards these two provisions. From the standpoint of promoting Nigeria as a seat for international commercial arbitration, there is a need for clarity in the legal framework. The arbitration law of a pro-arbitration seat must recognize the right of a party to a stay of proceedings where the other party institute an action in court in respect of a matter which is subject to an arbitration agreement. Lack of clarity in the national arbitration law may have the potential of creating a fundamental obstacle in the successful conduct of the arbitration. To have two provisions on the same subject matter in the same legislation, on the same subject matter with seemingly contradictory considerations coupled with the conflicting judicial interpretation would likely discourage parties from choosing such jurisdiction as a seat.

The bone of contention for those who advocate that s.4 should be repealed is because of the word 'shall' which makes it mandatory for the court to refer parties to arbitration.[405] It is believed that the mandatory nature of s4 (1) takes away the inherent discretionary powers of the court in granting a stay of proceedings. There is no doubt that there is a need for the reform of the two sections dealing with a stay of proceedings, considering that both have conflicting considerations. Nevertheless, this thesis disagrees that s.4 as it fails to take cognizance of the inherent discretion of the court to grant or refuse an application made before it, and hence it is unconstitutional.[406] The thesis contends that s4 ACA purports to make it mandatory for the court to refer parties to arbitration only at the instance of the other party and if the party who makes an application that an arbitration agreement exists. The court cannot on its own grant a

[405] See P. Idornigie (n247) at pp, See Ephraim Ibukun Akpata, Nigerian Law of Arbitration in Focus, 24–25 (West African Book Publishers 1997). See P.O. Idornigie, Stay of Proceedings: The Owners of the MV Lupex v. Nigerian Overseas Chartering and Shipping Ltd., 1 NJSCR 1, 15 (2011). ADIC – African Journal of International & Comparative Law 1 (2006).

[406]Greg. Chukwudi Nwakoby, Arbitration and Conciliation Act Cap A18 Laws of The Federation of Nigeria 2004 -Call for Amendment' African Online Journal, Vol 1 (2010) AJOL https://www.ajol.info/index.php/naujilj/article/view/138176 accessed 18 August 2021.

stay of proceedings, s.4 ACA only obligates the court to refer parties to arbitration on the condition that there is prima facie evidence of an arbitration agreement[407] and that the party applying for a stay of proceedings comes within the time limit.[408] The court for instance would still have its discretion in a situation where a party prefers to have the matter settled by the court and waives its right to insist on arbitration. More importantly, if the court was to retain discretionary power as provided by s.5 ACA, it is expected that in a pro-arbitration court, discretion would be exercised in support of arbitration rather than against it. The issue of constitutionality as regards the jurisdiction of the court does not arise in a situation where parties of their own volition agreed to resolve their dispute by arbitration. If anything, it is expected that in a pro-arbitration jurisdiction, the legal framework and legal system must give recognition to party autonomy. Curiously, the court will want to exercise discretion whether to grant a stay of legal proceedings in favour of arbitration, where the party applying for stay evidence an arbitration agreement and comes within the time limit and meets the conditions for a stay of proceedings. What s.4 ACA does, is to give the court the statutory power to stay a proceeding before the court where there is an existence of an arbitration agreement. This does not in any way take away the inherent discretion which the courts have. The issue of the power to exercise discretion by the court if the conditions are met should not arise under s.4 ACA, unlike under s.5 ACA where the court still holds and retains its discretion, even when there is a valid agreement to arbitrate.[409] It is usually argued by some authors[410] that the issue with s.4

[407] This is in line with art.11 (3) which requires that a court refer the parties to arbitration where one of the parties invokes and relies on a valid arbitration agreement.
[408] It is required that a court before which an action that 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, or stay of proceedings and refer the parties to the arbitrations. See ACA 2004 section 4(1).
[409] For instance, in the case of *UBA v Trident (*2013) 4 CLRN 119*,* the court held that a party seeking to stay court proceedings in favour of arbitration, must further show by documentary evidence, that he has taken steps to refer the dispute to arbitration, at the time of filing the application.
[410] See P.O Idonigie, 'Stay of Proceedings: The Owners of the MV Lupex v Nigeria Overseas Chartering and Shipping Company Ltd (2011) African Journal of International & Comparative Law 1, Ikeyi, Nduka Nigeria: Stay of Proceedings Pending Arbitration, 1999, 2(3), Int. A.L.R. N37-40 Andrew I. Okekeifere, 'Stay of Court Proceedings Pending Arbitration in Nigerian Law', 13 (1996) Journal of Int'l Arbitration 119.

ACA is that it provides for arbitration to commence or continue and an award may be rendered while the court proceeding is still going on. It may be a genuine concern that this may risk conflicting judicial decisions by both the arbitral tribunal and the court. It is the argument of this writer that the court should refer parties to arbitration to allow the arbitral tribunal to determine the question of the validity of the arbitration agreement, in deference to the age-long principle of competence-competence.[411] More so, the concurrent hearing of both the court proceedings and the commencement of arbitral proceedings as envisaged by s.4 ACA may reduce the delay tactics of recalcitrant party. This thesis disagrees that the concurrent court and arbitration proceeding constitute any challenge to the inherent constitutional judicial powers of the courts to determine matters within their jurisdiction as contended by Nwakoby.[412] Section 4 ACA only recognizes the right of parties to have their matters resolved by alternative dispute resolution outside the court system, which is also supported by the constitution.[413] Additionally, s.4 complies with Nigeria's NYC obligation as well as seeking the settlement of international disputes by arbitration and other ADR mechanism sanctioned also by the same constitution.[414] This thesis faults the argument and the jurisprudence that supports the retaining s.5 ACA based on the need to retain the court's discretionary power on all cases of proceedings pending arbitration. This gives the impression that Nigerian arbitrators and practitioners are not ready to promote Nigeria as an attractive seat for international commercial arbitration. Rather than repealing s4, it should be amended to comply and be consistent with the international position on stay of proceedings as provided by the New York Convention 1958, as well as the Model Law. Article II of the New York Convention compels the court and the judges to recognise

[411] See ACA sec. 12, Model Law art.16. The reasoning of the principle of competence- competence is that an arbitration agreement is autonomous and separate from the contract in which it is contained. Hence, the arbitral tribunal is empowered to decide its own competence independently. In order that a tribunal establishes its competence, the tribunal needs to assess the issue of arbitrability of the dispute, as well as all issues of validity and conclusion of the arbitration agreement.
[412] Greg C. Nwakoby (n392) at page 2.
[413] See s.19 (d) Chapter II, Fundamental Objectives and Directives Principles of State Policy, 1999 Federal Republic of Nigeria Constitution.
[414] Ibid.

agreements on subject matter capable of being subject to arbitration, and it is only when an arbitration agreement is invalid that a court should continue the legal proceedings[415] otherwise, the courts are obliged to refer parties to arbitration. More so, Art.11 of the New York Convention provides a global perspective on stay of proceedings in international commercial arbitration. The conflicting provisions of sections 4 and 5 ACA therefore offends international, standard on stay of proceedings. Not only is Nigeria a signatory to the New York Convention, section 4 of the ACA is a modified version of Art. II New York Convention which forms part of the Second Schedule to the ACA 2004.

While the provisions on stay of proceedings in section 4 and 5 of the ACA creates both mandatory and discretionary powers for the courts hence it lacks clarity as to when a stay of court proceedings in favour of arbitration was appropriate. Most pro-arbitration jurisdictions follow the New York Convention position. For instance, the English arbitration regime following in accordance with the New York Convention perspective in respect of stay of proceedings, creates a mandatory obligation for the court to grant a stay of proceedings if the conditions for a stay are met.[416] Under English Arbitration Act 1996, an application for a stay of legal proceedings will usually be made under s.9 of the Arbitration Act 1996, whose provisions are mandatory.[417] The court's jurisdiction to grant stay legal proceedings may arise under s.9 AA where even the seat of arbitration is outside England or a seat has not been designated but the stay relates must be proceedings before the English Court which is requested

[415] See New York Convention 1958 Art. II (3).

[416] EAA 1996 section 9 (1). Section 9 provides as follows: "Stay of legal proceedings A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or

(1) counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

[417] See Russell on Arbitration (24th ed 2015) para 7-039.

to consider the application. Section 9 provides that a stay must be granted unless the court is satisfied that the arbitration agreement is "null and void, inoperative, or incapable of being performed. Hence, under s.9 EAA 1996, the court does no longer has discretion if the conditions for a stay are met.[418] The English Court under section 9 AA must grant a stay of proceedings where the preceding provision of section 9 (1) that there is an existence of an arbitration agreement,[419] In *Ahmad Al-Naimi v Islamic Press Agency Inc*[420], the court stated that it is not necessary that the validity of the arbitration agreement is unchallenged. The existence of the arbitration agreement must be proved by the applicant in order that the stay of proceedings is granted, however the validity of the arbitration agreement should be left for the arbitral tribunal to decide.[421] The English Court would only refuse to grant a stay where the arbitration agreement is null, void and inoperative. An arbitration agreement was held null and void where the Court of Appeal found on the evidence that an arbitration agreement had not been concluded and upheld a dismissal of an application to stay court proceedings.[422]

As it can be seen, the provisions of stay of proceedings under section 9 Arbitration Act 1996 as well as the threshold test by the English Court for stay of proceedings in favour of arbitration is pro-arbitration as a mandatory stay of court proceedings commenced in breach of an arbitration agreement will be granted in favour of arbitral proceeding, unless the arbitration agreement is null and void, inoperative or incapable of being performed. Unlike the Model Law as well as the ACA there are no guidance as to who will decide first the question of the

[418] See the case of *Joint Stock Company "Aeroflot-Russian Airlines" v Berezovsky* [2013] EWCA Civ 784 at [99].".34

[419] *A v B* [2006] EWHC 2006. See also *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40 at [7].

[420] [2000] 1 Lloyd's Rep. 522 at 525, per Waller L.J.

[421] See *Premium Nafta Products Ltd v Fili Shipping Co Ltd* (n416).

[422] See *Sunlife Assurance Co of Canada v CX Reinsurance Co Ltd* [2004] Lloyd's Rep. I.R. 58; In Stretford v Football Association the Court of Appeal rejected an argument that the agreement to arbitrate was null and void by reason of Art.6 of the Convention for the Protection of Human Rights and Fundamental Freedom. See also Associated *British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch*); see also, Bilta (UK) Ltd (in liquidation) 1) Nazir & Otllers* [2010] EWHC 1086 (Ch); [2010] WLR (D) 129.

validity of the arbitration agreement. The thesis submits that the Model Laws arguably leaves too much room for national legislatures to confuse the issue of who decides first in terms of the validity of a purported arbitration clause, thereby permitting the courts to have the ride while the tribunal trudges behind on foot.[423]

From a pro-arbitration jurisdiction perspective, this thesis argues that the objective of a stay of litigation in breach of arbitration agreement requires respect for promises willingly contracted and for enforcing the general principle of good faith in domestic or international law. More so, for international commercial transactions, the foreknowledge that a potential or actual right to recourse to a stay of legal proceedings for arbitration in a potential arbitration seat is not only an attraction for parties but may facilitate trade and investment. This will have the potential of reducing legal risk and give a level of comfort to the parties of a fair resolution of a dispute. Moreover, the essence for a stay of proceedings is not only to assist in securing the often-repeated advantages of arbitration, but also important, a call for respect for mutual promises freely made by parties.[424]

The challenge of diverse interpretations of these two provisions has continued to inhibit the application of the relevant provisions of the stay of proceedings. What would be desirable would be an interpretation of the provision on stay of proceedings in favour of arbitration that is in a manner that is consistent with a pro-arbitration policy. When confronted with the application for a stay of proceedings, the law should be able to secure arbitration in the face of litigation if all conditions are met. The Model Law template on stay of proceedings obligates the court to refer parties to arbitration without expressly requiring the court to stay of

[423] Stravos Brekoulakis; John Ribeiro; Laurence Shore 'UNCITRAL Model Law, Chapter 11, Article 8 [Arbitration agreements and substantive claim before court]' in Loukas A. Mistelis (ed), Concise International Arbitration (2nd edn Kluwer Law International 2015 855-859.

[424] See Amazu Asouzu 'International Commercial Arbitration and African States (Cambridge University Press) 31-41 and 62-65.

proceedings.[425] The time limit stipulated in s.4 (1) ACA is consistent with provisions found in both art.8 (1) Model Law and art. II (3) NYC, as both require the court to refer the parties to arbitration. However, the major difference is that unlike art 8(1) and art. II (3) NYC, the stay of proceedings provisions of the ACA is silent on the question of the existence of substantive validity of the arbitration agreement. The Model Law recognizes and makes provision for a situation where for instance a party who brings an action in court in breach of an arbitration agreement invokes that the arbitration agreement is invalid or inoperative. The Model Law template seeks to delimit national court intervention in arbitral proceedings, "so that the courts will be a servant to the arbitration process".[426]

The conflicting judicial decisions and interpretation of the consideration attached to s.5 ACA, that for a party to be able to approach the court for a stay of proceedings, the party must not have 'taken any other steps in the proceedings' calls for concern. The different court decisions in this regard give the impression that the courts are uncertain as to what constitutes 'taking steps.[427]

Interestingly, cases decided by the Nigerian courts between 2012 and 2017 on the application for the grant of stay of proceedings pending arbitration were all decided based on the provisions of s.5 ACA.[428] This suggests the Nigerian courts' preference of s.5 by the Nigerian in either granting or refusing a stay of proceedings because of the discretionary power of the section. This may not only stifle the development of arbitration in Nigeria but also encourage

[425] See Model Law art. 8(1).
[426]Stravos Brekoulakis; John Ribeiro; Laurence Shore 'UNCITRAL Model Law, Chapter 11, Article 8 [Arbitration agreements and substantive claim before court]' in Loukas A. Mistelis (ed), Concise International Arbitration (2nd edn Kluwer Law International 2015 855-859.
[427] The issue of taking further steps in legal proceedings will be extensively discussed in the next chapter on Judicial Intervention in Arbitration.
[428]*Neutral Proprietary Ltd. U.N.I.C. Ins. Plc* [2016] 5 NWLR (Pt. 1505) 374; *Onyekweluye v. Benue State Government* [2015] 16 NWLR (Pt. 1484) 40*; B.C.N.N. v. Backbone Tech. Net. Inc.* [2015] 14 NWLR (Pt. 1480) 511; *R.C.O. & S. Ltd. v. Rainbowned Ltd.* [2014] 5 NWLR (Pt. 1401) 516; S.*A. & Ind. Co. Ltd. v. Ministry of Finance Incorp.* [2014] 10 NWLR (Pt. 1416) 515*; Statoil (Nig.) Ltd. v. N.N.P.C.* [2013] 14 NWLR (Pt. 1373) 1; *O.K.S.M.H. v. M.I.E.E*. (2012) 3 NWLR (Pt. 1287) 258; *Onward ENT. Ltd. v. Mo "Matrix*" [2010] 2 NWLR (Pt. *1179) 530; Enyelike v. Ogololma* (2008) 14 NWLR (Pt. 1107) 247.

recalcitrant parties to an arbitration agreement to want to undermine arbitration by instituting matters in court.

To ensure an up-to-date arbitration legal framework, the provision dealing with a stay of proceedings need to comply with international arbitration standard so that users especially foreign parties will have confidence in an arbitration seated in Nigeria. The provisions of on stay of proceedings need to follow the New York Convention perspective on stay of proceedings as provided under art. II (3), the purpose of which is to strengthen the obligation to recognise and enforce arbitration agreements. The provision of stay of proceedings in favour of arbitration is one of the criteria to measure the friendliness of a particular legislative regime towards arbitration. Model Law and pro-arbitration jurisdictions follow the New York Convention template for stay of arbitration by making the provisions of a stay of proceedings in favour of the arbitration mandatory where the conditions are met.[429] The situation where the legal regime on stay of proceedings have two contradictory provisions is not consistent with international arbitration standard and lacks clarity. It is indeed argued that with the provision of section 4 which is to some extent, a modified version of Art. II (3) NYC, the provision of section 5 ACA is unnecessary.[430]

c. Challenge Procedure for Removal of Arbitrator.

The obligation of arbitrators to be neutral in their duties towards parties is fundamental to the credibility of the process of arbitration. Been a private adjudication, disputing parties voluntarily agree to submit their dispute to one or two persons who make a final and binding decision on the dispute. It is therefore a core principle of arbitration legislation that arbitrators, whether party appointed or appointed by an appointing authority[431] or appointed by another

[429] See LSAL 2009 section 6, EAA 1996 section 9 EAA,
[430] The Arbitration and Mediation Bill has reformed the provision by omitting section 5 this will be discussed later in 3.6.3.
[431] See *Halliburton v Chub Bermuda Insurance Ltd* [2020] UKSC 48.

arbitrator, must be and remain independent and impartial. Jurisdictions that have adopted the Model Law 'justifiable doubts threshold incorporates the standard of circumstances giving rise to justiciable doubts as to independence or impartiality.[432] The dual concepts of impartiality and independence of an arbitrator are distinct but are related,[433] the two concepts in practice are used interchangeably but connote different meanings. Some arbitration legislation refers to impartiality and no reference to independence, for instance, Arbitration Act 1996 section 24 mentions only impartiality and did not refer to independence[434], while the ACA as well as the Model Law make refence to both independence and impartiality. Swiss Law refers to independence no mention of impartiality (Article 180 Federal Statute of Private international Law). The New York Convention addresses the subject in articles II (1) II (3) and V (1) (d), by requiring recognition and enforcement of the terms of the parties' agreement to arbitrate including the requirements regarding the arbitral tribunal's independence and impartiality. Impartiality is abstract and subjective; it relates to the state of the mind of the arbitrator.[435] It requires that the arbitrator is not biased in favour of or prejudiced against any of the parties. On the other hand, independence refers to the actual or past relationship between the parties and the arbitrators. The independence of an arbitrator could be ascertained as this is objective and relates to a financial, professional or social relationship. It connotes that the arbitrator does not have any inclination or disinclination towards the parties or the subject matter of the dispute.[436]

However both requirements of independence and of impartiality arbitrators are firmly

[432] Model Law 2006 Art.12, ACA section 8, Egyptian Arbitration Law art.14
[433] Bruce Harris and Rowan Planterose, *The Arbitration Act 1996-A Commentary* (3rd edn Blackwell 2003)
[434] Under the English Arbitration Act there is no independence requirement. The Law Commission Consultation Paper 257 (see n144) confirmed that there is reason to impose a duty of independence it is sufficient to impose impartiality and this approach reflects the English Supreme Court's position in the famous *Halliburton Company v Chubb [2020]* UKSC 48The English Courts use the test of apparent bias as articulated in the *Porter v Magill* case when applying the provisions of sections 24 and 33 EAA 1996.
[435]Jeffrey Waincymer, Procedure and Evidence in International Arbitration (Kluwer Law International, 2012) p294
[436] See *Locabil (UK) Ltd v Bayfields Properties* [2000] 1 ALL Er 65; see also *AT & T Corporation & another v Saudi Cable* [2000] 2 Lloyd's Rep 127 where the court held that owing to the small number of shares was sufficiently small and not considered to have any impact on the impartiality of the arbitrator.

recognized and enshrined in national arbitration laws[437] and rules.[438] This is in line with the fundamental principle of justice under various international and regional human rights laws and conventions that stipulate that everyone is entitled to an impartial tribunal in the determination of rights and liabilities.[439] Arbitration laws and rules recognize and make provisions for the safeguard of this basic fundamental principle of procedural fairness that is derived from the two maxims of law, *Audi alteram partem*[440] *and Nemo debet esse judex in propria causa.*[441] To this end, therefore, parties in international commercial arbitration, are allowed to challenge or disqualify an arbitrator where there are doubts justiciable doubts as to the independence or impartiality of an arbitrator. To ensure that the arbitrator complies with the duty to remain independent and impartial, arbitrators are under the obligation to disclose to the parties all facts that when they become known, may lead to a challenge of the arbitrator or even the award may be set aside.[442] In essence, impartiality connotes the idea that arbitrators are neutral between the arbitrating parties, while independence is the idea that arbitrators have no connection to the arbitrating parties. Disclosure is the idea that arbitrators should reveal what connections they might have. This duty is expressly provided for in most arbitration rules[443] and laws[444], even where it is not expressly provided , it follows from an implied term of the agreement between the parties and the arbitrator, for example the English Arbitration Act 1996 which does not expressly make provision on disclosure, but the English Courts fill this gap by the various

[437] Model Law Art 12, ACA 2004 s.8; EAA 1996 s. 24 (1) (a)and s 33.
[438] UNCITRAL Arbitration Rules 1976 (as amended in 2010) Art 12, art.10 (1) LCIA Rules 2020 art. 19(1), art. 14 ICC Rules 2021.
[439]Universal Declaration of Human Rights 1948 Art 10; European Convention on Human Rights and Fundamental Freedoms 1950 Art 6; African Human and People's Rights 1981 Articles 7 and 24.
[440]No man shall be condemned unheard.
[441] Every man has a right to an impartial (and independent) adjudicator, a corollary of which is that no man may be a judge in his own cause.
[442] See ACA 2004 s.30 on the grounds for misconduct; EAA 1996, s68 on grounds of irregularities.
[443] UNCITRAL Rules Article 9
[444] Model Law Article 12; English Arbitration Act sections 23 and 24, *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 WLR 113, [1999] 2 Lloyd's Rep 45*; A T & T Corp. v Saudi Cable Co* [2000] 2 All ER (Comm) 625*,* [2000] 2 Lloyd's Rep 127, CA; ACA 2004 section 8.

judicial decisions.[445] Section 8 ACA provides that an arbitrator must disclose to the parties when approached in regards to appointment as an arbitrator any circumstances that are likely to give rise to any justiciable doubts as to his independence or impartiality. The duty of disclosure is not only at the time of appointment but shall subsist throughout the arbitral proceedings except the arbitrator had previously disclosed such circumstances to the arbitrator.[446] Therefore, the duty of disclosure by the arbitrator to the parties of relevant circumstances is fundamental to maintain the needed perception of independence and impartiality.

To justify the removal of an arbitrator on grounds of justifiable doubts as to independence and impartiality, the ACA 2004 like various arbitration laws and rules allows parties to set out the procedure for challenging and removing an arbitrator. Failing such agreement, national arbitration laws, and arbitral rules make provision for the procedure to be followed. Under the ACA, sections 9 and 45 deal with challenge procedures to be adopted in domestic and international commercial arbitration respectively. Section 9 ACA is derived from art.13(1) Model Law, whilst s.45(5-9) is derived from articles 11 and 12 of UNCITRAL Arbitration Rules 1976. As a prelude to ACA s.9, when a challenge is made on these grounds, s.9 (3) ACA provides that "unless the arbitrator who has been challenged withdraws from office or the other party agrees to the challenge the arbitral tribunal shall decide on the challenge". If he refuses to withdraw what are the options open to either the arbitral tribunal or the other party? In a situation, where the arbitrator refuses or fails to withdraw or the other party does not agree with the challenge, is the decision of the arbitral tribunal final?

[445] Under the English Arbitration Act 1996, for the test of impartiality, an arbitrator may be removed under s.24 where there are doubts as to his impartiality. See *Halliburton v Chubb* [2020] UKSC 48*; B and Another v J & Ors.* [2020] EWHC 1373*; Halliburton Co v Chubb Bermuda Ins. Ltd & Ors* [2018]2 All ER 709.
[446] ACA 2004, s8(2).

On the issue, of whether an arbitrator needs to withdraw once challenged, the recent Nigerian court's decision of the High Court of Lagos State advocated that once challenged an arbitrator must withdraw.[447] In this case, the applicant argued that the failure of the chairman of the arbitral tribunal to disclose the relationship with the respondent as well as having given an expert opinion as a barrister in a litigation matter involving the respondent as a party raised the question of impartiality and independence of the arbitrator. On the issue of disclosure, the court held that once an arbitrator is challenged, it is expected that the arbitrator 'recluse himself'.[448] This rule of 'once challenged, must resign' is of doubtful legal arbitration jurisprudence neither is it in consonance with the provisions of the law as provided in s.9 (3) ACA which states that 'unless the arbitrator who has been challenged withdraws from office or the other party agrees to the challenge the arbitral tribunal shall decide on the challenge.' Nothing in this provision says that a challenged arbitrator must recuse himself. It can rightly be said that s.9 (3) of ACA 'unless the arbitrator withdraws' does not make it mandatory, hence it is the argument of this thesis that the court erroneously held that the "challenged arbitrator should have graciously resigned. The effect of this decision is that failure of disclosure would automatically give rise to a lack of independence and impartiality. Interestingly, the court did not elaborate nor give an analysis of how it came to hold that non-disclosure would automatically lead to misconduct.[449] The court in its reasoning rightly alluded, that arbitrators are obligated to uphold the duty of disclosure,[450] and stated that in the event of a challenge on grounds of misconduct of arbitrator for non -disclosure, it does not lie in the arbitrator to raise a defence. It is indeed the argument of the author, that the approach of the court indicates that it lacks understanding of the workings

[447] *Global Gas & Refinery Ltd v Shell Petroleum Development Company [2020] unreported High Court of Lagos State* Suit No: LD/1910GCM/2017.
[448]Ibid.
[449]Section 30(1) of the ACA 2004 provides that where an arbitrator has misconducted himself, the court may, on the application of a party, set aside the award.
[450] The Court largely relied on the case *of AT & T Corp. Technologies Inc. v Saudi Cable Co.* [2000] EWCA CIV 154,10; [200]2 All ER 625 (Comm).

of arbitration, as this is not the intention of the ACA nor international arbitration practice for an arbitrator to "once challenged must resign." Moreover, if the approach and reasoning of the decision is followed in later cases, it may result not only in frivolous challenges but make recalcitrant parties looking to delay arbitration proceedings and or deprive a party of the arbitrator of its choice. Consequently, the arbitrator would be obliged to resign, thereby initiating a replacement process that would invariably suspend and delay the arbitral proceeding. In fact, this means a party can keep on changing any arbitrator appointed.

It is trite that the legal duty of disclosure which is a part of the arbitrator's statutory duty to be independent and impartial[451] and to act fairly and impartially.[452] However, the court reached its decision without giving the significance of the non-disclosure within the context of the circumstances of the case at hand. The court, in its judgment, went on to determine that there were situations of conflict which the presiding arbitrator ought to have disclosed. Had the court considered the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines),[453] it is possible that the court may not have come to the decision made. The IBA Guidelines are a useful tool in deciding the questions of circumstances that may give to justifiable doubts as to independence, impartiality, and bias. Though the IBA Guidelines are not binding on the Nigerian courts but are of persuasive authority which the courts may refer to which may influence the court's assessment of when a duty of disclosure arises. The IBA Guidelines have been of assistance to the court as exemplified in the English case of *Sierra Fishing Company v Farran.*[454]

By way of comparison, the recent keenly awaited UK Supreme Court decision in the case of *Halliburton v Chubb Bermuda Insurance Ltd*[455] clarifies the approach of the English Court to

[451] ACA 2004 s.14; Model Law art.12.
[452] EAA 1996 s.1(a).
[453] IBA Guidelines on Conflicts of interest in International Arbitration 2014.
[454] [2015] EWHC 140 (Comm); *see also W Ltd v M SDN BHD* [2016] EWHC 422.).
[455] On appeal from [2018] EWCA Civ 817, Formerly known as Ace Bermuda Insurance Ltd) [2020] UK SC 48.

its arbitration law as regards the issue of failure of disclosure. Though the facts of Halliburton's case are not similar with that of the Nigerian *Global Gas* case, both cases relate to the arbitrator's duty of disclosure and apparent bias. Halliburton's case involved the non-disclosure of multiple appointments of an arbitrator. The English Supreme Court settled how the issue of apparent bias will be assessed by the English courts. The main issues the English Supreme Court considered are, first, the extent an arbitrator is entitled to accept appointments in multiple arbitrations with the same or overlapping subject matter with only one common party. Secondly, whether and to what extent the arbitrator could accept multiple appointments without providing disclosure. The UK Supreme Court agreed with the Appeal Court that the importance of impartiality of the arbitrator as the core principle of arbitration is not only a good arbitral practice but a legal duty under English law. On the first issue, the Supreme Court acknowledged that in some circumstances, the acceptance of multiple appointments involving a common party and the same or overlapping subject matter may give rise to an apparent bias. However, the Supreme Court explained that this will depend on the realities of international arbitration customs and practices of the relevant field of arbitration.[456] The Supreme Court held that the duty of disclosure underpins the integrity of English-seated arbitrations and arises from an arbitrator's statutory duty to act fairly and impartially under section 33 of the Arbitration Act and an implied term in the contract between the arbitrator and the parties and that the arbitrator will so act. Given that there was no allegation that the arbitrator was biased, the court considered whether there was an appearance of bias. The Supreme Court held that although the arbitrator had breached the legal disclosure obligations it further held that such non-disclosure is a factor that a fair-minded and informed observer would consider in assessing whether there is a real possibility of bias. Supreme Court, upholding the decisions of both the Court of Appeal

[456] The apex court in the decision in other words suggests that it would not typically be necessary for arbitrators in such arbitrations to disclose common or overlapping appointments because the arbitral practices of GAFTA and the LMAA are such that multiple appointments are not generally perceived as matters raising doubts about an arbitrator's impartiality.

and the High Court, held that, on the facts of the case, there was no apparent bias, and therefore no grounds for removing the chair as an arbitrator.

It is instructive to note that the Supreme Court in *Halliburton* relied on the IBA Guidelines and stated that IBA Guidelines can assist the court in identifying what is an unacceptable conflict of interest and what matters may need to be disclosed. The Supreme Court's decision emphasizes that non-disclosure does not necessarily give rise to bias and the Supreme Court concluded, that in considering an allegation of apparent bias in an English-seated arbitration the English courts will apply the objective test of the fair-minded and informed observer.[457]

Another problem with s 9 is that where a challenged arbitrator refuses to withdraw, the ACA provides that the arbitral tribunal itself is designated as the appropriate forum to decide the challenge.[458] Supposing the arbitration tribunal is made up of one arbitrator, it means, therefore, that if a sole arbitrator is challenged, he decides whether to sustain the challenge or not. Even where the tribunal is made up of three arbitrators, the arbitrators (including the challenged arbitrator) will decide on the challenge proceedings. The fact that under s.9 (3) ACA a challenged arbitrator hears and decides his challenge proceedings seemingly contravenes the constitutional principle of fundamental natural justice - *Nemo judex in causa sua*.

In the commentary to Model Law, the participation of the arbitrator in the deliberations and decision of the hearing of the challenge procedure is justified on the basis that it will save time and expenses.[459] Moreover, as intended by the Model Law, judicial intervention is permitted in the instance where problems exist or arise before the commencement or appointment of the arbitral tribunal. Regarding court appointment of the arbitrator, national courts possess the general jurisdictional, statutory, and inherent powers to act as the last resort to ensure necessary

[457] *Porter v Magill* [2001] UKHL 67.
[458] See also Model Law art. 13 (2) which also designates the tribunal as the appropriate forum to hear the challenge.
[459] See Model Law Commission Report, Article 13, paragraph 128.

standards of due process are met. The question of challenging an arbitrator should be subject to judicial supervision, for the court to decide whether the challenged arbitrator is impartial or independent. This is where there is a gap in the ACA, as there is no such provision in the Nigeria arbitration legislation. The Model Law in art.13 (3) Model Law, provides that national courts are designated as the last resort to review any previous unsatisfactory challenge it states that;

> *" If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award".*

However, the resort to court under art.13 (3) Model Law cannot be triggered unless the party has exhausted other available forums for challenging an arbitrator.[460] The English Arbitration Act 1996 also makes a similar provision. [461]

One of the problematic issues with the ACA regarding challenge proceedings is that did not provide for the court or appropriate authority as the last resort to decide the previous challenge. Consequently, under s.9 ACA, the decision of the tribunal on the challenge is final. Does this then mean that a party's right to challenge an arbitrator is lost if the tribunal dismisses the challenge? Arbitral tribunal ruling on their challenge can be open to abuse, so where a party is so concerned and in doubt of arbitrator's impartiality, he should be able to have the opportunity during the arbitral proceedings to resort to court. Since the ACA does not provide for a mid-

[460] For instance, an arbitral tribunal or appointing authority.
[461] Section 24 (2) EAA 1996 provides that "If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person".

arbitration bias challenge, parties would have to wait till an award is rendered before an application is brought to the court. Suffice to say that the lack of legislative provision for a fallback procedure and or resort to court would make a dissatisfied or recalcitrant party attack the resultant award on the wide margin ground of misconduct of the arbitrator.[462] The case of *Global Gas & Refinery Ltd v Shell Petroleum Development Company*[463] is a typical example in this regard. *Global Gas* commenced ICC arbitral proceedings alleging that Shell had breached their gas processing agreement dated 15 March 2002. During the proceedings, *Global Gas* challenged the appointment of the presiding arbitrator because he had failed to disclose information which led to doubts as to his independence and impartiality. ICC Court reviewed the challenge and dismissed it. *Global Gas* then proceeded to the Lagos High Court seeking orders setting aside the final award. The grounds for the application included a claim of misconduct of the arbitral tribunal. The court ruled in favour of *Global Gas* setting aside the award on the grounds of misconduct for arbitrator's non-disclosure. This case exemplifies the challenge procedure under the ACA, that an unsuccessful party at first instance will wait to attack the award. If the ACA had a provision that allows for a mid- arbitration challenge to the court and permits arbitration to continue[464] this approach complies with international standard practice. Furthermore, where a mid-arbitration challenge to the court is allowed as permitted in some jurisdiction,[465] parties will not have to wait until the award is granted before challenging an arbitrator on grounds of misconduct of an arbitrator under section 29 ACA, this will limit the resultant waste of time and money.

In respect of international commercial arbitration, failing party's agreement on challenge procedure, s.45 (9) ACA has three (3) options on the challenge if the other party does not agree

[462] See s.30 (1) ACA.
[463] See also the unreported case of *Gobowen Exploration & Production Limited v. Axxis Petro consultants Limited* (Suit No. FHC/L/CS/1661/2013) where the court set aside an award on grounds of misconduct of arbitrator for failure to disclose his family relationship with the lead counsel of the party that appointed him.
[464] See EAA 1996 section 24 (3).
[465] For example, in England, as discussed on page

with the tribunal's decision of the challenge and the challenged arbitrator does not withdraw. First, the decision shall be made by the appointing authority who made the initial appointment, second, by a designated appointing authority where the appointing authority did not make the initial appointment. The problem with this section is that it makes no express provision for the resolution of the challenge by an appointing authority. The Arbitration Rules contained in Schedule 1 of the ACA refer to the 'court' in place of appointing authority mentioned in the ACA. [466] This conflicts with the provision of the Act, in such circumstances the provision of the Act will prevail.[467] This conflict between s.9(2) ACA and the provisions of the article 12(1) of the Arbitration Rules that are scheduled after the ACA, came into play in the case of *Nigerian National Petroleum Corporation v Total E & P Nigeria Limited & 3 Ors.*[468] In declining jurisdiction in dismissing a challenge procedure before the court, the Federal High Court highlighted the conflict between the provisions of the ACA and the Arbitration Rules. However, it noted and argued that in international commercial arbitration, it is likely that for Nigeria seated arbitration, parties may choose their applicable arbitration rules instead of the Arbitration Rules attached in the Schedule of the ACA.[469]

c. Interim Measures/ Reliefs.

Interim measures and reliefs are essential in international commercial arbitration proceedings, as it provides parties with temporary protection pending when the final award is rendered.[470] During arbitration and even before the establishment of the arbitral tribunal, there may arise

[466] See art.12 Arbitration Rule art. 12 of the ACA. This is in contrast with articles 12 and 13 of UNCITRAL Arbitration Rules 2010
[467] See Arbitration Rules art.1.
[468] Unreported case FHC/ABJ/CS/390/2018.
[469] The Arbitration and Mediation Bill 2022 if signed into law, will resolve the conflict between the ACA and the Arbitration Rule. See the discussion on the Overview of Draft Bill in 3.6 of this chapter.
[470] See William Wang, International Arbitration, 'The Need for Uniform Interim Measures of Relief' (2003) 28 3 Brooklyn J. Int'l L. 1061, stated interim measures are an absolute necessity to protect what is at stake in the arbitration. Regardless of whether the evidence, real property, personal property, or financial assets needs to be preserved, there must be an effective procedure for maintaining the status quo. Without the protection of such provisional remedies, the outcome of the arbitration could become meaningless to the winning party.

instances where there is a need to protect the asset/property of the subject matter of a dispute or to maintain the status quo during arbitral proceedings so that the value or substance of the ultimate award is not greatly reduced. In such instances where interim reliefs or conservatory measures[471] are deemed necessary and required, most arbitration laws and rules give the arbitral tribunal the power to grant such measures. Most national arbitration laws recognize and empower the arbitral tribunal to grant such measures and relief, subject to any agreement to the contrary by the parties.[472] The ACA provisions on interim measures are rather scanty as it does not elaborate on the type of powers that it confers on the tribunal. It only provides that unless otherwise agreed by the parties, it confers power to the arbitral tribunal to grant interim and injunctive reliefs in favour of any of the parties pending the determination of the arbitration.[473] The Model Law as amended in 2006, investing the power to the tribunal to grant interim measures confers a wider power than the 1985 version of the Model Law which the ACA reflects. The old article 17 of the Model Law provides that "… the arbitration tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitration tribunal may consider necessary in respect of the subject matter of the dispute." This gives a general but restrictive power to the arbitral tribunal to grant interim relief it may deem necessary in respect of the "subject matter of the dispute." However, under the amendment, article 17 Model Law removed the restrictive phrase which provided that the measures being granted must be "in respect of the subject-matter of the dispute". Section 13 on interim measures reflects the 1985 version of Model Law, it vests the power to the arbitral tribunal to grant interim relief only where the property/assets to be protected is in the hands of one of the parties to the disputes and does not provide for interim relief against third parties.

[471] Different forms and names are given to such order, under the UNCITRAL Model Law art 17 and the UNCITRAL Arbitral Rules, Art 26 they are known as interim measures, while under the ICC Arbitration Rules, Art. 28 it is called conservatory and interim order.
[472] See Model Law art.17, ACA section 13.
[473] See ACA section 13(a).

Generally, the power of the arbitral tribunal to grant interim relief is limited by the inability to act before the establishment or appointment of the arbitral tribunal. Meanwhile, during this period, vital evidence or assets may disappear. When such a situation arises, recourse is generally to the national court to deal with such urgency. More so, whatever powers are given to the tribunal to grant interim reliefs, the major problem that such orders may face is enforcement. Both regimes, the ACA and the Model Law are powerless in this regard, as the arbitral tribunal lacks the type of state power to enforce their order like the court.[474] While the Model Law contains an express provision that gives jurisdiction to the court with the power to grant interim measures pending arbitration,[475] the ACA contains no such express provision.

When compared to the ACA, the English Arbitration Act 1996, provides an extensive list of powers when the English Courts can grant injunctive reliefs pending arbitration.[476] In Section 44 (3) EAA, a court in cases of urgency, may grant an order of injunction for the preservation of an asset or evidence pending the hearing and determination of an arbitration.[477] Section 44 (5) of the English Act goes further to provide that a court would only have the powers to grant an order of injunction pending arbitration where the arbitral tribunal lacks the power to grant the order of injunction or where the tribunal is for any reason, unable to grant same.[478]

Unlike the English arbitration law, the ACA does not expressly confer power to the court to grant interim relief in favour of a party pending the determination of the arbitration. It could be argued that the Arbitration Rules of the ACA has cured this lacuna by the provision of Article 26 (3) which provides that a Nigerian court can grant an order of interim or preservative

[474] See discussion on Interim Relief Measures in Chapter Four at 4.6.1.(e).
[475] See UNCITRAL Model Law (as amended in 2006) article 17(j).
[476] Proposed reform to make section 44 to be a mandatory provision under the Act and to require the arbitration parties' express agreement before they are deemed to have excluded the courts' supportive powers. See The Law Commission Consultation Paper (n144).
[477] See *AES Ust-Kamenogorsk v Ust-Kamenogorsk JSC* [2013] UKSC 35*; Cetelem SA v Roust Holdings Ltd.* [2005] 1 W.L.R. 3555.
[478] *Permasteelisa Japan KK v Bouyguesstroi* [2007] EWHC 3508 (QB) at [42]; *See also Euroil Ltd. v Cameroon Offshore Petroleum Sarl* [2014] EWHC 12 (Comm).

injunction pending the hearing and determination of an arbitration proceeding, However, it is noted that the Arbitration Rules of the ACA is not mandatory and not applicable in international commercial arbitration seated in Nigeria, more so, parties could have chosen their applicable arbitration rules different from that of the ACA. More importantly, the purpose of giving the courts powers to grant interim measures in arbitration legislation makes it crystal clear the judicial powers are exercisable in support of arbitration. The English Court in *Cetelem SA v Roust Holdings Ltd* aptly stated that "the whole purpose of giving the court power to make such orders is to assist the arbitral tribunal in cases of urgency or before there is an arbitration tribunal on ground."[479]

Going by the decision of the Nigerian Supreme Court decision in the case of *NV Scheep v. MV S. Araz*,[480] it becomes imperative that the ACA is amended to expressly endow the court with the power to grant interim relief pending arbitration. In this case, the court refused to grant an interim order for security in support of an arbitration proceeding in London because the Claimant in the suit had not submitted the issues in dispute between the parties for the determination of the Court. The Court, therefore, held that the admiralty jurisdiction of the Federal High Court could not be validly invoked for the sole purpose of obtaining security for an award in respect of the ongoing arbitration in London. The Supreme Court simply ruled that the Claimant ought to have approached the arbitral tribunal for an order for interim relief since the arbitral tribunal was responsible for determining the issues in dispute between the parties. Indeed, this decision fails to appreciate that the whole essence of giving the court power to make such orders is to assist the arbitral tribunal in cases of urgency and more so to support the efficiency of the arbitral process. If the tribunal could make such an order, enforcing such order is another matter, it is, for this reason, an application for protection that the support of the court

[479] [2005] EWCA Civ 618, Per Clarke L.J. at 71. See also *Econet Wireless Ltd v Vee* Networks [2006] EWHC 1568 at [14].
[480] (2000) 15 NWLR (Pt. 691) 622.

is needed. The decision of the Supreme Court would likely not have come to that conclusion, had it been the ACA had expressly endowed the courts with the power to grant an interim measure in support of arbitration proceedings. Even so, courts' power to grant injunctive relief can still be implied by art.26 (3) Arbitration Rules and by the inherent discretionary powers of the court.[481] In another case, the Supreme Court held that the court would only grant an injunctive relief during the pendency of arbitration only if there are "compelling and justifiable" reasons to so act.[482] In the case where the court appeared to agree that it had the power to grant interim relief pending arbitration, it relied on the Arbitration Rules of the ACA and under the Federal High Court Rules. This goes to buttress the need for explicit and express provisions in the Arbitration Legislation to give the courts the power to grant interim reliefs during or before the arbitration takes off. Arbitration Rules in recognition of instances for urgent interim reliefs to protect the property/assets which is the subject matter of the dispute from being dissipated provides for a party requiring urgent reliefs to apply for the appointment of an emergency arbitrator.[483]

The reason for court-ordered interim measures is to make effective the arbitral tribunal's order as the arbitral tribunal lacks the coercive powers to back up such order or compel its decision on third parties.[484] Such orders should generally be made available especially in the national courts of the seat of arbitration for the support of arbitral proceedings. For instance, in a case where a party had refused to disclose its domicile of business to avoid security posting about the cost of arbitration, the Courts provided support to the arbitral tribunal by giving appropriate

[481] Arbitration Rule 26(3) provides that a request for interim measures applied by any party to the court shall not be deemed to be incompatible with the agreement to arbitrate or a waiver to the arbitration agreement. See the case of *LAC v AAN Ltd (2006) 2 NWLR (Pt 963) 49*.
[482] *MV Lupex v. N.O.C.S Ltd (2003) 6 S.C. (Pt. II) 62 at 73; see also Maritime Academy of Nigeria v. A.Q.S (2008) All FWLR (Pt. 406) 1872 at 1895 Para B-C.*
[483] LCIA Rules 2020, Art. 9B; Stockholm Chamber of Commerce Arbitration Rules (SCC Rules), Art. 32(4) and Appendix II, Art. 3; ICC Rules, Art. 29(1) and Appendix V, Art. 1(2).
[484] See *Popack v. Lipszyc, CLOUT Case No. 385, Ontario Court of Justice, Canada, 8 June 1995.*

orders requiring the party to comply with that fundamental requirement.[485] The position under the Model Law is that the arbitral tribunal is given a default power to grant interim order just like under the ACA, but the Model Law makes for a more comprehensive provision by giving the tribunal broad powers (subject to parties' agreement) to grant interim measures.[486] For instance, under the Model Law, the tribunal is empowered to protect the status quo pending the determination of the arbitration.[487]

Whatever powers are given to the tribunal to grant interim reliefs, the major problem that such orders may face is enforcement. Although it could be argued that an interim order granted by the arbitral tribunal may be established in the form of an interim award,[488] and a party then seeks to enforce such an award, the issue still is that parties could still need the enforcing powers of the court. This is even more so, where an arbitral tribunal is yet to be constituted or where third parties are involved and subject matter is in the process of being dissipated, hence, a court ordered interim relief may be appropriate in these instances.[489]

By contrast, in EAA 1996, the powers of the court to grant interim measures are expressly provided under s.44. Court-ordered interim relief is based on three important purposes; to facilitate the conduct of the arbitral proceedings, to avoid damage or measures aimed at preservation of the situation until the resolution of the dispute, and lastly to ensure the facilitation of enforcement of the award.

d. Setting Aside of Arbitral Award (s.30).

Though the Arbitration and Conciliation Act (ACA) 2004,[490] recognizes and supports the finality of arbitral awards, the binding nature of arbitral awards in addition to its enforceability

[485] See *China Ocean Shipping Co. v Whistler International Ltd*. [1999] HKCFI 693.
[486] See Model Law (as amended in 2006) art.17.
[487] Model Law art.17(2) (a).
[488] See Arbitration Rules art. 26(2).
[489] See the case of LASG v PHCH [2012] 7 CLRN 134.
[490] See ACA 2004 section 31.

as that of a final judgment of national courts calls for some extent of judicial control. More so, judicial control of arbitral awards is necessitated by the need to ensure basic procedural fairness, and consistency of award with public policy.

For Nigeria- seated arbitration, the grounds for setting aside arbitral awards are set out in Sections 29, Section 30, and 48 of the ACA 2004. There are three grounds for setting aside an arbitral award under sections 29 and 30 ACA while there are additional grounds under s.48 of the ACA. There are contentions that the grounds for setting aside an award under sections 29 and 30 relates solely to domestic award because these sections are found under Part 1 of the ACA which makes provisions for domestic arbitration.[491] This thesis agrees and supports the argument that although Part III ACA relates to international commercial arbitration, the provision therein is in addition to Part 1 dealing with domestic arbitration.[492] Hence, the thesis analyses the setting aside as provided under Part 1 and Part III of the ACA, viz, sections 29, 30, and 48 ACA.

Section 30(1) ACA provides for two grounds by which the court in Nigeria can set aside an award, the first is if an arbitrator has misconducted himself/herself, the second ground is if the award is tainted with fraud. The ground of setting an aside award based on misconduct under the ACA is contentious and has received criticisms from scholars and writers.[493] One of the major pitfalls usually encountered to enforce an arbitral award through the Nigerian court system is the most used and abusive reliance on 'misconduct' as a ground for setting aside an arbitral award. This is encouraged by the lack of definition of what amounts to misconduct in the ACA. Because of this lacuna, the courts have resorted to the definition of misconduct under the common law.[494] The absence of a definition in the ACA of what constitutes misconduct

[491]Ephraim Akpata, The Nigerian Arbitration Law in Focus, (1997, West African Publishers) 84 and 87.
[492]Paul Obo Idornigie, (n32) at 274-275.
[493]J. Olakunle Orojo and M Ayodele Ajomo, (n395), Gaius, Ezejiofor, Paul O. Idornigie, ibid at 279.
[494]*Kano State Urban Development Board v Fanz Construction Company Limited*, (1986) 5 NWLR (Pt. 39) 74 at 89–90.

for purposes of setting aside an arbitral award, award debtors have turned the term into a capacious and open-ended concept that accommodates all kinds of, mostly frivolous and unfounded, allegations and complaints against an award. As this thesis discusses later,[495] in most cases, the allegations of misconduct turn out to be frivolous and unfounded when closely examined by the courts, but only after the award creditor must have been put through the rigors of expensive and protracted litigation that usually would likely end up in the appellate courts.[496]

While the ACA does not describe the situations that will amount to misconduct, the Supreme Court in its decision in the case of *Taylor Woodrow (Nig.) Ltd. v. Suddeutsehe Etna – Werk GMBH,*[497] seems to have expanded the margin of the ground by which an award may be set aside under 'misconduct of arbitrator.'[498] The Supreme Court listed ten examples of acts that would be held to amount to misconduct as; where, the failure of arbitral tribunal to decide all matters which were referred to it; the award deals with matters that were not referred to in the agreement of reference to arbitration; the award is inconsistent, uncertain or ambiguous; where there are irregularities in the proceedings; where the arbitral tribunal failed to act fairly towards either or both parties and where the arbitrator(s) delegated their authority.

The ground of misconduct under the Nigerian arbitration legislation has not only seen arbitral awards overturned but has also engendered much litigation as it gives the court a leeway to intervene in what is generally considered as the fairness of the arbitral process and not much of the correctness of the award. The sweeping generality of the expression 'misconduct' has been used by parties to frustrate the finality of arbitration proceedings and attack the resulting arbitral award on frivolous grounds clothing it as misconduct. Most challenge proceedings have been hinged on any of the ten arbitrator misconduct examples as set out by the apex court in *Taylor*

[495] See Chapter Four (4.6.1 f.).
[496]See *NITEL v. Okeke* [2017] 9 NWLR (Pt. 1571) 439.
[497]*(*1993) 4 NWLR (Pt.286) 127.
[498]*See Baker Marine (Nig.) Ltd v Chevron (Nig.) Ltd* [2000] 12 NWLR (pt. 681)393.

Woodrow's case. [499] The Court of Appeal in the case of *Arbico Nigeria Limited v Nigeria Machine Tools Limited*[500] dismissed *Arbico's* appeal on all the allegations of misconduct and on the errors of law that *Arbico* claimed appeared on the face of the award. Though the appellate court restated the principles laid down by the Supreme Court in *Taylor Woodrow case* and notwithstanding its wide powers, the court held that when parties have referred a question to a judge of their choice, they must be bound by his decision whether the conclusion be right or wrong" This decision demonstrates that the court's discontent with parties' sense of entitlement of judicial control of arbitral award. This stand was also highlighted in the Supreme Court's most recent decision in *NITEL v. Okeke*[501] the apex court clearly stated that a challenge to set aside an award is not a merit appeal and deplored the appellant's approach of attacking the substance of the award rather than demonstrating the alleged misconduct. Though, the Supreme Court considered *Taylor Woodrow* but on the on a different reasoning held that the conduct of the arbitrator in question did fit into any of the broad *Taylor Woodrow* examples of misconduct.[502]

The provision in respect of grounds to set aside awards, there is a need to replace the vague ground of arbitrator 'misconduct' by a provision allowing awards to be challenged only for enumerated procedural deficiencies, or for fundamental discord between what or how the arbitrator decided and what or how the parties authorized him to decide the dispute. It is argued that the provision should be replaced with clearer grounds for setting aside provisions as contained in the Model Law (as amended in 2006).

[499]See, *Global Gas Company Ltd v Shell Petroleum Development Co*. (unreported) Suit No: LD/1910GCM/2017; *Triana Ltd v UTB Plc* (2009) 12 NWLR (Pt.1155) 335; *A. Savoia Ltd v* Sonubi [2000]12 NWLR (pt.682)539; U.B.N. *Plc v. Ayodare and Sons (Nig.) Ltd.* [2007] 13 N.W.L.R. (Pt.1052) 567*; Kano State Urban Development Board v Fanz Construction Company Limited,* (1986) 5 NWLR (Pt. 39) 74.
[500][2002]15 NWLR (Pt 789) 24; see *also Mutual Life & General Insurance LTD v Iheme* (2014)1 NWLR (part 1389) 670.
[501][2017] (n496).
[502][2017] 9 NWLR (Pt. 1571) 439.

3.6 Draft Bill of ACA

The constant evolution of arbitration law and practices is often driven by changes in international commercial law and practice.[503] As highlighted and critically analysed above, the legislative framework for arbitration contains gaps and lacks clarity on a number of issues which affects the ability of Nigeria in becoming a preferred seat of arbitration. The need for the arbitration law to be comprehensive enough and capable of resolving international commercial disputes cannot therefore be over-emphasized.

The attempts to reform the current ACA started in 2005, after 17 years of administering the ACA, various concerns about the continuing efficacy of the existing legal framework emerged. The then Federal Attorney General,[504] set up a National Committee, National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria, (The Committee) in 2005.[505] The main terms of reference were to submit proposals on the reform of Nigeria's arbitration and ADR laws. The committee was headed by a retired Justice and representatives of the major arbitral institutions, arbitrators, legal practitioners, and other stakeholders. The purpose of setting up the Committee was not only as a response to concerns over the outdated legislation but also because the ACA was being (and is still) invoked and occasionally applied in a manner that undermines arbitration agreements and proceedings.[506] The report analysed the defects of the ACA 2004, the delay in disposing of matters about arbitration, and the high degree of judicial intervention in the arbitration process by the Nigerian courts. The report pointed out this has made an arbitration in Nigeria be regarded as a "first step to litigation‖,

[503] An example is the move to reform the Arbitration Act 1996 (England and Wales). Following the 25th anniversary of the Arbitration Act, the objectives of the reform by the Law Commission Are to modernize the law and ensure it law remains state of the art for domestic arbitration and supports England to be the first choice for international commercial arbitration. See Law Reform Commission Consultation Paper; (n144).
[504] Chief Bayo Oyo (SAN).
[505] Report prepared by the National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria 7 www.aluko-oyebode.com/_uploads/publications/amended%20report.pdf last accessed 15 November 2020.
[506] Sections 4 and 5 in respect of stay of proceedings.

rather than an alternative to litigation". The report further observed that the ACA 2004 is significantly a departure from the international standards as provided under the Model Law 1985 on enforcement of foreign arbitration awards. The Committee produced a Report which included two sets of arbitration laws, a draft federal arbitration and conciliation bill, and a draft uniform state arbitration and conciliation bill. Unfortunately, the report of the Committee went into abeyance as successive governments did not heed the call for reforms.

In 2017 another Committee was set up with the main objective to consolidate the various reports on the review of the laws on arbitration in the country.[507] It is interesting to note that between 2010 and 2020, several legislative attempts have been made to review the ACA but had been aborted and suffered setbacks as there has not been political will by both the legislature and executive to pass the Bill into law. Between 2018 and 2019, the draft Bill went through legislative review with the House of Representatives (Lower Chamber of the Legislature), and in May 2022, the Nigerian Senate passed the Draft Bill as the Arbitration and Mediation Bill, 2022. The Bill awaits the assent of the Executive before it is passed into law.

3.6.1 Overview of the Arbitration and Mediation Bill 2022 ('Bill')

The Bill to reform the ACA generally seeks to address identified shortcomings in the arbitration law and revamp legal framework of arbitration in Nigeria. The thesis will below highlight and discuss only key provisions of the Bill especially those salient provisions that are important in positioning Nigeria as an attractive seat. It is noticed that Bill makes some innovations that were absent in the 2017/2019 Bill.[508]

[507] The Senate Committee on Judiciary, Human Rights and Legal Matters 2017.

[508] The present Bill forms part of several abortive attempts made in the last sixteen years to amend the ACA. In 2017 a Bill to amend the ACA known as Arbitration and Conciliation Act (Repeal and Re-enactment) Bill was introduced to the Senate but could not achieve concurrence until the end of the tenure of the National Assembly in 2019. The Current Bill was then introduced at the National Assembly in 2020.

The Bill seeks to repeal the ACA and provide a unified legal framework largely based on the UNCITRAL Model Law 2006 and UNCITRAL Arbitral Rules as amended in 2010 and 2013. It seeks to rectify several weaknesses of the current regime as well as have innovations that are consistent with modern arbitration law and practice. However, this thesis observes that the bill is also fraught with some defects that are inherent in the current arbitration legislation. The draft Bill is intended, like the ACA 2004 legislation for both arbitration and mediation. The Arbitration provisions apply to both domestic and international arbitration, and it is divided into three parts, Part 1 deals with the arbitration, Part II deals with mediation and Part III deals with miscellaneous matters such as interpretations, repeals of past legislation, and receipt of written communication. It also has four schedules, the First Schedule contains the Arbitration Rules, the Second Schedule the text of the New York Convention on Recognition and Enforcement of Arbitration Agreements and Awards, and the Third Schedule contains the Arbitration Claims and Appeals (Procedure Rules and the Fourth Schedules Contains Mediation Rules.

However, one major flaw of the Bill is that it has not done much in terms of restricting appeals, especially in respect of the court appointment of an arbitrator, and jurisdictional issues should be restricted by the requirement of the leave of the court before an appeal can be filed against it. The Bill though modelled on amended Model Law and prevailing international commercial arbitration law and practice is not a perfect law as some gaps as identified in the thesis. These gaps should not in any way stand in the way of its prompt execution and implementation. The Bill is bound to test the ability of the judiciary.

3.6.2 New provisions of the Arbitration and Mediation Bill 2022

1. General Principles and Scope of Application: The preamble to the Draft Bill sets out the foundational principles of the legislation. The Bill in section 1 enumerates certain principles like party autonomy and the primacy of parties' choice of arbitration and this must be

applied by parties and arbitral institutions. The Bill expressly requires and mandates the courts in Nigeria to do "all things necessary for the proper and expeditious conduct of the arbitral proceedings." This is a welcome provision, and it is hoped that the courts will insist that parties remain faithful to the policy objectives of the legislation when they seek unwarranted court intervention.

2. The requirement of writing can now satisfy electronic communication and the Bill in section 2 (4) recognises electronic communication and conduct of electronic proceedings in Nigeria.

3. The Bill now provides for a default number of arbitrators as one in section 6(2). In addition, it also provides in section 7(1) that no one is precluded from acting as an arbitrator by reason of nationality unless parties agree otherwise.

4. The Bill also provides for immunity of an arbitrator in the discharge of functions unless the action or omission was in bad faith – section 13 (1) of the Bill.

5. The bill provides for a default appointing authority -in international arbitration where parties have failed to agree on the procedure for the appointment of an arbitrator or an appointing authority, then the Director of the Regional Centre shall be deemed to be the appointing authority.

6. Robust Provision for Interim Measures of Protection and Emergency Relief: The Bill makes provisions that are intended to strengthen the powers of arbitral tribunals to make them more effective. The Bill borrowing from the Model Law, confers on the court's power to grant interim measures and it prescribes conditions for the grant of such measures such as the likelihood of irreparable harm; the balance of convenience must weigh in favour of the grant of the measure, and there must be a reasonable possibility of succeeding on the merits. Notably, the Bill also provides for other incidences of the interim measures process, such

as (a) the modification, suspension, and termination of interim measures where subsequent facts emerge which show that they ought not to have been granted; (b) the duty of the party requesting an interim measure to disclose any material change in the circumstances upon which a measure was requested or granted, and (c) recognition and enforcement (or refusal of recognition and enforcement) of interim measures, including those issued outside Nigeria. Another innovation of the Bill is the provision for the appointment of an emergency arbitrator, a party requiring urgent reliefs can apply for the appointment of an emergency arbitrator to any arbitral institution designated by the parties or failing such designation, to the court.

7. The Bill also introduces the conduct of emergency proceedings through a meeting in person, by video conference, telephone, or similar means of communication.

8. Limitation Period: The Bill makes provision for the application of statutes of limitation to arbitral proceedings. Under the existing Limitation law in Nigeria,[509] an action to enforce an arbitration award has a six-year limitation period, which is calculated from the date the cause of action accrued. In most jurisdictions, however, this is calculated from the date of the breach of the arbitration agreement (failure to honour the resulting award). In *City Engineering Nigeria Ltd v Federal Housing Authority*[510] the Nigerian Apex Court held that the limitation period is calculated from the date that the cause of action accrued (date of the event that necessitated the arbitration proceedings). This decision implies that concerning arbitration proceedings conducted under the Act, the limitation period runs even during the period of the arbitration proceedings (however, the Arbitration Law of Lagos State 2009 provides that to compute the time within which an enforcement application must be

[509] Limitation Act, 1966 section 7, which is a federal enactment, has a similar provision to section 8 of the Lagos State Limitation Law, which was the subject of interpretation by the court in this regard.
[510] [*1997]9 NWLR (pt. 520) 224.*

brought, the limitation period begins to run from the date of the award and not before). The effect of this is that where there are lengthy arbitration proceedings coupled with long periods where the losing party pursues annulment proceedings or seeks to set aside the arbitral award, a successful party may lose its right to enforce the award in Nigeria. With the proposed Bill, it clarifies the position in *City Engineering Nigeria Ltd v Federal Housing Authorit*y by providing that in computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded.

9. **Grounds for setting aside an award.** Under the existing arbitration legislation, there is ambiguity as to whether s.29 which deals with setting aside arbitral award deals only with the domestic award, and by contrast s.48 which falls under Part II that deals with the additional provision relating to international commercial arbitration deals with the international arbitral award. The proposed bill expressly clarifies and makes no dichotomy as it provides the grounds for setting aside an award deal with both domestic and international awards. Another significant innovation in the Bill is the express abolition of the ground of "error of law on the face of the award" as a ground for setting aside awards as part of the nebulous ground of 'misconduct'. The Bill then replaces the current grounds for setting aside awards with clearer grounds as contained in the Model Law. These grounds are legal incapacity, invalid arbitration agreement, lack of due process, exceeding the scope of the submission, procedural irregularity, arbitrability, and public policy. By this provision, the bill has also relieved users of the never-ending debate as to what constitutes "misconduct" and "improper procurement". Additionally, mere proof of one of the grounds for setting aside an award is not enough under the Bill. The applicant must also show that the existence of that ground "has caused or will cause substantial justice to the applicant".

10. **Award Review Tribunal**: The Bill also introduced the establishment of a tier tribunal, known as the Award Review Tribunal, (ART). An aggrieved party may by an application to the ART (instead of a court) apply for the review of an arbitral award. The decision of ART in this regard will only be reversed by a court if the court finds that the decision is unsupportable, having regard to the ground on which it was made. On the other hand, where the ART affirms the arbitral award in whole or part, its decision will only be reviewed by a court on the grounds of arbitrability and public policy. The Award Review Tribunal process is aimed at further insulating the arbitral award from the unpredictability of court decisions on any of the new grounds highlighted on the grounds for setting aside an award in the Bill. However, this is an opt-in provision, and by opting for this provision, parties arguably, insulate their dispute from systemic problems, including the congestion and delays in the administration of cases at the Nigerian courts.

11. **Third-Party Funding (TPF):** TPF refers to an agreement by a third party (an entity or a law firm) that is not involved in the disputes provided to a party, an affiliate of that party, or a law firm representing that party, funds or by other material resources in order to finance fully or part of the cost of the proceedings. Such support is given in exchange for remuneration or reimbursement, wholly or partially dependent on the outcome of the dispute or provided through a grant or in return for a premium payment." TPF has been embraced in many jurisdictions because of its significance in arbitration as it offers claimants to get the benefit of the value of their claim. It also helps to spread the risk associated with complex international commercial disputes. The Bill did not make any provision nor directly address the TPF other than a tacit recognition of TPF by way of including TPF in its definition of 'Cost.' The thesis argues that the lack of a full detailed substantive provision on TPF in the Bill makes it doubtful that it will be permitted in a Nigerian seated arbitration. This is so because the non-explicit regulation of TPF in the Bill

will likely not override the common law rules against champerty and maintenance, which is still applicable in Nigeria.

12. Other important new provisions: The Bill also has several new provisions that seek to modernize arbitration legislation and practice in Nigeria. One of such is the provision that stipulates that : (a) the stipulation that there shall be a sole arbitrator (rather than three arbitrators under the ACA) where parties have not agreed on the number of arbitrators; (b) immunity of arbitrators and arbitral institutions; (c) permission to challenge an arbitral tribunal's preliminary ruling on its jurisdiction; (d) consolidation, concurrent hearing and joinder; (e) the power to award interest; and (f) provision of grounds for the refusal of recognition or enforcement of domestic awards

3.6.3 General Overview of the Reforms ACA by the Bill.

The Arbitration and Mediation Bill 2022, seeks to rectify several of the weakness and identified gaps of the current regime. One of such is the lack of clarity and contradictory provisions in respect of stay of proceedings in favour of arbitration caused by s4 and s5 of the ACA. Laudably, the Bill has taken a bold step by merging s4(2) and s5(2) ACA into one section. The bill replaces the word may' with shall and makes it unambiguously mandatory to stay proceedings in favour of arbitration unless the court finds that the agreement is null and void, inoperative, or incapable of being performed. This Bill essentially removed section 5 ACA retained and amended section 4 ACA to follow Art. II (3) New York Convention. However, it is hoped that the phrase 'incapable of being performed will not be used as an avenue to create ingenious arguments to circumvent the provisions. This is where the thesis believes that the court should firmly apply the principle of the draft Bill.[511]

[511] The Bill expressly provides that the court do all things for the proper and expeditious conduct of the arbitral proceedings.

The Bill also has amended the writing requirement of an arbitration agreement to conform with Article 7 of the Model Law. The Bill recognises electronic communication and other like mediums of communication such as email as a form of arbitration agreement. This will clarify the ambiguity concerning what qualifies as writing in respect of a binding arbitration agreement. The amendment of the writing requirement of the arbitration agreement is a welcome innovation as this will bring Nigeria's arbitration law and practice into the modern era. In respect of interim measures, the Bill makes a detailed provision for interim measures and expressly empowers the court to grant interim relief measures in support of arbitration. In addition, the Bill provided for the appointment of an emergency arbitrator from arbitral institution designated by the parties, failing such designation, then from the court. The new provisions requesting that an application for the appointment of an emergency arbitrator be made within two business day deadline from the receipt of the application and a decision made within three days. This does raise a question as to whether the Nigerian courts are well placed to select and appoint an emergency arbitrator given the protracted delays and other shortcomings associated with judicial intervention in Nigeria.[512]

The proposed amendment Bill as regards of challenge procedure of an arbitrator makes provision for an arbitrator challenge to be determined by the Nigerian courts if the challenge addressed by the arbitral tribunal is unsuccessful. While this reform on challenging an arbitrator addresses the defect in the ACA,[513] it is the argument of this writer that the Bill failed to make provision for the leave of court to appeal the courts' decision on such challenge. Given the ingrained litigation culture, unrestricted constitutional guarantees of the right to appeal against

[512] See discussion in Chapter Four, (4.7) on Perceived and Practical shortcomings of Judicial intervention in Nigeria.
[513] See discussion on Challenge Procedure for Removal of Arbitrator in 3.5.1 (c) of this Chapter.

a high court decision and abuse of the appellate system in Nigeria,[514] the unrestricted appeal in the provision will further frustrate the smooth running of the arbitration process.

The introduction of Award Review Tribunal (ART) by the Bill though intended to ensure the finality of arbitral awards, is criticised on two points. Firstly, it questions whether a clause providing that parties specify in their arbitration agreement that an arbitral award maybe reviewed by a second award review tribunal can be classified as arbitration within the meaning of arbitration agreement. One of the distinguishing features of arbitration as a dispute resolution mechanism is that it is based on the agreement of the parties to have their disputes resolved by one or more persons chosen by the parties, whose decisions are final and binding on the parties.[515] If a dispute has been referred to arbitration, any award would ordinarily be binding, and no second stage of review should arise.[516] An arbitration agreement to be bound by the arbitral award therefore, is both a contractual commitment on the part of the parties and the effect of the applicable law. The binding and finality of an arbitral award is subject only to limited grounds before national courts as provided under the ACA 2004[517] and the New York Convention.[518] As rightly commented by Born, "Arbitration does not produce a non-binding, advisory recommendation, which the parties are free to accept or reject; it also is not merely a process of negotiation, during which the parties are free to agree (or not) to settle their disputes"[519] In describing the essence of arbitration, in *IS Prime Ltd v TF Global Markets (UK) Ltd and others*[520] the English Court held that the very essence of arbitration, according to

[514] See chapter 4 (4.7.1 a) and chapter 5 (5.2 A) of this thesis on the abuse of the appellate system and interlocutory applications.
[515] See UNCITRAL Model Law Option 1, Art. 7; English arbitration Act 1996 section 6(1); *Kruppa v Benedetti* [2014] EWHC 1887 (Comm); *David Wilson Homes Limited v Survey Services Limited (now in liquidation), David Jonathan Marshall* [2001] EWCA Civ 34.)
[516] *See Kruppa v Benedetti* ibid.
[517]See ACA sections 30 and 32.
[518] See New York Convention 1958, Art. V.
[519] See Gary B Born, 'International Arbitration Law and Practice (3rd edn Kluwer Law) 3.
[520] [2020] EWHC 3375 (Comm)*; see also Berkeley Burke SIPP Administration LLP v* Charlton [2018] 1 Lloyd's Rep 337.

English Arbitration Act 1996, is understood as a consensual submission of a dispute to an individual or individuals by parties bound by contract to abide by and honour its determination by that individual or individuals pursuant to that submission. The English Court further held that submission to a non -binding process under the American Arbitration Association (AAA) prevented it from being an arbitration within the meaning of section 6(1) EAA. It is indeed the argument of this writer, that a clause in which parties agree to subject the arbitral award to ART questions whether such agreement is an arbitration, as this takes away the distinct key feature of arbitration as a final and binding dispute resolution mechanism. It is the argument of the writer that this novel provision of ART in the Bill has the potential of not only increasing the cost and time for the parties, but also may bring about satellite litigations. The ART is not an answer to the issues of enforcement of arbitral agreements and award in Nigeria, indeed, it is argued that it will only affirm the reputation of Nigeria's arbitration law and practice as lengthy and expensive.

Secondly, an arbitration agreement where parties will agree to subject the arbitral award to another arbitral appellate panel adds complexity to the arbitration agreement and distorts the general characteristics of an arbitration process. The Bill also recognises that parties may nonetheless resort to the national court if dissatisfied with the ART decision, this adds up to the layers of appeal that the arbitral award can be subjected to under the proposed Bill. This mechanism has the potential of prolonging an arbitral process, increase the cost of the arbitral process and ultimately slow down the recognition and enforcement of an award. It is the argument of this thesis, that the introduction of the ART in the Bill, though an optional provision is one major unnecessary shortcoming of the Bill. The Bill in reforming the grounds for setting aside arbitration, has removed the 'misconduct of arbitrator' as a ground for setting aside an arbitral award. This is also a welcome development as it will bring the grounds of

setting aside an award in international commercial arbitration to comply with international best practice.

The Bill has been passed by the Senate,[521] it is hoped that the Executive Government of Nigeria will have the political will to assent and sign the Bill into law. The Bill, notwithstanding some of the defects highlighted in this chapter, when eventually enacted and implemented in Nigeria, has the potentials of binging the arbitration law and practice in Nigeria in line with the global arbitration landscape of today. The Bill may contribute to the ongoing efforts to make Nigeria a more attractive and viable arbitration seat.

3.7 Conclusion

This chapter has illustrated the evolution of the legal framework of arbitration in Nigeria, Arbitration and Commercial Arbitration Act 2004, which was enacted in 1988, and based on the 1985 UNCITRAL Model Law, albeit with some exceptions, hereby making Nigeria the first African country to adopt the Model Law. Generally, the legal framework on arbitration in Nigeria arguably seems effective in that it contains and recognises the fundamental elements and principles of international commercial arbitration and has substantially uniform approaches to basic arbitration procedures and processes. However, the chapter has identified defects and demonstrated that the ACA has not kept track with the work of UNCITRAL Model Law as well as the advancements, in the international commercial arbitration world. International commercial arbitration can only work effectively in Nigeria if the legal framework provides a clear, modern and effective arbitration law. Since the enactment of the ACA in 1988 there has been various developments in the way international commercial transactions and how international commercial arbitration is practiced. The UNCITRAL Model Law has since

[521] The Bill to reform the Law has been on originally since 2005 and it went into abeyance and resurfaced again in 2017. An update shows that it is currently with the House of Representatives and passed the First Reading on 11 July 2019. The Second Reading of the Bill was done on 18 December 2019. And was recently passed by the Senate in May 2022.

amended its law to comply with the ever-evolving international commercial business transaction, but the thirty- four years old ACA 2004 has not been updated. The chapter highlighted and examined some of the provisions of the ACA that are disincentives to Nigeria becoming a preferred seat for international commercial arbitration. The chapter has demonstrated that the ACA in some key aspect lacks clarity and fails to reflect modern international commercial arbitration best practice. An instance is the failure of the ACA to provide for modern means of electronic communication in respect of writing requirement for arbitration agreement. It has also been shown that that the ACA lacked clarity in many aspects, such as the contradictory sections in respect of stay legal proceedings in favour of arbitration in sections 4 and 5 ACA, as it provides on one hand mandatory power to grant a stay and on the other hand discretionary. The chapter has been able to establish that the lack of clarity on such important aspect of arbitration law shows the failure of the ACA to comply with international arbitration standard, which may affect users especially foreign parties to have confidence in an arbitration seated in Nigeria. Another core defect which this chapter identified in the ACA is the absence of an express provision empowering the court to grant interim reliefs, especially in times where parties require urgent interim reliefs from the courts. The chapter demonstrated that the arbitral tribunal power to grant interim relief as provided under the ACA creates the problem of enforcement as the arbitral tribunal lacks coercive power to enforce such order. The absence of an effective enforcement mechanism for interim reliefs in the ACA falls short of international best practice in international commercial arbitration legal order. For the legal framework of international arbitration in Nigeria to reflect modern international commercial arbitration standard and best practice there is dire need for the reform of the ACA and the need to bring the arbitration law up to date to be adequate to address modern-day international commercial disputes. The chapter also demonstrated the various legislative attempts made in the last seventeen years to reform the ACA which has culminated

to the recent Arbitration and Mediation Bill 2022. The current Bill seeking to amend and reform the ACA has indeed laudable provisions, as it amended some of the featured shortcomings discussed in this chapter. However, the writer has highlighted and illustrated that some of the key provisions in the Bill leaves noticeable gaps in the proposed review of the ACA and may likely create potential risk of making arbitration processes complex, more expensive and lengthier. The chapter also highlighted that the Bill did not address unrestricted court appeals in respect of challenge procedures for the removal of arbitrator by the absence of a provision for the leave of court to appeal court's decision on such application. The chapter argued that an application for the leave of court will curtail needless wide scope of judicial intervention and appeals, so that the arbitration law will comply with the overall objective of promoting international commercial arbitration as a final and binding dispute mechanism. The chapter also demonstrated and pointed out that the introduction of an Arbitral Review Tribunal (ART) in the Bill is an unnecessary complexity to the arbitral process and an additional layer of appeal comparable to litigation. The chapter argued that ART in the Bill if passed to law, will in a matter of time become susceptible to judicial challenges. The is because not only does the ART makes the arbitral process susceptible to layers of appeal but also questions whether the parties have agreed to a non-binding dispute mechanism or arbitration. The chapter has illustrated that though a reform of the outdated ACA is long overdue, however, it is hoped that the Bill will not suffer the same fate previous aborted bills and most importantly that when signed into law it will transform the legal framework of arbitration in Nigeria and enhance its ability to become an attractive seat for international commercial arbitration.

The Bill when finally passed into law may change the approach of the courts towards arbitration as the Bill may likely reform the provisions which allowed the courts a wide scope within which to interpret and apply the law to support arbitration. Whether the courts in Nigeria are well placed to firmly apply the principle of the draft Bill in promoting an efficient arbitral process

where all parties act properly and expeditiously is another question that only time will tell. The next chapter shall explore the degree of judicial intervention as permitted under the ACA and examine whether arbitration receives the appropriate and effective support needed from the courts in Nigeria.

3.8 Recommendations

1. **Arbitration Legislation:**

- Execution of the Draft Bill: As discussed in chapter three, the current arbitration in

Nigeria, the ACA 2004 is over thirty-four years old and the many attempts to review and enact a modern arbitration legislation has proved abortive. The current draft bill, The Nigeria Arbitration and Mediation Bill 2022 was passed by the Senate (upper legislative arm) on the 10th of May 2022. It is expected that the Bill which awaits the final Presidential assent before it is passed as a law, will not suffer the same fate as other ill-fated aborted bills that sought to reform arbitration. At the time of writing this recommendation, it is almost five months after it had been passed by the senate it is hoped that the Bill will receive the final consent and be passed to law. When the Bill gets the final assent from the President, it has the potential of transforming arbitration law and practice as well as positioning Nigeria as one of the leading arbitration jurisdictions in the African region.

- Award Review Tribunal: The Nigeria Arbitration Mediation Bill 2022, introduces a novel device for an optional review of an arbitral award made in an arbitration seated in Nigeria. As discussed, the Award Review Tribunal (ART) specifically an opt-in provision which requires parties in their arbitration agreement to refer their awards to the tribunal for review instead of going to the court of first instance to set aside the award. There is no apparent advantage of this provision that would be sufficient incentive for parties to include it, as parties

would still if dissatisfied challenge the award in court. It is recommended that the option of an award review tribunal is well placed within the Arbitration Rules as a similar award review is contained in the ICC Rules rather than in an enactment.

- State Arbitration Laws: The constitutional debate over the legislative competency of state to enact arbitration and the co-existence of dated states arbitration with the federal arbitration law (ACA) can be resolved by an express repeal. It is therefore recommended that, all the various State Arbitration Laws that are based on the outdated Arbitration Ordinance 1958 which is in turn based on the English Arbitration Act 1914 should be expressly repealed. The States concerned should adopt the proposed Arbitration Bill 2022 once the Bill is executed and enacted as law. By so doing, constitutional debate and issues in respect of competency and scope of state arbitration laws as seen in cases like the Stabilini Visioni and Compaigne Generale De Geophysique will be avoided. More so, the proposed Arbitration Bill just like the ACA will be the principal arbitration law, it evinces unified arbitration legislation throughout Nigeria applicable both in the state and federal courts. The potential risk of conflict between the Lagos State Arbitration Law 2009 with the federal Arbitration Law can be cured by the courts recognising the party's autonomy to choose which of the arbitration laws will govern their arbitration.

Chapter Four: Arbitral Seats and National Courts

Judicial Intervention and Judicial Processes of Arbitration in Nigeria

Part One.

4.1. Introduction

The influence of courts on the choice of arbitral seat for international commercial arbitration cannot be over-looked. The role of seat of arbitration is undoubtedly significant because of the supervisory role over the arbitral process as well as the power to set aside an arbitral award. In international commercial arbitration, the question of judicial intervention remains important. While the success of the arbitration system may depend a lot on the adequacy and effective arbitration legislation, it is also hinged on the quality and effectiveness of the judicial system. In essence, while arbitration legislations generally seek to facilitate the laws that will provide a favourable arbitration regime, the courts, on the other hand, supports the efficiency of arbitration. However, the key themes recognised in the Model Law,[522] the ACA[523], and other modern arbitration legislation are minimal judicial intervention in arbitration. The degree and extent of judicial intervention recognised by the ACA are only those matters governed by the ACA. The extent of judicial intervention should be for the necessary assistance and support for the effectiveness of the entire arbitral process. The choice of arbitration as means of dispute resolution, parties may perceive the arbitral process to be free from the machinery of the court system. However, the reality is that the arbitral process cannot be said to be completely free from the court system. As attractive as arbitration is, the major shortcoming of arbitration is that arbitral tribunals lack coercive powers to enforce its orders and awards

[522] Article 5 UNCITRAL Model Law, see also New York Convention 1958, Article 11 (3).

[523] ACA Section 34, which is an adaptation of art.5 Model Law.

without the assistance of the court.[524] It is for this, that the relationship between the courts and arbitration is key to the effectiveness and success of any arbitral system. The prevailing international jurisprudence in commercial arbitration is minimal judicial intervention, this approach is represented not only in UNCITRAL Model Law but also in other jurisdictions that are pro-arbitration. Therefore, party autonomy, therefore, is the focal point of the arbitration process. While the role of the national courts is crucial, however, there is a need to ensure that there is a balance between judicial intervention and the smooth running of arbitration. In choosing a particular arbitration seat, parties will have to take into consideration the relationship between the national court and arbitration as this may make or derail the arbitral process.[525] However, there are challenges in maintaining a balance between the necessary intervention (supportive and supervisory) and excessive judicial intervention (that tends to control and disrupt).

The key question in this chapter is whether judicial intervention for support or supervision of arbitration before Nigerian courts could be interpreted as a control measure or whether it recognises that parties have chosen arbitration and not litigation to resolve their international commercial dispute. The focal point of the relationship between national courts especially courts at the seat of arbitration should be based on supporting arbitration while supervising it in the interest of the integrity of the legal system.

While it could be argued that in recent times the Nigerian legal system (as well as the arbitral system) and the courts have embraced arbitration as a viable alternative to litigation, the courts still have more to do as regards the need to have a reputation for efficiency and promptness in

[524] Except where parties voluntarily oblige and complies with the decision of the arbitral tribunal the coercive powers of the court may be needed in instances like, taking of the evidence of witnesses, interim measures to protect the res against a third party, the attendance of witnesses, production of evidence, and removal of arbitrator and in recognition and enforcement of arbitral awards.

[525] The seat of arbitration is important in the arbitral process as discussed in chapter three, the seat provides the necessary support for the initiation of arbitration by way of granting a stay of proceedings, appointment and removal of arbitrator, grant of interim measures as well as setting aside of arbitral award.

their proceedings and a good record of accomplishment of supporting and enforcing arbitral awards. While judicial intervention for support of arbitration is justified[526], unwarranted judicial interventions that derail arbitral proceedings and instances of prolonged arbitration matters before the courts have encumbered arbitration proceedings. This chapter argues that all the criticisms of judicial intervention of arbitration in Nigeria cannot be placed on the Nigerian courts alone, as the discussion in this chapter examines holistically other challenges that encumber desirable judicial support for arbitration and contributes to the issues confronting the judicial process and procedure in Nigeria.

The chapter examines whether courts' intervention in arbitration enhances the effectiveness of Nigeria's arbitral system. In an examination of the approach of the courts in some selected cases, the author argues that some of these judicial decisions give the impression of being unfriendly towards arbitration and there are concerns that judicial intervention could be the Achilles of arbitration in Nigeria.[527] The chapter examines whether Nigeria- seated arbitration can be said to rest on a legally pro-arbitration environment and receives optimum court support to enhance and promote efficient and effective arbitration processes. The challenges of judicial intervention and judicial processes in arbitration in Nigeria assumes some challenging perspective, especially in terms of making Nigeria a viable and attractive seat.

4.2 Judicial System in Modern Nigeria- An Overview

For a proper perspective of the interface of national courts in Nigeria and international commercial arbitration, an examination of the structure of the court system is important. It is important to understand the distinction between the judicial functions so as to highlight the

[526] There may be legitimate court interference, examples are instances, appointment of arbitrator or when the arbitrator is challenged. Arbitration laws provide for courts appointment of arbitrator where parties fail to appoint arbitrator and expressly limit the opportunities for appeals from such decisions.
[527] Examples of such cases are discussed in this chapter.

competent authority with jurisdiction for support and supervision of arbitration in Nigeria.[528] The English- styled court system in Nigeria is part of the legacy of British colonial rule in Nigeria.[529] Thus, the present Nigerian judicial system is largely formed along the English common laws model and is characterised by English laws during its growth and development.[530] The judicial court system is structured to fit the federal structure of Nigeria. The courts are established by the Constitution of the Federal Republic of Nigeria which vest judicial powers to superior courts of records.[531]

Jurisdictional issues are a bit complex in Nigeria, the reason being that the Nigerian court system is complex when determining the court with jurisdiction to hear and determine certain disputes. The thirty-six states and the Federal Capital Territory (FCT) all have States High courts and Federal High Courts. The jurisdiction of the court would generally dictate the matters under which a court can exercise its judicial power, and this would depend on several factors such as whether the court has appellate jurisdiction or whether it has exclusive jurisdiction over certain matters. It is important to understand the complex court system in Nigeria to determine which court will have the competent jurisdiction for support and supervision of arbitration matters.

4.2.1. Competent Authority with Jurisdiction for supervision and Support for Arbitration Matters

Article 6 of the Model Law provides that all arbitration-related matters for judicial support and or supervision be heard by a designated national court.[532] It is, therefore, necessary that

[528] The court system in Nigeria consists of a two-tier court system at the State level. The Magistrate Courts and the Customary Courts are at the lower level and are not courts of records. For this Thesis, the author discusses only superior courts of records which generally have the jurisdiction to hear and determine matters in support of arbitration matters.
[529] As a former colony of the British Empire, Nigeria's Court system follows the common law and the English court system.
[530] See discussion in chapter three, particularly in section 3.2.1. of this Thesis.
[531] Constitution of the Federal Republic of Nigeria 1999 section 6 (1) and (2).
[532] The Model Law specifically referred to the Model Law in articles 11(3) 11 (40 13 (30 and 34 (2).

for the court to intervene it must be the court that have jurisdiction to intervene in the arbitral process and to scrutinize the award to ensure the fairness, integrity, legality, and neutrality of the arbitral process. It is for this purpose that the Model Law in Art.6 confers jurisdiction on certain national courts to entertain arbitration-related matters. The ACA in s.57 defines a court to mean the High Court of a State, the High Court of the Federal Capital Territory, or the Federal High Court.[533]

4.2.2. Federal High Court or State High Court

The judicial structure is provided under section 6(1) of the 1999 Constitution of the Federal Republic of Nigeria, it expressly vests all forms of judicial power in what it refers to as Superior Courts of Record.[534] Under the Nigeria Court system, each state has a High Court of States[535] and the Federal Territory High Court.[536] The States High Courts including the High Court in the FCT have what is referred to as general jurisdiction, and they are vested with the power to hear and determine any civil and criminal proceedings. The Federal High Courts[537] have various divisions across the Federation and have exclusive jurisdiction in civil cases and matters relating to the revenue of the Government of the Federation such as taxation, customs, and excise duties, banking, copyright, admiralty, citizenship, etc. In a plethora of cases,[538] the courts have held that the Federal High Courts in Nigeria, to the exclusion of other courts, are conferred with the jurisdiction to entertain matters coming within the Exclusive Legislative

[533] By virtue of Section 6(5) of the Constitution these courts are listed as Superior Courts and are courts of the first instance, it also includes the National Industrial Court which exclusively entertains matters relating to labour and employment disputes, see National Industrial Court Act 2006.
[534]Courts designated as superior courts of records are High Courts and Federal High Courts. Appeal Courts and the Supreme Court of Nigeria. Other courts are regarded as inferior jurisdiction courts, these are Magistrate Courts s are Customary Courts, and Sharia Courts.
[535]The constitution establishes all the 36 states in Nigeria and the Federal Capital Territory (FCT) States High Courts. See Federal Constitution of the Republic of Nigeria sections 255 and 270.
[536] Federal Capital Territory (FCT) Abuja is the capital of Nigeria.
[537] The Federal Courts have divisions in all most all the major cities in the thirty-six states of the federation of Nigeria, including the FCT. See https://www.fhc-ng.com/judiciary.htm.
[538]*Ports & Cargo Handling Services Company Ltd v Migfo Nigeria Ltd* (2012*); Tanarewa Nig. Ltd v Palatiform Ltd* (2003)14 NWLR (Pt 840) 355; NEPA *v Edegbero* (2002*); American International Insurance Company (A.I.I. C. O) v Ceekay Traders Ltd* (2001).

List which only the National assembly can legislate upon.[539] The Constitution lists eighteen specific matters and further provided that aside from the listed matters the Federal High Courts have coordinated jurisdictions with State High Courts except for the matters listed in section 201 of the Constitution.[540] However, the duality of the high court's system has raised some problems, this is because of complex and technical jurisdiction rules,[541] as well as borderline cases that presents as conflicting jurisdictional claims.[542] For instance, the case of *Associated Discount House Limited v Amalgamated Trustees Limited*[543] is illustrative of the conflict of jurisdiction between States High Courts and Federal High Courts in Nigeria. The Apex Court gave a literal interpretation to the section of the Constitution and ruled that the State High Court had jurisdiction over the banking dispute between private parties.

The writer argues that the statutes that delimit the jurisdiction of the courts in Nigeria are not clear and as rightly observed by a Nigerian Chief Judge, the statutes that confer jurisdiction on the courts are of no use if "the ambits of such jurisdiction are not delimited and unambiguous"[544] In *Statoil (Nig.) Ltd v Inducon (Nig.) Ltd & Anor*[545] shows that there is yet to be a clear delimitation of jurisdiction between the Federal High Court and the State High Court. The Supreme Court in a majority decision held the Federal High Court lacked jurisdiction on disputes of a simple contract between private parties even though the subject

[539] 1999 Constitution section 251(1) 251(1)(b), see Federal High Court Act (as amended) section 7(1).
[540] The Federal High Courts have exclusive jurisdiction on matters pertaining to the listed matters.
[541] See *Onuorah v Kaduna Refining & Petrochemical Co Ltd* [2005] 16 WRN 1, 14 – 15.
[542] Jadesola Akande, "The Legal Order and the Administration of Federal and State Courts." (1991) Publius, vol. 21, no. 4, 1991, pp. 61–73. JSTOR, www.jstor.org/stable/3330311 . Accessed 17 May 2021.
[543][2006] 5 SC (Pt 1) 32; see also Oladipo v Nigeria Customs Service Board [2009] 12 NWLR (Pt 1156) 563.
[544] See K Abiri, Identifying and Delineating the Frontiers of the Jurisdiction of the State High Court vis-à-vis other Courts of Coordinate Jurisdiction (Paper presented at the induction course for newly appointed Judges and Khadi organised by the National Judicial Institute from 15 to 23 June 2015) seen and accessed at http://nji.gov.ng/images/Workshop_Papers/2015_ last accessed 28 April 2020.
[545] [2021] 7 NWLR (P. 1774) 1.

matter emanates from mining of natural resources which the federal court has exclusive jurisdiction over.[546]

The recurrent issue of the extent of the jurisdiction of the Federal High Courts and State High seems to elude clarity despite the efforts of both the Courts of Appeal and Supreme Court by some decisions to put the matter to rest.[547] It is argued that, since the Appellate Courts and the apex courts are unable to streamline the issue of the jurisdictions of the Federal courts and the State high courts as provided by 251(1) of the Constitution Court, that there is a need for the legislature to amend s.251 of the Constitution. This view is supported by the statement of the court in *CBN v Ranamamiya G. R Ltd*, where it was stated that there is the need to streamline in clear terms the matters which should go to the Federal High Court and such matters which shall be entertained by State High Courts. It was noted that such amendment would go a long way in guiding both litigants and the courts in a 'mathematical clarity which matter the court has jurisdiction to entertain.'.[548]

While the above cases are not arbitration related cases, it exemplifies the level of the confusion of jurisdiction between the state high courts and federal high courts. For judicial intervention in arbitration, the ACA clearly defines a court as either the State High Court or Federal High Court. Considering that the Nigerian Constitution vest different jurisdictions on each of these courts, the question is which of these courts would a party approach to seek judicial intervention either for support or supervision of arbitral process? The author observes that while a cursory reading of section 251 (1) of the constitution together with section 57 ACA designates and confers additional jurisdiction on both the State High Courts and the Federal High Courts have jurisdiction, irrespective of the subject matter of the underlying dispute.

[546] The dissenting Judge was of the opinion that the Federal High Court has exclusive jurisdiction over disputes arising from natural resources even though the matter is grounded on a simple contract Per Agim. JSC.
[547] *CBN v. Rahamaniyya G. R. Ltd.* [2020] 8 NWLR (Pt. 1726) 314 at 341-342; J*ohn Shoy Int'l Ltd. v. F.H.A.* [2016] 14 NWLR (Pt. 1533) 427 at 456-457.
[548] Per His Lordship, Okoro, JSC in *CBN v. Rahamaniyya G. R. Ltd*, (ibid).

However, the High Court that would ordinarily have jurisdiction of the underlying dispute should be the competent court with jurisdiction. This argument is based on the fact that although the ACA defines a Court to be either a State or Federal High Court, the Constitution is superior to the ACA, moreover, but for the arbitration clause, the underlying dispute would ordinarily confer jurisdiction to the appropriate competent court.[549] Where parties are in doubt it should be noted that except that the Federal High Courts will have exclusive jurisdiction in arbitration matters in all cases involving the Federal Government or any of its agencies and matters relating to the specifications listed in the Constitution. The case of *Chevron U.S.A. INC & Anor. v. Brittania-U Nigeria Limited & Ors.*[550] *su*pports this argument. The Court of Appeal overturned the decision of the Federal High Court that it had original jurisdiction to the exclusion of any other court. The Appellate Court further held that since the Federal High Court lacked substantive jurisdiction over the matter, the Federal High Court could not enforce arbitration agreement by ordering the parties to proceed to arbitration save to apply the Federal High Court Act and transfer the matter to an appropriate court.[551]

The lack of clarity of matters which should go to the Federal or State High Court could create problems for arbitration matters. The question of the supremacy of the Constitution comes to question here, and the issue of delimitation between Federal Courts and State High Courts becomes more complex. The confusion of the delimitation may create more problem in arbitration matters where the courts rules that both the Federal High Courts and State High Courts coordinate jurisdiction in respect of judicial intervention in arbitrations.[552] It has been

[549]In *Access Bank Plc v Akingbola* [2014] 3 CLRN 124 the Lagos State High Court refused to register the judgment of the English Courts on the basis that the subject matter was constitutionally within the exclusive jurisdiction of the Federal High Court.
[550] [2018] LPELR-43519(CA).
[551] See also the *Federal University of Technology Akure v BMA Ventures Nigeria Limited* [2018) LPELR-44429(CA).
[552] See *Knight Frank & Rutley v Delta Steel Co Ltd, Unreported case Suit No*: FHC/L/CS/383/95, Belgore, CJ (5 August 1995); *Tidewater Marine Intl Inc New Orleans (formerly known as Tidex Intl Inc) v Consolidated Oil Ltd Lagos* [1996] FHCLR 324; *Grinaker-LTS Construction Nig Ltd v UACN Property Development Co Ltd*, Suit No: FHC/L/CS/935/10, Idris J (21 February 2011).

suggested [553] that the jurisdiction of matters relating to international commercial arbitration should be conferred only to the Federal High Courts. It was further argued that exclusive jurisdiction of the Federal High Courts in arbitration matters will dispense with the conflict of jurisdiction between the state and federal high court, promote federalism and engender specialisation.[554] It is the argument of this writer that the Federal High Courts in Nigeria are still grappling with overcrowded dockets with cases it has exclusive jurisdiction over.[555] Thus, adding international commercial arbitration to matters which the Federal High Court will have exclusive jurisdiction over will require the increasing of the number of federal high courts already in existence. It is not an increase in the number of courts that will resolve the confusion created by the lack of clarity of the delimitation of the jurisdiction of the two divisions of the two courts. Rather, it is the contention of this writer that there is need to have a clear delimitation of the jurisdictions of the two courts. This could be by way of the amendment of the ACA, or by a clear judicial pronouncement. For Nigeria seated arbitration, parties must be able to determine the appropriate court with authority to intervene in arbitration. The inability of parties to know the appropriate court with jurisdiction to entertain arbitration matters may lead to satellite litigation, increase the cost and delay given the overcrowded docket. The uncertainty in this area would not be an attraction for international commercial arbitration parties.

Part Two – The Courts and Arbitration.

4.3. The Significance of the Relationship between National Courts and Arbitration

The importance of the relationship between the court and arbitration cannot be over-emphasized, this is because though minimal judicial intervention in arbitration is expected,

[553] Dakas C.J "The Legal Framework for the Recognition and Enforcement of International Commercial Arbitration in Nigeria- Dilemmas and Agenda for Action" (1998) Journal of Int'l Arb 15, 95.
[554]Ibid at 95-116.
[555] Ibid at 112.

however, the success of an arbitration regime demands the need to have an optimum role of the court in arbitration. One of the shortcomings of arbitration as an alternative dispute resolution mechanism is that often it requires the courts' power to give binding effects to arbitration agreements, orders, and awards.

It is not surprising that one of the World Bank determinants of Ease of Doing Business in a country is the facilitation of resolution of commercial disputes[556] Some studies by economists as well as legal scholars have emphasized the role of arbitration in international trade and the global market integration.[557] It suggests that the majority of international commercial contracts contain arbitration clauses and agreements, hence the argument that international commercial arbitration fosters the need of businesses.[558] Surveys carried out by international organizations have studied the economic benefits of international commercial arbitration to countries.

4.3.1 International Commercial Arbitration, National Courts and Economic Benefits

A recent study of international commercial arbitration in Commonwealth jurisdiction carried out by The Commonwealth Secretariat in 2019,[559] examined the economic benefits of international commercial arbitration as a means of dispute resolution and the contemporary landscape of commercial arbitration across all Commonwealth member countries. The study observed that countries that lack a modern international arbitration framework are at risk of

[556] The other determinants are rules that allow voluntary exchanges between economic sectors, strong property rights, and provide contractual partners with protection against arbitrariness and abuse. See World Bank Doing Business 2020 seen at https://documents1.worldbank.org/ last accessed 29 May 2021.
[557] Myburgh, A & J Paniagua "Does international commercial arbitration promote Foreign Direct Investment?', (2016) The Journal of Law and Economics, Vol. 59 No. 3, 597–627; Katherine Lynch, The Forces of Economic Globalization – Challenges to the Regime of International Commercial Arbitration (Kluwer Law International 2003); Alessandra Casella, 'On market integration and the development of institutions: The case of international commercial arbitration (1996) 40 EER 155-186, at 156. See also Prof. Dr. Jordi Paniagua's The Economic Impact of International Commercial Arbitration paper was presented at the 3rd Regional International Arbitration Conference, Sydney on March 17, 2021. Available at www.events.development.asia/systes/files/material/2021/03/202103-jordi-paniagua-presentation.pdf
[558] Ibid.
[559] A Study of International Commercial Arbitration in the Commonwealth 2019, https://library.commonwealth.int last accessed 10 June 2021.

losing foreign direct investment (FDI),[560] and trade revenue as a robust framework for resolving cross-border commercial disputes can help unlock valuable trade and investment opportunities for Commonwealth countries.[561]

Myburgh and Paniagua[562] explored the role of international commercial arbitration in the promotion of FDI using theoretical economic models with the aid of investment data to explain how access to international commercial arbitration leads to increased FDI when compared to resolution through domestic court by litigation.[563] They further postulated through empirical study that an improvement in the use of arbitration has a larger effect on the volume of FDI. An Economist,[564] has also suggested that international commercial arbitration can function as a vaccine to help South Pacific countries to recover from the devasting economic impacts of the Covid-19. He stated that there are four ways in which these countries can promote international business. First, by getting closer to desired markets through a shared language or history, secondly, by growing bigger through exploiting comparative advantages and seeking economic growth, thirdly, by providing contractual environment through arbitration and lastly by healthy and safe dealing effectively with the Covid -19 pandemic.

[560] The International Monetary Fund (IMF) defines this kind of investment as "investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that the investor, the investor's purpose being to have an effective voice in the management of the enterprise". Foreign direct investment typically consists of medium and large-term infusions of cash, equipment, enterprise, or other assets in another country, into either ongoing enterprises or new companies created for carrying on some business. See https://www.imf.org/external/pubs/ft/fdi/2004/fditda.pdf accessed 18 March 2021.

[561] The study examined the landscape of international commercial arbitration in the 56 member States of the Commonwealth and identified issues and challenges of the use of arbitration in the jurisdictions with a view to finding solutions to the issues.

[562] Myburgh, A & J Paniagua (n557) at 606.

[563] They show the importance of arbitration by referring to data provided by United Nations Conference on Trade and Development (UNCTAD).

[564] Dr. Jordi Panniagua, 'The Economic Impact of International Commercial Arbitration paper presented at the 3rd South Pacific International Arbitration Conference, Sydney on March 17, 2021. Available at www.events.development.asia/systes/files/material/2021/03/202103-jordi-paniagua-presentation.pdf

The writer agrees that there is no doubt that international commercial arbitration has become the most preferred dispute resolution method for international commercial parties.[565] However, the notion that the increase of Foreign Direct Investment (FDI) is a result of the reference to international commercial arbitration as the main dispute resolution method is debatable. Factors that determine the growth of FDI in a country, especially for developing economies like Nigeria are not necessarily because of the use of international commercial arbitration. It is the argument of the writer that on the contrary, it is the increase in FDI that has made the use of international commercial arbitration to be on the increase. The increase in the use of international commercial arbitration can therefore be said to be a by-product of the increased FDI. It is the view of this author that the correlation between international commercial arbitration and the growth of FDI is very blurry. The factors that determine and promote the increase of FDI are the natural resources, potential growth of the national economy, natural resources, fiscal measures and policy of openness to international trade and access to international markets, and quality of energy and technological infrastructure of the host country.[566] For instance, Nigeria experienced an increase in FDI between 2017 and 2019 as a result of sector reforms especially in the oil and gas, energy, and construction sectors. The increase in FDI was a direct effect of the open policy which ranged from the design of a competition regime to the restructuring of the labour and tax regimes.[567] Most international arbitration disputes that involve African parties usually have their seat of arbitration outside the region and are primarily administered by non-African international arbitration institutions, like the LCIA and ICC. The growth in the use of international commercial arbitration aside

[565] Various studies carried out by educational institutions and international legal firms like the Queen Mary University London and White and Case and arbitral institutions like LCIA and ICC have attested to this notion. See for example the LCIA 2020 Annual Casework Report at www.lcia.org/LCIA/reports.

[566] Uwaoma G. Nwaogu and Michael J. Ryan, "FDI, Foreign Aid, Remittance and Economic Growth in Developing Countries" Review of Development Economics, 19(1), 100–115, 2015.

[567] In 2002, Nigeria was the second largest recipient of FDI in Africa as a result of policies that were put in place to attract foreign investment. See, UNCTAD. 2003. World Investment Report. New York and Geneva: United Nations Conference, available and seen https://unctad.org/system/files/official-ocument/tdr2003_en.pdf./ Accessed 18 March 2021.

from the usual reasons given, it is also fuelled by the need for international commercial parties to have their disputes settled by a neutral forum rather than the perceived partiality of a national court. The question then is what is the extent of the role of international commercial arbitration in fostering foreign investment or encouraging investment? This writer is of the view that international commercial arbitration can attract economic benefits, not only to lawyers and arbitrators, but also generating income for hotels, hearing facilities, airlines as well as other administrative services. According to the recent Law Commission Consultation Paper 2022; Review of Arbitration Act 1996, it was reported that there are over 5000 domestic and international arbitration that takes place in England and Wales every which potentially brings in at least £2.5 billion to the UK economy.[568] In 2012, an Economic survey carried out in Toronto, Canada, estimated that arbitration would bring to the economy of the City of Toronto in 2013 would be in the range of about Two hundred and seventy-three Million Canadian Dollars (273M CAD).[569] Also Stockholm Chambers of Commerce carried out similar economic reports of the economic benefits of attracting arbitration.[570] While this writer argues that these figures are not actual but mere estimates there is no doubt that the economic activities will generate income indirectly to the local economy of the seat of arbitration.

It is the argument of the writer that having a judicial system that will give support to arbitration, either in enforcement of arbitration agreement or court ordered interim reliefs in support of arbitration are some of the key examples of assessing whether a national judicial

[568] See The Law Commission Consultation Paper September 2022: Review of Arbitration Act 1996 available at https://www.lawcom.gov.uk/project/review-of-the-arbitrationact-1996/.

[569] See Charles River Associates, Arbitration in Toronto: Economic Study, 2012, pp 3-8. See https://media.crai.com/sites/default/files/publications/Arbitration-in-Toronto-An-Economic-Study.pdf. Last accessed 12 January 2022.

[570] See Stockholm Chambers of Commerce Stockholm Chamber of Commerce, Tvister Säljer Sverige, 2018, pp. 22–23. For the entire study, please see https://www.chamber.se/rapporter/tvister (accessed 16 August 2021).

system is a friendly- arbitration court.[571] The efficacy of international commercial arbitration does not only depend on national arbitration laws but most importantly rely on the support of national courts. The smooth functioning and ultimate of any particular jurisdiction in relation to international commercial arbitration depends on the quality of its courts.[572] Having a judicial system that will give support to arbitration will bring about a successful arbitral system that would help to attract investment. Investors can have confidence that their contracts are underpinned by an effective, neutral form of dispute resolution that will be given effect to by the national courts either at the seat or an enforcing court. It is for these reasons and others that the relationship between arbitration and the national court is key to the success of any arbitration process. This argument is supported by the predictions made by the study of Myburgh and Paniagua[573] and even by the Commonwealth study which contended that "the judiciary that is not aware of its obligations regarding international commercial arbitration will discourage foreign direct investment and the use of international commercial arbitration by businesses."[574] Seen in this light, it is apparent that the importance of the relationship of the judiciary and arbitration is necessary to give confidence to investors of the availability of judicial support of their chosen method of dispute resolution.

[571] See George A. Bermann, 'What does it mean to be 'pro-arbitration'? (2018) 34 Arbitration International, 341–353; see also CIArb London Principles 2015 (n216).
[572] Successive arbitration survey by the Queen Mary University of London and the White & Case Arbitration Surveys, 2015, 2018, and 2021confirms that both the supervising seats and enforcing courts are critical to the success of international commercial arbitration.
[573] (n557) page 600.
[574] See the Commonwealth, A Study of International Commercial Arbitration in the Commonwealth 2019, (n559) page 93.

4.4 Role of Court in International Commercial Arbitration

The role of the court at the seat of arbitration is very important to the entire arbitration process from the beginning,[575] during[576] and after arbitration.[577] In essence, the court at the seat of arbitration supports and supervises the arbitral process and also plays an important role in the recognition and enforcement of awards.[578] Where parties have chosen a jurisdiction as the seat of arbitration, the appropriate court with jurisdiction to exercise supervisory and supportive roles would necessarily be the court at the seat of arbitration.[579]

The general principle that underpins the ACA 2004 like the Model Law and other pro-arbitration legislations is party autonomy. Rather than imposing on parties how their disputes will be resolved party autonomy allows a party to choose how their contractual relationship is governed. The principle of non-judicial intervention of Article 5 of the Model Law which provides that "in matters governed by this Law, no court shall intervene except where so provided in this Law" is also enshrined in the ACA 2004, section 34 provides that "a court shall not intervene in matters governed by this Act except where so provided in this ACA." This provision clearly defines the feature of the relationship between the national courts and arbitration. The question is whether section 34 ACA in absolute terms precludes the court from intervening in arbitration matters. This question is essential as the provision of section 34 ACA has been interpreted to mean that the courts are excluded from exercising the inherent and statutory powers to intervene generally in arbitration-related matters when such intervention

[575]For instance, recognising and enforcing arbitration agreement by staying proceedings in favour of arbitration, see sections 4 and 5 ACA, Model Law Article 8 and section9 EAA 1996.
[576] During arbitration proceedings the court may be called upon for attendance of a witness, documents, and evidence, see ACA section 23, Model Law art.27.
[577] For challenging and setting aside of the arbitral award, see sections 29, 30, and 48 ACA, and Art.34 Model Law.
[578] Prof. Bagoni Bukar, Twist and Turns in the choice of arbitral Seat, the Case of P &ID V Nigeria, [2021] 24 (4) Int. A.L.R. pp 281-291.
[579] *See, Malaysia Development Berhad v International Petroleum Investment Company and Aabar Investments PJS,* [2021] EWHC 2949 (Comm]; *Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb,* [2020] UKSC 38; *Process and Industrial Developments Ltd v Nigeria* [2019] EWHC 2241 (Comm); [2019] 2 Lloyd's Rep. 361; [2019] 8 WLUK 80 (QBD (Comm).

is not anchored on the Act.[580] The jurisprudence of limited court intervention in arbitration is a recognition of the policy of party autonomy as well as a manifestation of independence of arbitral tribunal and fairness of the procedure.[581] The extent of the court's role in arbitration is correctly observed by an author, Ǵmez as he stated that;

'…, *judicial intervention is precisely what ensures the effectiveness of the decisions made by the arbitral tribunal and gives practical meaning to the parties' decision to prefer international arbitration over other forms of dispute resolution.*

As to whether the court can exercise its inherent statutory power in all arbitration related matters, the court can only exercise its inherent jurisdiction on only matters that are so permitted by the ACA. Generally, the principle of party autonomy in international arbitration connotes minimal courts' intervention in matters relating to the arbitration proceedings. In other words, it is the parties that determine their adjudicator, applicable law, and procedure that should be followed.

To fully understand the basis of limited court intervention in arbitration as provided under Article 5 Model Law, there is a need for an understanding that the intention of Model Law is not to exclude or oust the jurisdiction of national courts but to limit the interference of national courts in arbitration. To this extent, the Model Law as well as the ACA makes provisions limiting the powers of the court to intervene in the arbitral process. The general rule as provided under the ACA is that it excludes court intervention except where it is expressly permitted in the ACA. National arbitration laws make provisions limiting the intervention of the courts in the arbitration to the few circumstances as provided and allowed by national

[580] *Statoil v NNPC* [2013]14 NWLR (PT 1373), 29; see also *Nigerian Agip Exploration Limited v NNPC* (n299).
[581] Vikram Raghavan, 'Heightened Judicial Review of Arbitral Awards: Perspective from the UNCITRAL Model Law and English Arbitration Act of 1996 on Some US Development'. (1998) Journal of International Commercial Arbitration 15 (3) 123-124.

arbitration laws.[582] The objective of the Model Law in limiting judicial intervention in commercial arbitration is also to achieve certainty as to the extent of judicial intervention.[583] Article 5 Model Law gives the arbitral tribunal the power to decide matters as contained therein except those otherwise expressly stated. It follows that intervention of the court is allowed when it is necessary for the main purpose of supporting or supervising arbitration. The principle of limited intervention as provided for in Model Law in arbitration, therefore, allows a national court to play the role in arbitration only to the extent as so permitted by the law.

4.5 Judicial Intervention in International Commercial Arbitration- Nigeria Perspective

In chapter two, the thesis discussed the juridical nature of arbitration as an extension of the judicial process of a State and as a contractual arrangement between parties which the courts not only respect and recognize but also enforce because the State so permits. In an autonomous arbitral regime where parties chose arbitration as a method of dispute resolution, the courts are generally not expected to intervene. The question is then, why are the courts permitted to intervene in arbitration? Arbitration by its nature is stemmed from the consent of parties to have their disputes resolved outside the court system and therefore the court ordinarily must not interfere with parties' freedom of contract. More so, the courts by limiting their intervention in commercial arbitration are helping in no small measures in saving judicial resources and time. In a jurisdiction like Nigeria, where the courts' resources can be said to be inadequate both in terms of judicial infrastructure and time, respecting and recognizing parties' right to arbitrate their disputes will in no small measure help the administration of the justice system to reduce its ever-overloaded court dockets. What then is the right extent of judicial

[582]See ACA section 34, Model Law art 16.
[583] Report of UNCITRAL on the Work of its Eighteenth Session, 40 U.N. Gaor Supp. (NO. 17) U.N. Doc. A/40/17 (1985),available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/model-law-arbitration-commonwealth.pdf last accessed 23 May 2021.

intervention in international commercial arbitration? It will be wrongly construed that once parties have chosen arbitration as means of resolving their disputes, they will be entirely free from the court's intervention. It has been observed that, it is a serious and misleading over-simplification to indicate that the courts do not have a role in arbitration.[584] The reality is that international commercial arbitration may require the coercive power of the courts for its effectiveness and most necessary for the legitimate expectation of parties despite their contractual agreements.[585] "Judicial intervention is also fundamental to international commercial arbitration in that it ensures due process and fairness of arbitral proceedings and fills in the blanks in arbitration agreements.[586] As commented by a writer, without prejudice to autonomy in arbitration, international arbitration exists with national jurisdictions for its existence to be legitimate, and for support and effectiveness.[587]

The ACA[588] incorporates both the principle of party autonomy and limited court intervention as enshrined in both the New York Convention[589] and the Model Law.[590] However, the challenges are the judicial interpretations and implementations of some of the provisions relating to these principles. The writer acknowledges that there are instances where the judicial approach and attitude towards international commercial arbitration have been positive. However, there are also instances that the courts in Nigeria have adopted a narrow and

[584] Markham Ball, The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration. (2006) 22 Arb. Intl (1) 73-93

[585]Chukwumerije, Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1966" (1999) 15(2) Arb Inter 171-173.

[586]See L.A Mistelis and J.D.M Lew "Pervasive Problems in International Arbitration" published by Kluwer Law International BV, 2006 pg. 156 (pp. 1-391).

[587]See William W. Park, The *Lex Loci Arbitr*i and International Commercial Arbitration, 32 INT'L & COMP. L.Q. 21, 30 (1983).

[588] While there is no specific section that expressly mentions party autonomy, however, various sections of the ACA, the principle of party autonomy is well enshrined in the ACA, parties are free to agree on language s.18, the number of arbitrators, and procedure for their appointment sections 6 &. 7, place of arbitration s.16, governing law ACA 2004 section 47(6).

[589] Article V (1) (d).

[590] Article 19 (1) provides that "subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings".

parochial approach rather than a constructive and positive attitude towards international commercial matters.

4.5.1 Hostility to Reluctance, and Jealousy or Acceptance

Historically, the Nigerian courts just as in other jurisdictions[591] had viewed arbitration as an inferior dispute mechanism and as such there was an apparent and open antagonism towards arbitration. The hostility of the courts in Nigeria towards arbitration can be traced to the inherited English law and court system. As discussed in chapter three, prior to the enactment of the ACA in 1988, the prevailing arbitration law in Nigeria was the Ordinance -based arbitration law which in turn was based on the English Arbitration Act 1889. The English Courts between the 18th and 19th century were generally hostile to arbitration,[592]and the hostility towards arbitration were demonstrated in some court decisions such as *Hill v Hollister.*[593] The English courts early conflicts with arbitration were mostly based on the need to protect the jurisdiction of the courts as arbitration agreements were regarded as an ouster clause.[594] In chapter two of this thesis, it was demonstrated that the Ordinance based arbitration law operative in Nigeria, and was adopted as the arbitration laws of various States in Nigeria. The open antagonism towards arbitration by the court's sterns from the then prevailing old arbitration regime which historically was based on strict judicial control of arbitration under the Ordinance based law of 1958.

Judicial hostility towards arbitration has a long history as evidenced in the old English case of *Vynoir case.*[595] Where it was held by the court that an arbitration agreement was not binding

[591] In the so-called arbitration-friendly seats like London, France, and the United States of America, historically these jurisdictions had long-standing jurisprudence against arbitration.
[592] See, Kyriaki Noussia, Confidentiality in International Commercial Arbitration—A Comparative Analysis of the Position under English, US, German and French Law (Springer 2010) 12; Julian Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) Arbitration International 183
[593] [1746]1 Wils. 129, see also *Mitchell v Harris [1793] 2 Ves.Jun 129. Thompson v Charnock* [1799] 8 T. R. 139; *Harris v Reynolds* [1845] 7 Q. B. 69.
[594] See *Vynior's Case,* 8 Coke Rep. 816 (1609).
[595] Ibid.

to the parties and a party could at any time before the rendering of an award rescind an arbitration agreement. It can well be stated that this past hostility towards arbitration is a heritage passed down to the Nigerian courts through the Nigerian Ordinance-based 1914 Arbitration Law. Under the old arbitration legal regime, the law permitted unfettered judicial intervention in arbitration. For instance, section 15 of the Nigerian Arbitration Act 1914, provides that "*any arbitrator or umpire may at any stage of the proceedings under reference, and shall, if so, directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference"*. This provision gave the Nigerian courts control of arbitration and made court assistance an interventionist approach. Can it be said that the judicial interventionist approach or antagonism towards arbitration has gradually faded or that the Nigerian courts have truly evolved from the past open antagonism towards arbitration to gravitating towards being receptive to arbitration? The answer to this question is not straightforward as the attitude of the courts in Nigeria has been flatulating over time from judicial jealousy, suspicion and subtle opposition to open support for arbitration. There have been instances where the courts have jealously assumed jurisdiction even though parties have contracted a foreign forum and governing law. In the case of *Sonar (Nig.) Ltd & Anor. v. Partenreedri M.S. Nordwind & Anon.*[596] The admiralty case involved a Nigerian company (Plaintiff) and German Carrier (defendant). The bill of lading contained an arbitration clause that 'any dispute arising under this bill shall be decided in the country where the 'Carrier' has his principal place of business, and the law of such country shall apply except as provided elsewhere herein." Plaintiff sued at the Federal High Court, Lagos Nigeria for breach of contract because of failure to deliver goods from Bangkok. It is interesting to note that while the Federal High Court and Court of Appeal gave effect to

[596] [1987] 4 NWLR (Pt. 66), 520, see also *Lignes Aerienenes Congolaise v. Air Atlantic Nigeria Limited* (2005) 11 CLRN 55 *and Ahmadu Bello University v. VTLS Inc.* (2020) LPELR-52142 (CA).

the choice of governing law, Supreme Court did not mince word in its attitude towards assuming jurisdiction when it stated that;

> *"……. our Courts should not be too eager to divest themselves of jurisdiction conferred on them by the Constitution and by other laws, simply because parties in their private contracts chose a foreign forum and a foreign law. Courts guard, rather jealously, their jurisdiction and even where there is an ouster of that jurisdiction by Statute it should be by clear and unequivocal words. If that is so, as indeed it is, how much less can parties by their private acts remove the jurisdiction properly and legally vested in our Courts? Our Courts should be in charge of their own proceedings. When it is said that parties make their own contracts and that the Courts will only give effect to their intention as expressed in and by the contract that should generally be understood to mean and imply a contract which does not rob the Court of its jurisdiction in favour of another foreign forum."*[597]

The above statement by a renowned Justice of the Supreme Court clearly indicates how the court overtly protect its jurisdiction and incorrectly held that the choice of a foreign arbitral law does oust the jurisdiction of the court. This Apex Court decision was followed in the Court of Appeal cases of *Lignes Aerienenes Congolaise v. Air Atlantic Nigeria Limited*[598] and *Ahmadu Bello University v. VTLS Inc*.[599] It is argued that in the absence of any valid reason to refuse the choice of governing law, the courts ought to respect the choice of the parties which would sit well with the doctrine of *pacta servanda*. It is surprising that the Apex Court in of *Sonar (Nig.) Ltd*, the Appellate Court in Lignes *Aerienenes Congolaise* and *Ahmadu Bello University* failed to acknowledge and recognise the key pillar of international commercial arbitration is party autonomy. International commercial arbitration could only be effective, if the judicial system understands the nature of arbitration.[600]

[597] Per Oputa JSC (as he then was) (Supra) at 545B-C.
[598] [2006] 2 NWLR (Pt. 963), 49.
[599] (2020) LPELR-5805 (CA).
[600] (2005) 11 CLRN 55, in contrast to the cases of *Metroline (Nig). Ltd. v. Dikko* [2021] 2 NWLR (Pt. 1761) 422; *and Mainstreet Bank Capital Ltd & Anor v. Nigeria Reinsurance Corporation Plc*, [2018] 14 NWLR (Pt. 1640), *423*; in these two cases the Apex Court acknowledged and recognised party autonomy in making the choice of governing law to their disputes.

Also, in *CELTEL Nigeria BV v. ECONET Wireless Ltd & Ors,*[601] the leading Appellate Judge in describing an arbitral tribunal stated that "an arbitral tribunal is by nature an informal adjudicatory body lacking the sophistication and technical know-how of judges of regular Courts"[602] Though, an obiter, this statement shows the extent at which some of the courts in Nigeria view and treats arbitration as an inferior dispute resolution mechanism. This clearly shows the court's perception of arbitration as lacking in the quality and content of adjudication. One wonders whether Lord Scrutton's statement in a 1922 case of *Czarnikow v Roth Schmidt & Co*. influences the Lordship statement where the Lord Justice observed that the role of courts in arbitration was to "ensure the proper administration of the law by the inferior tribunal."[603]

With the enactment of the ACA, which is an adaptation of the Model Law, the general jurisprudence of the Model Law is limited judicial intervention. It is worthwhile to examine whether courts in Nigeria recognises and give full support to limited judicial intervention in arbitration. It is the contention of the writer that courts in Nigeria have in some instances such as, enforcement of arbitration agreement,[604] stay of legal proceedings in favour of arbitration[605] and anti-arbitration proceedings[606] exhibited unfriendly arbitration approach. It is further argued that the Nigerian court's supposedly unfriendly approach and attitude towards arbitration may not all the time necessarily be borne out of jealousy in protecting the jurisdiction of the or reluctance but out of lack of understanding and workings of commercial arbitration. The courts in Nigeria had in some instances employed legalistic justice to approach in interpreting arbitration clauses. This in contrast with the international established principle that where the parties make provision for an arbitration clause, the interpretation of the said

[601] *(*2014) LPELR-22430(CA).
[602] Per Joseph Shagbaor Ikyegh, J.C.A at page 60.
[603] [1922] All ER 45; [1922] 2 KB 478.
[604] *Imoukhuede v Mekwunye,* [2015]1 CLRN 30.
[605] *Panormos Bay v Olam* (2004) 5 NWLR (Part 865) 1.
[606] *Specialised Vessel Services Ltd v Mop Marine Nigeria Ltd* [2021] EWHC 333 (Comm); *SPDC Nig Ltd & 2 Ors. v Crestar Integrated Natural Resources* Ltd [2016] 9 NWLR (pt. 1517) 300*; Zenith Global Merchant Ltd v Zhongful Int'l Investment Ltd (Nig) FZE & Ors.* [2017] 7 CLRN 69

clause should begin with the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their contractual relationship to be decided by an arbitral tribunal.[607] An example of such is where the Appeal Court had looked at the form rather than substance of an arbitration agreement.[608] In another case the Court of Appeal in interpreting an arbitration clause, upheld and recognised that arbitration agreement must be respected, and arbitration agreement should be construed as liberal as possible.[609] The lack of understanding and consistency in the decision of the courts reinforces the reluctance approach of the court to keep parties to their bargain.[610] In another decision, the Nigeria Appellate Court refused to refer the parties to arbitration on the basis that the respondent failed to meet some requirements for a stay of proceedings to be granted. More interestingly that the word "may" in the arbitration agreement is optional or directory rather than obligatory and as such does not impose on any of the parties the obligation to resort to arbitration. The further appeal to the apex court was also dismissed.[611]

Another instance, where the Nigerian court has shown undue interference and undermine arbitration proceedings is the issue of the grant of anti- arbitration injunction. While anti-arbitration injunctions are generally granted even if seen as controversial, in certain exceptional and right circumstances the courts will grant anti-arbitration injunctions. For instance, where the duty to arbitrate the dispute does not exist or the issue in dispute is not arbitrable, or that the parties have not agreed to submit the dispute to arbitration.[612] However, when it is granted

[607] See then English House of Lords decision in *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd's Rep 254, see Lord Hoffmann at Para 13.
[608] See Imoukhuede v Mekwunye (n604), compare with the decision in *Fidelity Bank Plc v Jimmy Rose Co. Ltd* [2012] 6 CLRN *82*
[609] Fidelity Bank Plc v Jimmy Rose Co. Ltd *[2012] 6 CLRN 82; see also Frontier Oil Limited v Mai Epo Manu Oil Nig. Ltd,* [2005] 2 CLRN 148.
[610] The reluctance of the court is shown more in cases that concerns the stay of legal proceedings in favour of arbitration which is discussed later in this chapter.
[611] *Mainstreet Bank Capital Ltd v Nigerian Reinsurance Corp. Plc,* [2018] 14 NWLR 423.
[612] See J Lew QC, 'Does National Court Involvement Undermine the International Arbitration Process?' (2009) 24 American University International Law Review 489, 509–511,

to disrupt or restrain arbitral proceedings, it calls for concern as this undermines the arbitration process. Of worrisome dimension is the issue of granting anti-arbitration injunctions by the Nigerian courts. Unlike an anti-suit injunction that seeks to stay court proceedings and enforce the contractual obligation between parties to arbitrate their disputes,[613] anti-arbitration on the other hand prevents arbitration from either commencing or discontinued.[614] In certain instances, the court in Nigeria has shown a disposition to readily grant an anti-arbitration injunction.[615] In *SPDC Nig Ltd & 2 Ors. v Crestar Integrated Natural Resources Ltd (Crestar*) in this case; *Crestar* (applicant) sought an application among others to retrain SPDC Nig Ltd (*SPDC*) from continuing with an ICC arbitration seated in London. Relying on an earlier Appellate Court decision[616] *SPDC* requested the Court to decline the application. However, in granting the anti-arbitration injunction the Appellate Court stated that section 34 ACA which limits court intervention only applied to 'domestic' arbitral proceedings seated in Nigeria. Therefore, for that reason, the court stated that its jurisdiction to restrain foreign arbitral proceedings is not a matter governed by the ACA. The Appellate Court relied on the Court of Appeal Act and held that it had jurisdiction to grant the anti-arbitration injunction. [617]

In *Zenith Global Merchant Ltd v Zhongful Int'l Investment Ltd (Nig) FZE & Ors*.[618] the High Court granted an anti-arbitration injunction restraining the parties from continuing an arbitral proceeding in Singapore on the ground that the 1st respondent had commenced an action at the Federal High Court to enforce its right to arbitration and other parties had taken a further step

[613] See discussion on stay of proceedings in Chapter 3 of this Thesis.
[614] See Richard Garnett, 'Anti-arbitration injunctions: walking the tightrope ', in William W. Park (ed), Anti-Suit Injunctions in International Arbitration (2020) 36 Arbitration International 3, 347. See also Hakeem Seriki, Anti-arbitration injunctions and the English courts: judicial interference or judicial protection? Academic Journal In: Int. A.L.R. 2013, 16(2), 43Paul Idornigie; Enuma U. Moneke, Anti-Arbitration Injunctions in Nigeria (2016) 84 Int'l j of Arb, Med & Disp. Resolution 4, 438.
[615] See Chimezie Onuzulike, 'An Appraisal of the Concept of Anti- Suit Injunction in International Arbitration', (2021) The Gravitas Review of Business & Business Law 12 (2), 35.
[616] In *Statoil Nig. Ltd v NNPC.* [2013]7 CLRN 72*,* The Court of Appeal relying on section 34 ACA held that the courts did not have jurisdiction to grant an anti-arbitration injunction. See also, *Nigerian Exploration Ltd v NNPC* 1 (2014) 6 CLRN 150. Agip
[617] [2016] 9 NWLR (pt. 1517) 300.
[618] Supra at (n140).

in the Federal High Court action. The rationale of the Nigerian courts in granting these anti-arbitration injunctions, nevertheless, offends the limited judicial intervention in arbitration as enshrined in section 34 ACA as well as Art. 5 Model Law. Furthermore, the Appellate Court's decision that section 34 ACA is only applicable to domestic arbitration would erroneously have the effect that the court can restrain arbitration in international arbitration even if seated in Nigeria. It is further submitted that this is inconsistent with the principle of limited court intervention that section 34 is applicable only on domestic arbitration. Additionally, it is inconsistent with the internationally recognised power of the arbitral tribunal to decide on the jurisdictional matters under its 'competence-competence' doctrine.[619] In the Crestar *case*, the rationale of the appellate court was that it was vexatious to allow the arbitral proceedings to continue before determining whether a Clause of the Share Purchase Agreement on which the arbitration was found was invalid. It is indeed argued that this reasoning is untenable given that the validity of the arbitration clause could have been determined by the arbitral tribunal. The Nigerian court's disposition towards granting of an anti-arbitration injunction clearly indicates unnecessary interference of the Nigerian judicial system in arbitration.

More recently in *Specialised Vessel Services Limited (SVS), v Mop Marine Nigeria Limited (MOP)*[620] clearly demonstrates further Nigerian courts' attitude and approach in granting anti-arbitration injunctions rather than showing commitment to protecting arbitration agreements. The claimant *(SVS*) applied for ant-suit injunction before the English Court in respect of Nigerian court proceedings in breach of the London seated arbitration agreement regarding a Bareboat Charter between the parties. In February 2020, *MOP* had brought claims against *SVS* in Nigeria, and *SVS* in return applied for a stay of proceedings in favour of arbitration in the

[619] See Model Law article 16 (1), ACA section 12(1).
[620] [2021] EWHC 333 (Comm) see also *Africa Finance Corp v Aiteo Eastern E & P Co Ltd* [2022] EWHC 768 *(Comm*), where the English Court granted an interim anti-suit injunction which restrained the continuation of the Nigerian proceedings and prevented proceedings in any forum other than London ICC arbitration.

Nigeria court. However, due to the COVID-19 lockdown, the stay proceedings suffered several adjournments and were not heard till October 2020. Meanwhile, SVS in May 2020, had gone ahead to commence an arbitration, and *MOP* in response applied and obtained an *ex-parte* injunction from the Nigerian Court against the arbitrator and SVS. The English court held that the English Court had the exclusive forum clause and granted the anti-suit injunction to restrain MOP in continuing the court proceedings and the court further considered the anti-arbitration injunction by the Nigerian court to be in breach of the arbitration agreement in the bareboat charter. The interesting aspect of this case is that while the Nigeria court's approach to the anti-arbitration injunction by way of an *ex-parte injunction,* is indeed argued by this writer that the court does not fully grasp the workings of international commercial arbitration. It also demonstrates the Nigerian court's attitude in failing to protect nor support the sanctity of arbitration and arbitral process. While the disposition of the Nigerian court towards protecting arbitration agreements gives negative attention to international commercial arbitration within the global arbitration community,[621] the grant of anti-suit demonstrates the commitment of the English Court to protect arbitration agreements.[622]

It is the argument of the writer that the courts in Nigeria need to appreciate that case in which there is a request for an anti-arbitration injunction, the overriding consideration should be the protection of the arbitration agreement, this ensures that parties respect their obligation to the arbitration agreement they freely chose to enter. To consider otherwise, gives the perception that the courts in Nigeria are not supportive of arbitration process and this may affect the

[621] For instance, in *Nigerian AGIP Exploration Ltd v GEC Petroleum Development Co Ltd* [2021] EWHC 1412 the English Court went ahead to grant an anti-suit injunction to a Nigerian Company, because of the existence of a real risk that a defendant would continue to pursue proceedings in Nigeria and elsewhere relating to a dispute that was the subject of London-seated arbitration.

[622] The English Courts have in a plethora of cases held that the courts have the power to issue an injunction restraining a party from pursuing proceedings in apparent breach of an arbitration agreement. See *Koninklijke Philips NV v Guangdong Oppo Mobile Telecommunications Corp Ltd* [2022] EWHC 1703 (Comm); *Sabbagh v Khoury* [2018] EWHC 1330 (Comm); *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309*; AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant* [2013] UKSC 35.

chances of Nigeria becoming an attractive seat for arbitration, as no party will consider choosing a jurisdiction that is readily disposed to granting an anti-arbitration injunction.

4.5.2. Scope and Extent of Judicial Intervention – Section 34 ACA

The scope and extent of judicial intervention in international commercial arbitration are defined by section 34 ACA, as it provides that, "a court shall not intervene in any matter governed by this Act except where so provided in this Act". This provision is in line with Article 5 of the Model Law which provides for situations where the courts are allowed to intervene. The ACA specifically provided for circumstances in which the courts are allowed to intervene, viz, revocation of the arbitration agreement,[623] stay of court proceedings in favour of arbitration,[624] appointment of arbitral tribunal,[625] issuance of orders compelling the attendance of witness before the arbitral tribunal or production of documents.[626] Other circumstances are application for the challenge and removal on grounds of misconduct,[627] remission of the arbitral award,[628] recognition and enforcement of arbitral award[629] and the setting aside and refusal of arbitral award.[630]

The courts in Nigeria are therefore permitted to intervene in the above areas where prudence and the international arbitral obligations of Nigeria demand judicial intervention. The clear implication therefore of s.34 is that judicial interventions are only allowed in all the instances referred to above and preclude the court from intervening on matters falling outside those areas. The intention of the legislature in making the provision in section 34 ACA in line with the Model Law jurisprudence of limited court interference is to protect the mechanism of

[623] ACA Section 2.
[624] Sections 4 and 5.
[625] Section 7.
[626] Sections 23 and section 19(2).
[627] Sections 29 and 30 (1).
[628] Section 29(3).
[629] Section 31.
[630] Section 32.

arbitration and to prevent the courts from having direct control over arbitral proceedings[631] and to prevent the courts from intervening in arbitral proceedings outside the circumstances specified in the Act. It is argued therefore, that the essence of limiting court intervention in arbitration is essentially to support the arbitral process and make the arbitral process independent of courts adjudication.[632]

The decisions of two Nigerian cases *of Statoil Nigeria Limited v NNPC*[633] and *Nigeria Agip Exploration Ltd v NNPC*[634] exemplify the principle of limited court intervention in arbitral proceedings. In the *Statoil case*, the court was explicit on the intention of the ACA and held that arbitral proceedings represent an alternative to adjudication before the courts and are not an extension of court proceedings. Therefore, section 34 was designed to prevent court intervention outside the instances strictly prescribed by the Act.[635]

Section 34 ACA and the Constitutionality Question.

Interestingly, constitutional issues have arisen in relation to section 34 ACA, as purporting to oust the jurisdiction of the court against the backdrop of the provisions of section 36(1) of the Constitution of the Federal Republic of Nigeria.[636] The constitutional challenge against section 34 ACA can be encapsulated on two grounds. Firstly, on the ground that section 34 ACA latently oust the jurisdiction of the court. This argument is premised on the unlimited respective constitutional jurisdiction of both the Federal High Courts and State High courts to

[631] See *Statoil Nigeria Limited v NNPC (n570)* where the Court of Appeal held that the purpose of 34 ACA is to protect the mechanism of arbitration and to prevent the courts from having direct control over arbitral proceedings.
[632] See *Lesotho Highlands v Impreglio SpA* [2005] UKHL43.
[633] (2013) 14 N.W.L.R (Pt.1373) 1
[634] (2014) 6 C.L.R.N 150 (AC).
[635] See *Statoil Nigeria Limited* (n6330) 25 [C]- [F], 28 [H] and 29 [F] – [H], it was also cited with approval in the lead Judgment of Tinuade Akomolafe-Wilson, JCA *in Nigerian Agip Exploration Ltd* (n299) on the propriety of the grant of an Order of Injunction restraining the continuation of arbitration.
[636] It provides that "In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

hear and determine any civil proceedings.[637] The essence of the constitutionality challenge to section 34 ACA, is that it provides to infringe on the unlimited constitutional access to the court. Most of the cases that have been before the courts on this issue have been on the question of the rule finality of the High Court decision as provided under section 7 (4) ACA which deals with default judicial appointment of the arbitral tribunal.[638] Indeed, it is argued that section 34 ACA, does not outrightly oust the jurisdiction of the court, but technically limits the jurisdiction of the court only to matters that are so allowed under the ACA. The courts are not prohibited from examining the ACA itself but are prohibited to exercise full supervision of arbitration matters.[639] By all intent and purpose, the restriction of section 34 ACA is aimed at minimizing court intervention and permits judicial intervention only for support and supervision of the arbitral process. Furthermore, it is argued that section 34 only affirms the independence of arbitration matter from the courts inherent jurisdiction over arbitration matters and tribunal. More so, the purpose of s.34 ACA in line with the Model Law only provides for very limited circumstances that the court's intervention ensure that the court's respects' parties wish and the arbitration process stays and remain on course.[640] In *Statoil (Nig.) Ltd v NNPC*,[641] the Nigerian Court of Appeal endorses this line of argument when it interpreted section 34 ACA as meaning that there should be no interference by a domestic court in arbitration except in the specific instances provided for in the Act. The court rejected the argument that the Nigerian Constitution and statutes vest the courts with inherent powers that would enable a court to interfere in arbitration even outside the specific instances permitted in the Act. In addition, the Court rejected the argument that the Constitution gives

[637] See Constitution of Nigeria sections 251 and 272.
[638] See discussion on the ACA and the Constitution in Chapter three.
[639] O.O Olatawura, Constitutional Foundations of Commercial and Investment Arbitration in Nigeria Law and Practice, 2014 (40) 4 Commonwealth Law Bulletin pp. 657-689.
[640] Redfern, Alan page 329.
[641][2013] 14 NWLR (PT.1373) 1; see also *Econet Wireless Ltd v Econet Wireless Nigeria Ltd, Suit No* FHC/L/CS/839/2003 (5 November 2004); *City Engineering Ltd v Federal Housing Authority* [1997] 9 NWLR (Pt.504) 224; *Nigerian Agip Exploration Limited & Anor v N.N.P.C* (Unreported CA/A/628/2011); *Celtel Nigeria B.V v. Econet Wireless Ltd* (2014) LPELR (22430) 1 at 58; LPELR (22430) 1 at 58.

superior courts supervisory powers over inferior courts and that an arbitral tribunal is equivalent to an inferior court. The Appellate Court further held that the provisions of section 34 ACA 2004 ensures that arbitral proceedings are not subject to undue interference by the regular courts. The court made it clear that the purpose of the Arbitration and Conciliation Act was to enable the settlement of commercial disputes through arbitration. However, the fact that s.34 ACA does not intend and does not oust the jurisdiction of the court does not mean that the courts should intervene or be willing to hear a matter brought before it in violation of a valid arbitration agreement or during the pendency of arbitral proceedings.

Another constitutional argument against section 34 is the curtailment of parties' right to access to the court. This constitutional argument is generally against the provisions of the ACA as discussed in the previous chapter, particularly section.34 ACA is questionable. Arbitration is a dispute resolution method that guarantees access to justice. Access to court and justice as correctly observed is not the physical or digital access to a system of adjudication but more to having a procedure that secures fair process.[642] The ACA, as well as the Model Law, international conventions, and arbitral rules all, have provisions that guarantee access to justice and ensure due process and fair resolution of disputes. Section 34 ACA in mirroring Article 5 Model Law only limits the role of the court to instances when it is only expedient that the court intervenes when the arbitral process needs judicial process or where there are likely unfair arbitral procedures. The challenges of constitutionality of section 34 will continue to persist as it is perceived not only as ousting the jurisdiction of the courts but also barring parties of their constitutional rights to access to court.[643] It is argued that the constitutional challenges

[642] See Leonardo V. P. de Oliveira, Access to Justice in Arbitration: Concept, Context, and Practice (de Oliveira and Hourani (eds); (2020 Kluwer Law), pp. 8.

[643] *See Magnum International Ltd v Enercon (Nig)* Ltd [2020] LPELR-49501 (CA); *A.G Ogun State & Ors v Bond Investment & Holdings Ltd; Bendex Engineering Corporation & Anor v Efficient Petroleum Nigeria Limited* [2008] NWLR (Pt715) 333 (CA); *Chief Felix Ogunwale v. Syrian Arab Republic,* [2002] 9 N.W.L.R. (part 771); *Agip Oil Co. Ltd. v. Kemmer and others,* [2001] 8 N.W.L.R. 506.

in some instances like in the case of *A.G Ogun State v Bond Investment Ltd* are aimed at undue delay of the commencement of arbitral proceedings.[644]

It is indeed the argument of the writer that section 34 ACA does not strip parties of their constitutional rights either to access to the courts or as demonstrated by judicial decisions in cases like *Statoil (Nig.) Ltd v NNPC* to oust the jurisdiction of the court. The question of limited court intervention is of importance in international commercial arbitration as it regulates circumstances in which judicial intervention is needed for support and efficiency of arbitral process. has been largely embraced by most national arbitration legislation.[645] By allowing for a degree of court intervention in certain situations the ACA recognises and complies with international commercial arbitration principle of minimum court intervention which is embraced by almost all national arbitration legislation. It is further argued that the attitude or extent to which the Nigerian courts interpret and recognise the principles of limited judicial intervention in arbitration determines whether the courts are well disposed towards achieving the purpose of court intervention in arbitration. It is worthwhile to examine in the sections below how the Nigerian courts have so limited its intervention in matters expressly governed by the ACA.

a. Upholding Arbitration Agreement

One of the roles of the court at the seat of arbitration is the support of arbitration through by way of the recognition and enforcement of arbitration agreements. The powers of the courts to stay proceedings brought in breach of an arbitration agreement becomes an essential obligation of the national courts to refer parties to the arbitration. This duty is predicated on

[644] [2021] LPELR-54245(CA), in this case, the respondent applied to the High for an arbitrator to be appointed due to the failure of the appellant who was served with court papers, and he failed to reply to the affidavit filed by the respondent in nominating a co-arbitrator When the lower court deemed his failure to respond as not opposing the list of nominees and the subsequent appointment of the co-arbitrator.

[645] See

the fact that Nigeria is a signatory to the NYC 1958 and adopts the Model Law. Articles II (1), and II (3) of the New York Convention obliges courts and judges to respect and recognize arbitral agreement on subject matter capable of being settled by arbitration and when seized of such matter to refer parties to arbitration at the instance of one of the parties unless such arbitral agreement is void, inoperative and incapable of being performed. Article 8 Model Law recognises the arbitration agreement of parties and refers parties to arbitration on the condition that there is a valid arbitration agreement. The NYC in Art II (3) provides that when a court is seized with a matter which is covered by an arbitration agreement, and at the request of one of the parties that the matter be brought before an arbitral tribunal, the court must refer parties to arbitration. The exception as provided by the NYC is where the court finds such arbitration agreement to be null and void, inoperative and incapable of performance.[646] Model Law sets out three prerequisites that a party seeking to enforce an arbitration agreement must prove. Firstly, the establishment of a valid arbitration agreement, secondly, that the disputes fall within the scope of the arbitration agreement, and thirdly, that the stay of proceedings application is brought before the court is made within a prescribed period.[647]

An arbitration agreement gives competence to the arbitral tribunal to exercise jurisdiction over parties' disputes that the parties have agreed to arbitrate. The courts are expected to recognise and respect parties' intention to arbitrate their disputes. The ACA in section 2 provides that except where a contrary intention is expressed an arbitration agreement shall be irrevocable except by the agreement of the parties or by the leave of the court or a judge.[648] The effect of this section is that an arbitration agreement shall be enforceable by the court except where parties have agreed to revoke the agreement to arbitrate. Generally, the courts are expected to

[646]New York Convention Art 11(3) 1958.
[647] Model Law Article 8.
[648] The part of Section 2 ACA that gives the court the power to revoke an arbitration agreement has been criticised as it failed to give conditions under which a court can grant leave to parties to revoke an arbitration agreement. See Chapter Three on the defects of the ACA.

adopt a positive approach by ensuring that an arbitration agreement is enforced. Parties having entered into a valid arbitration agreement are not allowed to file the same dispute in court. The Apex Court in the case of *Owners of MV Lupex v Nigerian Overseas Chartering & Shipping Ltd (MV Lupex*)[649] held that where parties have chosen to have their disputes resolved by arbitration instead of litigation then there is a *prima facie* duty cast on the court to act upon their agreements. In *Sino-Afric Agriculture & Ind Company Ltd & Ors v Ministry of Finance,* the court interpreted the effect of an arbitration agreement as being enforceable even if vague as long as the parties had intended to refer their disputes to a final and binding mechanism of arbitration.[650] It is argued that the decision of the *Sino – Afric Agriculture & Ind Company case* clearly depicts a constructive approach by looking at the substance rather than form in ensuring that the parties' intention to arbitrate is given effect. This constructive approach was also adopted in the case of C. *N Onuselogun Enterprise Ltd v Afribank (Nig) Ltd*[651], the court in enforcing the arbitration agreement, held that where an arbitration clause contains the unequivocal word 'shall' parties are obliged to refer their dispute to arbitration.[652]

It is argued that the Nigerian courts' attitude towards arbitration and arbitration agreement has not been consistent and keeps wavering between open antagonism to reluctance to enforce an arbitration agreement. There are instances that the courts in Nigeria have been reluctant in enforcing the arbitration agreements of parties. Unlike in the *Sino* case where the court did not look at form, in *Imoukhuede v Mekwunye*,[653] in this case, the parties inserted an arbitration clause that a sole arbitrator was to be appointed by the President of the "Chartered Institute of Arbitration (London) UK Nigerian Branch."[654] In appealing against the lower court's decision

[649] [2003]6 SC (Pt 11)62; [2003] 15 NWLR (Pt 8440 469 (SC).
[650] [2014]10 NWLR (PT1416) 515 CA.
[651] [2005] 1 NWLR (Pt 940) 577 (CA) 585.
[652] *See also Frontier Oil Ltd v Mai Epo Manu (Mem) Nigeria Ltd* [2005] 2 CLRN 148 (HC) 15.
[653] (2015) 1 CLRN 30.
[654] The correct description of the appointing authority is the "Chartered Institute of Arbitrates (UK) Nigerian Branch.

refusing to set aside the award, the appellant, argued that there was no body or organisation known as the Chartered Institute of Arbitration (London) Nigeria Chapter. Hence, there could not have been a referral for arbitration to a non-existent body. Accordingly, the arbitration is unenforceable, and the subsequent appointment, arbitral proceedings, and the award are of no effect, therefore, the clause is unenforceable, and the appointment or recommendation is of no effect. The Court of Appeal set aside an arbitral award on the basis that there was no body in existence known as the "Chartered Institute of Arbitration (London) UK Nigerian Chapter" The decision of the Court of Appeal has been described as a legalistic approach that which allowed legal technicities to "hold sway in arbitration is a recipe for disillusionment with the ADR process generally. A necessary corollary is that the dockets of the courts will continue to overflow at the brims, the pressure on judges will multiply and the quality of judgments will deteriorate."[655] It is indeed the argument of the writer that the courts in the enforcement of arbitration agreements and arbitral awards are expected to adopt an arbitration-friendly approach. This is demonstrated by the tendency to read an arbitration agreement generously and not look assiduously at defects in the form or on technical grounds. Thankfully, on further appeal to the Supreme Court, the Apex Court overturned the Appellate Court's decision. The Apex Court unanimously reversed the decision of the Court of Appeal, by jettisoning legal technicities and held that parties were bound by the arbitration agreement they entered, including mistakes contained in it which they condoned or waived.[656]

It is argued that the court has a duty to refuse to exercise jurisdiction over a matter that is covered by a valid arbitration agreement. In so doing the court is exercising its supporting jurisdiction over the arbitration. For a jurisdiction that desires to become an attractive

[655] See Adewale A. Olawoyin "Legalism v Substantial Justice in Arbitration in Nigeria: Imoukhuede v Mekwunye in Perspective". (2019) 84 (4) The International Journal of Arbitration, Mediation and Dispute Management, ed: Stavros Brekoulakis at pp 419.
[656] *Imoukhuede V Mekwunye & 2 ORS* (2019) LPELR-48996(SC).

arbitration seat, the courts are expected to adopt several remedies to rectify a breach of the arbitration agreement, such as a stay of legal proceedings in favour of arbitration. Such a policy approach of the judicial system towards arbitration agreement is one of the factors in assessing the quality and adequacy of judicial support of a jurisdiction as an attractive seat for international commercial arbitration.

b. Stay of Court Proceedings Pending Arbitration.

The law that concerns the stay of legal proceedings in favour of arbitration in Nigeria vests both mandatory and discretionary powers to the court.[657] The requirement under section 4 ACA is that parties must act timely.[658] Where the arbitration proceedings have already commenced, subsection 2 provides that the court proceedings and the arbitral proceedings can continue simultaneously. However, the court in the case of *Indorama Eleme Petrochemicals Ltd. Vs. Cutra International Ltd*[659] disregarded the provision that litigation and arbitration can continue simultaneously as provided under s4 (2) ACA.[660] The respondent, in reaction to the said termination of the contract claimed against the appellant, the sum of $2,700,000 (Two Million, Seven Hundred Thousand Dollars), being the outstanding balance for the government relations services rendered to the appellant during the pendency of the consultancy agreement. The respondent, in the exercise of her right under the agreement, purportedly invoked the arbitration clause in the agreement by applying to the agreed Head of the Chartered Institute of Arbitrators of Nigeria (CIAN) for the appointment of a Sole Arbitrator. Upon subsequent preliminary meeting of parties, the appellant challenged the jurisdiction of the arbitrator/arbitral panel to initiate the arbitral proceedings due to the failure of the respondent

[657] Sections 4 and 5, the challenges of having two different sections on the stay of proceedings are discussed in chapter 3.
[658] A party to a court proceeding who desires to apply for a stay of proceedings must do so at any time before filing his proceedings. ACA section 4 (1).
[659] [2020] 11 NWLR (PT 1735) 302 (CA)
[660] This is like Model Law article 8 (2).

to serve the appellant the requisite notice of arbitration as required under the ACA. The arbitrator ruled that such hearing notice can be dispensed with by the parties under Section 17 ACA. The appellant not satisfied with the ruling of the arbitrator filed an action in the Federal High Court against both the arbitrator and the respondent. He sought a declaration that the condition precedent to invoke the arbitral proceedings had not been complied with to warrant the commencement of the arbitration between the parties, and for an Order setting aside the ruling of the arbitrator as well as removing the same arbitrator. The appellant also filed a motion for the stay of the arbitral proceedings pending the determination of the suit filed against both the arbitrator and the respondent. While the stay of arbitral proceedings was still pending in court, the arbitral proceedings continued but the appellant refused to participate further in the arbitral proceedings, even though he was given notice of the continuation of the arbitral proceedings. Before the decision of the High Court on the objection of the respondent, the arbitrator granted an award in favour of the respondent. The Appellant thereafter applied to have the arbitral award set aside on the ground of misconduct. The appellant alleged that the arbitrator had misconducted herself mainly due to the failure of the respondent to serve the appellant the requisite notice of arbitration as required under the ACA and due to the continued hearing and determination of the arbitral proceeding without the participation of the appellant. The court refused the application to set aside the arbitral award, hence this appeal. The Court of Appeal held in favour of the appellant when it held that the arbitrator had misconducted herself for failure to give formal notice of arbitration which is a condition precedent to exercising any jurisdiction by the arbitrator. On the issue of continuation of the arbitral proceedings, while the stay of arbitration application has still been heard in court, the Court of Appeal stated that;

"Due process and caution demand that when one of the parties to an arbitral proceeding picks up the issue of challenging the jurisdiction of the arbitrator and the competence of the arbitral proceeding in

a competent court, no matter how such a process is viewed by the parties, the parties must defer to the court. In the instant case, the challenge before the High Court is over the jurisdiction of the arbitrator and the competence of the arbitral proceeding. It is therefore unconscionable with all respect, for the arbitrator to ignore the proceeding of the High Court and continue the arbitral proceeding."[661]

It is argued that the above statement by the Court of Appeal lacks both jurisprudential and legislature basis and is therefore questionable. This is because by Section 4(2) of the ACA the arbitrator/tribunal does not have to wait for the determination of a pending suit or file an action before proceeding with the arbitration.[662]

Considering the facts of the case, the appellant was made aware of the arbitration, hearing notices were issued, and the appellant had deliberately refused to participate any further in the arbitration all because he had filed an application or suit before the High Court. The arbitral tribunal by s4 (2) ought to stop sitting because there is a court proceeding or pending action until the Court orders a stay of the arbitration. It is the argument of the author that had the Appellate Court taken cognizance of Section 4(2) of the ACA the court may have arrived at a different decision. The continuation of arbitral proceedings pending a stay of proceedings in court is justified on the basis that it reduces the effect of dilatory tactics of recalcitrant parties and ensures that proceedings are not unnecessarily stalled. The writer argues that it would have been gratifying if the Court of Appeal had considered the objective of s.4 (2) ACA and the peculiar nature of the arbitral process rather than importing the nuances of the Nigerian litigation postures. The Court of Appeal decision in *Indorama Eleme Petrochemicals Ltd. Vs. Cutra International Ltd* does not favour Nigeria as an attractive seat for international commercial arbitration. This decision contrasts with the position set by the Supreme Court in

[661] Per Adah J. C. A delivering the leading judgement.
[662] S.4 (2) provides; thus, "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.

The Owners of MV Lupex v Nigerian Overseas Chartering & Shipping Ltd (MV Lupex, the Apex Court, in this case, overruled the lower court's decision that had refused a stay of proceedings commenced by a party that had agreed to arbitration in London. The Supreme Court referred parties to arbitrate their disputes.[663] One of the challenges in the stay of arbitration in favour of arbitration is the judicial attitude of the courts in Nigeria in the interpretation and application of section 5(1) ACA.[664] For an application for a stay of proceedings brought before the court in breach of an arbitration agreement. Section 5 (1) ACA provides that a party may at any time after appearance but before the delivery of any pleadings or taking any other step in proceedings apply for a stay of proceedings. The Model Law only places a requirement of time limit by which a party must apply for a grant of stay, failure of which the party is precluded from raising the arbitration agreement in subsequent phases of the court proceedings.[665] The ACA requests that for the stay of proceedings, an application must be made not later than when submitting his first statement on the substance of the dispute.[666]

c. Taking Step in Legal Proceedings- A Step too far?

The inconsistency and disparity between the provisions of sections 4 and 5 ACA and the approach of the courts in relation to section 5, raises doubt as to the adequacy of judicial support in relation to the enforcement of arbitration agreement.[667] This becomes more apparent given the trend that the Nigerian courts are more inclined to exercise discretionary power under section 5 ACA.[668] Section 5 ACA requires a party to apply for a stay of proceedings at

[663] *Owners of M.V. Lupex v. Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR (Part 844) 469 at 488.
[664] Sections of 4 and 5 ACA deals with the stay of proceedings and was discussed in the previous chapter, these two sections are quite controversial as it in one breath makes a stay mandatory while on the other hand gives the court discretionary power to grant a stay of proceedings in favour of arbitration.
[665] Howard Holtzman & Joseph Neuhaus, A Guide to The UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary (Kluwer, 1989) 218 at p. 306.
[666] Section 5
[667] See chapter 2 on the discussion on the inconsistency of ACA 2004 sections 4 and 5.
[668] The analysis of cases discussed under this section will show that the courts are more inclined to section 5.

any time after appearance and before delivering any pleadings or taking any other steps in the proceedings. In order to address the issue of the importance of the condition that a party applying for a stay must not have taken further step in the court proceedings it is important to know what is taking Step in Legal Proceedings? This becomes imperative given that one of the of the issues faced by judicial intervention in arbitration particularly in Nigeria, is the issue of the courts jealously guiding their jurisdiction. Hence when a party applies to the court to stay legal proceedings in favour of arbitration, it is important that the applicant who seeks to stay the legal action has not taken any action to answer the substantive claims before the courts. Section 5 ACA provides that:

(1) If any party to an arbitration agreement commences any action in any court with respect to any matter, which is the subject of arbitration, 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 (emphasis mine).

From the reading of the provision, there is no clear guidance as to what constitutes taking further step in court proceedings that could bar a party that sought for a stay of proceedings. The question is then, at what point has a party to an arbitration clause lost its contractual right to arbitrate by participating in court proceedings? The concept of taking a further step in proceedings as regards the application of a stay of proceedings before the Nigerian courts have been controversial. The reason for this is the wide but strict interpretation and meaning of what constitutes further steps. There is no legislative definition in the ACA or guidance on what

constitutes taking further steps,[669] the concept has been developed by case law, however, the inconsistency in the court's decision has not been helpful.

A step in a proceeding is deemed to have been taken if the applicant for a stay of proceedings employs the court apparatus to enable him to defend those proceedings on merits and or where the applicant goes beyond a mere acknowledgment of service of process.[670] The case authorities show that the circumstances of these cases vary, and the right of parties to arbitrate their disputes as agreed seems hindered by this too far-a-step concept. Taking steps has been defined and interpreted to mean the following:

- An application whatsoever to the court even for an application for time[671]
- An application for an order for pleading to be filed. [672]
- Where a party filed a motion to strike out the case so that the matter goes to arbitration.[673]

The starting point of this wide interpretation and uncertainty in the case law of what amounts to taking a step can be attributed to the old case of *Obembe v Wemabod Estates Ltd.* The appeal was brought in respect of an action for wrongful dismissal of the appellant in the High Court of Lagos State, the appellant had claimed against the defendant, a certain sum of money being the balance of fees and reimbursable expenses due to the plaintiff for services rendered for the defendants at their request in respect of the construction of a building project. The disagreement arose from their differences in the quantity of steel recommended by the appellant for the

[669] The English Arbitration Act gives more clarification as it provides that: "The An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
[670] See the Singaporean case of *L. Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312- where the court held that a step must be one that a party takes when he elects to submit to the court's jurisdiction as opposed to arbitration when he invokes the jurisdiction of the court.
[671] *Confidence Insurance Company Ltd v Trustees of O.S.C.E.* [1999} 2 NWLR (Pt. 591) 373*; Kano State Urban Development Board v Fanz Construction Co Ltd* [1990] 4 NWLR (Pt. 142) 1at pg. 50.
[672] *Kano State Urban Development Board v Fanz Construction Co Ltd* [1990] 4 NWLR (Pt. 142) 1 at pg. 50.
[673] *Achonu v National Employers Mutual & General Insurance* [1971] 1 ALR Comm.449.

project. The amount claimed was based partly on the scale of fees laid down in a booklet published by the Association of Consulting Engineers in London (Exhibit 3). The appellant defended the suit and failed to apply for a stay of proceedings even though a clause in the said Exhinit 3 contained a reference to arbitration in case of a dispute. The lower court dismissed the appellant's claim on the ground that the appellant did not prove his case as he did not lead any evidence or put in any document to support his case. Nevertheless, the judge went ahead to observe that even if the appellant had succeeded in proving the amount claimed, he (the judge) would still have been unable to enter judgment in the appellant's favour in view of the arbitration clause in part II of Exhibit 3. Dissatisfied with the lower court's decision, the appellant further appealed to the Supreme Court. In dismissing the appeal, the apex court noted that the trial judge was in error to have made the statement in respect of exhibit 3. The court then made the sweeping general statement that;

"*To get a stay, a party to submission must have taken NO step in the proceedings. A party who makes any application whatsoever to the court, even though it be merely for an application for extension of time, takes a step in the proceedings. Delivery of a statement of defence is also a step in the proceedings."*[674] *(emphasis added).*

It is this blanket statement of the apex court as to what constitutes 'taking steps' in an application for a stay of proceedings that has generated the confusion over. The Supreme Court for the sake of differentiating *Obembe* and other cases stated that the respondent had not applied for a stay and had after been served with the writ of summons, filed their statement of defence, testified in their defence, and took part in the proceedings. However, it seems some of the cases that followed the *Obembe c*ase did not take note of the peculiarity of the facts in *Obembe.* The attitude of the Nigerian courts is that parties must limit themselves to just filing

[674] Per Fatai Williams (JSC as he then was)

applications for stay of proceedings pending arbitration whenever they are brought before the court over a dispute in breach of the arbitration agreement. This was the reasoning of the court in *Kano State Urban Development Board v. Fanz Construction Co. Ltd.*[675] where the Supreme Court quoted with approval the Halsbury's Laws of England,[676] that a party who makes any application whatsoever to the court, takes a step in the proceedings. The Supreme Court held that an application for pleadings to be filed constitutes taking a step and as such a contravention of Section 5.

The Supreme Court had the opportunity in the case *Fawehinmi Construction Co. Ltd. v. O.A. U*[677] to give clearer guidance and correct itself on the sweeping *obiter* made in *Obembe's case.* Rather than overruling itself, rather the Supreme Court towed the easier path of distinguishing the *Obembe* case from the *Fawehinmi* case and held that the *Obemb*e case has no application to the case before it, thus, leaving what amounts to taking steps hazy and susceptible to different interpretations of the sweeping statement of the Supreme Court in *Obembe's* case. The Supreme Court in this case stated that preliminary objection "does not amount to submission to trial*".*[678]

In another case, upon the commencement of the suit and service of court process, parties exchanged pleadings. pleadings. In its statement of defence, the appellant averred that the respondent's action was premature as the respondents did not exhaust arbitration as agreed in the trust deed before resorting to litigation. The appellant's application to stay proceedings so that the matter proceeds to arbitration for stay of proceedings was refused by the lower court on the ground that the appellant had waivered his right to evoke the arbitration clause when he

[675] [1990] 4 NWLR (Pt. 142) 1.
[676] Halsbury's Laws of England, Volume 4, (1975) Butterworth.
[677] [1998] LPELR-1256 (SC).
[678] Ibid at 183-184.

chose file and delivered his statement of defence. On further appeal to the Court of Appeal, the appeal was also dismissed.[679]

Commendably the court in *Onward Enterprises Ltd. v. MV Matrix & Ors* [680]did not follow the wide and strict interpretation of 'taking a step' as given in the obiter in the case of *Obembe.*

The Court of Appeal gave a proper context of when 'whatsoever application' would be considered to amount to a waiver that would deprive a party of his right to arbitrate. The Appellate Court held that the two prior applications of the respondents, which respectively sought orders of the court to release their vessel from arrest and permit them to move the vessel to anchorage pending arbitration, were not further steps in the proceedings. Accordingly, the respondent successfully applied for a stay of proceedings pending arbitration despite these earlier applications. Given the decision of the Appellate Court, in this case, it may therefore be argued that parties against whom interim orders of the court have been made in a lawsuit filed in breach of an arbitration agreement may validly apply to the courts to lift those orders without being deemed to have waived their agreement or said to have taken steps in the proceedings.

The judicial decisions of most of these cases stating the situation that constitute taking steps in legal proceedings under which a party loses the right to arbitrate shows that the issue is not yet a subject of settled law in Nigeria. It is the argument of this writer that these reported cases are difficult to reconcile, creating more confusion rather than clear guidance on the nature of the step in the proceedings that would cause a party to an arbitration agreement to lose its contractual right to arbitrate. It appears that the decision of a court on the question what amounts to taking steps or at what stage will a party lose its right to arbitrate will depend on the facts and circumstances of each case. The applicant, beyond entering a formal appearance

[679] *Confidence Insurance Ltd. v. Trustees of O.S.C.E.* (1999) 2 NWLR (Pt. 591) 373.
[680] [2010] 2 NWLR (Pt. 1179) 530.

in the dispute before the court,[681] must not have filed pleadings or "taken any other steps in the proceedings". The determining factor should be whether the step taken is so clear as to amount to a waiver by not objecting to the jurisdiction of the court.

It is noted that a stay of proceedings as provided under Article 8 Model Law as well as in sections 4 and 5 ACA are non-territorial,[682] as a party can challenge court commencement of legal proceedings in any court in breach of an arbitration agreement in any court where such proceedings are instituted. However, a jurisdiction that aspires to become an attractive seat for international commercial arbitration, its courts must be one that a party can get redress and have the dispute referred to arbitration. The recent Court of Appeal decision in the case of *The Vessel MT Sea Tiger v ASM (HK) Ltd*[683] where the appellate court held that failure or refusal to enter an appearance and be represented in the suit constituted and amounted to a muted but clear submission to the jurisdiction of the lower court in the case. In *Tiger's* case, the Court of Appeal held that where proceedings are instituted in breach of a foreign arbitration clause, failure or refusal to appear before judicial proceedings, and payment of an out-of-court settlement amounts to waiver by submitting to the jurisdiction of the court. Indeed, the implication of the decision of the Court of Appeal is that where proceedings are instituted in a Nigerian court in breach of a foreign arbitration agreement, it would be prudent for the party requesting arbitration to appear before the court and apply for stay of proceedings in favour of a foreign arbitration agreement. Failure to do so would result in the international arbitration clause being ineffective in Nigerian law on the basis that the party requesting arbitration would be deemed to have waived its right by submitting to the jurisdiction of the court.

[681] In practice, this involves the applicant of a stay of proceedings to file a memorandum of (conditional) appearance.
[682] See Article 1 (2) which gives art, 8 its non-territorial nature.
[683] [2020] 14 NWLR (Pt. 1745) 418.

It is noted that the decision in *Tiger's* case is contrary to previous judicial decisions that have held that taking step-in proceedings amount to a waiver to an arbitration clause. It has been held that where the defendant enters an unconditional appearance or defends the case on its merits without challenging the jurisdiction of the court amounts to taking steps.[684] The author argues that when a party fails to appear before court proceedings, he cannot be deemed to have waived his right by submitting to the jurisdiction of the Nigerian court. Refusal to appear at courts' proceedings upon being duly notified is the opposite of submission to the jurisdiction of the court.

By way of analogy, the case of *Tiger* when compared to an old Nigeria Supreme Court judgment [685] where the apex court held that failure or refusal of a defendant resident in Nigeria to appear in the English court despite being duly notified of judicial proceedings in England, did not qualify as submission to the jurisdiction of the English court.[686] On the issue that the out-of-court settlement sum by the appellant for the release of their vessel amounted to submitting to the jurisdiction of the court, the writer further argues that this decision is erroneous. This is because such an approach by s.5 (1) ACA does not amount to delivering pleadings or taking steps as explained in the earlier decisions of the Court of Appeal in the cases.[687] For instance, in Confidence *Insurance Ltd v Trustees of O.S.C.E.[688]*, the Appeal Court was explicit of the opinion that effort made out of court to settle the matter in dispute between the parties does not amount to submission to courts' jurisdiction as envisaged by

[684] *Obembe v Wemabod Estates Ltd*. (1977) 5 SC 115; *K.S.U.D.B. v Fanz Const; Ltd. (1990) 4 NWLR; Mainstreet Bank Capital Limited & Another v Nigeria Reinsurance Corporation Plc* [2018] 14 NWLR (Pt. 1640) 423, 445-6, 452; *Onward Ent. Ltd. v MV Matrix* (2010) 2 NWLR (Pt. 1179) 530, 551*;Federal Ministry of Health v Dascon (Nig.) Ltd* [2019]3 NWLR (Pt. 1658) 127; *SCOA (Nig) Plc v Sterling Bank Plc* (2016) LPELR-40566(CA*) Sino-Africa Agriculture & Ind Company Ltd and Others v Ministry of Finance Incorporation and* Another (2013) LPELR-22379 (CA)1, 33 – 36, (2014) 10 NWLR (Pt. 1416) 515*; Osun State Government v Dalami (Nig.) Ltd (2003) 7 NWLR (Pt. 818) 72, 93, 101; Confidence Insurance Ltd v Trustees of O.S.C.E. (*1999) 2 NWLR (Pt.591)373, 386.

[685] *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309, this case is in respect of Recognition and Enforcement of Foreign Judgement.

[686] *Ibid.*

[687] See cases listed in (n684.

[688] (n679).

Section 5 of the ACA. Furthermore, the court stated that the following could not ordinarily amount to taking a step-in proceeding; an exchange of correspondence between parties or their counsel after entering an appearance, or the efforts made off the court to settle the matter, and or applying to the court to seek that the matter is placed before an arbitration panel. All these circumstances the court held cannot defeat a party's right to rely on the arbitration provision.[689]"

In *Eaglewood Integrated Resources Ltd. v Orleans Investment Holdings Ltd,*[690] the appellate court was called upon to determine whether the lower court's decision that a challenge to a court's jurisdiction amounts to submission to litigation and therefore a waiver of the arbitration agreement. The Appellate Court confirmed the decision of the lower court that an act done in furtherance of the prosecution of a defence amount to taking steps in proceedings. The case of *Panormos Bay v Olam*[691] concerned a dispute arising out of a contract, in which the parties have agreed to arbitration in London. One of the issues before the court was whether a defendant seeks to stay in court proceedings in deference to the parties' arbitration agreement. The court in denying the grant to stay proceeding held that by section 5 ACA, a party applying for a stay must do more than stating in the court (affidavit) processes that parties have agreed to arbitrate but must be ready and willing to arbitrate by showing documentary evidence that parties had agreed to arbitrate their dispute. This decision of the Court of Appeal was followed in *UBA v Trident Consulting Company Ltd*[692] that an applicant controverted deposition of willingness to arbitrate is not enough to warrant an order of stay of proceedings in an application for stay of proceedings. These decisions are regarded as an aberration as it imposes

[689] (2018) LPELR-45108(CA). See also *Onward Enterprise Ltd. v MV "Matrix" & 2 Ors [2010] 2 NWLR (Pt.1179) 530.*
[690] [2018] LPELR-45108 (CA).
[691] (2004) 5 NWLR (Part 865) 1.
[692] [2013] 4 CLRN 119.

unduly formalistic requirement before a stay of proceeding is granted.[693] All the cases reviewed illustrate the need for a shift in the attitude of Nigerian courts towards arbitration. The courts should be more inclined and obliged to request for a stay of proceedings than refuse it. As stated by a commentator the commercial realities give effect to the presumed intention of parties wanting to resolve their disputes by arbitration.[694] Staying of court proceedings in favour of arbitration is one of how the national courts support arbitration by insisting that parties comply with their arbitration agreement. The step that a defendant is alleged to have taken in a judicial proceeding to defend his right to arbitration must be so clear and positive as to constitute a waiver of his right to insist on the resolution of the dispute by arbitration. As held in a Singaporean case, the principle of a 'taking step' must be based on a party's unequivocal intention to submit to the jurisdiction of the court instead of recourse to arbitration.[695] The English Courts also take the same approach, and have held that a 'step in the proceedings must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.'[696]

The conflicting and wide interpretations given to the step principle by the courts in Nigeria as provided under s.5 (1) needs further judicial clarification by the Apex court. It is expected that courts in Nigeria, would grant a stay of proceedings pending arbitration once they become

[693] See Gbenga Bamodu 'Judicial Support for Arbitration in Nigeria: On the Interpretation Aspects of Nigeria's Arbitration and Conciliation Act, (2018)62, Journal of African Law, 2, 255.
[694] See Justice Clyde Croft, How the Judiciary Can Support Domestic and International Arbitration' a speech by the Hon. Justice Clyde Croft, Supreme Court of Victoria, presented at the Arbitrators; and Mediators Institute Annual Conference 25-27 July 2013 available at http://supremecourt.vic.org.au/about-the-court/speeches last accessed 15 August 2021.
[695] *Amore Pte Ltd v Otto Marine Ltd,* [2014] 1 SLR 724 where the Singaporean court held that a party would not be held to have elected to submit to the jurisdiction of the court by a Notice of Production of documents. requesting for the because of has elected to submi*t.* See also the English case of *Capital Trust Investments Ltd v Radio Design* TJ AB [2002] EWCA Civ 135*,* where it was held that a party has not waived its right to arbitrate notwithstanding its application for summary judgment in the court proceedings. The summary judgment application was expressed to be the alternative to the stay application.
[696] *The Deposit Guarantee Fund for Individuals (as Liquidator of National Credit Bank PJSC) v (1) Bank Frick & Co AG (2) Eastmond Sales LLP, [*2021] EWHC 3226 (Ch); applying *Eagle Star Insurance Co. v Yuval Insurance Co.* [1978] 1 Lloyd's Rep 357*,* though was a case decided under the English Arbitration Act 1950, similar approach. has been adopted under the Arbitration Act 1996 in the cases *Patel v Patel [2000] QB 551; Bilta (UK) Ltd (in liquidation) v Nazir* [2010] EWHC 1086 (Ch*)*.

aware that the parties had agreed to submit any disputes arising under their contract to arbitration. However, the wide meaning given to taking steps and the considerations attached to section 5 (2) calls for concern.

d. Court Support in Appointment of Arbitral Tribunal

National courts do have an important role to play in both the appointment and removal of arbitrators. The ACA provides efficient and comprehensive provisions for the appointment of the arbitrator (s) and the courts assist either as an appointing authority or as a fall-back appointing authority[697] or when the mandate of an arbitrator ends prematurely. The ACA provisions of the appointment of arbitrators reflect the UNCITRAL Model Law[698] and its underlying precept of party autonomy.[699] Where the parties fail to agree on the appointment of either a sole arbitrator or the third arbitrator, the ACA, vests the court with the power to appoint arbitrators where parties fail to agree upon the request of a party.[700] The power of the court when it is called upon to appoint arbitrators is guided at least by two factors. Firstly, the court will determine whether the dispute in question is within the contemplation of the parties' agreement and secondly, whether the parties failed, refused, or neglected to appoint arbitrators to resolve the dispute.[701] In this respect, the court held that where a court is requested to appoint an arbitrator, the party who makes the application shall furnish the court with an affidavit together with a copy of the arbitration agreement, and the court may require from either party such information as it deems necessary.[702]

[697] See Section 7 ACA.
[698] Article 11 Model Law.
[699] The primacy of party autonomy in respect of the appointment of an arbitrator is well illustrated in the case of *Backbone Connectivity Network Nigeria Limited and Others v Backbone Technology Network Incorporated [*2015] 14 NWLR (Pt 1480) 511.
[700] ACA S7 (2), empowers the court to appoint an arbitrator or three arbitrators where there is no agreement between the parties or provisions on the procedure of appointment. *See, Transnational Corporation v Ankor Pointe Integrated Services Ltd* [2021] LPELR 54548*;* Compagnie *General de Geophysique v. Etuk (*2004) 1 NWLR (pt.853) 20.
[701] *Felix Ogunwale v Syrian Arab Republic* [2002] 9 NWLR (Pt. 771) 127.
[702] Ibid.

The provisions of section 7(4) ACA which is like the Model Law[703], provided that the decision of the court in subsections (2) and (3) of s7 shall not be subjected to appeal[704] This provision has received criticisms on constitutional grounds. The Court of Appeal was short of stating that s.7(4) was unconstitutional when it held in the case of *Agip Oil Co. Ltd, v Kemmer & Ors,*[705] that the decision of the Federal High or a High Court appointing an arbitrator is appealable as otherwise would be contrary to s241 of the 1999 Constitution. In other words, appeals from the High Courts to the Appellate Court are constitutional right. This decision is in contrast with the Court of Appeal's decision in *Cetel Nigeria BV v Econet Wireless Ltd & Ors*[706] where it was held that there is no right of appeal from the decision of the courts' appointment of arbitrator under s.7 ACA. In *A.G Ogun State& Ors. v Bond Investment Ltd*[707] the Court of Appeal reiterated that s.7 ACA is not unconstitutional.

Section 7 (4) relates to courts' assistance where a party fails or where parties reach a deadlock on the appointment of the arbitrator and therefore should be applied and be given the meaning strictly to the procedure of appointment of the arbitrator. As rightly stated by the Appeal Court in *Bendex Engineering Corporation & Anor v Efficient Petroleum (Nig.) Ltd*,[708]

> *"s.7 (4) ACA is explicit about the scope of the matters coming within its purview and is not intended as a blanket deprivation of the right of appeal on any matter touching on arbitration. Deprivation of the right of appeal is confined to the question of appointment procedure as specified in Sub-sections 7(2) & (3) of the Act"*[709]

[703] Model Law Article 11 provides for a fallback appointment of the arbitral tribunal on the court appointing authority. In art.11 (5) provides and sets out the rule of finality of the court's decision on the appointment of arbitrators.
[704] However, the English Arbitration Act permits an appeal but with leave see section 18 (50.
[705] [2001]8 NWLR (Pt. 716)506.
[706] (2014) LPELR-22430(CA).
[707] (2021) LPELR-54245(CA).
[708] (2008)8 NWLR (Pt.715)333*;* see also *Ogunwale v. Syrian Arab Republic* [2002]9 NWLR (Pt 717)127 (CA).
[709] Per Olagunju, J.C.A.

The writer indeed argues that s.7 (4) does not purport to curtail or extinguish the constitutional right of appeal as enshrined in the Constitution. The finality of the decision of the court on the appointment of an arbitrator, as envisaged under s.7(4) does not exempt a court-appointed arbitrator from being challenged if he is found wanting under sections 8 to 11 ACA. An aggrieved party can still bring a challenge proceeding against a court-appointed arbitrator under s.9 ACA, particularly in the light of the possibility of corrupt or biased arbitrators improperly asserting jurisdiction.

While it is the argument of this writer that s.7(4) is not unconstitutional, in order to find a solution to the issue of its constitutionality of the finality of the court's decision, it is advocated that s.7(4) should be amended to the effect that a dissatisfied party of the court's appointed arbitrator should first seek the leave of the court to appeal. The court may then grant the leave to only deserving cases.[710] This will ensure that recalcitrant parties do not abuse appeal procedure just to frustrate arbitral proceedings. In most pro-arbitration jurisdictions, the arbitration regime makes provision for the leave of court to be granted before an appeal is made against the court's decision. An illustration of this approach can be seen in the English Arbitration Act s.17 EAA 1996, makes provision for the situation where one party fails or refuses to appoint an arbitrator, after giving the defaulting party notice, the non-defaulting party may go ahead to appoint an arbitrator as a sole arbitrator. In particular, the wording of s.17 (1) EAA contemplates its application to the three-person tribunal and where a party refuses or fails to appoint an arbitrator 'within the time specified.[711] There is no corresponding provisions under the Model Law or in the ACA. The provision of s.17 EAA constitutes a significant deterrent to a party contemplating delaying arbitral proceedings by not appointing

[710] The Lagos State Arbitration Law 2009, s.12 (2) provides that the court shall not exercise the power to remove an arbitrator unless it is satisfied that the applicant has first exhausted any available recourse either to the appointing authority or person.

[711] See EAA section 17 (2), the party in default of appointment must within seven clear days of notice make an appointment and notify the other party of having done so or else may lose the right to object may be lost EAA 1996 (s73(1c).

an arbitrator as the EAA provides that a party may appoint his arbitrator as a sole arbitrator in the situation where the other party refuses or fails to appoint.[712] Where such an appointment is made by the non-defaulting party a dissatisfied party nevertheless can apply to the court to set aside the appointment. The leave of court is required for an appeal from any of the decisions made by the court regarding such appointment under section 17.[713] This is demonstrated in the English case of *Itochu Corp v Johann MK Blumenthal GmbH & Co KG*[714], where the lower court refused the application for appeal to the Court of Appeal. A further appeal against the decision of the court on the appointment of sole arbitrator under section 18 (3) EAA was held to be caught up by section 18 (5) EAA.

In comparison with the ACA, the EAA in section18 further provides for a situation where the parties fail to agree on a procedure for the appointment of a sole arbitrator, (which is different from the situation of s.17, which envisages a three-man tribunal). This section is more applicable where the parties cannot agree on a sole arbitrator. In such a situation, the courts in England are empowered to make an appointment, even in situations where there is a vacancy or where the appointment made under section 17 has been set aside.

The judicial intervention would not be necessary if the parties, for example, have chosen to be governed by a specific arbitration rule that may not provide for a court to appoint an arbitral tribunal. Where the court intervenes in this regard as provided under the ACA, it is expected that the court would have had due regard to required qualifications and any other consideration that would likely secure the appointment of an independent and impartial arbitrator. Where a party has concerns as to qualification or questions relating to the impartiality of the arbitrator so appointed, rather than making the appointment by the court another subject of litigation,

[712] EAA, see also *Exmek Pharmaceuticals SAC v Alkem Laboratories Ltd, [*2015] EWHC 3158 (Comm), *Sierra Fishing Company &Ors. v Farrant& Ors.* [2015] EWHC 140 (Comm).
[713] See EAA 1996 s.17 (4).
[714] [2013] 1 All E.R. (Comm) 504; see also *Davinder Singh Virdee v Amritpal Singh Virdi, [2003] EWCA Civ 41.*

the Act makes provision for the challenge and removal of an arbitrator.[715] The recourse to the court for the appointment of an arbitrator in the first instance is usually because of the parties' failure or refusal to make an appointment. The courts would not usually intervene in matters relating to the appointment of an arbitrator/tribunal and neither will it *suo moto* order parties to appoint arbitrators or *suo moto* appoint arbitrators.[716] For instance, in the Canadian case of *Microtec Securi-T Inc. Quebec National and International Commercial Centre*, the court refused to intervene in the appointment of the arbitral tribunal when the parties failed to agree as the appointing authority (CACNIQ) had its appointment procedures in the event of lack of agreement between parties. The Canadian/Quebec Superior Court held that since the parties had agreed to adopt the specific arbitration rules to govern their proceedings which included the procedure for appointment of the arbitrator, the court is without jurisdiction and the rules of CACNIQ will prevail over the appointment procedure where parties fail to agree on the appointment of arbitrators.[717]

The Model Law concept of national court appointment of arbitrators as adopted by the ACA is to endeavour an expeditious process of constituting an arbitral tribunal. Therefore, the purport of the finality of the court's decision on its appointment of an arbitrator in s.7 (4) ACA (which is culled from art. 11(5) Model Law) is the need to take necessary measures to constitute an arbitral tribunal.[718] This would save the whole process of arbitration from becoming the first step to litigation. Especially in Nigeria, where the judicial system and procedure are already predisposed to unnecessary delay and abuse of court processes by the

[715] See sections 8 and 45 ACA, also a party can also have a second bite of the cherry by challenging the award on the ground of misconduct under s30 ACA.
[716] *Backbone Connectivity Network Nigeria Limited and Others v Backbone Technology Network Incorporated* [2015] 14 NWLR (Pt 1480) 511 (CA) where the court held that the court had no business to on its own order parties to appoint or on its own volition appoint a third arbitrator.
[717] *CLOUT case \No. 516,* Canada Quebec Superior Court, confirmed by the Quebec Court of Appeal in *Microtec Securi-T Inc v CACNIQ,* 14 March 2003 available online at https://www.uncitral.org/clout/clout/data/can/clout_case_516_leg-1741.html (accessed 14 August 2001).
[718] Howard M. Holtzmann and Joseph Neuhau, 'A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, (1989 Kluwer Law International) 358-387.

act of filing the frivolous preliminary application. Particularly, under s.7 (4) there are extensive considerations for the qualification of an arbitrator under s.7 (5), of which the courts shall take due regard before appointing an arbitrator.[719] In *Transnational Corp of Nigeria PLC. v Ankor*, the court stated that a court in entertaining an application to appoint an arbitrator is enjoined to see whether prima facie a dispute is contemplated in the arbitral agreement between the contending parties and the court assist parties in the event of an impasse as to the failure to agree on the appointment of the arbitral tribunal.[720]

The writer argues that there are good reasons for providing that the finality of the court's decision on the appointment should not be subject to appeal. One of the justifications for the finality of the court's decision on appointment as provided under s.7 (4) ACA is for the prompt constitution of the arbitral tribunal. In a jurisdiction like Nigeria that is noted for delay and abuse of court processes, the need to have such provision that will forestall delay of the arbitral process through intentional and dilatory court proceedings cannot be over-emphasized. More so, judicial intervention in this regard is to support the arbitral process, the courts' assistance in this regard is crucial as it provides a solution to a stalemate that may arise where parties fail to agree on the appointment of the arbitral tribunal. The case of *Obafemi Awolowo University v Inaolaji Builders Ltd*[721] exemplifies one of these instances and the likelihood for parties to spend several years before the Nigerian courts trying to resolve the issue of the appointment of an arbitrator. In this case, the Respondent (*Inaolaji Builders Ltd*.) in 2013, commenced an action against the Appellant *(Obafemi Awolowo University*) by way of Originating Summons, seeking among other reliefs an order appointing an arbitrator to settle the dispute between the parties as contained in the clause of the bill of quantities and articles of agreement executed

[719] See also art. 11(5) Model Law, which requires national courts to consider qualification of an arbitrator including independence and impartiality of arbitrator.
[720] [2021] LPELR 54548.
[721] [*2020] 4 NWLR (Pt. 1714) 347.*

by the parties. The lower court granted the reliefs sought and the appellant dissatisfied with the judgment sought inter alia, an order for the stay of execution of the judgment including the commencement of the arbitral process as it intended to appeal the judgment. The lower court granted the application of the appellant. It is interesting to note that a year and four months after the lower court granted the application for a stay of execution, the respondent approached the court for a vacation of the stay of execution and an application for the court to appoint a sole arbitrator. The appellant objected to the respondent's application; however, the court went ahead and granted the application and made an order appointing a retired Judge as the sole arbitrator. Curiously, the trial court in appointing a sole arbitrator introduced and prescribed a timeline for taking action that the ACA did not prescribe. The trial Court did this by granting the reliefs sought by the respondent with the caveat that either of the parties could approach the court for the definite appointment of an arbitrator if they do not agree on the choice of the arbitrator that was proposed and nominated by the Respondent within thirty (30) days from the date of the Court's ruling. The author argues that this timeline introduced by the court was an unnecessary element introduced to s.7 (2) ACA. The introduction of this timeline undoubtedly contributed to the delay and gave the appellant the leeway to further frustrate the appointment of an arbitrator and the commencement of the arbitral process. The court would have asked the lawyers of the parties to nominate and agree on an arbitrator instead of the timeline to which he gave or outrightly appointed an arbitrator.[722] It is not surprising that the appellant further appealed to the Court of Appeal in 2016, in 2019, the Court of Appeal upheld the appointment of the Sole Arbitrator by the trial Court and dismissed the appeal for lacking merit. The parties, in this case, wasted seven (7) years in Court just to resolve the issue of the appointment of a Sole Arbitrator in respect of an agreement that was executed in 1992.

[722] In *Ogunwale v. Syrian Arab Republic [2002] 9 NWLR (Pt 717) 127,* the court requested the lawyers to the parties to nominate possible candidates.

Another objective of the court's assistance in the appointment of the arbitral tribunal is to give recognition to the parties; arbitration agreement to have their dispute resolved by way of arbitration, in the event of an impasse as to the appointment of arbitrators or where parties fail to specify the method of a default appointment it is only appropriate for one of the parties to approach the court in this regard.

e. Challenge and Removal of Arbitrator

In respect of the removal procedure of an arbitrator, the ACA sets out the procedure for the challenge of an arbitrator on the grounds of lack of independence and partiality. The ACA in both s.9(3) and s.45(9) empowers the appointing authority to hear and determine the challenge of the arbitrator. Under section 9 ACA, it provides that in the absence of a procedure agreed to by the parties in the event of a challenge, the challenge of the appointment of an arbitrator must be brought within 15 days of becoming aware of the ground for the challenge. However, it is argued, that where the arbitration is seated in Nigeria and operates under the ACA, the party affected who waits after 15 days of becoming aware loses the right to make the challenge and waives his right to challenge the arbitrator for that ground. Parties are, therefore, better off in bringing a challenge for removal as soon as they are aware in order not to lose the right to challenge. The challenge of an arbitrator under the ACA, the arbitral tribunal is empowered to look at the issue of its jurisdiction. It is well settled in all most all jurisdictions that the arbitral tribunal is generally competent to rule on its jurisdiction under the principle of *kompetence-kompetence*[723] The ACA in following the Model Law also recognises this principle,[724] the age-long principle *kompetence -kompetence* describes the power of the arbitral tribunal to determine issues of its jurisdiction.[725] In section 12(4) ACA, the arbitral tribunal is empowered with the

[723] See G. Born (n298) p. 1048,

[724] Section 12 ACA, Model Law art 16, EAA s.30. the principle is also found in the arbitration rules, e.g., 2010 UNCITRAL Rules, Article 23 (1), 2021 ICC Rules article 6 (4). The principle is well recognised by the courts, see, *Candide-Johnson & ORS V. NPA & ORS (*2017) LPELR-45357(CA); *Albon v Naza Motor* [2007] EWHC 665 (Ch)*; Dallah v Pakistan [2010] UKSC 46.*

[725] *Prima Paint Corp v Flood & Conklin Mfg. Co*. 388 US 395 (1967); *First Options of Chicago v Kaplan 514* US 938 (1995). See Julian D. M Lew et all, Comparative International Commercial Arbitration 14-16 2003 (n).

legal right to decide its own jurisdiction and when so decided, the ruling by the tribunal on its jurisdiction is final and binding and is not subject to appeal. This is even more strengthened by the provision of ACA which limits courts' intervention in any matter governed by the Act, except where so provided in the Act.[726] The challenge here may be the finality of the decision of the tribunal.[727] As a result of the arbitral tribunal having the power to rule on its jurisdiction, neither the parties nor the tribunal would be required to apply to the court to resolve jurisdiction questions. However, this does not mean that the courts at the seat of arbitration have no power to determine jurisdiction. For instance, in some jurisdictions, the power to consider the tribunal jurisdiction would initially be dealt with by the tribunal itself after which the court may consider the jurisdiction.[728]

While one may be tempted to argue that by giving the arbitrators the jurisdiction to decide on their challenge or of one of their own, as provided under section 9(3) ACA falls abysmally short of the hallowed principle of fair hearing. However, indeed, it is argued that section 9(3) ACA is appropriate and apposite in the circumstance. This may be appreciated when one considers the incessant resorts to the courts which most times are for frivolous reasons. For instance, (though not about the removal of an arbitrator) a party filed an *ex parte* application to enforce an arbitral award during the pendency of an originating motion and an interlocutory application to set aside an award. The Court of Appeal held that for the respondent to file an *ex parte* application for the enforcement of the arbitral award after being put on notice by the

[726] ACA s.34.
[727] Section 12 (4) ACA.
[728]For example, Swiss Law recognises that the arbitral tribunal can initially decide its own jurisdiction when this is disputed by virtue of *kompentenz-kompetenz*, nevertheless, the issue of the jurisdiction of the arbitral tribunal is ultimately settled by the national court in so far it has jurisdiction to do so. See Swiss CPIL, art 186. See also *Compagnie de Navigation et Transports SA (France) v MSC- Mediterranean Shipping Co. SA (Switzerland) (1990)* XXL Ybk Comm Arbn 690-8.

appellant contesting the enforcement of the arbitral award is reckless and a wanton disregard for court processes.[729]

For domestic arbitration, the UNCITRAL Arbitration Rules 21 in Article 13 however, assures that where a party challenge is not successful, a party may within 30 days from the receipt of the notice of the decision presents the challenge to the court or other authority as specified in Article 6, to decide the challenge.[730] Where arbitration involves international parties and Nigeria is the seat of arbitration, a party would have to wait till post-arbitral award to resort to national courts to set aside the award under s.30 ACA on ground of misconduct of arbitrator.

The Model Law notably provides and enables parties to approach the courts as the last resort and fall-back procedure for the challenge of the arbitrator.[731] Article 13 (3) enables the parties challenging the decision of the arbitral tribunal to approach the Court about bias or impartiality of the tribunal. To forestall unnecessary court intervention, the Model Law in article 16, also recognises that a party to an international arbitration may approach the court to review the decision of the arbitral tribunal on jurisdiction. In which case, it is the decision of that court not that of the tribunal that is final and binding.[732] A corresponding section is found under the English Arbitration Act, section 24 applies where the seat of arbitration is England. Section 24 details circumstances under which a court may remove an arbitrator, one of which is where circumstances exist that give rise to justifiable doubts as to the impartiality of the arbitrator.[733] The absence or lack of an equivalent of the provision of section 24 EAA in the ACA, makes

[729] *CITEC International Estates Ltd v. FHA* (2019) LPELR-48066(CA).
[730] UNCITRAL Arbitration Rules 1976.
[731] See Article 13(3). In *Progressive Career Academy Pvt. Ltd v FIIT JEE Ltd* (2011) 5 RAJ 7 Delhi, at [20]: 'The UNCITRAL Model Law, in Article 13(3), explicitly enables the party challenging the decision of the Arbitral Tribunal to approach the Court on the subject of bias or impartiality of the Arbitral Tribunal.'
[732] *PT Tugu Pratama Indonesia v Magma Nusantara Ltd* [2003] SGHC 204*,* see also section 30 (1) English Arbitration Act,
[733] EAA Section 24 (1), see also *Newcastle United Football Co Ltd v Football Association Premier League Ltd and Others* [2021] EWHC 349 (Comm*)* this case applied the guidelines on the bias as given by the UK Supreme Court in the celebrated case of *Halliburton Co v Chubb Bermuda Insurance Ltd* [2021] Lloyd's Rep IR *1*.

court judicial intervention as to the removal of an arbitrator problematic in Nigeria.[734] Under the English Act, a party seeking to remove an arbitrator first exhaust any available recourse to a relevant arbitral institution or person.[735] The tribunal may continue with the arbitration while an application is pending.[736] The reason for this is to allow the parties to adopt a procedure that would be final and not give rise to unnecessary litigation.[737] A party seeking removal of an arbitrator cannot apply to the court but to the tribunal whose decision is final. Parties in Nigeria would need to wait till after the award is granted when it may apply to set aside the award on grounds set out under section 48 ACA.

Parties do not have to waste resources and time and bring the issue of removal of an arbitrator after an award has been rendered. The trend in Nigeria is for parties to wait after the award has been rendered and bring a challenge procedure under section 30 on grounds of misconduct. The setting aside an arbitral award under the grounds of misconduct as provided under 30(1) ACA is singled out as one of the most abused grounds for setting aside an arbitral award in Nigeria. An analysis of case law authorities on this ground will reveal that most often than not, there is an abusive reliance on the broad ground of misconduct of the arbitrator for setting aside an arbitral award. The reason for this trend in the opinion of this writer is that, under section 9 of the ACA, the challenged arbitrator or where there is more than one arbitrator the tribunal inclusive of the challenged arbitrator determines whether the challenges are valid and can dismiss the objection and continue with the arbitration process. The arbitral decision on the challenge is final and the court is not permitted to intervene or have a final say on the challenge. This invariably means that dissatisfied parties will have to wait till the post-award stage to bring an action to set aside an award on the ground of misconduct. This is evident in

[734] See the discussion on the defeats of ACA in the previous chapter.
[735] It is argued that a decision by any such institution not to remove an arbitrator is not finally determinative of the issue and an application may then be made to the court as seen in the case of Global Gas.
[736] EAA 1996 (Section 24(3).
[737] *Benaim (UK) Ltd v Davies Middleton & Davies Ltd* [2005] EWHC 1370 (TCC).

the plethora of cases under the sweeping generality of the expression 'misconduct' as provided under Section 30 ACA 2004.[738] Most of these cases have challenged the arbitrator on the issue of bias and independence,[739] irregularity in the conduct of the proceedings, and that the arbitrator had acted outside or over his jurisdiction.[740] It is indeed argued that most times the challenge by parties is aimed at delaying the finality of the arbitral award, thus sabotaging the very advantage of the arbitral process and award.[741] As rightly stated by a commentator,[742] these applications to set aside the arbitral award on grounds of misconduct are no more than "appeals against such awards under a different guise"[743] .

It is argued that a decision on the question a decision relating to the jurisdiction of the tribunal in respect of a challenge or removal of an arbitrator should be limited by time and be made final by the court.[744] However, an appeal on the decision of the court as regards the challenge should also be by the leave of the court in order to avoid unrestricted and unlimited appeals against an arbitral award.[745]

---

[738] *Polaris Bank v Magic Support (Nig.) Ltd* (2020) LPELR – *53106 (CA); Aeronautical Engineering & Tech. Services Ltd v Northwales Military Aviation Services Ltd* (2020) LPELR- 52267 (CA*); BUA Int'l Ltd Sketchyz Consulting Ltd* (2019) LPELR -4734 (CA); *Optimum Construction & Property Dev. Co. Ltd & Ors. v Provast Ltd.* (2018) LPELR-43689 (CA); *Global Spinning Mills Nig. Plc v Reliance Textile Industries Ltd* (2017 LPELR- 41433 (CA); *Tetrazzini Foods Ltd v. ABBACON Investment Ltd & Anor* (2015) LPELR-25007 (CA); *Adamen Publishers (Nig.) Ltd v. Abhulimen* (2015) LPELR -25777 (CA*); Mutual Life & General Insurance v Kodi Iheme [*2014] NWLR (Pt 1389) 670 (CA*); Triana Ltd v Universal Trust Bank Plc [2009] 12 NWLR (Pt 1155) 313; Arbico Nigeria Ltd v Nigeria Machine Tools Ltd. [*2002] 15 NWLR (Pt 789) 1 (CA*); A Savoia Ltd v A O Sonubi* (2000) 7 S.C. *(Pt. I) 36; Taylor Woodrow Nigeria Ltd v Suddeutsche Etna – Werk GMBH [*1991] 2 NWLR (Pt 175) 602 (CA). *Kano State Urban Dev. Board v Fanz Construction Co. Ltd. (*n671),

[739] *Global Gas & Refinery Limited v Shell Petroleum Company* [2020] supra.

[740] *TOTAL Engineering Services Team Inc. v Chevron Nigeria Ltd (*2017) 11 NWLR PART 1576 at 187*; Imoukhuede v Mekwunye (*2015) 1 CLRN 30; *NNPC v Lutin Investment Ltd (2004) Araka v. Ejeagwu (*2000) 15 N.W.L.R. (Pt. 692) 684; Arbico *Nig. Ltd v Machine Tools Ltd* (2002) 15 NWLR (Pt. 789)1. *See also Commerce Assurance Ltd v. Alli (*1992) 3 N.W.L.R. (Pt. 232)710*; Home Development Ltd v. Scancila Contracting Co. Ltd* (1994) 8 N.W.L.R. (Pt. 362) 252.

[741] *NNPC v Lutin see* (n107.)

[742] See Adewale A. Olawoyin 'Legalism v substantial justice in arbitration in Nigeria: Imoukhuede v Mekwunye in perspective' 85 Arbitration International (2019) 410.

[743] Ibid.

[744] The Model law demands that such court intervention be brought within a period of thirty days from the date of the arbitral tribunal ruling on jurisdiction and the decision be made (Article 16(3).

[745] See discussion on reform of the ACA in chapter three (3.6.2 and 3.6.3).

f. Interim Relief Measures

The provision for interim measures is important in any dispute resolution mechanism be it litigation of international commercial arbitration. In international commercial arbitration proceedings, the need for interim relief or measures may become necessary for either the arbitral tribunal or the court to issue interim relief orders. Judicial intervention in this regard is very critical as the courts coercive power becomes more effective for the order of an interim relief.

In most jurisdictions interim relief measure may be granted either by the arbitral tribunal or by the court.[746] One of the shortcomings of the ACA is the failure to expressly provide for the court to grant interim measures in arbitration.[747] This raises the question as to whether a party who seeks an interim should make an application to the arbitral tribunal or the court? In most national arbitration laws, a party may first seek an interim application from the tribunal and only then may seek to apply to the court at the seat of arbitration.[748]

Judicial support for interim relief in international commercial arbitration is important. The reason for court-ordered interim measures is to make effective the arbitral tribunal's order as the arbitral tribunal lacks the coercive powers to back up such order or compel its decision on third parties.[749] Such orders should generally be made available especially in the national courts of the seat of arbitration for the support of arbitral proceedings. For instance, in a case where a party had refused to disclose its domicile of business to avoid security posting about the cost of arbitration. The court provided support to the arbitral tribunal by giving appropriate orders

[746] Model Law, EAA, see also section17 Indian Arbitration Act 1996 (as Amended in 2016).
[747] See chapter 4, where this was discussed. The LSAL 2009, s. 21 provides for the granting of interim measures by the Lagos High Courts.
[748] See, for instance, Arbitration Act 1996 section 44 makes extensive provisions as regards the power of the court to act in support of arbitration where the tribunal is unable to act or has no power, the court may make an order to preserve assets in dispute see also *AB International (HK) Holdings plc and another v AB Clearing Corporation Ltd and others,* [2015] EWHC 2196 (Comm), 165.
[749] See *Popack v. Lipszyc,* CLOUT Case No. 385, Ontario Court of Justice, Canada, 8 June 1995.

requiring the party to comply with that fundamental requirement.[750] Also in urgent situations, where there is need to preserve the assets of the dispute, and the arbitral tribunal is yet to be established or cannot act, a party may seek an order from the court preserving the assets in dispute.

Whatever powers are given to the tribunal to grant interim reliefs under the ACA, the major problem that such orders may face is enforcement. Given the Nigerian Supreme Court decision in *NV Scheep v. MV S. Araz*,[751] it becomes imperative that the ACA is amended to expressly endow the court with the power to grant interim relief pending arbitration. In this case, the court refused to grant an interim order for security in support of an arbitration proceeding in London because the Claimant in the suit had not submitted the issues in dispute between the parties for the determination of the Court. The Court, therefore, held that the admiralty jurisdiction of the Federal High Court could not be validly invoked for the sole purpose of obtaining security for an award in respect of the ongoing arbitration in London. The Supreme Court simply ruled that the Claimant ought to have approached the arbitral tribunal for an order for interim relief since the arbitral tribunal was responsible for determining the issues in dispute between the parties. It is respectfully submitted that by this decision, the apex court failed to appreciate that the whole essence of giving the court power to make such orders is to assist the arbitral tribunal in cases of urgency and more so to support the efficiency of the arbitral process. If the tribunal could make such an order, enforcing such order is another matter, it is, for this reason, an application for protection that the support of the court is needed. The decision of the apex court would likely not have come to that conclusion, had it been the ACA had expressly empowered courts with the power to grant an interim measure in support of arbitration proceedings. It is the argument of this thesis that even in the absence of an express provision in the ACA. The

[750] See *China Ocean Shipping Co. v Whistler International Ltd.* [1999] HKCFI 693.
[751] (2000) 15 NWLR (Pt. 691) 622.

courts where appropriate and justifiable to do so can use its inherent jurisdiction to grant an interim measure. This will demonstrate courts' supportive role in ensuring the efficacy and smooth running of arbitration process. In another case, the Supreme Court held that the court would only grant an injunctive relief during the pendency of arbitration only if there are "compelling and justifiable" reasons to so act.[752] In the case where the court appeared to agree that it had the power to grant interim relief pending arbitration, it relied on the Arbitration Rules of the ACA and under the Federal High Court Rules. This goes to buttress the need for explicit and express provisions in the Arbitration Legislation to empower the courts with the power to grant interim reliefs during or before the arbitration takes off. Arbitration Rules in recognition of instances for urgent interim reliefs to protect the property/assets which is the subject matter of the dispute from being dissipated provides that a party requiring urgent reliefs can apply for the appointment of an emergency arbitrator.[753]

4.6.2 Judicial Supervision of Arbitration

a. Setting Aside of Award

One of the established roles of the court at the seat of arbitration is the supervisory jurisdiction to hear and determine any challenges over the validity of an arbitral award. The grounds for setting aside an international commercial award in Nigeria are found in section 48 ACA.[754] Though there are two schools of thought on the provisions of the ACA that deals with setting aside an arbitral award. On one hand is the school of thought that Part 1 of the ACA specifically deals with domestic arbitration and therefore only sections 29 and 30 deal with setting aside domestic awards. On the other hand, is the school of thought that Part III is stated as an additional provision relating to international commercial arbitration. The writer agrees with

[752] *MV Lupex v. N.O.C.S* Ltd (2003) 6 S.C. (Pt. II) 62 at 73; see also *Maritime Academy of Nigeria v. A.Q.S* (2008) All FWLR (Pt. 406) 1872 at 1895 Para B-C.
[753] LCIA Rules 2020, Art. 9B; Stockholm Chamber of Commerce Arbitration Rules (SCC Rules), Art. 32(4) and Appendix II, Art. 3; ICC Rules, Art. 29(1) and Appendix V, Art. 1(2).
[754] For domestic arbitration, an arbitral ward may be set aside under sections 29 and 30 ACA.

Idornigie[755] that although Part III of the ACA deals with international arbitration, it is right to state that it is an additional provision relating to international arbitration. Furthermore, section 43 clearly provides that, '*The provision of this Part of this Act shall apply solely to cases relating to international commercial arbitration and conciliation* ***in addition to the other provisions of this Act*** (emphasis are mine).

From a critical standpoint, where parties succeed in having an arbitral award set aside on ominous grounds such as misconduct of the arbitrator, the whole process of the arbitration, its finality, and value is compromised. While the courts exercise their judicial supervision over arbitration, it is expected that the court will protect the interest of parties and at the same time maintain the fairness of arbitration and the judicial system. However as will be demonstrated below, parties may with relative ease seek to set aside arbitral awards before the courts in Nigeria. For the arbitration process to be effective, and for Nigeria to become attractive as the seat of arbitration, the courts are expected to set high threshold in setting aside arbitral awards. It is further argued that this will improve the standing of both the arbitral system and the judicial system in Nigeria. To this end, a critical analysis of the judicial approach on all the provisions (sections 29, 30 (1), and 48 ACA) that deal with setting aside an arbitral award is examined below. The ACA provisions on the setting aside of domestic awards as well as the judicial decisions dealing with the setting aside of domestic arbitral awards are analysed for the main purpose of illustrating the dispositions of the Nigerian courts towards arbitration in general.

Grounds of Setting Aside under the ACA

The ACA establishes that an application for the setting aside of an award to the High Courts[756] and the grounds that which the courts may set aside an award in Nigeria. The ACA makes provision for instances that the courts may set aside an arbitral award under sections 29, 30 and

[755] Paul Obo Idornigie, 'The Relationship between Arbitral and Court Proceedings in Nigeria', (2002) Journal of International Arbitration 19(5) 443–459.C
[756] Se ACA Sections 29, 30 and 57.

48. Sections 29 and 30 of the ACA provides grounds that the courts may set aside an award. One, where arbitrators have exceeded their jurisdiction, second, there is misconduct by the arbitrators, third, the award was improperly procured or obtained by fraud, and or where there is an error on the face of the award. In Part III of the ACA which deals with additional sections dealing with international commercial arbitration, section 48 specifically provides for grounds for setting aside a foreign arbitral award. The grounds set out under Section 48 of the ACA 2004 is an adaptation of Article 34 of the Model Law which in turn replicates Article V of the New York Convention 1958. The grounds represent limited circumstances under which a court is allowed to intervene in an arbitral award. One of the significant differences between the Arbitration Act 1996 and the ACA 2004 and the Model Law is that the Arbitration Act 1996 provides for procedural irregularity where the arbitrator or arbitral tribunal failed to deal with all the issues brought before it as a ground for setting aside an award. The ACA 2004 and the Model Law have no equivalent provisions of a non-mandatory right of appeal on a point of law as a ground to set aside an arbitral award as provided in Section 69 Arbitration Act 1996. The grounds set under Section 48 by which a court can set aside an arbitral award, are grounds similar to grounds awarded in Model Law[757] and the New York Convention.[758]

1. Excess Exercise of Jurisdiction

The excess exercise of jurisdiction or failure to address all matters referred to the tribunal could be a ground for a party to apply to the court for setting aside arbitral award.[759] Section 29 (2) provides that an award will be set aside if the party making the application furnishes proof that the award contains decisions that are beyond the scope of the submission to arbitration. It also provides that ACA permits the court to set aside an award where it has been proved that the arbitrator had exceeded his authority or there is an irregularity in the conduct of arbitration

[757] See Model Art. 34.
[758] See New York Convention Art. V.
[759] See ACA s29 (2) and s.48(a) (v) and Model Law art.34 (2) (iii).

proceedings or that the award contains matters beyond the scope of submission.[760] The section further provides that "so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside."[761] This latter part of s29 (2) raises the concern as to how the court can neatly excise the part of the award on matters submitted to the tribunal from the offending part which was not submitted. Generally, failure by the arbitral tribunal to address all issues submitted by the arbitral tribunal is treated as a jurisdictional ground upon which the arbitral award could be challenged and set aside.[762] It is argued that in removing or excising the offending part of the award, would the court treat such excess authority or offending part as a jurisdictional issue and set it aside as provided for under s.29(3)? Or would the court remit the award published to the arbitral tribunal for a rightful decision to be given by the arbitrator?[763] Or would the court treat such as misconduct on the part of the arbitral tribunal? These questions are pertinent considering the Nigerian case law authorities on setting aside arbitral awards on jurisdictional grounds. Firstly, on whether the court would remit the offending part of the award published, the ACA does not expressly provide for the remission save for providing in s29 (3) that……" the court before which an application is brought under subsection (1) of this section may, at the request of a party where appropriate, suspend proceedings for such period as it may determine to allow the arbitral tribunal to resume the arbitral proceedings or take such other action to eliminate the grounds for setting aside of the award".[764]

Misconduct of Arbitrator

[760] Irregularity is also aground for setting aside an arbitral award under art.34(iii), see also s.68 EAA on serious irregularity, *Lesotho Highlands Development Authority v Impregilo SpA [*2005] UKHL 43; Maass v Musion Events Ltd [2015] EWHC 1346 (Comm),
[761] This part of 29(2) ACA is similar to s.48 (a) (v) ACA.
[762] See ACA sections, 29(2) and 48 (a) (v) and Model Law art. 34 (2)(iii)
[763] See ACA s.29(3).
[764] See art.34(4) Model Law which provides that rather than setting aside an award, the court may remit it back to the tribunal to eliminate the reasons for which the award can be set aside.

One of the key issues with setting aside an arbitral award in Nigeria is the reliance on the ground of misconduct, which lacks a statutory definition. The ACA did not define misconduct of arbitrators or the situations that would amount to the misconduct of the arbitrator. This lacuna in the law made the Nigerian courts in a plethora of cases[765] resort to the common law definition of misconduct which as noted by the Supreme Court is of wide import.[766] In *Taylor Woodrow (Nig). Ltd v GMBH*, the Supreme Court resorted to common law definition of misconduct by relying on Halsbury's Law of England.[767] In this case, which has become the leading case on misconduct of arbitrator, during arbitration proceedings, an applicant sought to amend its pleading to incorporate a clause that was outside the scope of the dispute which the arbitral tribunal refused. The Apex Court itself noted the difficulty in giving an exhaustive list of what may amount to the misconduct of an arbitrator. The lack of statutory provision has permitted the phrase 'misconduct of the arbitrator' into an open-ended concept that can accommodate all kinds of unfounded complaints against an arbitral award. The case of *Triana Ltd v UTB*[768] illustrates the abusive reliance of the ground of misconduct to set aside an award. In that case, in a tripartite agreement, *Triana Ltd*, *UTB*, and another third party (Globus Ent. Ltd) agreed to warehouse some goods belonging to Globus and to release them upon the instructions of *UTB*. During a stock-taking exercise, it was discovered that some of the goods had gone missing. Consequently, *UTB* who financed the purchase of the goods commenced arbitration against *Triana* for the value of the missing goods. The three-member arbitral tribunal made an award against *Triana* who then applied to set aside the award on grounds of misconduct, among others. According to *Triana, o*ne of the arbitrators had failed to disclose

[765] *Taylor Woodrow (Nig) Ltd. Suddentsche Etna- Werk GMBH* (1993) 4 NWLR 127*; Araka v Ejeakwu* (2000) 15 N.W.L.R. (Pt. 692) 684*; KSUDB v. Fanz Construction Ltd* (1990) 4 N.W.L.R. (Pt.142)1; *Shell Trustees Nig. Ltd v. Imani & Sons (Nig.) Ltd* (2000) 6 N.W.L.R. (Pt. 662) 639 *and A Savoia Ltd v. Sonubi* (2000) 7 S.C. (Pt. I) 36.; *Lagos State Development and Property Corporation v Adold & Stamm International (Nigeria) Limited,* 7 NWLR (Pt.358) 545.

[766] *Per Ayoola (JSC) in Araka v Ejeagwu (2000)* ibid.

[767] 4th edn Vol.2 pp 330-331 para.622.

[768] [2009] 12 NWLR (Pt 1155 335 (CA); see also *Arbico Nigeria Limited v Nigeria Machine Tools Limited* [2002]15 NWLR (Pt. 798) 1 (CA).

that he had acted against Globus in a different matter. The arbitrator in question was appointed by *Triana.* The court held that *Triana* had not established misconduct against the arbitrator in question, that the matter in respect of which the arbitrator acted against Globus was unrelated to the dispute that was submitted to the tribunal. The court also found as a fact that one of the lawyers to *Triana* at the arbitral proceedings knew the arbitrator in question had acted against Globus in a different and unrelated matter before nominating him as an arbitrator in the matter.

Error in the Face of an Award

It is also interesting to note that even though there is no express provision in the ACA to set aside an award on the ground of error in the face of an award, however by case law authority the courts in Nigeria would set aside an award on such ground. This is made possible by the open-ended and nebulous ground of misconduct under s.30 ACA. In *KSUDB v Fanz*[769] the apex court affirmed that an arbitral award can be set aside for an error of law on the face of the award, where for instance, there can be found in the award or in a document which incorporates some legal proposition which is the basis of the award, and which is erroneous.[770]

It is argued that where parties apply for setting aside on the ground of misconduct against arbitrators, the court must exercise and observe extreme caution. While the reform of ACA has yet to come to fruition, there is a need for the Apex Court to delineate the contours of misconduct as the decision of *Taylor Woodrow* has given a wide margin to what may amount to the misconduct of an arbitrator. It is noted that *Taylor Woodrow* as the locus classicus the position remains, even though the Apex Court followed the case of *Hodgkinson v Fernie*[771] which is no longer the law in England owing to the review of the legislation.[772] stated that "an

[769] [1990] (n765).
[770] See also the *Taylor Woodrow* case where the grounds of misconduct also included errors of law and mistakes of facts as grounds to set aside an award.
[771] 3 CB (NS) 189, 202, 140; ER 712 717.
[772] The English Arbitration Act uses the expression serious irregularity affecting the tribunal proceedings or the award in s. 68(2) and defines and gives a comprehensive list of circumstances whereby a serious irregularity may be said to arise.

application to remove an arbitrator is to be treated with great caution, to hold otherwise would open a wide door for all sorts of attempts to get rid of arbitrators deliberately chosen by parties to contracts".

Nigeria Judicial Approach Towards Setting Aside Arbitral Award

The purpose of judicial intervention in an application for setting aside an award is to ensure that the arbitration process and proceedings follow the basic rules of due process and before an independent and impartial tribunal and that the tribunal does not exceed its jurisdictions. Setting aside of an arbitral award remains significant in the arbitral process as it gives unsuccessful parties the avenue to challenge an arbitral award in instances where an award has been wrongly granted. It is for these reasons that the courts are expected to set a high threshold in setting aside an award so that recalcitrant parties do not use the courts to undermine the arbitral process. It is pertinent to observe that the grounds for setting aside an award in Nigeria seem to be made wide with Nigerian courts' guidance on what amounts to the misconduct of an arbitrator. The grounds for setting aside an award should be premised on restrictive grounds, parties should not be allowed to re-litigate or appeal an award under the disguise of setting aside an award either on any of the grounds under sections 29, 30, and 48 ACA. In jurisdictions that are acclaimed to be arbitration-friendly, the grounds for setting aside an award are premised on very limited grounds.[773] The limited grounds specified by the domestic arbitration of these pro-arbitration jurisdictions coupled with the high bar set by the courts makes it very rare for an award to be set aside or challenged successfully.[774] The ACA makes

[773] See, US Federal Law does not allow an appeal of an arbitral award and grounds for setting aside an award are limited as laid down under Federal Arbitration Act (FAA) Chapter 1 s. 10, in France domestic arbitration, parties cannot appeal against an arbitral award except they have agreed otherwise, and under international arbitration, no appeal is allowed, and setting aside of an award is initiated in the Court of Appeal 9see article 1491, French Code of Civil procedure (CCP).

[774] According to the Report of IBA 'Annulment of Arbitral Awards by State courts: Review of national law with respect to the conduct of the arbitral process, 2018" courts of 'notoriously arbitration-friendly jurisdictions of United Kingdom (comprising of England and Wales), France, USA, Switzerland, and Singapore are largely

provision for high evidential burden for applicants seeking to apply for setting aside an award, however, it is the argument of the writer that any benefits that are derived from this high evidential burden on the applicants are eroded by the broad interpretation of some of the grounds of setting aside an award. This is exemplified mostly on the ground of misconduct of an award which has made it relatively easy for parties to set aside an award in Nigeria, an example is *Charles Mekwunye v. Christian Imoukhuede*[775] where the Court of Appeal set aside an award based on technicality rather than on the merits of the application. Some of the technical grounds upon which the court of appeal set aside the award in this case included a drafting error, the appointing institution was not properly described, the appointing institution also failed to categorically state that it was making an appointment but rather recommended" a sole arbitrator. Thankfully the Supreme court reversed the respondent had waived his rights to challenge the arbitral award having taken part in the proceedings without any objections.[776] In complying with the limited grounds for setting aside an arbitral award, most pro-arbitration jurisdictions, are "broadly content to restrict the challenge of arbitral awards to excess of jurisdiction and lack of due process"[777] thus setting aside of an arbitral award are rarely successful. The strict and highly restrictive judicial approach to setting aside of award of some jurisdictions such as England and France, for instance in England, available statistics relating to challenges to arbitral award under s68 and even on appeals on points of law shows that the bar are very high and rarely would such application be successful as the threshold for any challenge is set very high both by law and the courts.[778] In France, it is reported that though

supportive of arbitration abs are reluctant to set aside an arbitral award on procedural grounds. Available at www.ibanet.org/MediaHandler Accessed 8 January 2022.

[775] [2010] 13 NWLR (Pt.1690) 439

[776] [2019] LPELR-48996 (SC)

[777] Ibid

[778] See the cases of *Alegrow SA v Yayla Argo Gida San ve Nak A.s* [2020] EWHC 1845; *ASA v TL* [2022] EWHC 2270 (Comm).

higher compared to England the proportion of successful challenges is still low.[779] The below shows statistics of the English Commercial Courts for arbitration applications under s68 AA.

Court Year	Section 68 (serious irregularity)
2017 -2018	71
2018 -2019	19
2019-2020	16

England and Wales Commercial Court Users Group: Meeting Report November 2020.[780]

- Between 2017 and 2018 no success was recorded according to the Report, this indicates extremely low rate of success, hence the decline in the number of applications between 2018 to 2020.
- In 2019/20, of the 16 challenges made under Section 68, only one was successful.

The statistics, as reported, demonstrate that most cases failed and most importantly a continuous decline of the number of cases filed by parties as parties are aware that the hurdle for the success of the applications is quite high. In comparison, in Nigeria, there are no viable court records or statistics relating to challenges under s. 29 and 30 ACA in Nigeria, it has been canvassed by Sodipo[781] that the only successful setting aside application by the Supreme Court in Nigeria was the *KSUDB v Fanz*. It is the argument of this writer there are successful cases both at the High Court and Court of Appeal. However, the time frame of hearing of matters at the lower court and the transition of cases from the lower court to the appellate courts may not give an accurate record of the successes or otherwise of these cases. To canvass that these cases may be reversed by the Supreme Court is just mere academic speculation. More so, any success derived are eroded by the slow pace of the administration of justice before the Nigerian courts which has

[779] Between 2016 and 2018 only one in four claims was successful, see G. Meijer in Goldman (ed.), Annulment and Enforcement of Arbitral Awards from a Comparative Law perspective, (2018 Wolters Kluwer) p. 118.
[780] Seen at https://www.judiciary.uk/wp-content uploads/2020. Accessed 27 March 2022.
[781] Bankole Sodipo, 'Dealing with Arbitrator Challenge, Non- Disclosure and Allegations of Bias: A Review of the Lagos State Ruling Setting Aside the *ICC Global Gas v Shell Award'* (2020) 86 (4) Int'l J of Arb, Med and Disp. Mgmt.

relatively affected the timely arbitration process. This is well illustrated in a plethora of cases[782] where it took an average of ten years for the appeal to be heard and the successful reversal of the lower court decisions of setting aside an award.

Until the courts in Nigeria in the supervision of arbitration matters deter parties from upsetting and frustrating the process of arbitration, it will be business as usual for parties to take arbitration as the first step to litigation. This trend is damaging and points to the need to reform the ACA to limit the extent to which parties can use legal proceedings in general to delay and frustrate arbitration. For instance, some jurisdiction requires the leave of the court for an appeal of the lower court's decision in most cases.[783] And in instances where the leave to appeal is refused by the lower court, the Court of Appeal cannot itself grant leave to appeal.[784] The policy of restricting appeals in arbitration matters before the court for support reflects the underlying principles of protecting parties from unnecessary delays and expenses as maybe provided under the arbitration legislation.[785]

4.6. Perceived and Practical Shortcomings of Judicial Intervention in Nigeria

It is in the supervisory capacity of the courts that the differences between jurisdictions as an attractive arbitral seat are accentuated. For instance, regarding respect to the enforcement of arbitration agreements, application for judicial appointment of the arbitrator, and the setting aside of the arbitral award. How can Nigeria conceivably be the seat of most international arbitrations? Instances where judicial intervention has been used to undermine the arbitral process has been demonstrated in cases such as setting aside of an award on grounds of misconduct. It is argued that even though there is a marked improvement in appreciation of

[782] *Charles Mekwunye v. Christian Imoukhuede [*2019] (n775*) took twelve years for the Supreme court to reverse the setting aside by the Court of Appeal; Baker Marine (Nig) Ltd v Chevron (Nig) Ltd 10years; Araka v Ejeakgwu; Home Development Ltd v Scancilia Co Ltd; Commercial v Ali [*1992] 3 NWLR (Pt.232*).*
[783] For example, under section 18(5) EAA which deals with failure of arbitrator appointment process.
[784] *Merthyr (South Wales) Ltd v Cwmbargoed Estates Ltd and another [*2019] EWHC 704 (Ch); *Henry Boot Ltd v Malmaison Hotel Ltd* [2001] QB 388.
[785] See Lagos State Arbitration Law 2009, section 18 EAA section

the sanctity of arbitration agreements and arbitral awards. Nevertheless, there is still much to be desired.[786] This has resulted in the loss of confidence in the effectiveness of the judicial systems in Nigeria. No doubt one of the major problems impeding Nigeria to become conceivably an attractive seat for international commercial arbitration is the lack of court support for the arbitration process.

4.6.1. Delay in Legal Proceedings in Nigeria

Much as it can be argued that court support for arbitration is useful and maybe indispensable, it may also work to the disadvantage of the arbitral process, especially in a jurisdiction where the judicial system is plagued by the inordinate delay in the disposition of cases. Also, while delay in the arbitration matters before the courts in Nigeria is not peculiar to arbitration matters and it is usually at the instance of delay tactics of the parties, indeed it is argued that the courts as demonstrated in some cases cannot be absolved from the delay in the administration of justice in Nigeria. Generally, even in jurisdictions that are regarded as advanced, court proceedings are usually associated with delay and in Nigeria, such delays take a different dimension. While the inordinate delay in the administration of justice is worst in criminal cases in Nigeria, civil proceedings are also characterized by severe delays. Instances of cases that have suffered protracted delays are too many to be mentioned, there is a plethora of cases that took between 22 years[787] and 29 years[788] to be finally disposed of by the courts. The famous case of *IPCO v NNPC*[789] has portrayed the administration of justice system in Nigeria in a negative manner, so much that the English Court, on being informed that an application dated 22 November 2004 to strike out NNPC's application to set aside the award as of 2014 had not

[786] Owing to the notoriety of the timeline within which to starts and conclude both civil and criminal cases in Nigeria, there is currently before the House of Representatives a legislation 'Bill for An Act to alter the Constitution of the Federal republic of Nigeria Cap C23' to set time within which cases are to be heard and determined in Nigeria. This Bill seeks to eliminate the unnecessary delay in the justice administration.
[787] *Shell Petroleum Development Co v Uzo & 3 Ors* [1994] 9 NWLR Pt.366)51.
[788] *Elf Nigeria Limited v Operesilo & Anor* [1996] NWLR (Pt. 350) 258.
[789] [2005] EWHC 726; *[2015] EWCA Civ 1144*; [2017] UKSC 16.

been heard, stated that "what has occurred in the Nigerian proceedings can I think properly and controversially be described as catastrophic."[790]

Hence, the interface between arbitration and the Nigerian courts, arbitration seemingly is unable to convey its promises of being a fast and quick alternative to litigation. The link between national courts and arbitration, therefore, may present a challenge for the advantages of arbitration especially in jurisdictions that court proceedings are notorious for the long delay.[791] One such issue is that of delay that is experienced in the process of judicial support of the arbitral applications and claims. The Model Law's permissiveness of court intervention in arbitration did not envisage court-related or induced delays especially in jurisdictions where such delays are endemic when courts are invited into arbitration matters. Nigeria, as the first country in sub-Saharan Africa to adopt the Model Law, is quite illustrative of such jurisdiction where the support of arbitration in the courts has suffered unnecessary protracted delays which is inconsistent and incompatible with the speedy notion of arbitration.

4.*6.2.* Causes of Delay of Legal Proceedings

The judicial system that allows for automatic right of appeal through the constitution is one of the causes of delay in the administration of justice system in Nigeria. In Nigeria, the Constitution provides that every person is entitled in the determination of his civil rights and obligation a fair hearing within a reasonable time.[792] Section 294 (1) of the Constitution also provides that judgment must be delivered within 90 days after the conclusion of the evidence and final addresses by counsel. These constitutional provisions as it relates to the quick and

[790]Per Field J stated at [2014] 1 Lloyd's Rep. 625 at 630

[791] A World Bank study estimates that a straightforward commercial dispute is typically resolved in around five months in Singapore, 33 months in Egypt, 43 months in Colombia and Liberia, and over 48 months in Bangladesh see World Bank. (2014). Doing Business 2015: Going Beyond Efficiency. Washington D.C. World Bank Retrieved from: http://bit.ly/1tgNlae last accessed 8 May 2022.

[792] See Constitution of the Federal Republic of Nigeria 1999, s.36 (1); See also, section international principles like the Bangalore Principles of Judicial Conduct, 2000, which also directs those cases be heard in a timely fashion using efficient case management and record keeping techniques.

efficient disposition of cases seems a mirage as the reality is that in Nigeria judicial supervision, in general, is plagued by the rampant obstacles of delays. The judicial interpretation ascribed to the concept of 'reasonable time' in respect to the timeframe as provided by the constitution is of a lower standard. Indeed, it is argued that the concept of reasonable time within which a matter is determined and disposed of as provided should have longed evolved from reasonable time to optimum time for dispensation of cases which will ensure that cases do not suffer undue delay. The courts in a plethora of cases have held that it is impossible to lay down a fixed rule as to what will amount to a reasonable time in the determination of cases[793]. In *Wema Bank PLC v Arison Trading & Engineering Company*[794], the court stated that reasonable time in its nebulous content cannot be determined in a vacuum but about the facts of each case because what constitutes a reasonable time in each case may not constitute reasonable time in another case.[795]

The extent of judicial delay in Nigeria and the perceived lack of commercial and modern sophistication of the courts have earned Nigeria's image international commercial arbitration community.[796] "An investor prefers to know a court's decision, within a reasonable time frame or that his venture is wrong or illegal as soon as he embarks on it, rather than to wait in anxiety for months or years before he knows that he is right. As rightly stated, delay frustrates initiative and ruins business.[797]

[793] *Danladi v Dangiri & Ors* [2014] LPELR-24020 (SC); *Femi Soetan & Ors v Steliz Ltd. & Anor* [2011] LPELR-9051 (CA); *UBA PLC v Onuoha & Ors* [2013] 12 NWLR (Pt.13).
[794] [2015] LPELR-40030 (CA).
[795] The World Bank Doing Business Report rates Nigeria low in the quality of judicial process index which assesses the practice of courts by tracking time and cost involved from the time of filling to the final disposition of the case and actual payment in enforcing contracts. See www.doingbussiness.org/en/data/exploretopics/enforcing-contracts/nigeria. Accessed 3 March 2022.
[796]The case of *IPCO v NNPC* is an excellent case study of the excessive delay in judicial intervention in Nigeria, judicial proceedings for challenge proceedings lasted for more than thirteen years.
[797]M.B. Belgore, "Judicial Response to the Regulation of Foreign Investment in Nigeria" in B. Sodipo (ed.), The Echo of a Judge: Selected Lectures of Mohamud Babatunde Belgore CJ (Ibadan: Evans Publishers, 2006), p.202.

The issue of protracted delay of cases has been of great concern not only to litigants also the judiciary itself has been alarmed by the backlogs of cases that have impacted on congestion of cases in courts. For instance, Lagos is incontrovertibly the commercial nerve centre in Nigeria as well as within the West African sub-region. Lagos also boasts as the capital of commerce and industry accounting for over 60% of industrial and commercial activities in the country.[798] Over the years, delay in the disposal of such cases by the Lagos High Court, which is majorly attributed to the high volume of cases in the court's dockets, has been a serious source of concern.[799] In 2018, the then Chief Justice (CJ) of Lagos State stated that there were over 3,000 backlogs of cases in different courts across the State.[800] Then Lagos State CJ further stated that the ridiculous backlog of cases has resulted in the courts being in a state of emergency as there are hundreds of cases in the court dockets aged between 5 years and the oldest being 70 years old.[801] This led the Lagos State Judiciary in 2019 to introduce a program, the Expeditious Disposal of Civil Cases Practice Direction No 1 of 2019 (Backlog Elimination Programme).[802] This program was introduced to ensure the timely disposal of backlog cases in the Lagos State Judicial system. The reality is that three years after the lamentations of the Lagos State CJ, the Lagos judiciary and other states' judiciary in Nigeria are still reeling under the burden of congested dockets.

[798]I. Nwangwu and T. Oni, "Lagos and the Potential for Economic Growth" (2 July 2015) available at, https://ng.boell.org Accessed 3 March 2022. See also, A. Babalola, "Lagos—Recognition as Commercial Capital City of Nigeria" (7 July 2016) available at: http://www.abuad.edu.ng/lagos-recognition-as commercial-capital-city-of-nigeria Accessed 24 March 2022

[799] The backlog of cases and congestion necessitated the launch of the Lagos Backlog Elimination Programme (BPE) which was designed to decongest the court and the use of ADR mechanisms to resolve some of these cases where possible.

[800]Lagos CJ decries Backlog of Cases – Lagos State Government seen at https://lagosstate.gov.ng/blog/2018/05/17/laos-cj-decries-backlog-of-court-cases accessed 14 October 2021.

[801] Ibid.

[802] In addition, the Expeditious Disposal of Civil Cases Practice Direction No 2 of 2019 (Pre-Action Protocol) was introduced, with the primary aim to ensure that an attempt is made at amicable resolution of the dispute before the institution of an action. The current position in the High Court of Lagos State is that non-compliance with the Pre-Action Protocol renders the action incompetent and liable to be struck out.

In the administration of the civil process, it could arguably be said to be three players, the litigants the lawyers, and the judicial system comprising the judges and the other judicial administrative structures. With regards to the endemic delay associated with the judicial process in Nigeria, many factors are responsible for the delay which could be summed up as procedural, institutional, cultural, and systemic. The lack of infrastructure, convenient and comfortable courtrooms, lack of adequate funding and poor working conditions[803], lack of continuous training of judicial personnel, and corruption are some of the causes of delay.[804]

The quality of judicial infrastructure is one of the main causes of delays in judicial proceedings before the Nigerian courts. It is interesting that in the age of modern technology, most of the courts in Nigeria lack computers and other IT equipment that could facilitate efficient and expedient court processes and cases. Judges in Nigeria still shuttle between listening to counsel and taking notes using long hands. The courts in Nigeria remain the same old institution mannered by old and archaic means of recording court proceedings such as stenographers and the use of typewriters. This is one of the reasons that cases suffer multiple adjournments in Nigerian courts, as judges get tired during court proceedings, the report has it that most adjournments are caused by the inability and or absence of judges to sit.[805] The endemic delay associated with the courts in Nigeria has further been exacerbated by the COVID-19 Global Pandemic which has resulted in the delay of about 155,757 court cases between the legal year 2019/2020.[806]

[803]There have been agitations for financial autonomy of the judiciary from the grips have the executive, this agitation has been the cause of periodic industrial strike actions of judicial workers in Nigeria.
[804] Another major factor of delay and backlog of cases before the courts in Nigeria is that Nigerian society is culturally litigious in nature as seen in the empirical study carried out in 2012 to indicate the use of alternative use alternative dispute resolution in Lagos State. See Emilia Onyema, The Multi-door Court House (MDC) Scheme in Nigeria, A case Study of the Lagos MDC' (20130 Apogee Journal of Business Property & Constitutional Law, 2(70 96-130, seen at http://eprints.soas.ac.uk Accessed 25 May 2021.
[805] Niki Tobi. In C. C Nweze Justice in the Judicial Process: Essays in honour of Hon. Justice Eugene Ubaezonu. Enugu, (2003 Fourth Dimension) 21.
[806] See Daily Trust 20 April 2020 seen at https://allafrica.com/stories/ last assed 11 April 2021.

Another cause for delay is that the judicial system seemingly allows frivolous applications, and the dilatory effect of such applications is unwarranted adjournments at the request of parties. This situation has caused a backlog and inordinate delays in arbitration matters. There are several cases[807] for instance, where enforcement proceedings overseas court had to be discretionally adjourned because the application to set aside proceedings is still pending before the Nigerian Courts.[808] The advantages associated with arbitration as rightly observed by a writer are proving illusionary due to the unwarranted delays of matters occasioned by parties' frequent recourse to the courts.[809] In the plethora of cases,[810] unwarranted or abusive applications and appeals to set aside lawful awards are made. Appeals against decisions remain pending owing to judicial delays. In *AIC v FAAN*[811], after an award was issued on 1st June 2010, both parties commenced lengthy proceedings before the courts and cross-appeals. At the enforcement proceedings before the English court, both parties went through the hierarchy of courts, federal high court, Court of Appeal, and up to the Supreme Court. There is then a dispute between the parties as to when the various appeals are likely to be heard by the Nigerian Supreme Court. *AIC*'s evidence is that the appeals will not be heard before 2023 or even 2024. *FAAN's* evidence is that the appeals will be listed for hearing in 2020. There have been delays in the preparation of the Record of Appeal required to be compiled and transmitted to the Nigerian Supreme Court before the appeals can be heard. In the event, *FAAN* did not file its Appellant Brief until 6 May 2019. That is nearly 4 years after issuing its Notice

[807] See *AIC Ltd v Federal Airports Authority of Nigeria,* [2019] EWHC 2212 (TCC); *IPCO v NNPC* [2017] UKSC 16; *NNPC v Clifco Nigeria Limited,* (2011) 10 NWLR (Pt. 1255) 209; *The Vessel MV Naval Gent & Ors. (Naval Gent & Ors.) v Associated Commodity International Limited* (2015) LPELR-25973(CA) The case of *A. Savoia v Sonubi* [2000] 12 NWLR (PT. 682) 539 is an excellent example of a case that has suffered a delay of more than 19 years before the courts in Nigeria

[808]*Specialised Vessel Services Ltd v Mop Marine Nigeria Ltd [*2021] EWHC 333 (Comm); see also *Specialised Vessel Services Ltd v Mop Marine Nigeria Ltd [*2021] EWHC 333 (Comm)*; IPCO (Ng.) v NNPC.* [2005] EWHC 726

[809]Ola. O Olatawura, (n299) 65

[810] *Metroline (Nig.) Ltd. v Dikko [*2021] 2 NWLR (Pt. 1761) 422*; Optimum Construction & Property Development Co. Ltd. & Ors v. Provast Ltd* (2018) LPELR-43689 (CA); *Felak Concept Ltd. v. A-G, Akwa Ibom State* [2019] 8 NWLR (Pt. 1675) 433

[811] [2020] EWCA CIV 1585.

of Appeal. In turn, *AIC* has yet to file its Appellant Brief as well as its Respondent's Brief in response to *FAAN's* appeal. The English court noted that there has already been a considerable delay between the issue of the Award in June 2010 and the resolution of the proceedings as to the validity and enforceability of the Award before the Nigerian Courts, not to mention the earlier delay between the appointment of the Arbitrator by the Chief Judge of Lagos State on 22 February 2002 and the date of the Award i.e., 1 June 2010.[812]

In as much as the attitude of the courts in assisting arbitral proceedings and ensuring the enforcement of the arbitral award, has been positive to some extent, nevertheless, there are one time too many instances that judicial intervention in Nigeria has resulted in many arbitration matters being locked down in the court's docket.

The consequences of delay and backlog of cases will and are affecting as well as stalling the growth of the arbitration industry in Nigeria, the predictable delays of cases make it unreasonable to choose 'Nigerian law' and this will ultimately affect the intended smooth development of Nigeria as a credible and viable regional, national, and international arbitration seat.

a. Abuse of Appellate Court System

At the apex of the judicial structure is the Supreme Court which exists at the federal level and is the ultimate authority and final court of appeal. The Apex court has not only appellate jurisdiction but also original jurisdiction on matters between the States and Federal Government.[813] Followed in the hierarchy is the Court of Appeal in Nigeria, divided into divisions in all the States of Nigeria.[814] The jurisdiction of the Court of Appeal in both

[812] See [2022] UKSC 16, the UK Supreme Court judgment
[813] The jurisdiction of the Supreme Court is mainly appellate, however for certain disputes enumerated in the Constitution, the Supreme Courts has limited original jurisdiction see section 232(1) Constitution FRN.
[814] Section 237 of the Constitution of FRN establishes the Courts of Appeals with divisions in every State Capitals of Nigeria.

original[815] and appeals from the High Courts[816] to the Court of Appeal then to the Supreme Court. The Supreme Court and the Courts of Appeal are federal courts[817] however, they are both appellate courts for the Federal High Courts and State High Courts. In arbitration matters before the courts in Nigeria, this hierarchy is followed for appeals. The slow pace of the delivery of justice as well as congestion of cases before the appellate courts in Nigeria has been of great concern. Though there is no solid database to back up the time frame within which an appeal process before the appellate court takes in Nigeria, however going by a plethora of cases it has been observed that the average lifespan of cases in Nigerian courts could be as high as 15 years with the appeal processes taking over 60% of the time.[818] For instance, a case period of eighteen (18) years in the case of *Union Bank Nigeria Plc v. Ayodare and Sons (Nig.) Limited*[819] where a case was instituted at the State High Court in 1989 but was not finally disposed of by the Supreme Court in 2007. Both the Appeal Courts and Supreme Court are daunted by unnecessary frivolous appeals made by lawyers to frustrate and delay the dispensation of cases. The Constitution recognizes and grants parties the right of appeal,[820] however, this constitutionally right of appeal has been used to frustrate cases before the court, hereby congesting the appellate court's system. The Court of Appeal and the Supreme Courts are over-clogged with appeal applications because unnecessary and frivolous appeals are made

[815] Original jurisdiction of the Courts of appeals are in matters regarding validity of the election or and or vacancy of offices of the President, Vice President of Nigeria. See section 239 Constitution FRN, see also *Dikko Yusuf & Anor v Olusegun Obasanjo* [2004] 5 SCM 174.
[816] Appellate jurisdiction to hear and determine appeals from the Federal High Courts, National Industrial Courts, State High Courts including the High Courts of the FCT, Sharia Court of Appeal Customary Court of Appeal and decision of a Military Court Martial, see section 240 Constitution FRN.
[817] As a federating unit, the Federal Constitution of Nigeria establishes these two courts as it were, however unlike other federal government system like the USA, the Nigeria judicial system as a federating system has no separate federal courts that exercise jurisdiction in matters within federal legislative competence and of state courts that exercise exclusive jurisdiction in matters within the legislative competence of the states.
[818] Effect Of Appeals On Course Of Trials – Litigation, Mediation & Arbitration – Nigeria' (Mondaq.com, 2020) https://www.mondaq.com/nigeria/trials-appeals-compensation/309008/effect-of-appeals-on-course-of-trials accessed 4 April 2022.
[819] [2007] 13 NWLR (Pt. 1052) 567.; see also the case of *Adisa v Oyinwola* [2000] 10 NWLR (Pt.674) 116, *the trial court delivered judgment in1985 while the appeal was not determined by the Supreme Court until the year 2000 – the appeal lasted for 15 years from the Court of Appeal to the Supreme Court.*
[820] Constitution FRN (as amended) Section 241, Chapter C23.

by lawyers to frustrate and delay the dispensation of cases[821]. This is exemplified when a party in the exercise of the right of appeal, causes an appeal to be entered at the Appellate Court, with the attendant effect that the case before the High Court would be adjourned indefinitely to await and abide by the outcome of the appeal. This leads to the rather disturbing trend that a case may end up staying in the courts for ten years, only to be returned to the trial court for determination. This practice was looked down upon by the then Chief Justice of Nigeria (CJN) in the case of *Amadi v N.N.P.C.*[822] where the CJN lamented that:

"With the success of the Plaintiff's appeal before us, the case is to be sent back to the High Court to be determined, hopefully, on its merits after a delay of 13 years. Surely, this could have been avoided had it been that the point was taken in the course of proceedings in the substantive claim to enable any aggrieved party to appeal on both the issue of jurisdiction and the judgment on merit in the proceedings, as the case might be".[823]

Another example is the case of *NNPC v Lutin*[824] where arbitration proceedings were stalled for twelve (12) years because an interlocutory issue of whether an arbitrator could hold proceedings abroad went through the high court and up to the Supreme Court.

Furthermore, delay in the determination of cases is also compounded by the fact that parties at the slightest unsuccessful interlocutory order by the courts exercise their right to climb the ladder of appeals up to the Supreme Court. Though arbitration is perceived as a single dispute resolution method devoid of a sequence of appeals and retrials before the national court, this is not usually the case in Nigeria. Inordinate delay of courts processes in support of arbitration has made arbitration in Nigeria mirror litigation. While parties exercise this right of appeal,

[821] See the cases *of Obafemi Awolowo University v Inaolaji Builders Limited,* [2020] 4 NWLR (Pt. 1714) 347; *Sunday Ehindero v Federal Republic of Nigeria* [2018] 5 NWLR (Pt1612) 30.
[822] *(*2000) 10 NWLR (Pt. 674) 76.
[823] Per Uwais CJN (as then was) at page 76.
[824] [2006] 12 NWLR (96) 504.

the attendant effect is that the case at the lower court is adjourned indefinitely to abide by the outcome of the appeal. This was the case in many of the arbitration matters that have suffered unnecessary and protracted delays, cases such as *IPCO v NNPC*[825]*, Mutual Life & General Insurance Ltd v. Iheme,*[826] *NNPC v. KLIFCO,*[827] *AIC v Federal Airport Authority of Nigeria Limited*[828] and *Specialised Vessel Services Ltd v Mop Marine Nigeria Ltd*[829] are some of the examples. To worsen the delay, there have been instances where after a protracted delay of ten (10years) at the Supreme Court, the apex court ended up sending back a case for trial at the lower court.[830] The then Chief Justice of Nigeria lamented that such unwarranted delay would have been avoided had it been that the point canvassed at the appellate court was taken during proceedings in the substantive.

The issue of abuse of appellate court system to frustrate and delay matters in court in Nigeria and especially delay of judicial intervention of arbitral matters has raised the question of whether the Nigeria appellate courts should have appellate jurisdiction in arbitration matters. This issue is the subject of debate between two schools of thoughts, on one hand,[831] it has been argued that the unwarranted delays and unnecessary court intervention in arbitration are caused because arbitration matters are permitted to go all the whole ladder of litigation up to the Supreme Court. It is further contended that the provisions of Sections 37 and 57 of the ACA 2004 limit judicial intervention in arbitration only to the high court and therefore the appellate courts lack jurisdiction to entertain any matter relating to arbitration.[832] On the other

[825] [2006] (n789).
[826] [2014)]1 NWLR (part 1389) 670) it took a period of thirteen (13) years to get to the Court of Appeal from the High Court.
[827] [2011] 10 NWLR (Pt. 1255) 209, took eleven (11) years to get to the Supreme Court.
[828] [2020] EWCA CIV 1585.
[829] [2021] EWHC 333 (Comm).
[830] See *Amadi v N.N.P.C* (n813) at pp.76.
[831] This school of thought led by Ola Olatawura contends that section 34 ACA which is based on Model Law art.5 and section 57 ACA limits court intervention only to the court of first instance (the High Court). See Ola Olatawura, 'Nigeria 's Appellate Courts, Arbitration and Extra-Legal Jurisdiction: Facts, Problems and Solutions '(2012) 1 Arbitration International (28) 63-76
[832] Ibid.

hand, the second school of thought argued that both the high courts and appellate courts are constitutionally vested with jurisdictions to entertain arbitration matter.[833] More so it was contended that both the ACA and the Nigerian Constitution allows parties to invoke the appellate system such as in setting aside of arbitral award. However, this writer examines the issue from a different perspective, it is argued that both writers have not addressed the root cause of delay and congestion of courts, especially the appellate courts. If the courts and especially the appellate court system in Nigeria allow parties to use the court's system as a tool to delay and frustrate court proceedings by way of frivolous interlocutory applications without sanction, parties will continue to use the free and liberal appeal system. The Court of Appeal and the Supreme Court administrations are disturbed by the trend in Nigeria of lingering appeals that have clogged the dockets of both courts. The administration of the Court of Appeal in Nigeria had to set up a special panel for the main purpose of decongesting appeal cases before the various appellate courts in Nigeria. It stated that the main reason for the backlog of cases in the Appeal Courts is the practice of lawyers filing frivolous appeals applications.[834] In absolving the judiciary of their indulgence in lawyers' frivolous appeals, in the *Obafemi Awolowo University of Nig. v Inaolaji Builders Ltd*,[835] the Appeal Court while decrying the trend stated that most times judges are criticized and harassed unnecessarily for the inordinate delays, while the real culprits are the lawyers when the courts are compelled to hear all grades of frivolous, "spiteful and undeserving" suits based on fair hearing.[836] The author respectfully disagrees with the contention by the Court of Appeal to the extent that as long as the courts in Nigeria are liberal towards the lawyers as regards what the court regarded

[833] Paul Obo Idornigie, 'Nigeria's Appellate Courts, Arbitration and Extra-Legal Jurisdiction—facts, problems, and solutions: A Rejoinder', Arbitration International, 2015 (3) Volume 31, Issue 1. See also Emilia Onyema, 'Nigeria' in Lise Bosman (ed), Arbitration in Africa: A Practitioner's Guide (Kluwer Law International 2013) 163 at 165

[834] See Premium Times Online 'Court of Appeal sets up Seven Panels to Treat Backlog of Cases' seen at https://www.premiumtimesng.com/news/more-news/427642-court-of-appeal-sets-up-seven-panels-to-treat-backlog-of-cases.html. Accessed 18 November 2021.

[835] [2020] 4 NWLR (Pt. 1714) 347.

[836] Ibid. Per JCA Danjuma, pp.372.

as ‘spiteful and underserving’ suits, lawyers will continue to abuse court processes. Lawyers in order to delay court proceedings and frustrate arbitral proceedings may have inordinate control of the pace of proceedings, except there are sanctions by way of cost awarded against such mischief by lawyers. To discourage and limit the abuse of court processes to frustrate the progress of a case, the appellate courts in Nigeria could impose costs and penalties for erring lawyers for default of appearance or delay in the filing process. Where for instance parties fail to file their application within the time prescribed by law, the court should not grant an application for leave to appeal or for extension of time unless in special circumstances or the alternative, impose a very heavy penalty on the erring party to deter abuse of the court process.[837]

b. Lack of Bespoke Civil Procedure Rules for Arbitration Matters

There is no doubt that for arbitration to be effective, the courts have a fundamental role to play. The general civil justice system in Nigeria is bedevilled with delays in case resolution, resulting in considerable waste of time and money for parties. Protracted delays of matters in support of arbitration in Nigerian courts are also affected as the application of rules of court are generally not streamlined to facilitate the early resolution of cases. The civil process of bringing such matters affects the efficiency, expediency, and effectiveness of arbitration claims before a national court.

The ACA did not specify the mode of procedures for bringing arbitration applications, therefore the courts resort to the Rules of the High Courts which is either by an originating summons or originating notice of motion supported by affidavit.[838] The Apex Court approved the use of an originating notice of motion supported by an affidavit as to the appropriate mode

[837] See The Commercial Court Guide, (incorporating The Admiralty Court Guide), Edited by the Judges of the Commercial Court of England & Wales Eleventh Edition (2022) available at https://www.judiciary.uk/wp-content/uploads/2022/06/Commercial-Court-Guide-11th-edition.pdf

[838] See Orojo and Ajomo (n395) p. 326.

of commencing an action for the application of setting aside an arbitral award.[839] However, State High Court Civil Procedure Rules and the Federal High Court Civil Procedure Rules prescribes different time by which a party can bring an application for the setting aside of an arbitral award in Nigeria. For instance, the High Court of Lagos State (Civil Procedure) Rules provide that any application for setting aside any arbitral award must be made within six weeks after such an award has been made and published to the parties.[840] The Federal High Court Civil Procedure Rules, on the other hand, provide three months after publication of the award has been made to the parties.[841] Meanwhile, the ACA provides dissatisfied party has within three months from the date of the award to bring an application to set aside an award.[842] Model Law art.34 (3) gives three months from the date the party applying for recourse received the award.[843] Depending on the court before which an application for setting aside of an arbitral award is brought, it may either be statute-barred or incompetent.[844] However, it is important to note that, where there is inconsistency between the Rules of Court and a statute the provisions of the statute will prevail and be applied.[845] The question of which time frame would be applied in instances is still unsettled going by the case *of Home Development Ltd v Scancila Construction Co. Ltd.*[846] The court relied on and applied the reasoning in the Arbitration Ordinance-based- arbitration law case[847] when it held that an application for setting aside an arbitral award be brought within the 15 days as stipulated in the Rules of Kaduna

[839] See the cases *KSO & Allied Products Ltd v Kofa Trading Co Ltd* [1996] 3NWLR 244; see also the Lagos State (Civil Procedure) Rules 2004 which provides for the use of a notice of motion supported by an affidavit for setting aside an arbitral award.
[840] Order 52 Rule 4 also makes provision that a judge may extend the time before or after the six weeks has elapsed.
[841] See order 52, rule 13, Federal High Court Rules 2019.
[842] See ACA 2004 section 29(1).
[843] In *Nigerian Telecommunication Limited v Okeke* [2017] 9 NWLR (Part 1571) 439, the Nigerian Supreme Court however held that a party's receipt of the award triggers the three-month time limit.
[844] *Araka v Ejeagwu* [2000] 15 NWLR (PT 6920) 700. *Commerce Assurance Ltd V. Alli* (1992) LPELR-883(SC)
[845] See *Stabilini Visinmoni Ltd v Malinson & Partners Ltd* [2014] (n272).
[846] [1994] 8 NWLR (Pt. 362 252 (SC).
[847] The Court relied on the case of *The United Nigerian Insurance Co. Ltd v Leandro Stocoo* [1973] All NLR 135 (SC*),* where the Supreme Court held that the lower court was right to apply the Lagos State Civil Procedure Rules for an application for setting aside an award. At that time, the Ordinance Arbitration Law did not specify any time limit for setting aside the arbitral award.

State Civil Procedure Rules 1977. Hence, it is argued that the disparity in the time limit between the different High Court Rules and the ACA drives home the need to have Civil Procedure Rules that comply or in tandem with the provisions of the ACA.

One of the major issues of lack of a bespoke civil procedure rule that is tailored to the arbitration provisions is that bringing an application before the courts either by way of originating summons or notice of motion is that it allows for complex filing of court processes and frivolous adjournments. The objective of rules of court should be focused on providing not only an orderly court process and procedure but also an expeditious court process as well as the expeditious settlement of disputes.[848] It is for this reason that modern civil procedure rules are geared towards the improvement of access to justice, reducing time and cost of litigation, and most importantly, removing unnecessary complexity and ensuring that the rules are compliant with the ever-evolving means of communication. The civil process system of litigation in Nigeria is characterized by long processes and technicalities, this can be undesirable for international commercial disputants who in the first place chose arbitration in settling their disputes, in order to have a flexible and quick dispensation of disputes. The approach of filing civil processes in Nigeria creates room for delay, this is exemplified in the case of *Mainstreet Bank Capital Limited v Nigeria Reinsurance Corp. Plc.*[849] In the Mainstreet Bank case, in 2014, the applicant by way of an originating summons sought injunctive reliefs against the respondent. In response, the respondent applied to the High Court for a stay of proceedings and order the parties to arbitrate their disputes. The respondent entered a conditional appearance and subsequently filed an objection challenging the court's jurisdiction, counter affidavits, and written address in opposition to the originating summons.

[848] See, Rule 1.1 Rules and Practice Directions and The Court of Protection Rules 2017, UK. See also the Commercial Court Guide (incorporating The Admiralty Court Guide) Edited by the Judges of the Commercial Court of England & Wales Eleventh Edition (2022) https://www.judiciary.uk/wp-content/uploads/2022/06/Commercial-Court-Guide-11th-edition.pdf

[849] [2018]14 NWLR 423.

The trial court heard the preliminary objection and the originating summons together and upheld the preliminary objections and referred parties to the arbitration. This decision was appealed against on the ground that the respondent had taken steps by subsequently filing processes in respect of the originating summons. The appeal was allowed by the Court of Appeal but held that the filing of the originating summons did not amount to taking steps in proceedings, however, refused to refer parties to the arbitration. On further appeal to the Supreme Court, the apex court dismissed the appeal and noted that the Appeal Court erred when it held that the respondent's subsequent filing of processes in respect of originating summons did not amount to taking steps in proceedings. It is indeed the argument of the writer that the court processes and the approach of the courts from the High Court up to the Supreme Court create room for delay and lead to issues in the appeal. Had the ACA or the High Court Civil Procedure Rules contained detailed arbitration claims, the appeal, and consequent delay may have been prevented.

The availability of a detailed arbitration claims in arbitration matters is important as it enhances the efficiency of judicial intervention in arbitration matters. The Civil Procedure Rules that are aimed at preventing frivolous challenges as seen in other jurisdictions enhances judicial intervention in arbitration. It is argued that the Nigerian situation may learn from the UK Civil Procedure Rules and the Commercial Court Guidance. For instance, arbitration claims and applications to English courts are governed by the Civil Procedure Rules (CPR) 1998 Part 62 (Arbitration Claims) and the associated Practice Directions.[850] The CPR provides for numerous procedures to be followed in respect of court support for arbitration. It sets out in detail the procedure for making 'arbitration claims', which includes applications under section 18 or section 24 of the 1996 Act. To commence an arbitration, claim before the court,

[850]Practice Directions are part of the CPR and deal with the practical application of the rules comprising the CPR, see also the Commercial G=Court Guidance 2022 (n837).

the application issues an arbitration claim form by the procedure set out in Part 8 of the CPR. There are also detailed standard directions applicable to any arbitration claim. The purpose and significance of this is to ensure case management of arbitration matters and cases are heard relatively quicker.

The need for the courts in Nigeria to have an efficient cost regime and penal consequence against deliberate dilatory tactics cannot be over-emphasized.

4.7 Judicial Corruption Perception or Reality?

The fundamental role of the judiciary in any society cannot be overemphasized. An incorruptible judiciary in every society is vital to the promotion and enforcement of the right to a fair hearing and application of the rule of law as enshrined in national,[851] regional[852], and international legal instruments.[853] All sectors of society depend on the judiciary through the courts as the judicial arm of government to interpret the law and maintain law and order. Corruption in the judiciary undermines the credibility of the entire justice system and erodes trust in the court's impartiality in all its core functions such as dispute resolution, protection of property rights and contract enforcement, and law enforcement.[854] More so, for a seat to be effective and efficient, the judiciary must be one that is independent and corruption-free judiciary. The ensuing loss of public confidence in the court systems arising from such damaging stories has the potential to damage institutions whose public standing and professional integrity ought to be beyond reproach.

[851] Right to a Fair hearing is constitutionally guaranteed as a Fundamental Human Rights under section 36 of the Constitution of the Federal Republic of Nigeria.
[852] See Article 7, African Chapter on Human and People's Rights, Article 6 European Convention on Human Rights (ECHR), Article 8 American Convention on Human Rights.
[853]See UN Universal Declaration of Human Rights (UDHR) 1948 Article 14 International Covenant on Civil and Political Rights (ICCPR).
[854] See, UNODC UNGD, Report of the Special rapporteur on the Independence of Judges and Lawyers, Human Rights Council, 26th session (28 April 2014), see also, Siri Gloppen, Courts, corruption and judicial independence in Corruption, Grabbing and Development: Real World Development (ed) Tina Soreide and Aled Williams, (2013) Monograph 68.

Corruption in general and judicial corruption in Nigeria is particularly alarming in Nigeria, given the increasing number of cases of allegations against judicial officers in Nigeria in the last ten years. The prevalence of corruption in Nigeria has affected all facets of the Nigerian society and arms of government[855] and sadly the judiciary is not excluded.[856] The issue of judicial corruption, seems to wreak havoc on the prestige and credibility of the Nigerian judicial system[857] The Nigerian body anti-corruption institution, the Independent Corrupt Practices and Other Related Offences Commission (ICPC) recent report of the Nigerian judiciary reignited the corruption perception of the Nigerian judiciary. The report rated the judicial sector on top of the Nigeria Corruption Index between 2018 and 2020.[858]

While the reports and some of the allegations are yet to be proven, the issue of judicial corruption arguably goes beyond mere perception. The allegations, charges as well as indictments of top judicial officers ranging from State High Court, and Appeal Court to the Supreme Court Judges, even the Chief Justices of Nigeria are not left out in the judicial corruption scandals.

Over the years the Nigerian judiciary has come up against attacks on its integrity from allegations of financial compromise.[859] The resulting loss of public confidence in the Nigerian court system arising from damaging reports of corruption in the judiciary has the potential to

[855] Transparency International ranks Nigeria 149/180 in the Corruption Index Report 2020 available at www.transparency.org Accessed 18 June 2021.
[856] Nigeria was ranked 22nd out of 31 regionally and 108 out of 128 globally by the World Project (WJP) Rule of Law Project Index 2020. The WJP is a world-leading independent data on rule of law, the Rule of Law Index Report is a survey based on eight factors: constraints of government powers, absence of corruption, open government, fundamental human rights order, and security regulatory enforcement, Civil Justice, and Criminal Justice. See www.worlorldjusticeproject.org Accessed 18 June 2021.
[857] See The International Bar Association Integrity Initiative: Judicial System and Corruption, Typologies of Corruption the Judiciary- Judiciary Integrity Initiative May 2016 available at www.ibanet.org/LPRU/Judicial_Systems_and_Corruptions. Accessed 27 June 2021.
[858]See the Independence Corrupt Practices and Other Related Offences (ICPC) Nigeria Corruption Index- Report of a Pilot Survey (1) 2020 available at www.icpcacademy.gov.ng
[859] In 2016, three judges were sacked for fraud and misconduct see Okakwu, E. (2016), "Nigeria sacks three top judges for fraud, misconduct Premium Times, 30 September, available at www.premiuntimesng.com/news/headlines/2117709-nigeria -sacks-three-top charges of corruption and of -judges-for-fraud-misconduct.html Accessed 3 July 2021.

damage not only public confidence and trust but also a dent in the image of Nigeria as an attractive seat for international commercial arbitration.

Three top justices including a presiding justice of the Court of Appeal were sacked for fraud.[860] In October 2016, Nigeria's Department of State Services (DSS) raided the homes of seven judges including two Supreme Court justices and were arrested on charges of corruption. Prior to their arrest, an estimate of £645,000 in cash was seized in raids of a home of one of the judges. In 2019, the Chief Justice of the Federation was removed on charges of corruption. [861] The Federal Government filed six counts of charges against the Chief Justice both non-fraudulent and fraudulent declaration of assets and for maintaining a series of foreign bank accounts which was in breach of the Code of Conduct for public office holders.[862] Again, in June 2022, Judges of the Supreme Court petitioned the Chief Justice of the Federation to resign amidst allegations of corruption and misappropriation of welfare funds for the Supreme Court Judges[863]

All these negative narratives will surely raise considerable concern and impact the integrity of the judiciary in Nigeria, and the attractiveness or otherwise of Nigeria as a seat of arbitration. In promoting Nigeria as a seat of arbitration, the race for arbitration seats is highly competitive globally and regionally, international commercial parties would not want to have their arbitration seated in a jurisdiction whose judiciary is tainted with corruption. An arbitral seat where the leader of the judicial arm and senior judges are embroiled in suspected financial crimes is not an attraction to international commercial parties. It is important that the judiciary at the seat where arbitration is to be established to be independent as international commercial

[860] Ibid.
[861] The then Chief Justice Onnoghen Nkanu Walter Samuel, was charged before the Code of Conduct Tribunal with suspected financial crimes.
[862] See section 15(1) of the Code of Conduct Bureau and Tribunal Act Cap C15 LFN 2004
[863]See www.premiumtimesng.com/news/headlines/539646-senate-to-continue-probe-on-corruption-allegations-against-ex-cjn.html

parties would prefer not only a supportive judiciary but one with well-equipped courts and noted for its transparency and neutrality.[864]

4.8. Conclusion

The foregoing has illustrated the interaction of the Nigerian courts and arbitration is very important in international commercial arbitration. Although arbitration is a private process, it is not self-executing, as it relies on the coercive power of the court to ensure efficiency of the arbitral process The chapter has demonstrated that one of the key factors that is essential for efficiency of the arbitral process is limited court intervention in the arbitral process. Limited judicial intervention is evidenced by a supportive judiciary to the arbitration process. The chapter has shown that in Nigeria, the shift from judicial jealousy and hostility towards arbitration to accepting arbitration has not gone unnoticed as evidence in some positive approach towards arbitration. However, the chapter has illustrated that the some of the benefits of the positive and supportive judicial attitude towards arbitration by the Nigerian courts has been impeded by some negative judicial attitude and approach towards arbitration. This chapter identified and illustrated varying degrees of open antagonism to subtle jealousy and unsatisfactory understandings of the workings of arbitration. The case of *Specialised Vessel Services Ltd* for instance exemplifies instances where the Nigerian court's attitude has left much to be desired as regards positive disposition to uphold arbitration agreement. The chapter also argued that though the ACA provision on stay of proceedings is contradictory as it gives the court both mandatory and discretionary power to stay proceedings in favour of arbitration. The chapter further demonstrated that some of the factors that constitute overwhelming shortcomings of the judicial intervention and contribute to the inefficiency of arbitral process

[864]The national courts of preferred seats are noted to have the reputation of their formal legal infrastructure built on impartiality and neutrality of their legal system and efficiency in their court system. See 2018 International Arbitration Survey: The Evolution of International Arbitration.

in Nigeria is the issue of conflicting judicial interpretations and decisions of the provisions of the ACA. In most cases these inconsistent judicial decisions are as a result of the disparity in the provisions of the ACA, however the chapter has argued that the courts in such instances are expected to fill in the gap where there is a legislative lacuna. The Nigerian courts interpretation of the discretionary power under section 5 ACA places onerous standard on parties as illustrated by the courts interpretation of taking further steps shows that a gap in the attitude of the court toward supporting arbitration. The chapter argued that once the party making the application satisfies the statutory conditions for stay, the court should refer the parties to arbitration. The chapter argued and demonstrated that the lack of statutory definition of misconduct as a ground for setting aside an arbitral award in the ACA has allowed the courts to interpret the grounds as an open-ended concept that can accommodate all kinds of unfounded complaints against an arbitral award. This chapter argued that the application to set aside an award under the grounds of misconduct are no more than appeals against arbitral awards under the onerous ground of misconduct.

The chapter examined instances where the attitudes of the Nigerian court towards arbitration maybe said to be considered in support of arbitration. It demonstrated that the courts seemingly support of arbitration process, however, does not erase the perceived and practical shortcomings of the judicial processes in arbitration. The chapter also argued and illustrated that one of the factors that contributes to the inefficiency of judicial intervention in arbitral process is the delays in the court system in Nigeria. Though, the administration of justice in Nigeria is generally noted for being notoriously slow, regrettably, court control of arbitration matters cannot be insulated from the general slow justice system which as affected the efficient judicial intervention in arbitration.

However, the chapter argued that the courts cannot be absolved from the delay, as the courts are found to have indulged parties by way of entertaining frivolous applications and abuse of

the appellate court system. It is also argued in this chapter that the lack of tailored arbitration claims before the courts is one of the downsides of judicial intervention and processes of arbitration in Nigeria. The chapter argued that delay in judicial proceedings acts as a disincentive not only to investors but also to international commercial parties as regards the selection of arbitral seats. The already overwhelmed Nigerian judiciary is faced also with judicial corruption that can lead to distrust of the judicial system and judicial supervision of arbitration.

The chapter has illustrated that judicial process and procedures for support of international commercial arbitration in Nigeria are far from being adequate as there is a need for a more favourable disposition towards arbitration. Rather than an overly interference and subtle judicial jealousy against arbitration by over protectiveness of the court's jurisdiction, the courts need to be more supportive and be recognized as a judicial system that will give efficacy to the arbitral process. This approach will not only make a jurisdiction an attractive arbitration centre but will contribute to the economic growth of a nation.

4.9 Recommendations

1. The Courts- Judicial Intervention:

- Judicial Attitude to Arbitration: to earn a reputation as an arbitration-friendly jurisdiction, there is a need for a paradigm shift in the general attitude of the Nigerian courts when they are called upon to intervene in matters related to international commercial arbitration. For an effective judicial intervention and judicial processes in international commercial arbitration in Nigeria, the following are strongly recommended:

a. Restricting Abuse of Appeals- One of the major causes of delay of arbitration applications before the courts for judicial intervention is the abuse of the appellate court system as

discussed in in this chapter. Appeal in arbitration cases, especially in respect of court appointment of an arbitrator, and jurisdictional issues should be restricted by the requirement of the leave of the court before an appeal can be filed. It has been demonstrated from the analysis in the thesis that appeal applications are often used to delay and frustrate arbitral process. In order to stamp out this practice, the courts should be more stringent in the way it handles appeal application. The leave of court to appeal can be dealt with by papers without physical hearing as parties will file the permission to appeal application attaching all necessary supporting documents and evidence of relevant issues. The court can then decide without a physical hearing of such so that the courts will decide on the merits or otherwise of granting a leave to appeal. This will curb frivolous appeals as well unnecessary delays and de-clog the appellate courts. Detailed guidance as to the application for leave should be set out in the Civil Procedure Rules of the various courts for efficient case management in this regards the Commercial Court Guidance of England and Wales is quite instructive. This recommendation should not be seen as controversial as regards constitutional challenges regarding right to access to court. It is the contention of the writer that the right to access to court is not in any way denied as the constitutional right to access to court in this regard is not physical appearance before the court but the right to be heard. In addition, introduction of electronic filing processes for appeal applications which will allow the court to filter frivolous appeal applications and allow only valid challenges to be heard by the court should be introduced. This will not only curb delay tactics but will also discourage constitutional challenges on grounds of rights of access to the court.

b. Bespoke Civil Procedure Rules for arbitration-related matters: One of the challenges of judicial intervention in arbitration matters is the inordinate and protracted delays of arbitration matters in the Nigerian courts. To avoid delays, there is a need for bespoke Civil Procedure Rules for arbitration claims and applications. The current various State High Court

Civil Procedures including the Lagos State High Court Civil procedure Rules 2019 and the Federal High Court Civil Procedure Rules provide only generic court civil procedure rules suitable for litigation and did not take into consideration that arbitration is not litigation. The Federal High Court (Alternative Dispute Resolution) Rules 2018 provides for Civil Procedures rules for all types of alternative dispute resolution mechanisms and not specifically for arbitration. There is a need to amend the current Court Civil Procedure Rules of both the various State High Courts and the Federal High Courts that will be consistent with the proposed Arbitration Bill in respect of arbitration claims before the courts. This will promote uniformity of court procedure rules as regards arbitrations and enhance the quality of the judicial process and proactive case management in arbitration-related matters and applications. By providing specific court civil procedure rules for arbitration matters, arbitration-related matters will not have to suffer the same court process as ordinary civil litigation matters. An example is the Part 62 Arbitration Claim of the Court Civil Procedure Rules, which is made pursuant to the Arbitration Act 1996, that deals specifically with arbitration claims.

c. Substance, not Form: It has been demonstrated that Nigerian courts most often have the disposition to look at the form and not substance as regards the interpretation and construction of arbitration provisions and agreements. It is highly recommended that to maintain the sanctity of arbitration agreement and the courts should eschew technicalities in interpreting and construing arbitration agreements and arbitration provisions.

d. Judicial Expertise in Arbitration Matters: expertise in international commercial arbitration is not only acquired by refresher courses for judges. It is also beyond having the knowledge of the law and practice of arbitration. It requires courts to have specialised and devoted courts and judges who are assigned arbitration matters. This enables designated judges to acquire and maintain experience in handling arbitration-related matters. It will also

make the courts in Nigeria to be commercial and international in focus and approach when handling international commercial arbitration matters. As the case in most preferred and well-recognised arbitral seats like England and Singapore, which have dedicated commercial courts and judges that deal with commercial arbitration matters. For example, commercial courts in England have courts and judges that deal with commercial matters (COMM), and a certain number of courts that deals with technology and construction (TCC) will only deal with construction and engineering-related disputes. By dedicating special courts and judges to handle international commercial arbitration-related matters, the judicial approach to arbitration will be informed by a better and sound perspective on international commercial arbitration in Nigeria.

e. General Justice Reform: In Nigeria, the problem of delay and long trials is not only peculiar to arbitration matters but to all civil litigation and criminal matters. There have been calls for the general overhaul of the justice delivery system which has culminated in the Civil Justice Bill which aims to eliminate bureaucratic bottlenecks and delays associated with civil justice delivery. The passing into law of the Civil Justice Bill will go a long way in addressing the general problem of delays associated with the Nigerian justice system and improve the quality of the Nigerian court system.

Chapter Five: Structural Issues and Challenges of International Commercial Arbitration in Nigeria

5.1 Introduction

This chapter examines the structural issues which pose challenges facing Nigeria as an attractive seat for international commercial arbitration. Much emphasis is focused on modern and effective arbitration legislation and a supportive national court as key factors for attracting international commercial arbitration references. While these are important features of an attractive seat for international arbitration, there are other factors that are equally important, especially for a developing arbitration jurisdiction like Nigeria.[865] The most touted slogan in efforts to showcase the attractiveness of Nigeria as a preferred seat for international commercial arbitration is that Nigeria is a Model Law jurisdiction.[866] Structural factors such as arbitral institutions, arbitrators, lawyers, and parties (corporate and individual users) are important key stakeholders that play important roles in the effective and smooth resolution of commercial disputes through international commercial arbitration. The role that well-established arbitration institutions play as one of the main drivers in promoting jurisdictions as preferred arbitration seats cannot be over-emphasized.[867] Nigeria boasts of many arbitration institutions,[868] yet the proliferation of arbitral institutions has not yet translated to any meaningful number of international commercial arbitration references. A critical examination of some of the arbitration institutions in Nigeria and Africa, in general, will demonstrate whether the proliferation of arbitration institutions in Nigeria has had any impact on the promotion of the

[865] Court litigation is a pervasive feature of Nigerian commercial and civil and life, the use of arbitration and other method of dispute resolution mechanisms are yet to become popular. Hence the term 'developing arbitration jurisdiction' is used in the context of the dynamic process of arbitration in Nigeria.

[866] The English Arbitration Act 1996 is not based on the UNCITRAL Model Law, but it is greatly influenced by it see The Departmental Advisory Committee on Arbitration (DAC) February 1996.

[867] A cursory look at the five top preferred seats shows the top five arbitration institutions are drivers of those seats. London has the LCIA, Hong Kong the Hong Kong International Arbitration Centre (HKIAC), Paris International Chambers of Commerce (ICC), and Singapore SIAC

[868] Aside the six major notable arbitral institutions there are still pockets of arbitration centres and industry based arbitral institutions.

practice of arbitration and in making Nigeria an attractive seat for international commercial arbitration.

In Nigeria, court litigation is a pervasive feature of the legal system resulting in the ingrained culture of litigation amongst legal practitioners as well as parties. Instances of inordinate delays and dilatory tactics by legal practitioners to frustrate arbitration proceedings where judicial intervention for support and supervision are sought have given arbitration negative publicity. Another challenge that is worth considering is the issue of the uncertainty and restrictive approach of Nigeria towards foreign representation in international commercial arbitration. The ability of parties to have their choice of representation in international commercial arbitration is an extension of party autonomy. From the perspective of attracting international commercial arbitration as a seat, the current Nigerian restrictive approach to foreign legal representation in arbitration will impact Nigeria's attractiveness.

Other structural issues can be described as soft factors which are crucial features that make a place attractive as a seat of arbitration. Though, described as "mundane issues of convenience and cost"[869] these soft factors include general infrastructures such as hearing facilities, technical support, accommodation logistics, and other facilities that would aid in the smooth arbitral proceedings and hearings. Given the socio-political developments of Nigeria as a developing nation, these 'mundane issues of convenience and cost' may not necessarily present as mundane but as peculiar challenges of developing countries that cannot be taken for granted.

The chapter will be divided into three parts, part one examines the role of legal practitioners in making Nigeria an attractive seat for arbitration. It will also examine the restrictive approach

[869] Gary Born (n307)1677

of Nigeria of foreign legal representation in international commercial arbitration and the implication on arbitration-friendliness of Nigeria.[870]

The second part of this chapter is an exposition of the important role which arbitration institutions play in fostering a jurisdiction as an attractive and preferred seat of arbitration.

The third part of the chapter critically examines other soft factors such as general infrastructure, state of security of the country as well as challenges of power supply, good roads and transportation, telecommunication and public services are factors that bear weight against the reputation of Nigeria as an attractive seat.[871]

5.2 Role of Lawyers and Other Stakeholders

A. Arbitration or Court Battles

The role of legal representation and assistance in adversarial proceedings including arbitration is of great importance. For the benefits of arbitration, the uptake is to an extent dependent on legal practitioners either as lawyers representing parties for arbitration applications before the court or as party representatives in the arbitration tribunal. The quality and attitude of legal representation for arbitration and the judicial process for arbitration have an impact on the outcome of the entire arbitral process.

While the emphasis is placed on the quality of a clear and predictable legislative framework as well as an effective judicial system that supports arbitration, so also should the emphasis be laid on legal practitioners and other stakeholders that clearly understand the workings of international commercial arbitration. The role of legal practitioners especially as it concerns judicial support for arbitration is understudied and or relegated to the background. Legal

[870]By virtue of article 4 of the Arbitration Rules, only a legal practitioner who is enrolled to practice law in Nigeria can appear in domestic arbitration proceedings in Nigeria.
[871]There have been instances of when judicial workers had gone on a nationwide industrial strike action, which saw the whole court system grounded to a halt.

Practitioners as counsels in arbitration or as lawyers representing parties in arbitration matters before the court have major roles to play in the promotion of arbitration and by extension promoting a jurisdiction as an attractive seat. The seating of arbitration not only attracts business but also by no means builds a jurisdiction's reputation as a modern and reliable place for the promotion of trade and commerce as well as bringing business for legal practitioners.[872] This is because by and large, the services of legal practitioners may be sought whether as arbitrators or as lawyers. The seating of international commercial arbitration can therefore develop the domestic legal industry in two major ways, transfer of expertise and generation of revenue for local lawyers. Legal practitioners in arbitration-related activities are quite important and must exhibit the right attitude towards the arbitration process and judicial intervention. The tendency of Nigerian legal practitioners in using the judicial procedure to frustrate and delay arbitration proceedings is inimical to the attractiveness of Nigeria as a seat for international commercial arbitration. It has been noted that in Nigeria, the wheel of justice grinds so slowly.[873] It is expected that lawyers and other stakeholders when appearing as counsels or arbitrators would have an overriding objective of arbitration, as a flexible and less formal dispute resolution method. On the contrary, arbitration in Nigeria is perceived as a preliminary process before litigation, this perception (correctly or wrongly held) is negatively impacting Nigeria's standing as an arbitration-friendly jurisdiction. Instances abound where lawyers have used judicial processes and proceedings to delay arbitration.[874] Court actions are commenced

[872]See The Commonwealth, A Study of International Commercial Arbitration in the Commonwealth, 2020 (n544); see also Seraglini Christopher, Nyer Dian Templeman John, and de Ferrari Lucas, The Battle of the Seats: Paris, London or New York? 6 December 2011, http://www.whitecase.com/publications/article/battle Accessed 11 December 2021).

[873] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2005] EWHC 726.

[874] See *Specialised Vessel Services Ltd v Mop Nigeria Ltd* [2021] EWHC 333*) Comm; AIC v Sundersons Limited & Milan Nigeria Limited v Cruiser Shipping PTE Limited & Universal Navigation PTE* Limited [2014] LCN/6835(CA); A classic example is the case of *K.S.U.D.B v Fanz*,(1990) 4 NWLR (Pt.142)1, the court ordered the matter to be referred to arbitration as agreed by parties in 1981, two years after the matter first came to court. The award was subsequently made in favour of the Plaintiff, who by an application, sought to enforce the award. Defendant then sought to set aside the award. The matter went on appeal to the Court of Appeal and ended up at the Supreme Court which delivered its judgment on June 1990. Eleven years after the High Court was first approached

in breach of the arbitration agreement, rather than advising parties to respect the arbitration agreement, lawyers may make the courts take jurisdiction in the face of a written and valid arbitration agreement. This attitude is clearly against the Nigerian Rules of Professional Conduct of Legal Practitioners which provides that lawyers representing clients must not fail or neglect to inform their clients of the option of alternative dispute resolution mechanisms before resorting to or continuing litigation on behalf of their client.[875] Parties are made to go through a judicial appeal mechanism even at the very early stages of the arbitration reference.[876] A case may be held in abeyance for a long period just by filing a preliminary objection on the ground of lack of jurisdiction. In today's dynamic and globalized world, parties in international commercial arbitration disputes seek control over outcomes, and the best practice is that arbitration agreements should be respected, except if there are valid and reasoned grounds for challenge. It is with the foregoing in mind that the writer examines the possible reasons why arbitration is perceived as another litigation by legal practitioners in Nigeria.

a. **Ingrained Litigation Culture**: Nigeria as a common law country, has an adversarial legal system, and the typical court is the battleground where lawyers will use all means possible to ensure that they have their day in court to win a case. Court litigation is a pervasive feature of Nigeria in both commercial and civil life, resulting in overloaded dockets.[877] Other forms of dispute resolution are perceived as secondary (and probably inferior) to litigation. This notion has made litigation become and still is predominately the means of dispute resolution in Nigeria. The structure of legal education and profession in Nigeria is also responsible for the ingrained culture. Legal practitioners in Nigeria are trained and

[875] See Rules of Professional Conduct, for Legal Practitioners 2007 (made pursuant to s.12 (4) Legal Practitioners Act, Cap L.11, LFN 2004.) Rules 15 (2) (d).
[876] First instance decision of the Federal High Courts in *SPDC v Cresta; NNPC v Statoil; and NNPC v NAE* where the anti- arbitration injunctions were issued by the court, thankfully the Court of Appeal reversed the decisions in both cases.
[877] M.M. Akanbi, "The Role Performance of the Lawyer and the Judge in the Administration of Justice in the Society" in M.M. Akanbi (ed.), The Judiciary and the Challenges of Justice (Lagos: Patrioni Books, 1996), p.132

qualified to practice both as barristers and solicitors. The general notion amongst legal practitioners in Nigeria is that litigation is the principal process of dispute resolution, and every other alternative dispute resolution method including arbitration is secondary to litigation.[878] It is therefore the notion of Nigerian lawyers that the real law practice is the battle in the court and that filing of court processes and going to court is more profitable and prestigious for both the parties and more so for the lawyers than an outright settlement of the dispute. For instance, for the conferment of the honorary award of Senior Advocate of Nigeria (SAN),[879] one of the criteria is that the applicant must have had 'contested cases' in at least eight judgments of the High Court, six judgments of the Court of Appeal and at least three judgments at the Supreme Court.[880] It is interesting to note that there is no provision for matters resolved outside litigation or the courtroom in the requirement, yet arbitration alongside other ADR mechanisms is recognized as means of dispute resolution methods. The writer argues that final and valid arbitration awards should be regarded as contested cases since an arbitral award is on par with a judgment of the court.[881] The requirement which excludes arbitration matters and maybe consent judgments breed the encouragement of court congestion with the myriad of cases.

These are perhaps why Nigerian lawyers approach and perceive arbitration as the first step to litigation, this is illustrated in some of the arbitration matters that need not have triggered unnecessarily protracted litigation[882]. The determination of commercial disputes

[878] Larry O.C. Chukwu and Kevin N. Nwosu, The Role of Lawyers in Fostering Alternative Dispute Resolution in Multi-Door Courthouse, (2016)49 (2) Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia, and Latin America, 49(2), 220–232 seen at http://www.jstor.org/stable/26160074 Accessed 16 July 2022.
[879] Equivalent to the rank of a Queen's Counsel (QC) in the UK.
[880] See Legal Practitioners Act (Cap L.II) LFN 2004 s.6 read in conjunction with Senior Advocates of Nigeria (Privileges and Functions Rule (Cap 207) LFN 1990 and Guidelines for the Conferment of the Rank of Senior Advocate of Nigeria and All Matters Pertaining to the Rank, 2018.
[881] See *Raz Pal Gazi Construction Co. Ltd v Federal Capital Development Authority* [2001] 10 NWLR (Pt. 722) *559.*
[882] See chapter Four which extensively dealt with challenges of judicial proceedings in Nigeria which are usually characterised by severe delays, arbitration matters in court for judicial support and supervision are not exempted from these inordinate delays.

in the regular courts of law particularly in Nigeria is not time efficient. For international commercial disputes, protracted litigation is negative for the affected businesses.

b. **Abuse of the use of Interlocutory /Applications[883]:** Another major obstacle in the arbitration landscape in Nigeria, is the penchant of legal practitioners the use interlocutory applications to delay the arbitral process. One of such is the challenge in the improper use of court processes to interfere with the smooth administration of justice and in the case of arbitration matters, to interfere with the arbitration process. Granted that the right of appeal against the decision of the High Court is provided under the Constitution.[884] However, the arbitrary exercise of this constitutional right of appeal is common in litigation practice in Nigeria, and this trend is also experienced when arbitration matters come before the courts. The attempt by lawyers to use the court to delay and frustrate arbitration proceedings and awards made the court in *A. Savoia Limited v Sonubi* state that "*it has always been thought that proceedings by way of arbitration are a quick way to resolution of disputes between contracting parties when compared with the tardy proceedings of a law court. This case appears to cast some doubt on the truism of this belief."*[885] The court's statement concerning the attitude of lawyers in arbitration matters is correct as most times parties find themselves in the corridor of the judicial system - which they strove to circumvent by their submission to arbitration, in the first instance. Illustrative of the attitude of the lawyer to use litigation to delay the constitution of the arbitral tribunal is the case of *A.G Ogun State & Ors v Bond Investment & Holdings Ltd*. In this case, the appellant at the lower court failed to respond to the application of the respondent to appoint a co-arbitrator after being dually served. The court appointment of

[883] See Ola O. O Olatawura, 'Nigeria's Appellate Courts, Arbitration and Extra-Legal Jurisdiction: Facts, Problems, and Solutions' (n789). See also this writer's discussion in Chapter Four of this Thesis.
[884] See sections 241 (1)(a) of the Constitution of the Federal Republic of Nigeria.
[885] Per Ogundare JSC.

the co-arbitrator from the list submitted by an adversary party was appealed on grounds of invalid appointment under sections 7 (2) and (3) and constitutional grounds of finality rule of s7 (4) which mirrors Article 11 (5) Model Law.[886]

The courts find themselves obliged to exercise their discretionary powers to grant interlocutory applications, especially protracted adjournments, and appeals which in the long run have an enormous bearing on the outcome of the substantive matter. Interlocutory appeals often cause endless delays which tend to defeat the entire process and impede the effectiveness of arbitration. For instance, in the case of *N.N. P. C v Lutin,*[887] arbitration proceedings were stalled for twelve years because of an interlocutory application brought by one of the parties regarding whether an arbitrator was right in exercising his discretion under s.16 (2) ACA to hold arbitral proceedings abroad. The application went through the high court and then to the Supreme Court. For a jurisdiction desiring to position itself as an attractive seat of arbitration, the domestic courts should not be seen as one that indulges frivolous interlocutory appeals that extend the time scale within which courts intervene in arbitration. Lawyers are blameworthy for protracted delays caused by their abuse of court processes. Importantly, arbitrations in need of judicial support need not get entangled in litigation and bogged down in intractable delays caused by interlocutory appeals.[888]

B. Legal Representation and Assistance in International Commercial Arbitration

Party autonomy remains one of the basic tenets that make international commercial arbitration attractive for cross-border commercial disputes.[889] Parties are not only allowed to create procedures that are suitable to their specific needs and situations, but they are also allowed the freedom of choice of applicable laws, choice of seat, and arbitrators. The ability and the right

[886] [2021] LPELR-54245(CA).
[887] (2006) 2 NWLR (pt. 965) 506.
[888] A. Savoia v Sonubi [2000]12 NWLR (Pt.682)539 (SC)
[889] Fouchard Gaillard Goldman on International Commercial Arbitration (Emmanuel Gaillard & John Savage eds, Kluwer Law International 1999).

of parties to choose legal representatives whether local or foreign in international commercial arbitration is an extension of party autonomy.[890]

Generally, parties are allowed to represent themselves in international commercial arbitration this self-representation is recognized in most national laws[891] and procedural rules.[892] However, there are legitimate reasons why international commercial parties may need legal representatives specialized in international commercial arbitration. Firstly, the complexities of international commercial disputes may involve multiple parties and large sums of money. Secondly, international commercial arbitration is a quasi-legal form of dispute resolution having both procedural and substantive legal issues involved in the arbitral processes and proceedings. Thirdly, the consequences of a final and binding arbitral award make it prudent for parties to have legal representatives.

While most jurisdictions recognize the ability of parties to select any representative of their choice,[893] this however in Nigeria, there seems to be uncertainty as regards the freedom of parties to appoint foreign legal practitioners in arbitral proceedings. The ACA makes no express provision on the issue of the ability of parties to select the representative of their choice.[894] On the other hand, the Arbitration Rules annexed to the ACA make no express restriction on same, other than saying parties may be represented by legal practitioners of their choice.[895] The wordings of most arbitration rules vary, the writer argues that the use 'may be represented in

[890] See also Principle 5 of the London Principle which provides that a safe seat for international commercial arbitration is one that A clear right for parties to be represented at arbitration by party representatives (including but not limited to legal counsel) of their choice whether from inside or outside the Seat.
[891] English Arbitration Act 1996, section 36.
[892] See 2010 UNCITRAL Rules, Article 5, LCIA 2020 Note for Parties in section 14; Rules 2020 article 18.1
[893] See For instance, the English Arbitration Act allows parties to appoint a person as representative with or without legal qualification (may be represented by a lawyer or other persons chosen by him. See section 36
[894]The Model Law also makes no express provision as regards rights of parties to their choice of legal representation.
[895] The Nigerian Arbitration Rules is based on the UNCITRAL Arbitral Rules (1976 version) Article 4. See also See also UNCITRAL Arbitration Rules 2010 (as revised in 2013) Art. 5; Rules of Arbitration of the International Chamber of Commerce (2021) ('ICC Rules'), Art. 26(4); Rules of the London Court of International Arbitration (2020) ('LCIA Rules'), Art. 18.1.; Rules of the Singapore International Arbitration Centre (2016) ('SIAC Rules'), rule 20.1.

most of the arbitration rules, clearly indicates the right but not an obligation. However, these rules still provide parties with the freedom to be represented by persons of their choice.

Most jurisdictions recognize the right to choose the legal representation of their choice in an arbitration seated in their jurisdiction.[896] This approach reflects modern international commercial arbitration best practices as incorporated by the IBA Guidelines on Party Representation in International Arbitration[897] It is further argued that the prevailing trend in most jurisdictions is a liberal approach in allowing parties the right of choice of representation either by self, legal representation, or other persons in international commercial arbitration.[898] A handful of jurisdictions restrict foreign legal representation and other professionals in international commercial arbitration from sitting in their jurisdiction.

Though the ACA did not explicitly restrict foreign legal representation in arbitration, both the statutory and judicial definition of a legal practitioner under Nigerian law, seemingly, restricts the right of parties to appoint a legal representation. The Nigeria Legal Practitioners Act (LPA) 2004, which regulates legal practice defines a legal practitioner, as "*a person is only entitled to practice as a barrister and solicitor if his/her name is on the Roll of the Supreme Court of Nigeria, or he/she is authorized to practice as a barrister by a warrant of the Chief Justice of Nigeria for a particular proceeding."*[899] This definition was supported and upheld by the Supreme Court when the court defined a legal practitioner in *Okafor v Nweke* as "a person

[896] EAA Section 36, see also Swiss Code of Civil Procedure, Art. 373(5) ("Each party may act through a representative"); Austrian ZPO, §594(3). See also G. Born, International Commercial Arbitration 3067–69 (3d ed. 2020)."

[897] IBA Guidelines on Party Representation in International Arbitration, adopted by a resolution of the IBA Council on 25 May 2013, available at www.ibant.org/publications/org/Publications/publications_IBA_guides_and_free_materials.aspx last accessed 30 May 2022.

[898] Jurisdictions that have relaxed their restrictions to allow foreign legal representation not only in an international arbitration seated in their jurisdiction but also in domestic arbitration. An example of such jurisdiction is Japan which passed a law aimed at reducing "residual protectionism" that relaxed restrictions on foreign lawyers See Marialuisa Taddia, Back to the World Stage, The Law Society Gazette (21 October 2019), available at https://www.lawgazette.co.uk/features/back-on-the-world-stage/5101861.article last accessed 3 September 2022.

[899] see section 2 (1) (a) and (b).

entitled according to the provision of Section 24 of Legal Practitioners Act, 1990 to practice as a barrister or as barrister and solicitor either generally or for any particular office or proceedings.[900] In this case the court in deciding whether a law firm in issuing or signing a court process was a legal practitioner recognized by law, further held that "for a person to be qualified to practice as a legal practitioner he must have his name in the roll, otherwise he cannot engage in **any form of legal practice in Nigeria** (emphasis mine)."

According to section 18 of the Interpretation Act of Nigeria,[901] the phrase, "legal practitioner" has the meaning assigned to it by the LPA. The implication of this is that legal practitioner as used in Article 4 of the Arbitration Rules has the meaning ascribed to it by the LPA 2004. However, it is argued that the restriction as set out in the Arbitration Rules applies to only domestic arbitration in Nigeria.[902] While the judicial pronouncement in *Okafor v Nweke* was made in respect of litigation proceedings, however, in *Shell v FIRS*[903], the Appellate Court seems to transfer the restriction placed on litigation to arbitration in its decisions. The issue of who is a legal practitioner under Nigerian Law came up in *Shell v FIRS.* One of the major issues that were canvassed before the Court of Appeal was whether the initiating processes in the arbitration were valid, having been co-signed by English and Nigerian Law firms that were not licensed to practice law as legal practitioners in Nigeria. The Court of Appeal held that Article 3(3) of the Arbitration Rules does not require the signature of a legal practitioner who practices in Nigeria. However, the Appellate Court gave primacy to Article 4 of the Arbitration to the

[900] [2007] 10 NWLR (pt.1043) 521, at 531.
[901] see Chapter 123, Laws of the Federation 2004.
[902] This argument has been canvassed by many authors, see Adedoyin Rhodes-Vivour, International Arbitration and Appearance Rights of Lawyers: A Review of Article IV of the 1st Schedule To The Arbitration And Conciliation Act Cap A18 Laws Of The Federation 2004 seen online https://drvlawplace.com/publications/ accessed 20 July 2020; also Oghogho Akpata and Adewale Atake "Domestic Arbitration in Nigeria: Can Foreign Counsel Still Run the Race?" (Templars, Dispute Resolution Practice Group, Newsletter, 2012 ibid (n66).
[903] *Shell Nigeria Exploration and Production. Ltd & 3 Ors. v Federal Inland Revenue Service &* Anor (Unreported Appeal CA/A/208/2012).

effect that a party who has chosen to be represented by a legal practitioner, such a legal practitioner must be a person who meets the requirement of the LPA in Nigeria.[904]

The extension of the LPA to international commercial arbitration processes by the Appellate Court falls short of an arbitration-friendly approach. The language of the Nigeria Arbitration Rules, in the view of this author is a limitation to the party's freedom of choice of representation as it limits or restricts representation to only legal practitioners. More so, arbitration is not limited to the legal community, it is open to lawyers as well as other professionals.[905] Most prominent arbitration institutions' rules contain parties' right to choose representation without words that fetter their choice. The wordings have no requirement for a representative to be a lawyer nor to be admitted to practice in any jurisdiction. International Chamber of Commerce (ICC) Rules provides that parties may appear in person or through duly authorized representatives, and in addition, they may be assisted by advisers.[906] Under Article 18.1 of the London Court of International Arbitration (LCIA) Rules 'any party may be represented in the arbitration by one or more authorized representatives appearing by name before the Arbitral Tribunal'.[907] The Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules also stipulate that 'parties may be represented by persons of their choice.[908]

The writer argues that taking a restrictive approach to foreign legal arbitration would limit party autonomy upon which international best practice of international commercial arbitration strives. While it is agreed that the restrictive approach to legal representation is part of the legal

[904] *Shell Nig. E. & P. Ltd & 3 Others v. Federal Inland Revenue Service* (Unreported Appeal CA/A/208/2012).
[905] See *Stabilini Visinoni v Mallisson &Partners Ltd* see (n272*),* the Court of Appeal stated that arbitration is open to lawyers and non-lawyers and therefore there cannot be a requirement that the notice of arbitration must be signed by a legal practitioner.
[906] Rules of Arbitration of the International Chamber of Commerce (effective 1 Jan. 2021) ('ICC Rules'), Art. 26(4).
[907] Rules of the London Court of International Arbitration (effective 1 Oct. 2020) ('LCIA Rules'), Art. 18.1.
[908] Hong Kong International Arbitration Centre Administered Arbitration Rules (effective 1 Nov. 2018) ('HKIAC Rules'), Art. 13.6. See also According to rule 23.1 of the Rules of the Singapore International Arbitration Centre (SIAC), 'any party may be represented by legal practitioners or any other authorised representatives. The Registrar and/or the Tribunal may require proof of authority of any party representatives.

traditions of most sovereign states, nevertheless this should not be extended to arbitration proceedings. The writer argues that arbitration is different from litigation. Litigation is a judicial proceeding, a public dispute resolution (state forum) while arbitration is a private dispute resolution mechanism. The writer faults the Apex Courts' decision Shell *v FIRS on the* grounds that arbitration is litigation, and it was incorrect to have extended the LPA definition of a legal practitioner to arbitration proceedings. The freedom of parties to appoint representatives of their choice is consistent with the essential principle of party autonomy which extends to the freedom of choice of representation. Furthermore, Article 4 of the Arbitration Rules Nigeria will not be applicable where parties expressly designate their arbitration 'international' and apply the UNCITRAL Rules (or any other international rule) in their arbitration proceedings.[909]

For international commercial arbitration, it is a common practice that parties can appoint 'any person of their choice as their representative. Parties can appoint even non-legal practitioners as their representatives in international commercial arbitration as provided under the arbitration rules of most prominent arbitration institutions.[910] For instance, the Mauritius Arbitration Act 2008 (Mauritian IAA) goes one step further by expressly permitting foreign lawyers to act as counsel. It provides as unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, who need not be qualified to practice law in Mauritius or any. other jurisdiction.[911] Emerging Arbitration hubs such as the United Arab Emirates (UAE) and the Dubai

[909] See O. Sashore "Representation of Arbitration Proceedings: The Recent Trend in Shell v FIRS 'Miyetti Quarterly Law Review '(20216) 1/11, Emmanuel Onyedi Wingate, Qualification for Party Representatives and Arbitrators in Nigerian Arbitration: Shell v FIRS (2020) 64 Journal of African (3) 451-461.
[910]See 2020 LCIA Rules, for example, the term 'authorized' representative is used.
[911] See Mauritian International Arbitration Act 2008 (as updated in 2016) section 31.

International Financial Centre (DIFC) do not have restrictions on qualified lawyers from jurisdictions outside the UAE representing a party in arbitral proceedings seated in the UAE[912]

From the perspective of Nigeria's quest to become a preferred seat for international commercial arbitration, a restrictive approach towards foreign legal representation will impact Nigeria's friendliness to foreign counsel. National laws which have in the past restricted foreign lawyers from appearing before international commercial arbitration has reformed and amended their laws to reflect right of parties of their choice of legal representation.[913] The right of choice of legal representation from inside or outside the seat of arbitration is one of the features of an effective, efficient and safe seat.[914]

5.3 The Role of Arbitral Institution in Promoting a Jurisdiction Seat of Arbitration

i. Characteristics of An Arbitration Institutions.

In choosing to resolve their disputes by international commercial arbitration, parties must determine whether the arbitral process and procedure will be conducted ad hoc or institutional based. Ad hoc arbitration is an arbitral proceeding that requires the parties to be in the driving seat of the arbitration. Parties in ad hoc arbitration make their arrangements for the selection of the arbitrators and designate the arbitral rules, applicable law, and administrative support subject only to the parties' arbitration agreement. In other words, in an ad hoc arbitration, the parties and the arbitral tribunal will conduct the arbitration according to the procedures agreed by the parties or with their concurrence subject to applicable national arbitration legislation.[915]

---

[912] Except for the requirement to be entered into the Register, there are no restrictions applicable to arbitration proceedings seated in the DIFC. See https://globalarbitrationreview.com/regions/united-arab-emirates accessed 27 November 2021.

[913] Countries like Japan, Portugal, Singapore, Thailand, and Turkey. See Malaysian Arbitration (Amendment) (No. 2) Act 2018, s. 3A ('[unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by any representative appointed by the party). See also, Mikhail Batsura, Limits to Party Autonomy in Appointing Counsel in International Commercial Arbitration, (2021), 38, Journal of International Arbitration, Issue 5, pp. 671-698.

[914] See Principle 5, London Principles (n559).

[915]Gary B. Born, See Gary B. Born International Commercial Arbitration (3rd edn Kluwer law 2020),

In contrast, institutional arbitration is an arbitral proceeding that is administered by specialist arbitral institutions.[916] In an institutional-based arbitral process, the arbitration is conducted, administered, and supervised by an established arbitration institution. The significant evidence of the success of arbitral institutions as a rules-based method of dispute resolution has resulted in the establishment of hundreds of arbitration institutions all over the world.[917] However, there are some notable, leading, and well-known international commercial arbitration institutions such as the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA"), the Stockholm Chamber of Commerce Arbitration Institute ("SCC"), the Hong Kong International Arbitration Centre ("HKIAC") and the Vienna International Arbitral Centre ("VIAC")the American Arbitration Association ("AAA") and, the Singapore International Arbitration Centre ("SIAC"). and preferred arbitration institutions include the LCIA, the ICC, and AAA.[918]

Characteristics of Arbitration Institutions: To discuss and understand the role and function of arbitration institutions, it is imperative to first examine the essential characteristics of leading and emerging arbitral institutions.

a. Permanent organizations, set of arbitration rules, and the offering of administrative services.[919] The characteristic of permanent organization connotes that there is the presence of some permanent entity whose existence precedes, and outlasts, that of the tribunals constituted to decide disputes. The Arbitral institutions must have the

[916] Blackaby et al. supra (n4) at 43.
[917] Historically, only 10% of the number's arbitration institutions existed before 1940, while most of the institutions were established in the last 30 years, see also, "The Rise and Rise of the Arbitration Institution" by Guy Pendell, CMS Cameron McKenna LLP, November 30, 2011. http://kluwerarbitrationblog.com/blog/2011/11/30/the-rise-and-rise-ofthe-arbitration-institutions
[918] There are no statistics on the exact number of arbitration institutions in the world, but for a list of well-known major list of arbitral institutions, see G. Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing 36-50 (5th ed. 2016) Kluwer Law.
[919] Rémy Gerbay, The Functions of Arbitral Institutions (2016 Kluwer Law) 5-28.

resources-both financial and human to keep the proceedings moving and manage many arbitration references.[920]

b. Arbitration institutions are identified by the existence of their own arbitration rules.[921] The procedural rules of an arbitration institution play a key role in parties' choice of an arbitral institution and the quality of the arbitral process. The arbitration rules constitute a private source of international arbitration law because their binding nature is not derived from the acts of one or more public authorities.[922] The arbitral procedural rules are a key element in the functions of an arbitration institution, although most arbitral institutions offer similar Arbitration Rules there are few differences by which to distinguish them.[923] Clarity, flexibility, innovations, and improvement to adapt to changing needs of users.[924] For instance, to attract financial institutions in using arbitration mechanisms, the LCIA in 2020 has introduced methods for the early disposal of disputes[925] These features are among the factors that inform parties' choice of the arbitral rules.[926]

c. Arbitration institutions also offer the services of professional administration and supervision of arbitral proceedings. While balancing party autonomy with the services they provide, parties have the freedom to agree on their choice of law and designate their choice of the arbitral tribunal and their seat of arbitration. Arbitral institution's

[920]Rémy Gerbay, ibid at pp.12-13.
[921] Most of the Arbitral Institutions especially the prominent old and established institutions like ICC Arbitration Rules and LCIA Arbitration Rules.
[922] Fouchard Gaillard Goldman on International Commercial Arbitration (Emmanuel Gaillard & John Savage eds) Kluwer International 1999) 986.
[923] For example, under the ICC, the time limit for challenging an arbitrator is thirty (30) days from the date of appointment and confirmation or 30 days from becoming aware of relevant circumstances, see Article 14 (2) ICC Rules 202. While LCIA it is fourteen (14) days from appointment or if later 14 days from becoming aware of the relevant circumstance, see Article 10 (3) LCIA Rules 2020.
[924] For instance, the LCIA 2020 incorporates new provisions on data protection, cybersecurity and regulatory issues, see Article 30A LCIA 2020 Arbitration Rules.
[925] Expedited proceedings to reduce time and cost of arbitration, see Article 14.3 2020 LCIA Arbitration Rule.
[926] See the 2021 International Arbitration Survey: Adapting Arbitration to a Changing World by the School of International Arbitration at Queen Mary University of London, which recorded the reasons for respondents' preference for certain institutions.

roles in the appointment of arbitrators, the conduct of the proceedings provision of facilities for, and training of members of the public on arbitration are some of the services that define how efficient. and good an arbitral institution is measured.

ii. Promoting a Jurisdiction as An Attractive Seat – Role of Arbitral Institutions.

Arbitral institutions are generally established to provide dispute resolution services and administer and supervise the conduct of any arbitration proceedings. To a large extent, the acceptance and popularity of the international arbitration process are made possible by the pioneering work of the world's leading arbitral institutions, like the ICC International Court of Arbitration, the London Court of International Arbitration, the American Arbitration Association, and others around the globe. These international arbitration institutions are responsible for promoting the use of arbitration, encouraging the enactment of modern arbitration legislation, developing procedures for the conduct of arbitral proceedings, and conducting programs to educate users and neutrals concerning proper arbitration practice.[927] The ICC Young Arbitrators Forum (YAF) for instance is a forum for young arbitrators to gain knowledge, develop skills and build networks with the aim of better understanding of ICC arbitral procedures and other dispute resolution methods.[928]

The role of arbitration institutions goes beyond performing administrative functions in the conduct of arbitration proceedings. Historically, arbitration institutions played a significant role in the popularity of international arbitration as a preferred method of resolving international commercial disputes. The development and growth of international commercial arbitration as an effective cross-border dispute mechanism can be attributed largely to prominent international arbitration institutions. These arbitral institutions helped in no small measures to

[927] See Eric Schwartz, 'The Role of the Arbitral Institution in the New Millennium; (1999) Int'l Journal of Arb Med 7 Disp. Mgmt.65 (4) PP 321-325.
[928] The ICC YAF is a global network with chapters across Africa for arbitrators under the age of 40 years old, offering young arbitrators and lawyers to gain knowledge, and skills and develop global best practices in international commercial arbitration. see www.iccwbo.org

push for arbitration laws and developed effective arbitration rules. To date, some of the rules of these arbitrations' institutions are evolving to meet up with the best international standards as well as the ever-changing dynamic modern commercial and trade standards. For instance, with the Covid -19 Pandemic in 2020 with the resultant global lockdown, most institutional arbitration rules amended their rules to the effect that hearings may take place "virtually by conference call, videoconference" or some other technology. [929]

Parties' choice of an arbitral institution or adopting a particular set of tried and tested arbitral rules would not necessarily mean choosing the seat with a strong tie to the country or region in which the institution is based. For example, parties are free to hold an ICC arbitration in Lagos, thus locating the seat in Nigeria. Aside from the normative role of arbitral institutions to provide administrative services to users (parties) in connection with arbitration proceedings, arbitral institutions' roles have and are still evolving beyond the traditional roles. Beyond the primary roles, arbitral institutions are playing a significant role in promoting the use of arbitration as an effective method of dispute resolution. The arbitral institution also has an important role in promoting the selection of the seats where the arbitration institution is located. The parties' choice of the seat of arbitration in the jurisdiction where the arbitral institutions are located is influenced by some factors.

The quality of the overall legal system of the location of an arbitral institution exerts influence on the selection of the jurisdiction of where the institution is located. As discussed in chapter two, courts at the seat of arbitration would typically have supervisory jurisdiction over the arbitration proceedings.[930] According to empirical studies (see below), it has been shown that there is a correlation between the success of leading arbitration institutions, the selection of the

[929] See LCIA Arbitration Rules 2020 Article 19.2, For instance with the Covid -19 Pandemic in 2020, the 2 ICC
[930] The courts at the seat would have supervisory jurisdiction over issues like the appointment and removal of arbitrators, disputes concerning jurisdictional objections, court-ordered provisional/interim relief, judicial assistance in evidence-taking and setting aside/annulment of the arbitral award.

seats where they are located, and the overall quality of the legal system in the jurisdiction where the arbitral institutions are located.[931]

	'95	'96	'97	'98	'99	'00	'01	'02	'03	'04	'05	'06
France	80	81	90	51	89	56	103	72	97	75	69	81
Switzerland	88	63	67	58	74	72	73	99	69	67	89	82
U.K.	22	28	37	46	46	48	52	48	43	62	47	37
U.S.A.	17	33	35	18	35	37	35	40	46	34	37	28
Germany	14	15	7	19	16	21	20	15	17	14	15	18
Singapore	5	2	10	10	11	11	13	14	14	10	14	11
Brazil	0	1	0	0	1	1	1	0	4	10	1	12
Austria	14	11	12	7	10	11	8	10	7	10	5	2
Spain	1	2	3	2	4	3	3	6	8	7	17	7
Mexico	5	3	1	3	4	3	8	5	6	10	10	9
Sweden	8	8	9	8	8	6	3	6	6	7	8	4
Italy	7	7	3	5	2	11	4	5	12	11	3	8
China/H.K.	3	5	6	6	3	5	3	6	4	6	5	9
Netherlands	4	0	4	3	6	4	10	12	9	6	5	10
TOTAL	268	259	284	236	309	289	336	338	342	329	325	318

[931] See Gary B. Born, International Commercial Arbitration (3rd edn 2021) Kluwer Law International pp 2218-2219. See also White & Case QMUL Arbitration Survey 2015, 2018 and 2020.

	'07	'08	'09	'10	'11	'12	'13	'14	'15	'16	'17	'18	Total
France	86	73	94	109	92	80	93	84	78	76	111	121	1739
Switzerland	82	77	109	79	88	115	88	77	55	82	88	72	1637
U.K.	53	56	67	66	59	68	63	80	53	63	68	67	1146
U.S.A.	36	29	31	42	43	33	35	53	52	72	50	70	838
Germany	21	35	37	24	39	18	20	24	20	28	22	19	443
Singapore	15	30	34	23	22	31	32	23	35	22	38	26	429
Brazil	14	8	11	11	14	14	22	20	19	22	28	27	240
Austria	13	14	22	11	11	13	10	19	15	11	11	11	224
Spain	10	13	11	8	15	7	8	18	15	15	13	13	201
Mexico	8	9	6	12	10	11	8	11	12	8	17	17	184
Sweden	5	10	6	6	5	5	15	5	7	4	4	2	122
Italy	5	8	6	6	6	3	6	6	7	5	2	12	128
China/H.K.	5	11	8	11	5	10	14	16	10	8	15	10	164
Netherlands	9	8	6	5	5	4	4	5	4	14	8	12	146
TOTAL	362	381	448	413	414	412	418	441	382	430	475	479	7641

Source: Gary B. Born 'Chapter 14: Selection of Arbitral Seat in International Arbitration, in Gary B. Born, International Commercial (Third Edition), (© Kluwer Law International; Kluwer Law International 2020).

The above ICC statics of caseloads from 1995 to 2019, shows parties' preference by their choice of the arbitral seat by choosing a leading arbitral centre jurisdiction such as Paris and London.[932] Perhaps the reason for this apart from the quality of the legal system of these jurisdictions could also be attributed to the perception of an arbitration institution being closely linked with the host jurisdiction.

In the absence or failure to specify the seat of arbitration in their agreement, the party's choice of an arbitral institution could be used as a means for selecting a seat of arbitration.[933] For example, where parties fail to specify the seat of arbitration in their agreement but have referred

[932] The five top arbitration institutions, Paris London, Hong Kong, Singapore and Geneva are noted to have national courts and judiciary that are supportive of arbitration.
[933] As discussed in chapter two, when parties fail to specify the seat of arbitration in their arbitration agreement, there are other mechanisms used in determining or selecting the seats of arbitration. see also Gary B. Born, see (n915) pp. 2205 – 2282.

to an arbitral institution by its name, followed by only a single geographic reference, the court has interpreted it to mean the selection of the place where the institution is located. In *VTB Commodities Trading DAC v. JSC Antipinsky Refinery*[934] in reviewing the clause "shall be referred to and finally resolved by arbitration under the arbitration of the London Court of International Arbitration, the court confirmed that the seat of arbitration was London.

Another way in which arbitral institutions play a significant role in influencing the selection of a seat of arbitration is through the default mechanism of the arbitral rules of some arbitration institutions. Some of the arbitral institutions' rules contain a default mechanism for the selection of an arbitral seat in situations where parties fail to agree on arbitral seats but have agreed on institutional arbitration. A default mechanism for selecting the arbitral seat, with the selection typically being made by either the arbitral institution that administers the arbitration or by the arbitral tribunal.[935] Some arbitration institution provides for mandatory default mechanism for the selection of a seat, an example is the LCIA which provides that, "in default of any such agreement, the seat of the arbitration shall be London (England), unless and until the arbitral tribunal orders, given the circumstances and after having given the parties a reasonable opportunity to make written comments to the Arbitral Tribunal, that another arbitral seat is more appropriate."[936] National arbitration legislation[937] and national courts[938] recognize the default mechanisms of the fixing of the place of arbitration. This selection of the arbitral seat by the parties' delegation of this choice to an arbitral institution is either expressly or impliedly permitted by most arbitration legislation.[939]

[934] [2020] EWHC 72 (COMM)
[935] For example, 2018 HKIAC Rules, Art. 14(1).
[936] 2020 LCIA Rules, Art. 16(2).
[937]See section 16 ACA 1994, UNCITRAL Model Law, Art. 2(d) and art. 20(1): S3 (a-c) English Arbitration Act, 1996.
[938] *Process & Indus. Devs. Ltd v. Nigeria* [2019] EWHC 2241*; Star Shipping AS v. China Nat'l Foreign Trade Transp. Corp. [*1993] 2 Lloyd's Rep. 445, 452.
[939] Gary Born (n915).

In a published ICC statistics of choice of arbitral seats by parties, figures indicated that in most cases, parties in the exercise of their autonomy selected arbitral seats by choosing a leading arbitral centre – specifically, London, Paris, Switzerland (Geneva or Zurich), the United States (New York, Washington D.C., Miami), Singapore, or Hong Kong.[940] This demonstrates how the choice of arbitral institutions influences the choice of arbitral seats. The role of arbitral institutions is aptly described by a commentator as the engines of arbitral reform and development. They spark the flame that kindles enthusiasm in the process both by governmental and private parties and users. [941]

iii. General Overview of African Arbitration Institutions

Generally, the use of arbitration has been on the increase in Africa, the reason for the rise of arbitration in the region has been attributed to the growth in foreign investment in addition to the general reluctance of foreign investors to submit disputes to the national courts of an African country.[942] This has resulted in an increase in Africa- related arbitration caseload in major arbitral institutions. Despite the number of African-related caseloads in leading arbitral institutions, the participation of African states in the global arbitration market is low. Yet, the continent has in the last twenty years witnessed an increasing number of arbitral institutions. According to a recent survey, over 100 arbitral institutions exist within the African continents[943] Whether these numbers of the arbitral institution will earn strong global recognition and reputation is another question that is outside the scope of this research. It has been argued[944]

[940] See QMUL White & Case 2018 International Arbitration Survey, The Evolution of International Arbitration, available at https://www.whitecase.com/insight-our-thinking/2018-international-arbitration-survey-evolution-international-arbitration-0

[941] Emilia Onyema, The Transformation of Arbitration in Africa: The Role of Arbitral Institutions. Alphen Aan Den Rijn, (Ed.) (2016) Kluwer Law International.

[942] Challenges of perceived national court bias protracted and unnecessary delay of the national court in the support and supervision of arbitration matters.

[943] The School of Oriental and African Studies (SOAS) Arbitration in Africa Survey 2020 Report: Top African Arbitral Centres and Seats, authored by Emilia Onyema available at https://eprints.soas.ac.uk/33162/. Accessed 17 May 2022.

[944] See Emilia Onyema (ed) (n941).

that the proliferation of arbitration centres portends a bright future for the arbitration industry and market in Africa. While the several numbers of the arbitral institution in Africa may help in creating awareness of arbitration and other ADR mechanisms as viable methods of dispute resolution. The growth and attractiveness of arbitration institutions within the African continent lie not in number but in the conduct of arbitral processes and provision of administrative services of globally recognized standards. The concerns of the foreign users with regards to the courts in the region are generally the lack of impartiality of judges, corruption, political instability, civil unrest, and length of proceedings amongst other reasons.[945]

It is interesting to note that even with the emergence of several arbitration centres in Africa,[946] arbitration references from African businesses and parties are often made to these global leading arbitration institutions and not to African Arbitral institutions. For instance, in the 2020 ICC Dispute Resolution Survey, a total of 171 parties from 35 African countries represented 6.8% of all parties. Nigeria had parties with 22, out of which only 2 had Nigeria chosen as the seat of arbitration. [947] It is for these reasons and many more as will be discussed that gives the leading arbitration institutions an edge over other competing arbitration institutions across the world including in Africa in general. There is a need to have at least two arbitral institutions emerge as major global players within Sub-Sharan Africa. Arbitral institutions will have a formidable geographic reach within the region and be a popular choice for at least the African arbitration market. African arbitral centres such as the Cairo Regional Centre for International

[945] Many of the arbitral institutions in Africa are yet to earn global reputation and recognition. See Justin B. Prelogar, 'From Forecast to Five-Cast: The Arbitral Promise of Africa, (2022)43 (2) University of Pennsylvania Journal of Int'l Law, 523-554.
[946] According to the White & Case Survey 2020, almost 100 arbitration institutions of various sizes and areas of specialization exist in Africa, see schedule.
[947] See https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf Accessed 26 July 2022.

Commercial Arbitration (CRCICA), and the Kigali International Centre (KIAC) are examples of top arbitral centres with high profiles in terms of caseloads experience and reputation.

iv. Arbitration Institutions in Nigeria- Quantitative or Qualitative Growth

The growing status of Nigeria as an investment destination[948] increased international commercial transactions. This increase in investment and trade influenced the increase in the use of arbitration as the preferred resolution mechanism for transnational commercial disputes. This in turn increased arbitration awareness in Nigeria resulting in the birthing of other arbitration institutions.[949] Nigeria has several numbers of arbitral institutions such as, the Lagos Regional Centre for International Commercial Arbitration (RCICAL), Lagos Chamber of Commerce International Arbitration Centre (LACIAC), Nigeria Institute of Chartered Arbitrators (NICArb), International Centre for Arbitration & Mediation, (ICAMA), Janada International Centre for Arbitration & Mediation, Abuja, the Maritime Arbitrators Association of Nigeria, and the Lagos Court of Arbitration (LCA). Aside from these major ones, there are still several clusters of smaller arbitral institutions in Nigeria.[950] Generally, it would be expected that this quantity of arbitral institutions should portend a viable arbitration market for Nigeria. either as seats or appointed as arbitrators.[951] The contrary is the case, as the numbers of arbitral institutions have not resulted in any considerable number of arbitration references. It is not in numbers but in the quality of recognized arbitral institutions that will promote the use of arbitration and Nigeria as an attractive seat for international commercial arbitration. While some of the arbitration institutions are private sector-driven and are therefore independent of

[948] Nigeria, as Africa's largest economy and population, its attractiveness to foreign investments includes the oil and gas industry, and the non-oil economy in the telecommunication and construction industries.
[949] The enactment of the ACA in 1988, ushered in the beginning of the drive for the awareness of arbitration law and practice in Nigeria.
[950] Aside from these major arbitration institutions in Nigeria, there are other arbitration and ADR centres such as the Chartered Institute of Arbitrators (CIArb) UK (Nigeria Branch), Multi-Door Courthouse (MDC) Initiative, and The Lagos Multi-Door Courthouse (LMDC) with several other industry- based arbitration centres.
[951] According to ICC Statistical Report 2015, ICC Bulletin No. 1, 2016, only five cases were conducted in African jurisdiction and the number of African arbitrators appointed on international cases remains woefully small.

government regulation they provide only hearing facilities and conferences[952] others are the creation of government collaboration and agreement and conduct the arbitration.

Historically, the clamour for the internalization of Nigeria as a seat for international arbitration began a year after the adoption of Model Law in 1988, with the establishment of the Regional Centre for International Commercial Arbitration, Lagos (RCICAL) under the auspices of the Asian African Legal Consultative Organisation (AALCO).[953] The objectives of the establishment of the regional centre in Lagos included amongst others, the promotion of international commercial arbitration in Asian and African regions.[954] In establishing the Lagos centre, it was intended to attract potential users of the arbitral process arising out of the AALCO agreements to be brought to the Lagos Centre. However, this seems to have yielded little success.[955] There is no publicly available data on this in the annual reports provided to the AALCO by the Lagos Regional Centre. Also, there is no statistical information relating to their caseload on their website.[956] The lack of such vital information on their website may raise questions about the strength and viability of the arbitral institution.

Aside from the RCICAL which was established in 1989, other arbitration institutions in Nigeria are relatively new arbitral institutions as they were established within the last twelve years.[957] A detailed analysis of the six major arbitration institutions in Nigeria would require a treatise

[952] Beyond the start-up infrastructure by the Lagos State Arbitration Law 2009, the LCA is private sector driven and independent of Lagos State Government regulations and controls.
[953] The Asian African Legal Consultative Organisation (AALCO) has four regional centres Kuala-Lumpur, Cairo, Lagos and Teheran. The Lagos Centre was established to serve African countries in the South Sharan. For a detailed account of the work of the AALCO see Amazu Asouzu, International Commercial Arbitration and African States (CUP 2001).
[954] Two basic objectives of the AALCO's integrated dispute settlement scheme, are firstly, to establish a system under which disputes and differences arising out of transactions in which both the parties belong to the Asian-African and Pacific regions could be settled under fair, inexpensive and adequate procedures. Secondly, to encourage parties to have their arbitrations within the region where the investment made or the place of performance under an international transaction was a country within this region.
[955] There is no publicly available data on this in the annual reports provided to the AALCO by the Lagos Regional Centre. Here is no statistical information relating to their caseload on their website.
[956] This is not peculiar to the RCIRCAL, all most all the Nigerian arbitral centres' website lacks any information and report as regards their caseloads established in 2012.
[957] Examples are the LCA and LACIAC.

far beyond the scope of this research. However, an overview of three out of the six notable arbitral institutions would be necessary to give an insight into the capabilities of these institutions in transforming the arbitration market of Nigeria.

The number of arbitral institutions in Nigeria does not commensurate with the number of international commercial case references. RCICAL despite being in existence for more than twenty years when compared to its counterpart in Cairo, the Lagos Regional centre has not been able to achieve as much as the Cairo Centre. The increase in the caseloads of the Cairo Centre has earned it the lead position in the African Arbitral institution.[958] Unlike the Cairo institution, the Lagos Regional centre is yet to gain itself a reputation as an experienced efficient arbitration institution within the region. The writer argues that as long as the Federal Government of Nigeria is the host in charge of the centre, Lagos Regional Centre may have challenges in heading in the right direction. Though the agreement for establishing the centre, provides that the host government shall respect the independent functioning of the centre, the centre is highly under the regulation and control of the federal government. The RCICAL caters for arbitration and other ADR mechanisms for the needs of both private and public sectors of the economy in Nigeria as well as other jurisdictions in sub-Saharan Africa. In respect of promoting the use of international commercial arbitration, the main aim of the AALCO in establishing the regional centres is to function as international commercial arbitration in the Asian and African regions. It also aims to ensure that disputes emanating as a result of investment in the two regions are arbitrated within the Asian – Afro region rather than outside the regions. This gives the perception that the centre functions only for commercial disputes belonging to states of the

[958] As of 31 December 2020, the total caseload filed at the Cairo Regional Centre for International Commercial Arbitration has reached 1452, and by 15 February 201 the number increased to 1467, and by 3o September caseload has reached 1517. See https://www.circa.org/news/2021/caseload/Report accessed 27 June 2022.

regions under the AALCO agreement. It functions to provide its services to all nationalities, irrespective of whether the parties are nationals of member-states of the AALCO or not.

The LACIAC is an independent arbitral institution with affiliation with the oldest chambers of commerce in Nigeria, the Lagos Chamber of Commerce and Industry.[959] The LACIAC offers a dispute resolution management service including arbitration. LACIAC should have been the equivalent of what the ICC is to Paris and the global arbitration market. The centre is not on the list of top African Arbitral institutions. Nevertheless, the LACIAC aims to make Lagos, Nigeria an attractive seat for international commercial arbitration as it functions to provide a friendly centre for the management of arbitration both local and international. The centre acts as appointing authority and administers arbitration processes under its rules, the LACIAC Rules were recently revised in 2016. The LACIAC Rules 2016, also incorporates the IBA Guidelines on Party Representation in International Arbitration and the IBA Guidelines on Conflicts of Interest in International Arbitration.[960] The centre maintains and publishes on its website the list of its arbitrators and neutrals as well as its fees, but nothing on its website to show data or information about its caseload. Quality and reliable information such as the report of caseloads may make a good impression of the performance of an arbitral institution to prospective international commercial parties.

Of the numerous numbers of arbitral institutions, the Lagos Court of Arbitration (LCA) though comparatively new shows signs of potential growth and developing a reputation as an emerging arbitral institution in Africa. The LCA has positioned itself as a choice arbitral institution in Nigeria, as its main function is the promotion of disputes by arbitration and other ADR mechanisms. The LCA advances the cause of the promotion of Nigeria as a favourable seat of

[959] It was founded in 1888, and incorporated in 1950 as a non-profit making organization, Limited by Guarantee. The is affiliated under the auspices of the Lagos Chamber of Commerce and Industry, a foremost and premier chamber of commerce in Nigeria

[960] See Annex 1 and Annex 11 LAIAC Arbitration Rules 2016.

arbitration by describing Lagos as the default seat of the arbitration under its rules.[961] LCA has been adjudged as one of the top five arbitral institutions in Africa,[962] although in its twelve years of existence it has only one international commercial arbitration case. Nevertheless, the LCA is making its presence felt within the African arbitration community and beyond.[963] The LCA was established and created by the Lagos State Arbitration Law 2009 but started its operation in 2012 as a private sector-driven arbitral institution independent of government control.[964] The LCA arbitral centre administrative structure is modelled after the London Court of International Arbitration (LCIA) and the UNCITRAL Arbitral Rules.[965] The situation of the LCA in Lagos, Nigeria, makes it very strategic as Lagos is incontrovertibly the commercial nerve centre in Nigeria as well as within the West African sub-region. Lagos also boasts as the capital of commerce and industry accounting for over 60% of industrial and commercial activities in the country.[966]

v. Challenges of Arbitral Institutions in Nigeria

Given the proliferation of arbitral institutions in Nigeria, it is expected that this will transform the arbitration landscape in Nigeria. However, having a viable arbitral institution that is internationally recognised and accepted is not just in numbers. Arbitral institutions in Nigeria are yet to gain regional and global reputations for the following reasons.:

[961] The LCA International Centre for Arbitration is Africa's first purpose-built ADR centre and provides functional facilities for the promotion of the use of arbitration as well as other alternative dispute resolution mechanism.
[962] See School of Oriental and African Studies (SOAS) Arbitration in African Survey Report 2020. Top African Arbitral Centres and Seats, authored by Emilia Onyema (a Reader in International Commercial Law at SOAS), available at https://eprints.soas.ac.uk/33162/.
[963] In the last five years the LCA has been collaborating with notable arbitration institutions in Africa an example is the LCIA – MIAC Centre in Mauritius in 2018.
[964] See http://www.lagosarbitration.org/
[965] The LCA has a three-tier structure like the London Court of International Arbitration (LCIA) comprising of a Board of Directors, a Secretariat, and the LCA members.
[966] Lagos State Investment Potentials available at: www.lagosstate.gov.ng/pagelinks.php?p=10 [last accessed 29 March 2022].

Reputation and Recognition: Most of the arbitral institutions in Nigeria are young compared to the longstanding established arbitral institutions like the LCIA, ICC, and HKIAC. Aside from the fact of the age, there is more to be done to acquire a reputation that will provide confidence and trust to users. One of the key reasons that were found as important reasons why parties prefer a specific arbitral institution over the other is the general reputation and recognition of the arbitral institution.[967] World-leading arbitration institutions like the ICC, LCIA, and the AAA have been in existence for almost ten decades. For instance, The LCIA's origin can be traced back to as earlier as 1891, the oldest global arbitral institution, is one of the leading international bodies administering arbitration cases, and is the main arbitral institution in the UK.[968] Likewise, the ICC is one of the most reputable and experienced arbitral institutions for international commercial arbitration, it was established in 1923,[969] These two arbitral institutions alongside other popular and leading arbitral institutions[970] have a well-established track record for conducting and administering effective modern arbitration practice which cut across regions. SIAC and HIKAC have been able to position themselves not only as major leaders within the Asian region but also amongst the top five leaders of preferred institutions and seats.[971]

Another challenge of arbitral institutions in Nigeria is the quality of the judicial system as well as the arbitration legislation. According to the White & Case and Queen Mary University of London ("QMUL") '2021 International Arbitration Survey, jurisdictions with strong, modern arbitration laws and judiciaries that are supportive of the arbitral processes are two essential

[967] See QMUL White & Case 2018 International Arbitration Survey, The Evolution of International Arbitration, https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration. The same reasons and factors were highlighted in the 2015 survey.
[968] See https://www.lcia.org/LCIA/history.aspx
[969]See https://iccwbo.org/about-us/who-we-are/history/ Accessed 2 February 2022
[970] For example, Arbitration Institute of the Stockholm Chamber of Commerce (SCC); American Arbitration Association / ICDR (AAA). Singapore International Arbitration Centre (SIAC)and the Vienna International Arbitral Centre (VIAC).
[971] The 2021 Survey, SIAC moved to the second position of most preferred Arbitration Institution and seat beating Paris and Geneve see Arbitration Survey.

elements that are found in the top five arbitration seats. Interestingly, the top five arbitral institutions are also located in these top five preferred seats for arbitration. National court support for arbitration, an impartial judicial system, growth of domestic arbitration, and track record of enforcement of arbitral awards are factors of the seat that could rub off on an arbitral institution located in a jurisdiction.

Experience: Reputation and recognition can only be acquired by experience, and experience in turn is gotten by proven track records based on the perception of users. This would mean that it would take a considerable length of time before arbitration institutions in Nigeria get the reputation and experience needed to build up their following, particularly in the international commercial arbitration landscape. Countless arbitration agreements are entered into by parties in respect of international commercial arbitration, these contracts do not give rise to disputes, and the exact time when things would go wrong is not easily predictable. Whether the arbitral institutions would still be functioning as arbitration institutions to see new claims being brought as a result of international commercial transactions is another question. This is because most of these arbitration clauses are based on long-term investment and projects, particularly in the construction, oil, and gas transactions. Additionally, the timeline within which an arbitration institution with a high administrative reputation starts experiencing an increase in caseload.[972] It is interesting to note in this regard that most of the arbitral institutions in Nigeria, like others in Africa, do not provide the traditional functions of administering and managing arbitration

[972] For instance, both HIAC and SIAC started their operation in 1985 and 1991respectively. Both first built and developed their reputation within the Asian international arbitration community and have witnessed increased caseloads in the global arbitration market which have in the last five years made them emerge as preferred arbitration institutions. See Christopher K Tahbaz, Justin R. Rassi, 'The Development of Arbitral Institutions in Asia', (2018) 13 U. Pa. Asian L. Rev. Available at: https://scholarship.law.upenn.edu/alr/vol13/iss2/4 Accessed 18 April 2022.

proceedings but only provide facilities for arbitration meetings like hearing rooms, conferences, and meeting[973] and or act as appointing authorities.[974]

Viability of Arbitral Institutions: Connected to the issue of experience is the resources to manage the processes. To have a viable arbitral institution that is internationally recognised and comparable to notable international arbitral institutions is undoubtedly capital intensive. Most international commercial arbitration matters are complex in nature and may involve presentation of technical and complex documents. The conduct of such arbitral process involves use of both technical, human and financial resources for a smooth and effective conduct of the arbitration process and proceedings.

Arbitration References: Nigeria has been at the top and has a chunk size of the number of African-related disputes settled in most of the renowned International Arbitral Institutions[975], yet it faces challenges in establishing itself as an attractive seat for international commercial arbitration. This is despite the fact the country has played a pioneering role in international commercial arbitration within the sub-Saharan African region.[976] It is interesting to note that out of the numerous arbitration institutions in Africa, only five were identified as leading arbitration institutions. The Lagos Court of Arbitration (LCA) was among the top five. The institutional structures in Nigeria have not been able to stamp their presence firmly and convincingly in the international commercial arbitration space. Their attractiveness as arbitration centres is minimal hence, they tend to attract few cases. One of the downsides of the arbitral institution in Nigeria is that most of these centres' websites lack adequate and relevant

[973] The Nigerian Institute of Chartered Arbitrators and the Chartered Institute of Arbitrators (UK) Nigerian Branch, International Centre for Arbitration & Mediation Abuja are examples of Arbitral institutions that provide only meeting and hearing room facilities for arbitration and ADR.

[974] Chartered Institute of Arbitrators (UK) Nigerian Branch does not administer arbitration proceedings but acts as appointing authority.

[975] See for instance the LCIA Annual Casework Report for the period of 2018 to 2020 Nigeria has the highest number of cases. See www.lcia.org/LCIA/repots. last accessed 25 May 2021

[976] Nigeria was the first African country to adopt the UNCITRAL Model Law on International Commercial Arbitration in 1988.

information for potentially interested parties seeking out arbitration centres to inquire about their activities. Even for research purposes, all the website of these arbitral institutions lacks adequate information compared to that of say ICC and SIAC.

		2016	2017	2018	2019	2020
Lagos Court of Arbitration (LCA):	Domestic Arbitrations	3	3	7	11	12
	International Arbitrations	-	-	-	1	-
Lagos Chamber of Commerce International Arbitration Centre (LACIAC):	Domestic Arbitrations	-	-	2	2	1
	International Arbitrations	-	-	1	-	-
Abuja Chamber of Commerce-Dispute Resolution Centre (ACC-DRC):	Domestic Arbitrations	-	-	1	6	4
	International Arbitrations	-	-	-	-	-

Source: Emilia Onyema, Arbitration in Africa Survey Report (2020) on Top African Arbitral Centres and Seats.[977]

The above indicates the low statistics of arbitration references of Nigerian arbitral institutions in respect of attracting international commercial arbitration references. The writer argues that the above survey may not give the exact picture of the arbitration references of these institutions. Issues with most arbitration institutions in Africa and Nigeria inclusive are lack of access to data, regarding the number of cases they have administered, credible empirical analysis of domestic arbitration considering the private and confidential nature of the arbitration. The domestic arbitration references, as shown above, are equally poor, although it has been argued that the explanation of poor domestic references is due to most of the domestic arbitration being ad hoc.[978] The writer argues that the explanation notwithstanding, it does not erase the fact of the ingrained litigation culture in Nigeria may also be a factor for the poor domestic references. The more arbitration references, the better skilled the arbitral institutions

[977]Available and seen at https://eprints.soas.ac.uk/33162/1/2020ArbitrationSurveyReport last accessed 27 March 2022.

[978] See Emilia Onyema, Arbitration in Africa Survey Report (2020) on Top African Arbitral Centres and Seats, available at: https://eprints.soas.ac.uk/

become in efficiency and reputation. It has been observed that jurisdictions that have been successful in establishing busy international arbitration centres and attracting significant international arbitration references also have vibrant domestic arbitration. This is true of jurisdictions like England (LCIA), France (ICC), and other notable arbitration destinations. This emphasises the point that attracting international commercial arbitration references requires a robust domestic arbitration sector as the two feed off each other. As earlier stated, the ingrained litigation culture is one of the challenging mitigating against the development of domestic arbitration.

Nigeria has been at the top with a chunk size of the number of African-related disputes settled in most of the renowned International Arbitral institutions like the LCIA and the ICC. Yet in the Nigerian arbitral institution, the above data shows zero international commercial arbitration cases. The numerous arbitral institutions have not helped in establishing Nigeria as an attractive seat for international commercial arbitration. This is despite the fact the country has played a pioneering role in international commercial arbitration within the sub-Saharan African region.[979]

The involvement of government in the running of arbitral institutions also impacts on arbitration references. The government's involvement gives the perception of interference and is dependent on the external influence of the government. For instance, the Federal Government of Nigeria is responsible for the appointment of the members of the RCICAL. It is the argument of the writer that though the support of the government may be required at the initial stage of the creation of the arbitral institution, however, continuous influence and control by the government will erode the independence of the arbitral institution and affect the confidence and trust of users.

[979] Nigeria was the first country to adopt the UNCITRAL Model Law on International Commercial Arbitration in 1988.

Nigeria aims to become and assert itself as an attractive and preferred seat for international commercial arbitration in Sub-Saharan Africa. The rise of arbitration centres in jurisdictions such as Rwanda, Mauritius, Kenya, and Uganda as well as Egypt and Morocco are strong contenders in the African arbitration market. For instance, the Cairo Regional Centre for International Commercial Arbitration (CRCICA), a product of AALCO is an established and recognized arbitral institution in Africa.[980] Rwanda is also an example of an emerging African arbitration seat in Africa.[981] The Federal Government of Nigeria proposed National Arbitration Policy (NAP) has proposed the creation of more arbitral centres in Abuja and Lagos. It is the argument that this proposal is unnecessary. The numerous arbitration centres in Nigeria are yet to record any considerable success in international commercial cases. Although a regional centre, RCICAL has not recorded expected success in respect of attracting arbitration references in Nigeria. The Cairo Regional Centre for International Commercial Arbitration (CRCICA) which was also established under the auspices of AALCO enjoys more reputation as one of the top five Arbitration Centres in Africa. Rather than create more arbitral institutions, existing arbitration institutions in Nigeria should create a niche in the global arbitration market and embark on the promotion and transformation of arbitration practice in Nigeria to gain regional and global recognition.

5.4 Other Structural Challenges

Nigeria is Africa's largest economy and a destination of a significant number of international transactions and investments.[982] Despite the increase and policy drive for the use of arbitration

[980] See SOAS Arbitration Survey (n230).
[981]The Kigali International Arbitration Centre (KIAC) has been reported as more of the emerging well-established African Arbitral Centres. See White & Case, Institutional Arbitration in Africa: Opportunities and Challenges available at https://www.whitecase.com/insight-our-thinking/instituional-arbitration-africa-opportunities-an-challenges.Accessed 19 April 2022.
[982] For section 17 of the Federal High Court Act, Cap F21 LFN 2004, provides that the court may promote reconciliation among parties and encourage and facilitate amicable settlements.

in Nigeria,[983] not much has been achieved in terms of attracting international commercial arbitration in Nigeria. Adequate legal framework and supportive court though are of key importance, other determinative factors are important in influencing the choice of the seat of arbitration. These factors as been termed 'soft factors which include important issues such as safety and security, general infrastructure and service facilities, technical support, and the general reputation of the jurisdiction as an attractive seat for arbitration. In Nigeria, these pose as challenges that may impact on the attractiveness of Nigeria as a seat.

A Safe Environment: Critical amongst these structural factors is the security challenge of Nigeria in recent times. A safe environment for all participants and their documents according to the London Principles is one of the criteria in evaluating a safe seat for international commercial arbitration.[984] Though, the selection of jurisdiction as the seat of arbitration does not mean that the hearing would be physically heard in the jurisdiction. However, given that there may be a need for parties, arbitrators, and counsels to seek judicial support for arbitration which may necessitate the attendance of parties in the court. More so, the general reputation of unsafe jurisdiction may weigh against the selection of Nigeria as an attractive seat. The state of safety and security in Nigeria has a great challenge with high rates of kidnapping,[985] insurgency and bandit attacks,[986] and civil unrest.[987] It is the argument of the writer that the implication

[983] In 2020, the Office of the Attorney General of Nigeria established the National Policy on Arbitration with the main objective of the growth of arbitration practice in Nigeria. In addition, many State High Court Civil Procedure Rules in Nigeria provide for the use of ADR for the resolution of parties' disputes.

[984] The sixth Principle emphasises adequate safety and protection of the participants, their documentation, and information. See London Principle https://www.ciarb.org/media/1263/london-centenary-principles.pdf last accessed 26 June 2022.

[985] Reports of various kidnappings by bandits have been in the News, of recent bandits attacking an Abuja/Kaduna bound train on March 28, 2022. Several people were killed others were kidnapped. Available at https://www.theguardian.com/world/2022/mar/29/injured-gunmen-attack-passenger-train-nigeria-abuja-kaduna s

[986] The Islamist Movement of Boko Haram has been responsible for armed violent attacks that claim lives and properties in the Northern part of Nigeria including the Federal Capital City (FCT) Abuja. See https://www.un.org/africarenewal/topic/boko-haram

[987] In October 2020, Nigerian youths peacefully protested the brutality of the now disbanded Police Special unit (SARS), "the End-Sars Protest" which resulted in the killing of Nigerian youths by excessive use of arms by both the Nigerian Army and the Police. The response to the killing by the Nigerian government drew the outrage of many international organizations. See https://www.amnesty.org.uk/press-releases/nigeria-least-12-endsars-protestors-killed-military

of the declining security and safety in Nigeria has a negative global rating of Nigeria which can also work against the attractiveness of Nigeria as seat for arbitration.[988] The high rate of insecurity in Nigeria has caused some countries to issue travel warnings to Nigeria.[989] The unsafe environment deprives arbitral institutions in Nigeria the experience and reputation that are needed to earn global recognition and acceptability. Given the rate of insecurity in Nigeria, the attractiveness as a safe and convenient place to hold arbitration proceedings or as a seat of arbitration to attend court hearings for judicial support will be affected.

General Reputation and Recognition: The reputation and recognition of a place as a seat of arbitration is adjudged one of the top five factors parties consider when selecting a place as a seat of arbitration.[990] Connected to the issue of security and safety is the general perception and prevalence of corruption in Nigeria which affects all facets of the Nigerian society and arms of government[991] and sadly the judiciary is not excluded.[992] Nigeria faces challenges of corruption not only in the judiciary but even in arbitration proceedings. An on-going example is the of *P & ID* case, where corruption in the procurement of the subject matter of the contract tainted the recognition and enforceability of the arbitral award.[993] The alleged corruption in the subject matter of the contract involved a natural gas contract between the government of Nigeria and a British Virgin Island company. Not only government officials were implicated but also indicted a Nigerian arbitrator/lawyer. The English Court in P *& ID* case stated that

[988]See https://www.economicsandpeace.org/report/global-peace-index-2021/

[989] For example, the UK Home office and the Canadian government issues travel advice to its citizens to avoid non-essential travel to Nigeria because of the dwindling state of insecurity. See https://www.gov.uk/foreign-travel-advice/nigeria; https://travel.gc.ca/destinations/nigeria

[990] See both the Arbitration surveys conducted by Queen Mary University of London (QMUL) & White Case IN 2015 AND 2018. See also the Global Arbitration Review with the Chartered Institute of Arbitrators (CIArb) Seat Index 20i8 https://globalarbitrationreview.com/survey/gar-ciarb-seat-index/2020.

[991] Transparency International ranks Nigeria 149/180 in the Corruption Index Report 2020 available at www.transparency.org.

[992] Nigeria was ranked 22nd out of 31 regionally and 108 out of 128 globally by the World Project (WJP) Rule of Law Project Index 2020. The WJP is a world-leading independent data on rule of law, the Rule of Law Index Report is a survey based on eight factors: constraints of government powers, absence of corruption, open government, fundamental human rights order, and security regulatory enforcement, Civil Justice, and Criminal Justice. See www.worlorldjusticeproject.org.

[993] See the judgment of the High Court of Justice England and Wales [2019] EWHC 2241.

there was strong evidence to suggest that the lawyer/arbitrator had deliberately in conjunction with *P&ID* together with government officials undermined the arbitration proceedings in order lose the arbitration.[994] This case has tainted the reputation of Nigeria in the global arbitration community.

Corruption in the judiciary undermines the credibility of the entire justice system and erodes trust in the court's impartiality in all its core functions such as dispute resolution, protection of property rights and contract enforcement, and law enforcement.[995] It impacts negatively on the general reputation of Nigeria as an attractive or preferred seat for international commercial arbitration. An incorruptible judiciary in every society is vital to the promotion and enforcement of the right to a fair hearing and application of the rule of law as enshrined in national,[996] regional[997], and international legal instruments.[998] The fundamental role of the judiciary in any society cannot be over-emphasized. All sectors of society depend on the judiciary through the courts as the judicial arm of government to interpret the law and maintain law and order.

The general reputation of corruption in the Nigerian judiciary calls for great concern, the indictment of top judicial officers depletes the prestige and credibility of the Nigerian judiciary.[999] The Nigerian body anti-corruption institution, the Independent Corrupt Practices and Other Related Offences Commission (ICPC) recent report on the Nigerian judiciary

[994] See [2020] EWHC 2379 (Comm), paras 225-226.
[995] See, UNODC UNGD, Report of the Special rapporteur on the Independence of Judges and Lawyers, Human Rights Council, 26th session (28 April 2014), see also, Siri Gloppen, Courts, corruption and judicial independence' in Corruption, grabbing and Development: Real World Development (ed) Tina Soreide and Aled Williams, (2013) Monograph 68.
[996] Right to Fair hearing is constitutionally guaranteed as a Fundamental Human Rights under section 36 of the Constitution of the Federal Republic of Nigeria.
[997] See Article 7, African Chapter on Human and People's Right, Article 6 European Convention on Human Rights (ECHR), Article 8 American Convention on Human Rights,
[998]See UN Universal Declaration of Human Rights (UDHR) 1948 Article 14 International Covenant on Civil and Political Rights (ICCPR),
[999] See The International Bar Association Integrity Initiative: Judicial System and Corruption, Typologies of Corruption the Judiciary- Judiciary Integrity Initiative May 2016 available at www.ibanet.org/LPRU/Judicial_Systems_and_Corruptions.

reignited the corruption perception of the Nigerian judiciary. The report rated the judicial sector on top of the Nigeria Corruption Index between 2018 and 2020.[1000] The judiciary has come up against a bulwark of attack against its integrity from allegations of financial compromise.[1001] Three top justices including a presiding justice of the Court of Appeal were sacked for fraud.[1002] In 2016, Nigeria's Department of State Services (DSS) raided the homes of seven judges including two Supreme Court justices and were arrested on charges of corruption. In 2019, the Chief Justice of the Federation was removed on charges of corruption.[1003]

General Infrastructure and Facilities: Adequate and modern facilities comparable to notable international arbitration seats, especially for arbitral institutions contributes to the development of international commercial arbitration. International commercial arbitral proceedings depend on support services for an effective conduct of arbitral proceedings and procedures. In Nigeria these basic infrastructures such as insufficient power supply, cost and access to uninterrupted internet service as well as other technology support and services are challenges which prevails in Nigeria. Though, these logistic issues may seem trivial, however, they may have consequences, given that some commercial disputes may involve complex and technical matters that may require uninterrupted power supply during arbitration hearings or presentation of documentary evidence.[1004] It is the argument of the writer that the lack of adequate basic infrastructure and facilities are factors that would dissuade parties from selecting Nigeria as a seat and would rather choose to arbitrate in a more developed seat.

[1000]See the Independence Corrupt Practices and Other Related Offences (ICPC) Nigeria Corruption Index- Report of a Pilot Survey (1) 2020 available at www.icpcacademy.gov.ng

[1001] In 2016, three judges were sacked for fraud and misconduct see Okakwu, E. (2016), "Nigeria sacks three top judges for fraud, misconduct Premium Times, 30 September, available at www.premiuntimesng.com/news/headlines/2117709-nigeria -sacks-three-top charges of corruption and of -judges-for-fraud-misconduct.html

[1002] Ibid.

[1003] The then Chief Justice Onnoghen Nkanu Walter Samuel, was charged before the Code of Conduct Tribunal on suspected financial crimes.

[1004] Gary Born (n915) at pg. 2216.

5.4 Conclusion

This chapter illustrated and examined key structural issues and challenges are often the missing factors in the Nigerian international arbitration commercial landscape which impacts on the attractiveness of Nigeria as a preferred seat. The chapter has demonstrated that critical to the development and transformation of Nigeria as an attractive seat for international commercial arbitration are other structural factors. Legal practitioners, arbitral institutions, and the general infrastructure and the general reputation of Nigeria are fundamental to making Nigeria become an attractive seat for international commercial arbitration. However, these challenges have not received the adequate awareness and attention that they require as much emphasis are usually placed on legal framework and the courts. Therefore, for a holistic approach to the challenges of Nigeria being an attractive seat for arbitration, it is crucial that a great deal of attention is given to these challenges. It is important that legal practitioners involved in either the conduct of arbitration proceedings or as lawyers in arbitration matters before the courts understand that arbitration is a dispute resolution method and not another litigation. The extension of the Nigerian statutory definition of a legal practitioner for the purposes of litigation to arbitration proceedings and processes restricts parties' access to their choice of legal representation. This restrictive approach derogates from the principle of party autonomy and erodes the right of the party's access to legal representation of their choice. A non-restrictive approach to legal representation whether domestic or foreign) in international commerce is important as this is reflective of a modern and attractive seat for arbitration. Owing to the many challenges facing several arbitration institutions, Nigeria needs a viable and internationally recognized arbitration body that can favourably compete with both the regional and global arbitration market. To achieve this feat, Nigeria's arbitral institutions must be independent with resources to efficiently keep and maintain arbitral proceedings and processes. Critical to regional and global recognition and acceptability as an attractive seat, a safe environment, a stable political environment as well as the need to tackle the perception of corruption, especially with regards

to arbitrators and the judiciary is necessary to positioning Nigerian arbitral institutions to the international level.

5.4 Recommendations

1. Institutional structures and infrastructures.

- Arbitral Institutions: There is a need for Nigeria to have a strong and viable arbitral institution that will be associated with Nigeria as a seat of arbitration like the LCIA and London. Currently, there are pockets of arbitral institutions in Nigeria, that cannot be recognised as providing high-quality arbitration administrations, some of these arbitration institutions may collaborate to provide and offer a niche in specific industry-related arbitral institutions. For instance, oil and gas-related international commercial disputes. Government should withdraw from the control of arbitral institutions an example is the Regional Centre for International Commercial Arbitration Lagos. The Federal Government's presence in the RCICAL should be limited to strengthening the capacity of the regional centre to compete and benefit from potential disputes with the Cairo AALCO centre.

- Capacity Building: Arbitral institutions must embrace international best practices in dealing with international commercial arbitration Notable arbitration institutions like the LCA and the RCICAL should embark on capacity building by way promoting arbitration through seminars and workshops as well as the sponsorship of international commercial arbitration conferences and workshop to attract recognition. The many arbitral institutions in Nigeria that have no expertise or resources to effectively administer international commercial arbitration will harm the reputation of Nigeria as an attractive seat for international commercial arbitration in general. To build a high-quality arbitration institution in Nigeria, the way forward is to build international profile, with well-designed arbitral rules that are user friendly and meets the needs of parties. To this end, it is recommended that rather than having many arbitral institutions,

existing small arbitration institutions in Nigeria can collaborate and establish cooperation amongst themselves and with acclaimed and reputable international arbitral institutions.

- Training of Arbitrators/ Legal Practitioners: For arbitration process and judicial intervention in arbitration to be effective, there is need for a change of attitude of legal practitioners towards arbitration. The approach and attitude of perceiving arbitration as the first step to litigation whereby arbitration applications before the courts suffer protracted adjournments and delay raises concern. There is need for legal practitioners to understand that arbitration is not litigation but another dispute resolution method. This can be done by the acquisition of skills, knowledge and through continuing education, organised by arbitration institutions, an example is the Chartered Institute of Arbitrators both the Nigerian and the UK branch. Attendance of both national and international commercial arbitration workshops, conferences and seminars, are also important as it enhances global exposure and an opportunity to develop knowledge and expertise in the field of international commercial arbitration. This will enhance the quality and attitude of legal representation for arbitration and the judicial process for arbitration and will have an impact on the outcome of the entire arbitral process as well as the general reputation of Nigeria as an attractive seat for international commercial arbitrations.

- Legal Representation: In Nigeria the issue with legal representation of arbitral matters is not the issue of lack of legal expertise as Nigeria is recognised as having the largest number of legal practitioners and arbitrators in Africa in accordance with the SOAS Arbitration Survey Report 2018. However, the challenge is the disposition of perceiving arbitration as another litigation. In this light it is recommended that the general attitude of legal practitioners representing parties before the courts need to understand that arbitration is different from litigation. There is need to have sound knowledge of the workings of arbitration.

CHAPTER SIX: CONCLUSION

6.1 Introduction

The objective of this thesis has been to critically examine the efficiency of the Nigerian arbitration law, the adequacy of judicial support for arbitration, availability of efficient institutional as well structural infrastructure for the conduct of international commercial arbitration. The thesis argues that for Nigeria to attract international commercial arbitration within its jurisdiction and for global credibility as an attractive seat, there is a need to improve not only its legal framework but also there the need to convince the legitimate expectations of international commercial judicial intervention, processes, and procedures as well as institutional and structural infrastructures in Nigeria. For international commercial arbitration law and practice to be developed and seen to be developed, the importance of judicial support and supervision in both domestic and international commercial arbitration can never be over-emphasised. It was argued and shown that for a jurisdiction that aspires and wants to become an attractive seat for international commercial arbitration, legislation and legislative reforms are not enough, the judiciary must be actively involved when called upon to support arbitration. The institutional framework and structural infrastructure and services must be that is internationally comparable to some extent to recognised and established arbitral seat for international commercial arbitration.

6.2 Conclusion of Thesis

While Chapter One dealt with the introduction of this thesis, Chapter Two examined the foundational issues by looking at the significance of seat of arbitration in international commercial arbitration. It illustrated that the concept of seat still constitutes a major building block within the international commercial arbitration process. The seat theory, therefore, cannot be regarded as an out-of-date concept, even with criticisms and trend towards delocalisation.

Chapter two first, laid the foundation of judicial intervention by examining the juridical nature of arbitration discussed the various theories: namely jurisdictional, contractual, mixed or hybrid and the autonomous theory as well as delocalisation theory. In chapter the writer highlighted that though jurisdictional theory rest well with the idea that state has supervisory power over any international commercial arbitration that takes place within its jurisdiction, it failed to take account of the need to free arbitration from the stronghold and grip of the state and judiciary. It was argued that arbitration has become international, and more than one jurisdiction may have control over an arbitration proceeding. Contractual theory denies state jurisdiction over arbitration as arbitration depends for its existence on the parties' willingness to enter into the arbitration agreement. The contractual theory fails to explain the needed coercive power of the state for the effective functioning of arbitration. Both the autonomous theory and delocalisation theory places their central themes on the notion that arbitration is a separate legal regime that should be detached from any national legal system. It was demonstrated that the two theories failed to consider that arbitration cannot exit in a legal vacuum. For proper functioning of arbitration, the enforcement of the arbitration agreement and arbitral awards can be given effect to by a body of legal order. Issues concerning the arbitration agreement and arbitral awards can only be enforced by the reference to some legal order that renders them enforceable. The hybrid theory sees arbitration as a mixture of all the theories, hence arbitration has contractual and judicial elements which is based on party autonomy. However, while the writer did not patronise any of the theories it is concluded that the jurisdictional theory is a dominant factor through all the various theories albeit with different level of restriction. More so, the writer adopts the jurisdictional approach to justify the judicial intervention of arbitration, albeit, within the confines of the principle of minimal court control of the arbitral process as recognised by the arbitration legislation. The chapter also demonstrated that the prevalence of the seat theory is evident in the wide adoption of the UNCITRAL Model Law in many jurisdictions. Chapter

Two also demonstrated that given that the courts at seat of arbitration plays predominate role in international commercial arbitration process it is important to clarify and identify the seat of arbitration chosen by the parties. The chapter illustrated that there is inconsistency in the terminology as, seat, venue and place are used by some arbitration legislation such as ACA, Model Law and English Arbitration Act. The chapter with the aid of legislative and judicial authorities, illustrated that the term place or seat is interpreted and referred as the legal domicile and that arbitral proceedings may not physically be conducted at the seat. While venue is the geographical place that parties have chosen for arbitral meetings and hearings. The chapter demonstrated that the selection of a particular jurisdiction is an important decision for international commercial parties. This is because of the legal consequences and implication as the seat is inextricably connected to important aspects of the arbitration process. The chapter established that the seat of arbitration generally impacts on the *lex Abitri* or the law governing the arbitration agreement and the arbitral proceedings. Legal and judicial authorities presented in this chapter shows that the courts at the seat have the competence to supervise over the arbitration on matters such as jurisdiction as well as the enforceability of the award. The writer in setting the tone in discussing Nigeria's perspective as a seat of arbitration, examined the principles of the CIArb London Centenary Principles for international commercial arbitration. The writer identified and outlined the principles into three essential characteristics of an attractive seat, notably, modern arbitration legislation, supportive judicial system, institutional and structural infrastructure. It is indeed contended that contended that for Nigeria to be an attractive seat of arbitration, the law and practice of international commercial arbitration must be compatible with these characteristics. Hence, the thesis adopts the London Principles in benchmarking Nigeria as an arbitral seat. The chapter identified that for a jurisdiction to be attractive as a seat of arbitration for international commercial arbitration the legal framework

for arbitration must be one that is modern, efficient and adequate to address modern international commercial disputes.

Chapter Three, started with considering whether the current ACA as it stands, can be said to provide a comprehensive legislative framework that would make Nigeria a regional frontrunner and attractive arbitration seat. The chapter started with an overview of the history of the legal framework of international commercial arbitration during and after colonisation in Nigeria. The analysis traced the legal framework of international commercial arbitration to the English Arbitration Act 1889 which was enacted as Arbitration Ordinance of 1914. The Ordinance based-arbitration law was re-enacted as the arbitration laws of the various state of the Federation until 1988. The analysis shows that the current primary arbitration legislation, the ACA 2004 was enacted in 1988, an adaptation on the 1985 version of UNCITRAL Model with some modifications. However, the coming into existence of the ACA in 1988, did not expressly repeal the ordinance-based arbitration law, hence some states in Nigeria still have in their statute the 1914 Arbitration Law as their arbitration law. The chapter illustrated that some of the Arbitration Law of some States in Nigeria such as Cross Rivers State, is based on the English Arbitration Law of 1889. In considering whether the ACA is adequate, effective and predictable for the conduct of arbitration as a seat of arbitration, the chapter critical examined some key provisions of the ACA that are important and necessary for facilitating the fair and just resolution of commercial disputes through arbitration. The analysis identified and illustrated that the defect of the ACA is one of the reasons that though Nigeria is the first African nation to adopt the Model Law, it has been unable to establish itself as a regional frontrunner and attractive arbitration seat. In this chapter it was shown that while the ACA embraces fundamental tenets of international commercial arbitration, such as party autonomy and limited court jurisdiction, however, the chapter tackled the issues and challenges of the legal framework of arbitration in Nigeria from the two major fronts. Firstly, the chapter demonstrated that some

key provisions of the ACA have been subjected to constitutional challenges and secondly and most critical are the weaknesses and shortcomings of some of the salient provisions of the dated ACA that are disincentives to the ability of Nigeria becoming an attractive seat of arbitration.

The chapter identified that Nigerian being a constitutional State, there have been debates and constitutional challenges against some provisions of the ACA and one of the key principles of international commercial arbitration, limited judicial intervention. The chapter demonstrated and established that the ACA and the Nigeria Constitution, as well as the constitutionality of some of the provisions do not oust the judicial powers of the court nor deny parties of the constitutional guaranteed right to access to court and right of appeal. The chapter established that arbitration is constitutionally recognised alongside other alternative dispute resolutions as a viable dispute resolution method The chapter further demonstrated that there are no constitutional risks regarding the use of arbitration as a dispute resolution for commercial disputes as the ACA recognises the constitutional foundations of international commercial arbitration process. The ACA in line with the Model Law endorses due process, fairness, contains safeguards and other constitutional rights in the arbitral processes and procedures for international commercial arbitration. The thesis in this chapter has shown defects and weaknesses of the ACA in some important provisions of the ACA which impacts on the adequacy of the legislation for international commercial arbitration. It has been demonstrated that the thirty-four years old legislation is not only out-dated but in key aspects of arbitration process, it fails to recognise and comply with best practice in international commercial arbitration law and practice. The ACA has not kept track with the reforms of UNCITRAL Model Law and other modern trend in international commercial disputes. This is evidenced by the failure to review the ACA in line with modern arbitration law and practice and its failure to recognise that modern form of international commercial law and practice has evolved significantly since 1988 when Nigeria enacted the ACA. An example is the ACA in defining

the constituents of writing in an arbitration agreement failed to provide for modern technological revolution and the wide use of electronic commerce in international commercial trade. The chapter also illustrated that the ACA contains contradictory provisions and unclear provisions on key aspects of upholding and enforcing arbitration agreement. An example is the lack of clarity as to when a stay of court proceedings in favour of arbitration was appropriate. The ACA contains two similar provisions but different in effect, on one hand is a mandatory provision and the other hand, discretional power of the court to stay court proceedings for arbitration. The cases examined in respect of stay of proceedings under sections 4 and 5 ACA demonstrated that the Nigerian courts are more inclined to section 5 which is more restrictive and allows the courts to exercise discretionary power in refusing to grant a stay of proceedings. This in effect, makes the ACA unpredictable as it widens the scope of the court's interference in arbitration and leaves many opportunities for parties to play delay tactics and frustrate the process of the enforcement of arbitration agreement in Nigeria. Within the context of international commercial arbitration, the adequacy of the outdated national arbitration law is more questioned as the ACA contains nebulous ground of misconduct of arbitrators for setting aside arbitral awards. The ACA 2004 also fails to provide for arbitrators' immunity, lacks court-ordered interim measures and preliminary orders. The chapter contended that had the ACA contained specific provision on court -ordered interim relief in support of arbitration it is most likely that in cases such as NV *Scheep v. MV S. Araz*, the Nigerian Apex Court may have reached a different decision. The chapter demonstrated that the weaknesses of the ACA have over the last ten years attracted criticism and calls for its review. The chapter has shown that there had been various committees set up for its review, which came up with its reports and consequently a proposed Bill to amend the ACA. However, while arbitration stakeholders were keen to have the ACA amended the government has not demonstrated the political will to see the passing of the Bill into law, until May 2022 when the upper legislative arm (The Nigerian

Senate) passed the Arbitration and Mediation Bill 2022 which seeks to repeal the ACA once it is signed into law by the Executive for it to come into force. The chapter analysed the current Bill and identified salient provisions of the Bill. The chapter concluded that Bill seeking to amend and reform the ACA has indeed laudable provisions. This is exemplified by the review and amendment of some of the discussed shortcomings discussed in this chapter, such as the introduction of electronic communication for writing, the removal of discretionary power to stay court proceedings (section 5 ACA) removal of misconduct as a ground for setting aside of an arbitral award and the providing for court-ordered interim relief. However, the chapter highlighted and illustrated that some of key provisions in the Bill leaves noticeable gaps in the proposed review of the ACA and may likely create potential risk of making arbitration processes complex, more expensive and lengthier. Importantly, the Bill failed to make provision for the leave court to appeal the decisions of the in respect of default appointment of arbitral tribunal and address unrestricted court appeals in respect of challenge procedures for the removal of arbitrator. The writer contends that introduction of an Arbitral Review Tribunal (ART) in the Bill, is an unnecessary complexity to the arbitral process and is likely to be susceptible to an additional layer of appeal comparable to litigation. The chapter has established that the provision of ART will in a matter of time become susceptible to judicial challenges because it may question whether parties have agreed to have their dispute settled by arbitration. Nevertheless, it was further argued that the ACA was long overdue for replacement with one which would fill the gaps and embody provisions which is in line with modern international arbitration developments.

Chapter Four The question of judicial intervention and the approach of the judicial system is of high significance in international commercial arbitration. The chapter examined salient relevant provisions of the ACA vis-a-vis Nigerian courts' intervention in commercial arbitration. The support and supervision of the court in international commercial arbitration

are important to ensure the successful outcome of the arbitral process. The thesis has found that the hierarchy of courts that exercises jurisdiction over arbitration matters. Arbitration applications and matters for courts' support and supervision are held and decided at the High Court and are open to appeal up to the Supreme Court. This is unlike some jurisdictions where lower court decisions for arbitration applications can only be appealed by the leave of court while in some other jurisdictions, arbitration matters are heard by and limited to the appellate courts. The aim of judicial intervention in commercial arbitration is to curtail unnecessary judicial intervention as well as respecting the party's choice of arbitration rather than litigation as the method of dispute resolution. However, the thesis has established that the legal system in Nigeria allows parties in arbitration matters to go all the whole ladder of litigation from the High Court up to the Supreme Court hence making arbitration become like litigation. The chapter also critically examined the Nigerian courts approach and attitude towards arbitration applications and claims. Attractive and popular arbitration seats are often cited for having arbitration- friendly courts and an impartial and independent legal system. The courts are reputed for providing rulings that protect arbitration agreements and generally demonstrate an arbitration-friendly approach to arbitration-related matters heard by their courts. However, the chapter has found that courts in Nigeria have in some instances shown a favourable disposition towards arbitration matters, yet some cases where the Nigerian courts have made judicial errors in the interpretation and application of section 34 some of the arbitration matters that sought judicial support and supervision. As discussed, the thesis pointed out that the ACA recognises the concept of minimal judicial intervention in arbitration as one of the key themes of arbitration and as such provides for court intervention in arbitration. Nevertheless, the examples of cases shown in chapter four demonstrates inconsistency in interpretations of arbitration principles and jurisprudence which may affect Nigeria's chances in the quest for a leading arbitration seat in the sub-African region. Cases such as *SPDC Nig Ltd & 2 Ors. v Crestar Integrated Natural*

Resources Ltd and *Zenith Global Merchant Ltd v Zhongful Int'l Investment Ltd (Nig) FZE & Ors* raises concern that requires a rethink of the approach of the courts towards arbitration in order to give effective and efficient support and supervision of arbitral process. The chapter identified key drawbacks that face judicial intervention in Nigeria which were considered, these drawbacks include the inadequate operational structure of the judiciary, such as the ICT and electronic devices and facilities, are infrastructural challenges affecting the judiciary in Nigeria. The lack of bespoke civil procedure processes that will promote efficient and quick dispensation of matters in aid of arbitration rather than the prevailing slow and cumbersome process of litigation which results in unnecessary and protracted delays in hearing matters. The chapter contended that the objective of effective judicial support in arbitration will be defeated where court proceedings in support of arbitration are heard and determined, for instance, the determination of an interim issue for a period spanning over a period of two to five years. The general reputation of the Nigerian judiciary as being notoriously slow is well illustrated by the notable case of *IPCO v NNPC.* Foreign National Courts like the English Courts had cause to comment on the real risk of protracted judicial proceedings for arbitration matters also in cases such as *Africa Finance Corp v Aiteo Eastern E & P Co Ltd and AIC Ltd v Federal Airports Authority of Nigeria.* The general perception of corruption reverberated in the case of the *Federal Government of Nigeria v Process & Industrial developments Ltd.* While the allegation of corrupt judicial practices and indictment of top judicial officers ranging from State High Court, Appeal Court to the Supreme Court Judges, even the Chief Justices of Nigeria questions whether the corruption perception is more of a reality. Whichever way, this affects the reputation of Nigeria as well as the confidence of the public and the perception of the world at large of the judicial system in Nigeria.

While it is agreed that the issue of judicial intervention and processes of arbitration generally is like a never-ending venture as the debate continues about the extent of courts' involvement

in the arbitration. It is the argument of the writer that in Nigeria, there are instances where the courts have maintained and upheld a minimal judicial intervention, however, there have been instances where the judicial attitude of the Nigeria has left much to be desired as shown by the failure to uphold arbitration agreement in cases such as *Specialised Vessesl Ltd v Mop Marine Nig. Ltd.* The chapter has argued and established by the examples of cases discussed that judicial process and procedures for support of international commercial arbitration is not adequate and there is need for the Nigerian courts to become more supportive of arbitration process. The chapter demonstrated that courts in Nigeria need to refrain from entertaining court actions that are instituted in breach of arbitration agreement. The Nigerian courts should avoid excessive intervention and should not frustrate parties' right to have their disputes settled by arbitration. For Nigeria to become an arbitration-friendly jurisdiction, there is also the need for a paradigm shift in the judicial approach toward arbitration

Chapter Five The thesis questions whether the quality of the institutional, structural and professional support is adequate for the law and practice of international commercial arbitration. In answering these questions, the chapter examined the structural issues and challenges of international commercial arbitration in Nigeria. The important issue in this chapter was whether the structural and infrastructural challenges of international commercial arbitration in Nigeria are sufficient to project Nigeria as an attractive seat for international commercial arbitration. The chapter examined both institutional infrastructures as well as physical infrastructures that pose challenges for Nigeria to become a preferred and attractive seat at least within sub-Saharan Africa. The development of international commercial arbitration in any jurisdiction, especially a developing arbitration jurisdiction like Nigeria depends significantly on the role of key stakeholders such as arbitrators, local legal practitioners, and arbitral institutions. Legal practitioners should understand and appreciate that international commercial arbitration is another dispute resolution method and not litigation.

The chapter argues that the ingrained litigation culture of legal practitioners in Nigeria may be one of the reasons why most lawyers in Nigeria perceive arbitration as a preliminary process before litigation. The attitude by which lawyers frustrate arbitration applications for judicial support is well illustrated in cases such as *NNPC v Lutin*[1005] where arbitration proceedings were stalled for twelve years because of a protracted interlocutory application before the Nigerian court. In international commercial arbitration, as in any other adjudication, parties expect to be represented by counsel of their choice. The chapter argued that a non-restrictive approach to legal representation whether domestic or foreign) in international arbitration is important as this is reflective of a modern and attractive seat for arbitration.

As regards institutional infrastructure, the role of arbitral institutions with modern facilities that are fit for purpose is necessary to administer, support, and promote the arbitration process to run efficiently. The administrative role of arbitral institutions expressed in institutional arbitration rules is designed for the organisation and administration of the arbitral process. The choice of the seat of arbitration may also be influenced by the choice of arbitral institutions rules, as where parties fail to select a seat, institutional arbitral rules provide for default choice of seat in the place where the arbitral institution is located. It was also argued that the quality of the legal system of the location of the arbitral institution is also a factor in the choice of arbitral institutions. Top leading arbitral seats like London and the LCIA are choice seats and arbitral institutions for arbitration users. The chapter considered whether the effectiveness of the various arbitration institutions in Nigeria and how if at all they have been able to promote Nigeria as an attractive seat for international commercial arbitration. The chapter has found that despite the proliferation of arbitral institutions in Nigeria, none of the many arbitral institutions are yet to gain regional and global reputation nor has it resulted in an increase in arbitration references. The thesis argued that many reasons are responsible for the low performance of

[1005] [2006] 12 NWLR (96) 504

arbitral institutions in Nigeria, some of which are, the influence of government control and influence in the administration of some of the arbitral institutions affect the perception of the independence of the arbitral institutions and most importantly the lack of the confidence and trust of prospective users.

The chapter established that the political environment as well as the general reputation as a safe jurisdiction has a great influence on parties' selection of an arbitral seat. The thesis noted that the declining state of security and safety as well as infrastructural facilities in Nigeria affects the attractiveness as a seat of arbitration. It has also found that the negative global rating as a safe jurisdiction and general perception of corruptions are factors that will affect the chances of Nigeria becoming a safe seat for the conduct of international commercial arbitration.

Bibliography

Books

Ajogwu F, Commercial Arbitration in Nigeria: Law & Practice Centre for Commercial Law Development (Centre for Law and Development 2013).

Akanbi MM The Judiciary and The Challenges of Justice: Selected Papers and Speeches of Honorable Justice Muhammed Mustapha Akanbi, President, Court of Appeal, Nigeria (Lagos: Patrioni Books, 1996).

Akpata E, The Nigerian Arbitration Law in Focus (West African Publishers 1997).

Asouzu A, International Commercial Arbitration and African States Practice Participation and Institutional Development (Cambridge University Press 2001).

Bantekas I, An Introduction to International Arbitration (Cambridge 2015).

Barret J., A History of Alternative Dispute Resolution: A Story of a Political, Cultural and Social Movement, (Jossey-Bass, 2004).

Bermann, G. A. and Mistelis, L.(eds.), Mandatory Rules in International Arbitration (Juris, 2011).

Berger K P, The Creeping Codification of the New Lex Mercatoria (2nd edn, Kluwer Law International, 2010).

Blackaby N and Partasides, C, Redfern, A and Hunter, M, Redfern and Hunter Law and Practice of International Commercial Arbitration, (6th edn Oxford University Press 2015).

Blake S, Browne J and Sime S, A Practical Approach to Alternative Dispute Resolution (5 edn Oxford University Press, 2014).

Jurisdictions (Kluwer Law International 2019).

Born G, International Arbitration: Cases and Materials (Kluwer Law International, 2011).

Born G, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (Kluwer Law International, 2013).

Born G, International Commercial Arbitration – Volume I -III (Kluwer Law International, 2014).

Born G, International Arbitration: Cases and Materials (Kluwer Law International, 2015).

Born G, International Arbitration Law and Practice (3rd edn Kluwer Law International 2021).

Bosman L, Arbitration in Africa, A Practitioner's Guide (ed) (2021 Kluwer Law).

Brown H and Marriott A, ADR Principles and Practice (3rd edn, Sweet & Maxwell/Thomson Reuters, 2011).

Carbonneau TE, Towards a New Federal Law on Arbitration (Oxford Publishers 2014).

Carbonneau TE, Carbonneau on International Arbitration: Collected Essay (Juris 2011).

Carbonneau TE Resolving Transnational Disputes through International Arbitration" (University Press of Virginia, 1984).

Carbonneau TE, Cases and Materials on the Law and Practice of Arbitration (Juris 2000).

Candide-Johnson C A, and Shasore O, Commercial Arbitration Law, and International Practice in Nigeria (LexisNexis 2012).

Chukwumerije A.I, Studies, and Materials in International Commercial Arbitration, (1st edn Law House Book, 2002).

Chukwumerije O, Choice-of-Law in International Commercial Arbitration (Quorum Books, Westport 1994).

Cordero-Moss G, (ed) International Commercial Arbitration, Different Forms and Features (Cambridge 2013).

Craig W, Park W, and Paulsson J, International Chamber of Commerce Arbitration, (Oceana Publications, 2000).

de Oliveira L V P & Houram S (eds) "Access to Justice in Arbitration, Concept, Context and Practice (Kluwer International Law 2021).

Dicey A., Morris J., Collins L., Dicey, Morris and Collins on The Conflict of Laws (15th edn Sweet & Maxwell, 2012).

Domke M, Commercial Arbitration, (Prentice-Hall Inc (America 1965).

Ezejiofor G, The Law of Arbitration in Nigeria (Longman Nigeria 1997).

Gaillard E, Transcending the National Legal Order for International Arbitration (2012) ICCA Congress Series, 17, Wolters Kluwer.

Gaillard E, Legal Theory of International Arbitration, (Martinus Nijhoff Publishers, 2010).

Gaillard E., Fouchard P and Goldman B., Savage J., Fouchard, Gaillard, Goldman on International Commercial Arbitration, (Kluwer Law International, 1999).

Holtzman H, Neuhaus J, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, (Kluwer Law1989).

Idornigie P, Commercial Arbitration Law, and Practice in Nigeria (Law Lords 2015).

Joseph D, Jurisdiction and Arbitration Agreements and their Enforcement (Sweet & Maxwell 2015).

Kaufmann-Kohler G, Identifying and Applying the Law Governing the Arbitration Procedure: The Role of the Law of the Place of Procedure' in AJ van den Berg (ed), Improving the Efficiency of Arbitration Agreements and Awards: 40 years of the Application of the New Year Convention (1999 Kluwer Law International).

Lew J and Mistelis Pervasive Problems in International Arbitration (Kluwer Law International, 2006).

Lew J, Applicable Law in International Commercial Arbitration" (Oceana Publications, 1978).

Lew J, Contemporary Problems in International Arbitration" (Centre for commercial law studies, Queen Mary College, University of London, 1986).

Lew J, Mistelis L and Kroll S, Comparative International Commercial Arbitration (Kluwer Law International, 2003).

Lillch RC and Brower C N, International Commercial Arbitration in the 21st Century: Towards Judicialization and Uniformity (Transnational Publishers 1994).

Lorenzen E G, Selected Articles on the Conflict of Laws (William S. Hein, 2006).

Mann, F. A., 'Lex Facit Arbitrum,' in Sanders, P. (ed.), International Arbitration – Liber Amicorum for Martin Domke (Martinus Nijhoff, 1967).

Meijer G, in Goldman (ed.), Annulment and Enforcement of Arbitral Awards from a Comparative Law perspective, (2018 Wolters Kluwer).

Merkin R, Arbitration Law (Lloyd's of London Press, 2013).

Merkin R and Flannery L on the Arbitration Act 1996 (6th edn Informa Law 2019)

Mikall S, The Three ages of International Commercial Arbitration (Cambridge 2022).

Mistelis Loukas A and Brekoulakis Stavros L, (eds), Arbitrability: International and Comparative Perspectives (Kluwer Law International 2009).

Mistelis L. A (ed) Concise International Arbitration (2nd Edition 2015 Kluwer Law).

Mustill M, Boyd S., The Law, and Practice of Commercial Arbitration in England, (Butterworths, 1982).

Musdapher D, The Nigerian Judiciary: Towards Reform of the Bastion of Constitutional Democracy' (NIALS, 2011).

Noan H, Choice of Law Problems in International Commercial Arbitration, (J.C.B. Mohr, 1992).

Noussia K, Confidentiality in International Commercial Arbitration—A Comparative Analysis of the Position under English, US, German, and French Law (Springer 2010).

Nwakobi G, The Law, and Practice of Commercial Arbitration in Nigeria (Iyke Ventures Production 2004).

Newman L and Hill R, The Leading Guide to International Arbitration, (Juris Publishing, 2008).

Nweze C, Justice in The Judicial Process: Essays in Honour of Hon. Justice Eugene Ubaezonu (Fourth Dimension 2003).

Obilade A, The Nigerian Legal System (Sweet and Maxwell 1979).

O'Callaghan K, Arbitration in England, (Kluwer Law International 2013).

Onyema E, (ed) The Transformation of Arbitration in Africa: The Role of Arbitral Institutions. (Kluwer Law International 2016).

Orojo and Ajomo, Law and Practice of Arbitration and Conciliation in Nigeria (Mbeyi & Associates Nig. Ltd 1999).

Ostrove M, Salomon C and Shifman BE, Choice of Venue in International Arbitration (Kluwer Law 2014).

Park W, Arbitration of International Business Disputes (2nd edn, Oxford University Press 2012).

Park WW, "The Arbitrator's Jurisdiction to Determine Jurisdiction" (2006) 13 ICCA Congress Series.

Paulsson J, The Idea of Arbitration (1st edition, Oxford University Press 2013).

Paulsson J and Bosman L, ICCA International Handbook on Commercial Arbitration, (Kluwer Law International,1984).

Peter B. Routledge, Arbitration, and the Constitution' (Cambridge 2013).

Petrochilos G, Procedural Law in International Arbitration, (Oxford University Press, 2004).

Poudret J and Besson S, Comparative Law of International Arbitration (Thomson 2007).

Recueil MM, Alphabatique de Questions de Droit (4th edn Tarlier Brussels 1829).

Rhodes-Vivour A Commercial Arbitration Law and Practice in Nigeria Through the Cases (LexisNexis 2016).

Rubellin-Devichi JL, 'Arbitrage: Nature Juridique, Droit Interne et Droit International Prive (Librarie Generate de Droit et de Jurisprudence Paris 1965).

Samuel A, Jurisdictional Problems in International Commercial Arbitration, (Schulthess, 1989).

Sanders P, The Work of the UNCITRAL on Arbitration and Conciliation, (Kluwer Law International, 2004).

Schwebel S, International Arbitration: Three Salient Problems (Grotius Publ., 1987).

Seriki H, Injunctive Relief and International Arbitration, (Informa Law 2014).

Shaw M, International Law (Cambridge University Press, 2008).

Spencer H, The Principles of Ethics (Hard Press, 2013).

Soriede T and William A (eds), Corruption, Grabbing and Development: Real World Challenges (Edward Elgar Publishing 2014).

Sutton D, Gill J, Gearing M, Russell on Arbitration, (Sweet & Maxwell, 2003).

Tobi N, Sources of Nigerian Law (MIJ Professional Publishers, Lagos 1996).

Van den Berg AJ (ed) International Arbitration in a Changing World (Kluwer International 1994).

Van den Berg AJ, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (Kluwer Law and Taxation, 1981).

Van den Berg AJ, (ed) Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention (Kluwer International 1999).

Weigand F, Practitioner's Handbook on International Arbitration, (OUP Oxford, 2002).

William WP, Arbitration of International Business Disputes: Studies in Law and Practice (2nd edn Oxford 2012).

Zekos GI, 'Constitution, Arbitration and the Courts' (2013).

Journals

Adaralegbe AG, ‘Challenges in Enforcement of Arbitral Awards in Capital Importing States, The Nigerian Experience’ (2006) Journal of International Arbitration (23) 401.

Akanbi MM, ‘Examining the Effect of Section 34 of the Arbitration and Conciliation Act of 1988 on the Jurisdiction of Courts in Nigeria’ (2009) 2 Nigerian Journal of Public Law 306.

Akpata O and Atake AD “Domestic Arbitration in Nigeria: Can Foreign Counsel Still Run the Race?” (Templars, Dispute Resolution Practice Group, Newsletter, 2012).

Allsop J. J ‘Judicial Support for Arbitration’ (Paper presented at the APRAG 10th Anniversary Conference, Melborne, available at http://www.ausilli.edu.au/au/journals.

Appealable, ‘The International Journal of Arbitration, Mediation and Dispute Management’ (2002) 68 (2) (CIArb) pp. 397.

Asouzu A, ‘Arbitration and Judicial Power in Nigeria’ (2010) 18 (6) Journal of International Arbitration 617.

Bamodu G, ‘A Field Not Covered: Arbitration and the Nigerian Constitution’ 7 (2016) Gravitas Review of Business and Property Law 2.

Batsura M, ‘Limits to Party Autonomy in Appointing Counsel in International Commercial Arbitration’ (2021) Journal of International Arbitration (38) 5, 671.

Bermann GA, ‘What does it mean to be ‘pro-arbitration’? (2018) 34 Arbitration International 341.

Bermann, G. A., ‘The “Gateway” Problem in International Commercial Arbitration’ (2012) 37 Yale Journal of International Law 1.

Brekoulakis, S., ‘The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements’ (2007) 24 Journal of International Arbitration 341.

Bukar B. A. ‘Twist and Turns in the choice of arbitral Seat, the Case of P &ID V Nigeria’ [2021] 24 (4) Int. A.L.R. pp 281.

Christopher, R. D. Regulatory Competition and the Location of International Arbitration Proceedings (2004) 24 (3) International Review of Law and Economics.

Chukwuemerie A, ‘Salient Issues in the Law and Practice of Arbitration in Nigeria’ (2006) 14 (1) A.J.I.C.L 1.

Chukwuemerie AI, ‘Arbitration and Human Rights in Africa’ (2007) 7 African Human Rights Law Journal 103.

Chukwumerije O, ‘Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996’ (1996) 15(2) Arbitration International 171.

Croff, C. ‘The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?’ (1982) 16 International Lawyer 613.

Ezike, E. O. ‘The Validity of Section 34 of the Nigerian Arbitration and Conciliation Act’ (2000-2001) 8 The Nigeria Juridical Review 140.

Farah, Y, ‘Electronic Contracts and Information Societies under the E-Commerce Directives (2009) 12 Journal of Internet Law 3.

Gaillard, E. ‘Sociology of International Arbitration, (2015) 31 Arb Int’l 1 Arb Int’l 1.

Garnett, R. ‘Anti-Arbitration Injunctions: Walking the Tightrope ', in William W. Park (ed), Anti-Suit Injunctions in International Arbitration (2020) 36 Arbitration International 3, 347.

Gloppen S, Courts, corruption and judicial independence’ in Corruption, grabbing and Development: Real World Development (ed) Tina Soreide and Aled Williams, (2013) Monograph 68.

Hanotiau, B. ‘International Arbitration in a Global Economy: The Challenges of the Future’ (2011) 28 Journal of International Arbitration 2, 89.

Idornigie P and Moneke E. U. ‘Anti-Arbitration Injunctions in Nigeria’ (2016) 84 Int’l j of Arb, Med & Disp. Resolution 4, 438.

Idornigie P O. ‘Nigeria’s Appellate Courts, Arbitration and Extra-Legal Jurisdiction—facts, problems, and solutions: A Rejoinder’ (2015) 3 (31) Arbitration International 1.

Idornigie P, 'The Default Procedure in the Appointment of Arbitrators is the Decision of the Court, (2002) Int’l Journal of Arbitration, Mediation and Dispute Management (64) 4, 369.

Idornigie, P. O. ‘The Relationship between Arbitral and Court Proceedings in Nigeria,’ (2002) 19 (5) Journal of International Arbitration 443.

Larry, O. C. and Kevin, N. N. The Role of Lawyers in Fostering Alternative Dispute Resolution

in Multi-Door Courthouse (2016) Law and Politics in Africa, Asia and Latin America Journal, (49) 2.

Madu V. C, 'Judicial review of Legislation' (2012) 1 Nigeria Institute of Advanced Legal Studies (NIALS) 1 International Journal of Legislative Drafting 157.

Markham B, The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration. (2006) 22 Arb. Intl (1) 73.

Nwakoby, G. C. 'The Constitutionality of Sections 7(4) & 34 of the Arbitration and Conciliation Act: Chief Felix Ogunwale v Syrian Arab Republic Revisited' (2003) 1(3) Nigerian Bar Journal 352, 355 and 358.

Nwakoby, G. C. 'The Courts and the Arbitral Process in Nigeria' (2007) 27(4) Unizik Law Journal, 1.

Nwaogu, U. G and Ryan, M. J. 'FDI, Foreign Aid, Remittance and Economic Growth in Developing Countries" (2015) 19 (1) Review of Development Economics 100.

Olatawura O. O. 'Nigeria 's Appellate Courts, Arbitration and Extra-Legal Jurisdiction: Facts, Problems and Solutions '(2012) 1(28) Arbitration International 63.

Olatawura, O. O. 'Constitutional Foundations of Commercial and Investment Arbitration in Nigeria' (2014) 40 (4) Commonwealth Law Bulletin 657.

Olatawura O. O. 'Stay of Proceedings in Nigerian Law of Arbitration-An analysis of its Functions and Problems' (2012) 28 Arbitration International 4.

Olatawura O. O. Constitutional Foundations of Commercial and Investment Arbitration in Nigeria Law and Practice (2014) 4(40) Commonwealth Law Bulletin 657.

Olawoyin A. 'Charting New Waters with Familiar Landmarks, The Changing Face of Arbitration Law and Practice in Nigeria' (2009) 26 (3) Journal of International Arbitration, 373.

Olawoyin, A. A. 'Legalism v Substantial Justice in Arbitration in Nigeria: Imoukhuede v Mekwunye in Perspective.' (2019) 84 (4) The International Journal of Arbitration, Mediation and Dispute Management.

Onuzulike C. 'An Appraisal of the Concept of Anti- Suit Injunction in International Arbitration,' (2021) 12 (2) The Gravitas Review of Business & Business Law 35.

Park, W. W. 'The Lex Loci Arbitri and International Commercial Arbitration' 32 (1983) INT'L

& COMP. L.Q. 21, 30.

Raghavan, V. 'Heightened Judicial Review of Arbitral Awards: Perspective from the UNCITRAL Model Law and English Arbitration Act of 1996 on Some US Development' (1998) 15 Journal of International Commercial Arbitration (3) 123.

Reed, S. L. 'Ab(use) of due process: sword vs shield' (2017) 33 Arbitration International 3, 361.

Sanders, P. 'UNCITRAL's Model Law on International Commercial Arbitration' (2007) 23 Arbitration International 1.

Sashore, O. "Representation of Arbitration Proceedings: The Recent Trend in Shell v FIRS Miyetti Quatrely Law Review '(2021) 1/11.

Schwartz, E. 'The Role of the Arbitral Institution in the New Millennium; (1999) 65 Int'l Journal of Arb Med 7 Disp. Mgmt 4.

Seriki H, Enforcing Annulled Arbitral awards: Can the Unruly Horse be Tamed" (2018) Journal of Business Law 8, 679.

Seriki H. Anti-arbitration injunctions and the English courts: judicial interference or judicial protection? Academic Journal In: Int. A.L.R. 2013, 16(2), 43.

Sodipo, B. 'Dealing with Arbitrator Challenge, Non- Disclosure and Allegations of Bias: A Review of the Lagos State Ruling Setting Aside the ICC Global Gas v Shell Award' (2020) 86 (4) Int'l J of Arb, Med, and Disp. Mgmt 4.

William, W. International Arbitration, the Need for Uniform Interim Measures of Relief' (2003) 28 Brooklyn J. Int'l L 3.

Wilske S, 'The Global Competition for the 'Best' Place of Arbitration for International Arbitrations—A More or Less Biased review of the Usual Suspects and Recent Newcomers' (2008) 1 Contemporary Asia Arb J. 21.

Wingate EO, Qualification for Party Representatives and Arbitrators in Nigerian Arbitration: Shell v FIRS (2020) 64 (3) Journal of African 451.

Online Resources

Articles and Blogs

Adedoyin Rhodes-Vivour, International Arbitration and Appearance Rights of Lawyers: A Review of Article IV of the 1st Schedule to The Arbitration and Conciliation Act Cap A18 Laws of The Federation 2004 seen online https://drvlawplace.com/publications last accessed 21 November 2021.

Babalola A "Lagos—Recognition as Commercial Capital City of Nigeria" (7 July 2016) available at: http://www.abuad.edu.ng/lagos last accessed 23 April 2022.

Charles River Associates, Arbitration in Toronto: Economic Study, 2012, pp 3-8. See https://media.crai.com/sites/default/files/publications/Arbitration-in-Toronto-An-Economic-Study.pdf last accessed 19 September 2020.

Christopher K Tahbaz, Justin R. Rassi, 'The Development of Arbitral Institutions in Asia', (2018) 13 U. Pa. Asian L. Rev. Available at: https://scholarship.law.upenn.edu/alr/vol13/ Accessed 18 April 2022.

he Current State and Future of International Arbitration: Regional Perspective' IBA 2015 Arb 40 www.ibanent.org last accessed 21 April 2020.

Edward Brunet, 'Arbitration and Constitutional Rights' (1992) 71(1) N.C. L. Rev. 81. Pp.81-120. Available at: http://scholarship.law.unc.edu/nclr/vol71/iss1/1 last accessed 27 April 2021.

Greg. Chukwudi Nwakoby, Arbitration and Conciliation Act Cap A18 Laws of The Federation of Nigeria 2004 -Call for Amendment' African Online Journal, Vol 1 (2010) AJOL https://www.ajol.info/index.php/naujilj/article/view/138176 last accessed 18 August 2021.

Guy Pendell, CMS Cameron McKenna LLP The Rise and Rise of the Arbitration Institution, http://kluwerarbitrationblog.com/blog/2011/11/30/the-rise-and-rise-ofthe-arbitration-institutions last accessed 12 February 2022.

Jadesola Akande, "The Legal Order and the Administration of Federal and State Courts." (1991) Publius, vol. 21, no. 4, 1991, pp. 61–73. JSTOR, www.jstor.org/stable/ . Accessed 17 May 2021.

Justice Clyde Croft, How the Judiciary Can Support Domestic and International Arbitration' a speech by the Hon. Justice Clyde Croft, Supreme Court of Victoria, presented at the Arbitrators; and Mediators Institute Annual Conference 25-27 July 2013 available at http://supremecourt.vic.org.au/about-the-court/speeches accessed 10 July 2020.

Justice J Allsop "Judicial Support for Arbitration' (Paper presented at the APRAG 10th Anniversary Conference, Melborne, available at http://www.ausilli.edu.au/au/journals last accessed 15 March 2022.

K Abiri, Identifying and Delineating the Frontiers of the Jurisdiction of the State High Court vis-à-vis other Courts of Coordinate Jurisdiction. Seen http://nji.gov.ng/images/Workshop_Papers/2015 last accessed 28 April 2020.

Marialuisa Taddia, 'Back to the World Stage', The Law Society Gazette (21 October 2019), available at https://www.lawgazette.co.uk/features/back-on-the-world-stage last accessed 12 November 2022.

Oghogho Akpata and Adewale Atake "Domestic Arbitration in Nigeria: Can Foreign Counsel Still Run the Race?" (Templars, Dispute Resolution Practice Group, Newsletter, 2012 https://www.templars-law.com/our-people/oghogho-akpata last accessed 13 December 2020.

Onyema Emilia, 'The Multi-Door Court House (MDC) Scheme in Nigeria: A case Study of the Lagos MDC (2013) 2 (7) Apogee Journal of Business, Property & Constitutional law 96-130 http://eprints.soas.ac.uk/14521 last accessed 19 November 2020.

Nwangwu, U. G., Oni, T. 'Lagos and its Potential for Economic Growth' available at: https://www.ng.boell.org last accessed 17 February 2022.

Nwakoby, G. C. Arbitration and Conciliation Act Cap A18 Laws of The Federation of Nigeria 2004 -Call for Amendment' African Online Journal, Vol 1 (2010) AJOL accessed https://www.ajol.info/index.php/naujilj/article/view/138176 last accessed 29 November 2018.

Seraglini Christopher, Nyer Dian Templeman John, and de Ferrari Lucas, The Battle of the Seats: Paris, London or New York? Available at http://www.whitecase.com/publications/article/battle last accessed 22 October 2019.

Online Newspaper and News Resources.

BBC News, Nigeria's top judge Walter Onnoghen to forfeit bank accounts, https://www.bbc.co.uk/news/world-africa-47974690 last accessed 20 June 2020.

Premium Times Online Court of Appeal sets up Seven Panels to Treat Backlog of Cases' seen at https://www.premiumtimesng.com/news/more-news/427642-court-of-appeal-sets-up-seven-panels-to-treat-backlog-of-cases.html. > last accessed 17 September 2021.

Premium Online Times- Nigeria Sacks Three Top Judges for Fraud and Misconduct www.premiuntimesng.com/news/headlines/ > last accessed 3 July 2021.

Reuters April 18, 2019, Nigerian chief justice sacked for false asset declaration https://www.reuters.com/article/nigeria-politics- 20 June 2020.

This Day Online, 23, June 2022 Senate Probes Corruption Allegations against CJN By Supreme Court Colleagues www.thisdaylive.com/index.php >Last accessed 23 June 2022.

US News 26 August 2022 Nigeria's Chief Justice Resigns Amid Corruption Allegations https://www.usnews.com/news/world/articles/2022-06-27/nigerias-chief-justice-resigns-amid-corruption-allegations > accessed 27 August 2022.

The Guardian Newspaper, 26 May 2021, Nigeria's court strike paralyses underfunded justice system www.theguardian.com/global-development/2021/may/26/nigerias-court-strike-paralyses-underfunded-justice-system > accessed 26 May 2021.

The Guardian Newspaper 28 March 2022 Bandits attack Abuja/ Kaduna Bound Train https://www.theguardian.com/world/2022/mar/29/injured-gunmen-attack-passenger-train-nigeria-abuja-kaduna 30 March 2022.

Reports and Surveys

Cairo Regional Centre for International Commercial Arbitration Caseload Report https://www.circa.org/news/2021/caseload/Report > Accessed 27 June 2022.

Emilia Onyema, School of Oriental and African Studies (SOAS) Arbitration in Africa Survey Report (2020) on Top African Arbitral Centres and Seats, available at: https://eprints.soas.ac.uk/ > last accessed 18 March 2022.

Chartered Institute of Arbitrators (CIArb) London Centenary Principle https://www.ciarb.org/media/1263/london-centenary-principles.pdf last accessed 26 June 2020.

ICC Dispute Resolution Survey Report https://www.icc.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf Accessed 26 July 2021.

Independence Corrupt Practices and Other Related Offences (ICPC) Nigeria Corruption Index-Report of a Pilot Survey (1) 2020 available at www.icpcacademy.gov.ng Accessed 23 November 2021.

International Bar Association Integrity Initiative: Judicial System and Corruption, Typologies of Corruption the Judiciary- Judiciary Integrity Initiative May 2016 www.ibanet.org/LPRU/Judicial_Systems_and_Corruptions Accessed 27 June 2021.

International Bar Association Integrity Initiative: Judicial System and Corruption, Typologies of Corruption the Judiciary 2016, www.ibanet.org/LPRU/Judicial_Systems_and_Corruptions > Accessed 17 2020.

IBA Guidelines on Party Representation in International Arbitration, www.ibant.org/publications/org/Publications/publications> Accessed 30 May 2022.

ICC 2019 Dispute Resolution Statistics www.iccwbo.org/dr-stat > last accessed 30 July 2020.

IMF Regional Economic Outlook, 2015, 'Sub- Saharan Africa; How Can Sub-Saharan Africa Harness the Demographic Dividend? www.imf.org > last accessed 28 April 2019.

LCIA Annual Casework Report 2018 to 2020 www.lcia.org/LCIA/reports > Accessed 20 August 2021.

National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria 7 www.alukooyebode.com/_uploads/publications/amended%20report.pdf> Accessed 15 December 2020.

Queen Mary University of London White & Case 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf > Accessed 16 January 2022.

Queen Mary University of London White & Case 2018 International Arbitration Survey, The Evolution of International Arbitration, https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration. > Accessed 09 September 2022.

Queen Mary University of London White & Case 2015 Improvements and Innovations in International Arbitration Reports and Surveys https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey > Accessed 19 September 2022.

The Commercial Court Guide (incorporating The Admiralty Court Guide) The Business and Property Courts of England & Wales (11th edn 2022) available at www.justice.gov.uk

The Law Commission Consultation Paper September 2022: Review of Arbitration Act 1996 available at https://www.lawcom.gov.uk/project/review-of-the-arbitrationact-1996/ accessed 20 November 2022.

The Commercial Court Guide, (incorporating The Admiralty Court Guide), Edited by the Judges of the Commercial Court of England & Wales Eleventh Edition (2022) available at https://www.judiciary.uk/wp-content/uploads/2022/06/Commercial-Court-Guide-11th-edition.pdf

Transparency International Corruption Index Report 2020 www.transparency.org.> Accessed 12 March 2021.

The Commonwealth, A Study of International Commercial Arbitration in the Commonwealth, 2019 A Study of International Commercial Arbitration in the Commonwealth https://library.commonwealth.int/Library/Catalogues/Controls/Download.aspx?id=8023> Accessed 26 October 2020.

UNCTAD, World Investment Report, Investment and Digital Economy (2017) https://unctad.org/system/files/official-document/wir2017_en.pdf > Last accessed 23 April 2020.

World Bank Report on Nigeria www.data.worldbank.org > Accessed 15 December 2020.

World Justice Project (WJP) Rule of Law Project Index 2020. www.worlorldjusticeproject.org > Accessed 18 June 2021.

Appendices

Appendix 1.- Arbitration and Conciliation Act 1988

Arbitration and Conciliation Act
Chapter 18
Laws of the Federation of Nigeria 2004

Arrangement of Sections

Part I

Arbitration

Arbitration Agreement

Composition of Arbitral Tribunal

Recognition and Enforcement of Awards

General

Part II

Conciliation

Part III

Additional Provisions Relating to International Commercial Arbitration and conciliation

Part IV

Miscellaneous

Schedules

First schedule
Arbitration Rules

Second Schedule
Convention on Recognition and Enforcement of Foreign Arbitral Awards June 10, 1958

Third Schedule
Conciliation Rules

Arbitration and Conciliation Act
Chapter 18
Laws of the Federation of Nigeria 2004

[14th March, 1998

An Act to provide a unified legal frame work for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.

Part I

Arbitration

Arbitration agreement

1. (1) Every arbitration agreement shall be in writing contained-

(a) in a document signed by the parties; or

(b) in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement; or

(c) in an exchange of points of claim an of defence in which the existence of an arbitration agreement is alleged by one party and denied by another.

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

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

3. An arbitration agreement shall not be invalid by reason of death of any party thereto but shall, in such an event, by enforcement by or against the personal representative of the deceased.

4. (1) A court before which an action which is the subject of an arbitration agreement is brought shall, if any party so request not later than when submitting his first statement on the substance of the dispute, order or 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 subsection (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 still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

Composition of Arbitral Tribunal

6. The parties to an arbitration agreement may determine the number of arbitrators to be appointed unde the agreement, but where no such determination is made, the number of arbitrators shall be deemed to be there.

7. (1) Subject to subsection (3) and (4) of this section, the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator.

(2) Where no procedure is specified under subsection (1) of this section-

(a) in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third, so however that-

(i) if a party fails to appoint the arbitrator within thirty days of receipt of request to do so by the other party; or

(ii) if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointments, the appointment shall be made by the court on the application of any party to the arbitration agreement;

(b) in the case of an arbitration with one arbitrator, where the parties fail to agree on one arbitrator, the appointment shall be made by the court on the application of any party to the arbitration agreement made within thirty days of such disagreement.

(3) Where, under an appointment procedure agreed upon by the parties-

(a) a party fails to act as required under the procedure; or

(b) the parties or two arbitrators are unable to reach agreement as required under the procedure; or

(c) third party, including an institution, fails to perform any duty imposed on it under the procedure,

rt may request the court to take the necessary measure, unless the appointment procedure agreed upon parties provides other means for securing the appointment.

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

(5) The court in exercising its power of appointment under subsection (2) and (3) of this section shall have due regard to any qualifications required of arbitrator by the arbitration agreement and such other consideration as are likely to secure the appointment of an independent and impartial arbitrator.

8. (1) Any person who knows of any circumstances likely to give rise to any justifiable doubts as to his impartiality or independence shall, when approached in connection with an appointment as an arbitrator, forthwith disclose such circumstances to the parties.

(2) The duty to disclose impose under subsection (1) of this section shall continue after a person has been appointed as an arbitrator and subsist throughout the arbitral proceedings unless the arbitrator had previously disclosed the circumstances to the parties.

(3) An arbitrator may be challenged-

(a) if circumstances exist that give rise to justifiable doubts as to his impartiality or independence; or

(c) if he does not possess the qualifications agreed by the parties

9. (1) The parties may determine the procedure to be followed in challenging an arbitrator.

(2) Where no procedure is determined under subsection (1) of this section, a party who intends to challenge an arbitrator shall, within fifteen days of becoming aware of the constitution of the arbitral tribunal or becoming aware of any circumstances referred to in section 8 of this Act, send the arbitral tribunal a written statement of the reasons for the challenge.

(3) Unless the arbitrator who has been challenged withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

10. (1) The mandate of the arbitrator shall terminate-

(a) if he withdraws from office; or

(b) if the parties agree to terminate his appointment by reasons of his inability to perform his functions; or

(c) if for any reason he fails to act without undue delay.

(2) The fact that-

(a) an arbitrator withdraws from office under subsection (1) of this section or under section 9(3) of this Act; or

(b) a party agrees to the termination of the mandate of an arbitrator, shall not be construed as implying the existence of any ground or circumstances referred to in subsection (1) of this section or section 8(1) of this Act.

11. Where the mandate of an arbitrator terminates-

(a) under section 9 or 10 of this Act; or

(b) because of his withdrawal from office for any reason whatsoever; or

(c) because of the revocation of his mandate by agreement of the parties; or

(d) because of any other reason whatsoever,

a substitute arbitrator shall be appointed in accordance with the same rules and procedure that applied to the appointment of the arbitrator who is being replaced.

Jurisdiction of Arbitral Tribunal

12. (1) An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement.

(2) For purposes of subsection (1) of this section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the validity of the arbitration clause.

(3) In any arbitral proceedings a plea that the arbitral tribunal-

(a) does not have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising such plea by reason that he has appointed or participated in the appointment of an arbitrator;

(b) is exceeding the scope of its authority may be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings,

and the arbitral tribunal may, in either case, admit a later plea if it considers that the delay was justified.

(4) The arbitral tribunal may rule on any plea referred to it under subsection (3) of this section either as a preliminary question or in an award on the merits; and such ruling shall be final and binding.

13. Unless otherwise agreed by the parties, the arbitral tribunal may before or during an arbitral proceedings-

(a) at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute; and

(b) require any party to provide appropriate security in connection with any measure taken under paragraph (a) of this section

Conduct of Arbitral Proceedings

14. In any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case.

15. (1) The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the first schedule to this Act.

(2) Where the rules referred to in subsection (1) of this section contain no provision in respect of any matter related to or connected to any particular arbitral proceedings, the arbitral tribunal may, subject to this Act, conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing.

(3) There power conferred on the arbitral tribunal under subsection (2) of this section, shall include the power to determine admissibly, relevance, materiality and weight of any evidence placed before it.

16. (1) Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of subsection (1) of this section and unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.

17. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date the request to refer the dispute to arbitration is received by the other party.

18. (1) The parties may by agreement determine the language or languages to be used in the arbitral proceedings, but where they do not do so, the arbitral tribunal shall determine the language or languages to be used bearing in mind the relevant circumstances of the case.

(2) Any language or languages agreed upon by the parties or determined by the arbitral tribunal under subsection (1) of this section, shall, unless, a contrary intention is expressed by the parties or the arbitral tribunal, be the language or languages to be used in any written statement by the parties, in any hearing, award, decision or any other communication in the course of the arbitration.

(3) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal under subsection (1) of this section

19. (1) The claimant shall, within the period agreed upon by the parties or determined by the arbitral tribunal, state the facts supporting his points of claim, the points at issue and the relief at remedy sought by him, and the respondent shall state his point of defence in respect of those particulars, unless the parties have otherwise agreed on the required elements of the points of claim and of defence.

(2) The parties may submit with their statements under subsection (1) of this section, all the documents they consider to be relevant or they may add a reference to the documents, or other evidence they hope to submit at the arbitral proceedings.

(3) Unless otherwise agreed by the parties, a party may amend or supplement his claim or defence during his course of the arbitral proceedings if the arbitral tribunal considers it appropriate to allow such amendment or supplement having regard to the time that has elapsed before the making of the amendment or supplement.

20. (1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether the arbitral proceedings shall be conducted-

(a) by holding oral hearings for the presentation of evidence or oral arguments; or

(b) on the basis of document or other materials; or

(c) by both holding oral hearings and on the basis of documents or other materials as provided in paragraphs (a) and (b) of this subsection,

and unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if requested so to do by any of the parties

(2) The arbitral tribunal shall give to the parties sufficient advance notice of any hearing and of any meeting of the arbitral tribunal held for the purposes of inspection of document, goods, or other property.

(3) Every statement, document or other information supplied to the arbitral tribunal shall be communicated to the other party by the party supplying the statement, document or other information, and every such statement, document or other information supplied by the arbitral tribunal to one party shall be supplied to the other party.

(4) Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

(5) The arbitral tribunal shall, unless otherwise agreed by the parties, have power to administer oaths to or take the affirmations of the parties and witnesses appearing.

(6) Any party to an arbitral proceedings may issue out a writ of *subpoena ad testificandum* or *subpoena duces tecum,* but no persons shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action

21. Unless otherwise agreed by the parties, if, without showing sufficient cause-

(a) the claimant fails to state his claim as required under section 19(1) of this Act, the arbitral tribunal shall terminate the proceedings; or

(b) the respondent fails to state his defence as required under section 19(1) of this Act, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; or

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award

22. (1) Unless otherwise agreed by the parties, the arbitral tribunal may-

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) require a party to give to the expert any relevant information or to produce or provide access to, any documents, goods or other property for inspection.

(2) Unless otherwise agreed by the parties, if a party so request or if the arbitral tribunal considers it necessary, any expert appointed under subsection (1) of this section shall, after delivering his written or oral report, participate in a hearing where the parties shall have the opportunity of putting questions to him and presenting expert witnesses to testify on their behalf on the point at issue.

(3) The arbitral tribunal shall not decide *ex aequo et bono* or as amiable compositeur unless the parties have expressly authorised it to do so.

(4) The arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of the usages of the trade application to the transaction.

23. (1) The court or the judge may order that writ of *subpoena ad testificandum* or *of subpoena duces tecum* shall issue to compel the attendance before any arbitral tribunal of a witness wherever he may be within Nigeria.

(2) The court or a judge may also order a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before any arbitral tribunal.

(3) The provisions of any written law relating to the services of an execution outside a State of the Federation of any such *subpoena* or order for the production of a prisoner issued or made in civil proceedings by the High Court shall apply in relation to a *subpoena* or other issue or made under this section.

Making an Award and Termination of Proceedings

24. (1) In an arbitral tribunal compromising more than one arbitrator, any decision of the tribunal shall, unless otherwise agreed by the parties, be made by a majority of all its members.

(2) In any arbitral tribunal, the presiding arbitrator may, if so authorised by the parties or all the members of the arbitral tribunal, decide questions relating to the procedure to be followed at the arbitral proceeding.

25. (1) If, during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the arbitral proceedings, and shall, if requested by the parties and not objected to by the arbitral tribunal, the settlement in the form of an arbitral award on agreed terms.

(2) an award on agreed terms recorded under subsection (1) of this section shall-

(a) be in accordance with the provisions of subsection 26 of this Act and state that it is such an award; and

(b) have the same status and effect as any other award on the merits of case.

26. (1) any award made by the arbitral tribunal shall be in writing and signed by the arbitrator or arbitrators.

(2) where the arbitral tribunal comprises of more than one arbitrator, the signatures of a majority of all the members of the arbitral tribunal shall suffice if the reason for the absence of any signature is stated.

(3) the arbitral tribunal shall state on the award-

(a) the reasons upon which it is based, unless the parties have agreed that no reason are to be given or the award is an award on agreed terms under section 25 of this Act;

(b) the date it was made; and

(c) the place of the arbitration as agreed or determined under section 16(1) of this Act which place shall be deemed to be the place where the award was made.

(4) A copy of the award, made and signed by the arbitrators in accordance with and signed by the arbitrators in accordance with subsection (1) and (2) of this section, shall be delivered to each party.

27. (1) The arbitral proceedings shall terminate when the final award is made or when an order of the arbitral is issue under subsection (2) of this section.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when-

(a) the claimant withdraws his claim, unless the respondent objects thereto and arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute; or

(b) the parties agree on the termination of the arbitral proceedings; or

(c) the arbitral tribunal finds that continuation of the arbitral proceeding has for any reason become unnecessary or Impossible.

(3) Subject to the provisions of section 28 and 29(2) of this Act, the mandate of the arbitral tribunal shal cease on termination of the arbitral proceedings.

28. (1) Unless another period has been agreed upon by the parties, a party may, within thirty days of the receipt of an award and with notice to the other party, request the arbitral tribunal-

(a) to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature;

(b) to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers any request made under subsection (1) of this section to be justified, it shall, within thirty days of receipt of the request, make the correction or give the interpretation and such correction or interpretation shall form part of the award.

(3) The arbitral tribunal may, on its own volition and within thirty days from the date of the award, correct any error of the type referred to in subsection (1)(a) of this section.

(4) Unless otherwise agreed by the parties, a party may within thirty days of receipt if the award, request the arbitral tribunal to make an additional award as to the claims presented in the arbitral proceedings but omitted from the award.

(5) If the arbitral tribunal considers any request made under subsection (4) of this section to be justified, it shall, within sixty days of the receipt of the request, make the additional award.

(6) The arbitral tribunal may, if it considers necessary, extent the time limit within which it shall make a correction, give an interpretation or make an additional award under subsection (2) or (5) of this section.

(7) This provision of this section 26 of this Act, which relate to the form and contents of an award, shall apply to any correction or interpretation or to an additional award made under this section.

Recourse Against Award

29. (1) A party who is aggrieved by an arbitral award may within three months-

(a) from the date of the award; or

(b) in a case falling within section 28 of this Act, from the date of the request for additional award is disposed of by the arbitral tribunal,

by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section.

(2) The court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on maters which are beyond the scope of submission to arbitration so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside.

(3) the court before which an application is brought under subsection (1) of this section may, at the request of a party where appropriate, suspend proceedings for such period as it may determine to afford the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action to eliminate the grounds for setting aside of the award.

30. (1) Where an arbitrator has misconduct himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on application of a party set aside the award.

(2) An arbitrator who has misconducted himself may on the application of any party be removed by the court. Recognition and Enforcement of Awards

31. (1) An arbitral award shall be recognised as binding and subject to this section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.

(2) The party relying on an award or applying for its enforcement shall supply-

(a) the duly authenticated original award or duly certified copy thereof;

(b) the original arbitration agreement or a duly certified copy thereof.

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

32. Any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award. General

33. A party who knows-

(a) that any provision of this Act from which the parties may not derogate; or

(b) that any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to non-compliance within the time limit provided therefore shall be deemed to have waived his right to object to the non-compliance.

34. A court shall not intervene in any matter governed by this Act except where so provided in this Act.

35. This Act shall not affect any other law by virtue of which certain disputes-

(a) may not be submitted to arbitration; or

(b) may be submitted to arbitration only in accordance with the provisions of that or another law.

36. Notwithstanding the provisions of this Act the arbitral tribunal may, if it considers it necessary, extend the time specified for the performance of any act under this Act.

Part II

Conciliation

37. Notwithstanding the other provisions of this Act, the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation under the provisions of this part of this Act.

38. (1) A party who wishes to initiate conciliation shall send to the other party a written request to conciliate under the provisions of this Part of this Act.

(2) Any request sent under subsection (10 of this section shall contain a brief statement setting out the subject of the dispute.

39. The conciliation proceedings shall commence on the date the request to conciliate is accepted by the subject of the dispute.

40. Where the request to conciliate under section 38 of this Act has been accepted, the parties shall refer the dispute to a conciliation body consisting of one or three conciliators to be appointed-

(a) in the case of one conciliator, jointly by the parties;

(b) in the case of three conciliators-

(i) one conciliator by each party, and

(ii) the third conciliator jointly by the parties.

41. (1) The conciliation body shall acquaint itself with the details of the case and procure such other information it may require for the purpose of settling the dispute.

(2) The parties may appear in person before the conciliation body and may have legal representation.

42. (1) After the conciliation body has examined the case and heard the parties, if necessary, it shall submit its terms of settlement to the parties.

(2) If the parties agree to the term of settlement submitted under subsection (1) of this section, the conciliation body shall draw up and sign a record of settlement.

(3) If the parties do not agree to the terms of settlement submitted under subsection (1) of this section, they may-

(a) submit the dispute to arbitration in accordance with any agreement between them; or

(b) take any action in court as they may deem fit.

(4) Nothing done in connection with the conciliation proceedings shall affect the legal rights of the parties in any submission to arbitration or any action taken under subsection (3) of this section.

Part III

ADDITIONAL PROVISIONS RELATING TO INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

Application of this Part of this Act and Composition of Arbitral Tribunal, etc.

43. The provision of this Part of this Act shall apply solely to cases relating to international commercial arbitration and conciliation in addition to the other provisions of this Act.

44. (1) If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom will serve as the sole arbitrator.

(2) If within thirty days after receipt by a party of a proposal made in accordance with subsection (1) of this section the parties have not reached agreement on the choice of a sole arbitrator shall be appointed by the appointing authority.

(3) The appointing authority shall, at the request of one of the parties appoint the sole arbitrator as promptly as possible; and in making the appointment the appointing authority shall use the following li procedure, unless both parties agree that the list-procedure, unless both parties agree that the list procedure should not be used or unless the appointing authority determines in its discretion that the use of the list procedure is not appropriate for the case, that is-

(a) at the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;

(b) within fifteen days after the receipt of the said list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preferences;

(c) after the expiration of the above named period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the list returned to it and in accordance with the order of preference indicated by the parties.

(4) In making the appointment, the appointing authority shall have regard to such consideration as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well as the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

(5) If three arbitrators are to be appointed, each party shall appoint one arbitrator; and the two arbitrators thus appointed shall choose the third arbitrator who shall act as the presiding arbitrator of the arbitral tribunal.

(6) If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the other party of the arbitrator he has appointed the first party may request the appointing authority previously designated by the parties to appoint the second arbitrator.

(7) If within thirty days after the appointment of a second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under subsection (1) to (4) of this section.

(8) When the appointing authority is required to appoint an arbitrator pursuant to the provisions of this section, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract, and the appointing authority may require from either party such information as it deems necessary to fulfil its functions under this Act.

(9) Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

(10) Except as otherwise agreed by the parties, no person shall be disqualified from being appointed by reason of his nationality.

45. (1) A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment and circumstances likely to give rise to justifiable doubt as to his impartiality or independence.

(2) An arbitrator, once appointed or chosen, shall disclose such circumstances as referred to in subsection (1) of this section to the parties unless they have already been informed by him of those circumstances.

(3) Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

(4) A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

(5) A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after circumstances mentioned in subsection (1) to (4) of this section become known to that party.

(6) The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal and the notification shall be in writing and shall state the reason for the challenge.

(7) When an arbitrator has been challenged by one party, the other party may agree to the challenge and the challenged arbitrator may also, after the challenge, withdraw from his office; but the fact that the other party agrees to the challenge or that the arbitrator withdraws does not imply acceptance of the validity of the grounds for the challenge.

(8) Where the other parties agree to the challenge or the challenged arbitrators withdraws, the procedure provided in section 44 of this Act shall be used in full for the appointment of the substitute arbitrator, even during the process of appointing the challenged arbitrator a party had failed to exercise to appoint or to participate in the appointment.

(9) If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be made-

(a) When the initial appointment was made by an appointing authority, by that authority;

(b) When the initial appointment was not made by an appointing authority,but an appointing authority has been previously designated, by the authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing as provided for in section 44 of this Act.

(10) If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in section 44 of this Act and in this section except that, when the procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

46. (1) Where an arbitrator dies or resigns during the course of an arbitral proceeding, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in section 44 and 45 of this Act that was applicable to the appointment or choice of the arbitrator being replaced.

(2) Where an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in section 44 and 45 of this Act shall apply.

Making of Awards and Termination of proceedings

47. (1) the arbitral tribunal shall decide the dispute in accordance with the rules in force in the country whose laws the parties have chosen as applicable to the substance of the dispute .

(2) Any designation of the law or legal system of a country shall, unless otherwise expressed, be construed as directly referring to the substantive law of that country and not to its conflict of law rules.

(3) Where the laws of the country to be applied is not determined by the parties, the arbitral tribunal shall apply the law determined by the conflict of the law rules which it considers applicable.

(4) The arbitral tribunal shall not decide *ex aequo et bono* or as *amiable compositeur* unless the parties have expressly authorised it to do so.

(5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of the usages of the trade applicable to the transaction.

(6) If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the arbitral tribunal shall comply with this requirement within the period of time required by law.

48. The court may set aside an arbitral award-

(a) If the party making the application furnishes proof-

(i) that a party to the arbitration agreement was under some incapacity,

(ii) That the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the laws of Nigeria,

(iii) That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case, or

(iv) That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or

(v) That the award contains decisions on matters which are beyond the scope of submission to arbitration, so however that the if decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decision on matters not submitted to arbitration may be set aside, or

(vi) That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or

(vii) Where there is no agreement between the parties under subparagraph (vi) of this paragraph, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act; or

(b) if the court finds-

(i) that the subject-matter of the dispute is not capable of settlement by arbitration under laws of Nigeria or

(ii) that the award is against public policy of Nigeria.

49. (1) The arbitral tribunal shall fix costs of arbitration in its award and the term "cost" includes only-

(a) the fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself;

(b) the travel and other expenses incurred by the arbitrators;

(c) the cost of expert advice and of other assistance required by the arbitral tribunal;

(d) the travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal;

(e) the cost for legal representation and assistance of the successful party if such cost were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such cost is reasonable.

(2) The fees of the arbitral tribunal shall be reasonable in amount taken account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

(3) If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing his fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

(4) If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators; and if the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

(5) In cases referred to in subsection (3) and (4) of this section when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority, which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

50. (1) The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the cost referred to in paragraph (a), (b) and (c) of this section 49(1) of this Act.

(2) During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

(3) If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the authority consents to perform the function, the arbitral tribunal shall fix the amount of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

(4) If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or other of them may make the required

payment; and if such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

(5) After award has been made, the arbitral tribunal shall render an account to the parties of the deposits received and return any unexpended balance to the parties

Recognition and Enforcement of Awards

51. (1) An arbitral award shall, irrespective of the country in which it is made, be recognised as binding and subject to this section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.

(2) The party relying on an award or applying for its enforcement shall supply

(a) the duly authenticated original award or a duly certified copy thereof;

(b) the original arbitration agreement or a duly certified copy thereof; and

(c) where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language.

52. (1) Any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award.

(2) The court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse to recognise or enforce any award-

(a) if the party against whom it is invoked furnishes the court proof-

(i) that a party to the arbitration agreement was under some incapacity, or

(ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made, or

(iii) that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case, or

(iv) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or

(v) that the award contains decisions on matters which are beyond the scope of submission to arbitration, so however that if the decision on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on maters submitted to arbitration may be recognised and enforced, or

(vi) that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, or

(vii) where there is no agreement within the parties under sub-paragraph, that the composition of the arbitral tribunal , or the arbitral procedure, was not in accordance with the law of the country where the arbitration took place, or

(viii) that the award has not yet become binding on the parties or has been set aside or suspended by a court in which, or under the law of which, the award was made; or

(b) if the court finds-

(i) that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, or

(ii) that the recognition or enforcement of the award is against public policy of Nigeria.

(3) Where an application for the recognition of an award has been made to a court referred to in subsection (2)(a)(viii) of this section, the court before which the recognition or enforcement is sought may, if it considers it proper, postpone its decision and may on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Application of Arbitration Rules set out in the First Schedule

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

Application of Convention on the recognition and Enforcement of Foreign Arbitral Awards

54. (1) Without prejudice to section 51 and 52 of this Act, where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the Convention on the

Recognition and Enforcement of Foreign Awards (hereafter referred to as "the Convention") set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any contracting state:

(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;

(b) that the Convention shall apply only to differences arising out of legal relationship which is contractual.

(2) in this part of this Act, " the appointing authority" means the Secretary-General of the Permanent Court of Arbitral at The Hague.

Conciliation

55. Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be settled by Conciliation Rules set out in the Third Schedule to this Act.

PART IV
MISCELLANEOUS

56. (1) Unless otherwise agreed by the parties, any communication sent under or pursuant to this Act shall be deemed to have been received-

(a) When it is delivered to the addressee personally or when it is delivered to his place of business, habitual residence or mailing address; or

(b) Where a communication cannot be delivered under paragraph (a) of this subsection, when it is sent to the addressee's last known place of business, habitual residence or mailing address by registered lette or any other means which provides a record of the attempt to deliver it .

(2) A communication shall be deemed to have been received on the day it is delivered under subsection (1) of this section.

(3) The provisions of this section shall not apply to communications in court proceedings.

57. (1) In this Act, unless the context otherwise requires-

"arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

"arbitration" means a commercial arbitration whether or not administered by a permanent arbitral institution;

"commercial" means all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail, or road;

"court" means the High Court of a State, the High Court of a Federal Capital Territory, Abuja or the Federal High Court;

"Judge" means a Judge of the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court;

"party" means a party to the arbitration agreement or to conciliation or any person claiming through or under him and

"parties" shall be construed accordingly.

(2) An arbitration is international if –

(a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different countries; or

(b) one of the following places is situated outside the country in which the parties have their places of business-

(i) the place of arbitration if such place is determined in, or pursuant to the arbitration agreement,

(ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is mist closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; or

(d) the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.

(3) For the purposes of subsection (2) of this section-

(a) if a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference shall be made to his habitual residence.

(4) Where a provision of this Act, other than section 47 of this Act, leaves the parties free to determine a certain issue, such freedom include the right of the parties to authorise a third party, including an institution, to make that determination.

(5) Where a provision of this Act-

(a) refers to the fact that parties have agreed or that they may agree; or

(b) in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to In the agreement.

(6) Where a provision of this Act, other than section 21(a) or 27(2)(a) refers to a claim, such claim includes a counter-claim, and where it refers to a defence, such defence includes a defence to such counter-claim.

58. This Act may be cited as the Arbitration and Conciliation Act and shall apply throughout the Federation

Schedules

First Schedule

Arbitration Rules

Section 1
Introductory Rules

Scope of Application

Article 1

1. These Rules shall govern any arbitration proceedings except that where any of these Rules is in conflict with a provision of this Act, the provision of this Act shall prevail.

NOTICE, CALCULATION OF PERIODS OF TIME

Article 2

1. For the purpose of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official days or non-business days occurring during the running of the period of time are included in calculating the period.

NOTICE OF ARBITRATION

Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

(a) a demand that the dispute be referred to arbitration

(b) the names and addresses of the parties;

(c) a reference to the arbitration clause or the separate arbitration agreement that is invoked;

(d) a reference tot the contract out of or in relation to which the dispute arises;

(e) the general nature of the claim and an indication of the amount involved, if any;

(f) the relief or remedy sought;

(g) a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

4. The Notice of Arbitration may also include:

(a) the proposals for the appointment of a sole arbitrator;

(b) the notification of the appointment of an arbitrator referred to in Article 7;

(c) the statement of claim referred to in Article 18.

REPRESENTATION AND ASSISTANCE

Article 4

The parties may be represented or assisted by legal practitioners of their choice. The names and addresses of such legal practitioners must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

SECTION 11- COMPOSITION OF THE ARBITRAL TRIBUNAL

NUMBERS OF ARBITRATORS

Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

APPOINTMENT OF ARBITRATORS (ARTICLES 6 TO 8)

Article 6

1. If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom would serve as the sole arbitrator.

2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1, the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the court.

3. The court shall, at the request of one of the parties appoint the sole arbitrator as promptly as possible; and in making the appointment the court shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the court determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) at the request of one of the parties the court shall communicate to both parties an identical list containing at least three names;

(b) within fifteen days after the receipt of this list, each party may return the list to the court after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of preference;

(c) after the expiration of the above period of time the court shall appoint the sole arbitrator from among the names approved on the lists return to it and in accordance with the order of preference indicated by the parties;

(d) if for any reason the appointment cannot be made according to this procedure, the court may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the court shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator; and the two arbitrators thus appointed shall chose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed the first party may request the court to appoint the second arbitrator.

3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the court in the same way as a sole arbitrator would be appointed under Article 6.

Article 8

1. When a court is requested to appoint an arbitrator pursuant to Article 6 or Article 7, the party which makes the request shall send to the court an affidavit together with a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The court may require from either party such information as it deems necessary to fulfil its functions.
2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names and addresses shall be indicated, together with a description of their qualification.

CHALLENGE OF ARBITRATORS (ARTICLE 9 TO 12)

Article 9

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose their circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators impartiality or independence.
2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 11

1. A party who tends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in article 9 and 10 became known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reason for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in Article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made-

(a) when the initial appointment was made by the court, by the court;

(b) when the initial appointment was not made by court, but an appointment authority has been previously designated, by that authority;

(c) in all other cases, by the court as provided for in Article 6.

1. If the court sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in Articles 6 to 8 except that, when this procedure would call for appointment by the court, the appointment of the arbitrator shall be made by the court which decided on the challenge.

REPLACEMENT OF AN ARBITRATOR

Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in Articles 6 to 8 that was applicable to the appointment or choice of the arbitrator being replaced
2. In the event that an arbitrator fails to act or in the event of de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the proceeding articles shall apply.

REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR

Article 14

If under articles 11 and 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated at the discretion of the arbitral tribunal.

SECTION 111- ARBITRAL PROCEEDINGS

GENERAL PROVISIONS

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings fo the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearing or whether the proceedings shall be conducted on the basis documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by the party to the other party.

PLACE OF ARBITRATION

Article 16

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

2. The arbitral tribunal may determine the locale of the arbitration within the place agreed upon by the parties. It may hear witnesses and hold meeting for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or document. The parties shall give sufficient notice to enable them to be present at such inspection.

LANGUAGE

Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place to the language or languages to be used at such hearing.
2. The arbitral tribunal may order that any document annexed to the statement of claim or statement of defence, and any supplementary statement documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

STATEMENT OF CLAIM

Article 18

1. Unless the statement of claim was contained in the notice of the arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

(a) the names and addresses of the parties

(b) a statement of the facts supporting the claim;

(c) the point at issue;

(d) the relief or remedy sought.

3. The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

STATEMENT OF DEFENCE

Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particular (b), (c) and (d) of the statement of claim (Article 18, paragraph 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decide that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of Article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

AMENDMENTS TO THE CLAIM OR DEFENCE

Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard

to the delay in making it or prejudice to the other party or any other circumstances. However, a claim not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 21

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of this article, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

FURTHER WRITTEN STATEMENTS

Article 22

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and fix the periods of time for communicating such statements.

PERIODS OF TIME

Article 23

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the tribunal may extend the time limits if it concludes that extension is justified.

EVIDENCE AND HEARINGS (ARTICLE 24 AND 25)

Article 24

1. Each party shall have the burden of proving the facts relied on to support his claim or defence, and to the arbitral to the tribunal may, if it consider it appropriate, require a party to deliver to the tribunal and the 4other party within such a period of time as the arbitral shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.
2. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to the present, the subject upon and the languages in which such witnesses will give their testimony.

3. The arbitral tribunal shall make arrangements for the translation of oral statement made at a hearing and for a record of the hearing of either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.

4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witnesses or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are determined

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The arbitral tribunal shall determine the admissibly, relevance, materiality and weight of the evidence offered.

INTERIM MEASURES OF PROTECTION

Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the cost of such measures.

3. A request for interim measures addressed by any party to court shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement.

EXPERTS

Article 27

1. The arbitral tribunal may appoint one or more experts to report to it in writing, on specific issues to be determined by the tribunal. A copy of the expert's term of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decisions.

3. Upon a receipt of the expert's report the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied on his report.

4. At the request of either party the expert, after delivering the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either

parity may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

DEFAULT

Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

CLOSURE OF HEARINGS

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.
2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to re-open the hearings at any time before the award is made.

WAIVER OF RULES

Article 30

A party who knows that any provision of, or requirement under, these rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

SECTION IV
THE AWARD/DECISIONS

Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions for procedure, when there is no majority or when the arbitral tribunal so authorises, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

FORM AND EFFECT OF THE AWARD

Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of signature.

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

APPLICABLE LAW, AMIABLE COMPOSITEUR

Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction.

SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable ground for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where the arbitral award on agreed terms is made, the provisions of Article 32, paragraph 2 and 4 to 6, shall apply.

INTERPRETATION OF AWARD

Article 34

1. Within thirty days after receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within forty-five days after receipt of the request. The interpretation shall form part of the award and the provisions of Article 32, paragraph 2and 6, shall apply.

CORRECTION OF AWARD

Article 36

1. Within thirty days after receipt of award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.
2. Such corrections shall be in writing, and the provisions of Article 32, paragraphs 2 and 6, shall apply.

ADDITIONAL AWARD

Article 37

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request of an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

3. When an additional award is made, the provisions of Article 32, paragraphs 2 to 6, shall apply.

COSTS (ARTICLES 38 TO 40)

Article 38

The arbitral tribunal shall fix the cost of arbitration in its award.

The term "costs" includes only-

(a) the fees of the arbitration tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with Article 39;

(b) the travel and other expenses incurred by the arbitrators;

(c) the cost of expert advice and of other assistance required by the arbitral tribunal;

(d) the travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal;

(e) the cost for legal representation and assistance of successful party if such cost were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such cost is reasonable.

Article 39

The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

Article 40

1. Except as provided in paragraph 2, the cost of arbitration shall in principle be borne by unsuccessful party. However, the arbitral tribunal may apportion each of such cost between the parties if it determines that apportionment is reasonable taking into account the circumstances of the case.

2. With respect to the cost of legal representation and assistance referred to in Article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of arbitral proceedings or makes an award on agreed terms it shall fix the cost of arbitration referred to in Article 38 and Article 39, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under Articles 35 to 37.

DEPOSIT OF COSTS

Article 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the cost referred to in Article 38, paragraphs, (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If the required deposits are not paid in full within thirty days after the receipt of the requests, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

4. After the award has been made, the arbitral tribunal shall render an account to the parties of the deposits received and return any unexpected balance to the parties.

SECOND SCHEDULE

CONVENTION OF THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS JUNE 10, 1958

Article 1

1. This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such award are sought, arising out of difference between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitration awards" shall include not only awards made by arbitrator, appointed for each case but also made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered commercial under the national law of the State making such declaration.

Article 11

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

APPENDICES

2. The term "agreement in writing" shall include an arbitral clause in a contract or in an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

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

Article 111

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of application supply:

(a) the duly authenticated original award or duly certified copy thereof;

(b) the original agreement referred to in Article 11 or a duly certified copy thereof

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these document into such language. The translation shall be certified by an official or sworn translator or by a diplomatic agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that-

(a) the parties to the agreement referred to in Article 11 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforcement; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that-

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V paragraph (1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of award, order the party to give suitable security.

APPENDICES

Article VII

1. the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31st December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or thereafter becomes a party to the Statute of the International Court of Justice, or any other state to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in Article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that his convention shall extent to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day or receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibilities of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

1. In the case of a federal or non-unitary state, the following provisions shall apply-

(a) with respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) with respect to those articles of this Convention that come within the legislative jurisdiction of the constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) a federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

APPENDICES

Article XIII

***1.** Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General*

***2.** Any State which has made a declaration or notification under Article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of receipt of the notification by the Secretary-General.*

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A contracting State shall not be entitled to avail itself of the Present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in Article VIII of the following-

(a) signature and ratifications in accordance with Article VIII;

(b) accessions in accordance with Article IX;

(c) declarations and notifications under Articles I, X and XI;

(d) the date upon which this Convention enters into force in accordance with Article XII;

(e) Denunciations and notifications in accordance with Article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian, and Spanish texts should be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in Article VIII.

THIRD SCHEDULE

CONCILIATION RULES

APPLICATION OF THE RULES

Article 1

(1) These Rules apply to conciliation of disputes arising out or relating to a contractual or other legal relationships where the parties seeking an amicable settlement of their dispute have agreed that the Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of this Act any law from which the parties cannot derogate, that provision prevails.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Article 2

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it is confirmed in writing.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

NUMBER OF CONCILIATION

Article 3

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

APPOINTMENT OF CONCILIATOR

Article 4

(1) (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.

(2) Parties may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular-

(a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliators; or

(b) the parties may agree that the appointment of one or more conciliator be made by such institution or person.

In recommending or appointing individuals to act as conciliators, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator.

SUBMISSION OF STATEMENT TO CONCILIATOR

Article 5

(1) The conciliator upon his appointment, request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his syayement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

(3) At any stage of the conciliation proceedings the conciliators may request aparty to submit to him such additional information as he deems appropriate.

REPRESENTATION AND ASSISTANCE

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

ROLE OF CONCILIATOR

Article 7

(1) The conciliator assists the parties in an independent and an impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the party may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposal for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

ADMINISTRATIVE ASSISTANCE

Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by suitable institution or person.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 9

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator after consulting with the parties having regard to the circumstances of the conciliation proceedings.

DISCLOSURE OF INFORMATION

Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substances of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate.

CO-OPERATION OF PARTIES WITH CONCILIATOR

Article 11

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with request by the conciliator to submit written material, provide evidence and attend meetings.

SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

Article 12

Each party may, on his own initiative of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

SETTLEMENT AGREEMENT

Article 13

(1) When it appears to the conciliator that there exist elements of a settlement, which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observation. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement. If requested by the parties the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

CONFIDENTIALITY

Article 14

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15

The conciliation proceedings are terminated:

(a) by the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated on the date of the declaration.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 16

The parties undertake not to initiate during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings.

COSTS

Article 17

(1) Upon termination of the conciliation proceedings, the conciliator fixes the cost of the conciliation and gives written notice thereof to the parties.

The term "costs" include only:

(a) the fee of the conciliator which shall be a reasonable amount;

(b) the travel and other expenses of the conciliator;

(c) the travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

(d) the cost of any assistance provided pursuant to Articles 4, paragraph 2(b), and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different appointment. All other expenses incurred by a party are borne by the party.

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the cost referred to in Article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits, in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this Article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpected balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

Article 19

The parties and the conciliator undertake that the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The conciliator shall not be presented as a witness in any such proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDING

Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

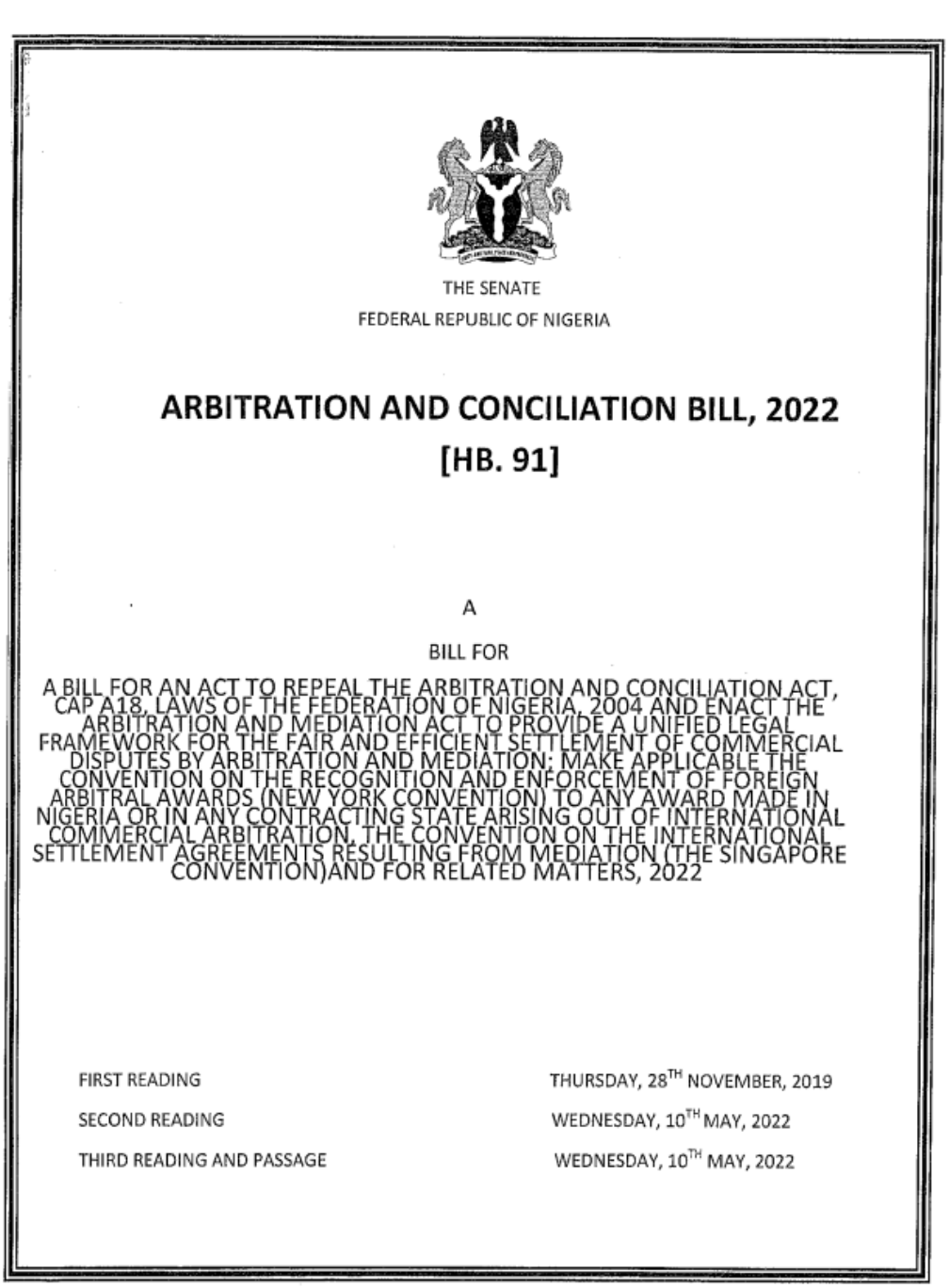
(a) views expressed or suggestion made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of a conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Appendix 2. Arbitration and Mediation Bill 2022.



THE SENATE

FEDERAL REPUBLIC OF NIGERIA

ARBITRATION AND CONCILIATION BILL, 2022

[HB. 91]

A

BILL FOR

A BILL FOR AN ACT TO REPEAL THE ARBITRATION AND CONCILIATION ACT, CAP A18, LAWS OF THE FEDERATION OF NIGERIA, 2004 AND ENACT THE ARBITRATION AND MEDIATION ACT TO PROVIDE A UNIFIED LEGAL FRAMEWORK FOR THE FAIR AND EFFICIENT SETTLEMENT OF COMMERCIAL DISPUTES BY ARBITRATION AND MEDIATION; MAKE APPLICABLE THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK CONVENTION) TO ANY AWARD MADE IN NIGERIA OR IN ANY CONTRACTING STATE ARISING OUT OF INTERNATIONAL COMMERCIAL ARBITRATION, THE CONVENTION ON THE INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION (THE SINGAPORE CONVENTION)AND FOR RELATED MATTERS, 2022

FIRST READING	THURSDAY, 28TH NOVEMBER, 2019
SECOND READING	WEDNESDAY, 10TH MAY, 2022
THIRD READING AND PASSAGE	WEDNESDAY, 10TH MAY, 2022

ARBITRATION AND CONCILIATION BILL, 2022

Arrangement of Clauses

Clause

A BILL FOR AN ACT TO REPEAL THE ARBITRATION AND CONCILIATION ACT, CAP A18, LAWS OF THE FEDERATION OF NIGERIA, 2004 AND ENACT THE ARBITRATION AND MEDIATION ACT TO PROVIDE A UNIFIED LEGAL FRAMEWORK FOR THE FAIR AND EFFICIENT SETTLEMENT OF COMMERCIAL DISPUTES BY ARBITRATION AND MEDIATION; MAKE APPLICABLE THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK CONVENTION) TO ANY AWARD MADE IN NIGERIA OR IN ANY CONTRACTING STATE ARISING OUT OF INTERNATIONAL COMMERCIAL ARBITRATION, THE CONVENTION ON THE INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION (THE SINGAPORE CONVENTION)AND FOR RELATED MATTERS, 2022 (HB. 91)

{ } Commencement

ENACTED by National Assembly of the Federal Republic of Nigeria as follow:

PART I - ARBITRATION

1. (1) The provisions of this Part are founded on the following principles, and shall be construed accordingly - General principles and scope of application.

a. the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

b. the parties should be free to agree on how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

c. an arbitration agreement between parties for the settlement of their dispute shall be binding upon and enforceable against each of the parties to the exclusion of any other dispute resolution method unless the parties otherwise provide or the agreement is null and void;

d. the parties, arbitrators, arbitral institutions, appointing authorities and the Court shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

(2) Save for the provisions mentioned in subsection (3) of this Section, the provisions of this Part apply only if the seat of the arbitration is in the territory of the Federal Republic of Nigeria.

(3) The following powers of the Court shall apply even if the seat of the arbitration is outside the Federal Republic of Nigeria or no seat has been designated or determined:

a. Section 5 (power to stay court proceedings);

b. Section 19 (power of Court to grant interim measures of protection);

c. Section 28 (recognition and enforcement of interim measures);

d. Section 29 (refusing recognition and enforcement of interim measures);

e. Section 43 (securing the attendance of witnesses);

f. Section 57 (recognition and enforcement of awards); and

g. Section 58 (refusing recognition and enforcement of awards).

Form of arbitration agreement

2. (1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The Arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of points of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) For the avoidance of doubt, the reference in a contract or a separate arbitration agreement to a document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract or the arbitration agreement.

(7) For the purpose of this section –

a. "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy; and

b. "electronic communication" means any communication that the parties make by means of data messages.

Arbitration agreement irrevocable except by agreement or leave of court

3. Subject to Section 5(1) of this Act, and unless the parties agree otherwise, an arbitration agreement shall be irrevocable.

Death or Change in Status of party

4. (1) An Arbitration Agreement shall not be invalid by reason of the death of any party to the agreement.

(2) The authority of an arbitrator shall not be revoked by the death, bankruptcy, insolvency or other change in circumstance of any party by whom the arbitrator was appointed.

(3) Nothing in this Section shall be taken to affect the operation of any law by virtue of which

any right of action is extinguished by the death of a person.

(4) For the purposes of this Section, 'death' shall include the meaning ascribed to it in Section 91(1) of this Act.

Power to stay court proceedings on the same substantive claim

5. (1) Notwithstanding the provisions of any other law, a Court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if any of the parties so requests not later than when submitting their first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(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.

(3) Where a Court makes an order for stay of proceedings under subsection (1) of this Section, the Court may, for the purpose of preserving the rights of parties, make such interim or supplementary orders as may be necessary.

Composition of Arbitral Tribunal

6. **Number of arbitrators**

(1) The parties to an arbitration agreement may agree on the number of arbitrators to constitute the arbitral tribunal.

(2) If there is no agreement as to the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator.

Appointment of arbitrators

7. (1) No person shall be precluded by reason of his or her nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties may agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of subsections (4) and (5) of this Section.

(3) Subject to section 59 of this Act, where the parties fail to agree on the procedure for appointing the arbitrator or arbitrators under subsection (2) of this Section –

a. in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty (30) days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty (30) days of their appointment, the appointment shall be made, upon request of a party, by the appointing authority designated by the parties or, failing such designation, by any arbitral institution in Nigeria or by the Court;

b. in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator within thirty (30) days after the receipt of a written communication containing a request for the dispute to be referred to arbitration by the other party or parties, the arbitrator shall be appointed, upon request of a party, by the appointing authority designated by the parties or, failing such designation, by any arbitral institution in Nigeria or by the Court;

c. where the arbitration agreement entitles each party to nominate an arbitrator; and where the parties to the dispute are more than two and such parties have not all agreed in writing, within thirty (30) days of the receipt of a written communication containing a request for the dispute to be referred to arbitration, that the disputing parties represent two separate sides for the formation of the arbitral tribunal as Claimant and Respondent respectively, then the appointing authority designated by the parties or, failing such designation, any arbitral institution in Nigeria or the Court shall, upon request of a party, have the power to appoint the arbitral tribunal without regard to any party's nomination;

d. when the designated appointing authority or, failing such designation, any arbitral institution in Nigeria or the Court is requested to appoint an arbitrator pursuant to the provisions of this Section, the party which makes the request shall send to the appointing authority, arbitral institution or Court a copy of the request for a dispute to be referred to arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract, and the appointing authority, arbitral institution or Court may require from either party such other information as it deems necessary to fulfil its functions under this Act;

e. where any party proposes the names of one or more persons for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

(4) Save as otherwise specifically provided under this Act, where, under an appointment procedure agreed upon by the parties,

a. a party fails to act as required under such procedure, or

b. the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

c. a third party, including an institution fails to perform any function entrusted to it under such procedure,

any party may request the Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) The appointing authority, arbitral institution or Court exercising its power of appointment under this section shall make the required appointment within thirty (30) days of the request and shall have due regard to any qualifications required of the arbitrator by the arbitration agreement and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator, and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

(6) The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the arbitral institution chosen by a party.

8. (1) When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and

Grounds for challenge

throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed to by the parties. A party may challenge an arbitrator it appointed, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.

9. (1) The parties may agree on a procedure for challenging an arbitrator, subject to the provisions of subsection (3) of this Section. Challenge procedure

(2) Where no such agreement is reached between the parties under subsection (1) of this Section, a party who intends to challenge an arbitrator shall, within fourteen (14) days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in Section 8(2) of this Act, send a written statement of the reasons for the challenge to the arbitral tribunal and unless the challenged arbitrator withdraws from his or her office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under subsection (2) of this Section is not successful, the challenging party may, within thirty (30) days after having received notice of the decision rejecting the challenge, request either of the following as may be appropriate to decide the challenge:

(a) the appointing authority, arbitral institution or the Court (as the case may be) that appointed the arbitrator; or

(b) where a party appointed the arbitrator, the Court.

While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

(4) The appointing authority, arbitral institution or Court (as the case may be) shall decide on the admissibility and, at the same time, if necessary, on the merits of the challenge after affording an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. The submitting party shall communicate such comments to the other party or parties and to the arbitrators.

10. (1) Where, by reasons of law or fact an arbitrator becomes unable to perform his or her functions or otherwise fails to act without undue delay, the arbitrator's mandate shall terminate upon his or her withdrawal or by agreement of the parties on the termination. Where any dispute remains between the parties as to the grounds upon which the arbitrator's mandate is sought to be determined, any party may request the Court to decide on the termination of the mandate. Failure or impossibility to Act.

(2) If, under this Section or Section 9(2), an arbitrator withdraws from his or her office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this Section or Section 8(2).

11. Where the mandate of an arbitrator terminates under Section 9 or 10 of this Act or because of his or her withdrawal from office for any other reason or because of the revocation of his or her mandate by agreement of the parties or in any other case of termination of his or her mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the Appointment of substitute Arbitrator

appointment of the arbitrator being replaced.

12. (1) The parties may agree with an arbitrator as to the consequences of the arbitrator's withdrawal from his or her office as regards - Withdrawal, Death and Cessation of Office of an Arbitrator.

a. the arbitrator's entitlement if any to fees or expenses; and

b. any liability incurred by the arbitrator.

(2) Where there is no such agreement referred to in subsection (1) of this section, the following provisions shall apply-

(a) an arbitrator who withdraws from his or her appointment may (upon notice to the parties) apply to the appointing authority designated by the parties or, failing such designation, apply to the Court:

i. to grant the arbitrator relief from any liability thereby incurred by the arbitrator; and

ii. to make such order as it thinks fit with respect to the arbitrator's entitlement if any, to fees or expenses or the refund of any fees or the refund of any fees or expense already paid.

(b) If the appointing authority or, where applicable, the Court is satisfied that in all the circumstances it was reasonable for the arbitrator to withdraw, it may grant such relief as mentioned in subsection (2)(a) of this Section on such terms as it thinks fit.

(3) Subject to subsection (6) of this Section, the authority of an arbitrator is personal and ceases upon the death of such arbitrator.

(4) Where the mandate of an arbitrator terminates under Section 10 of this Act, or by resignation or death, the parties may agree –

a. whether and if so to what extent the previous proceedings should stand; and

b. in the event of the death of the arbitrator, the sum if any to be paid to the estate of the arbitrator for work done and the refund of expenses incurred.

(5) If and to the extent that there is no such agreement, the tribunal when reconstituted shall determine -

a. whether and, if so, to what extent the previous proceedings shall stand;

b. the sum (if any) payable to the estate of the deceased arbitrator; and

(6) The arbitrator's ceasing to hold office shall not affect any appointment made by him alone or jointly of another arbitrator, in particular, any appointment of a presiding arbitrator.

Immunity

13. (1) An arbitrator, appointing authority or an arbitral institution is not liable for anything Immunity of Arbitrator, Appointing

done or omitted in the discharge or purported discharge of their functions as provided in this Act, unless their action or omission is shown to have been in bad faith. Authority and Arbitral Institution.

(2) Subsection (1) of this Section applies to an employee of an arbitrator, appointing authority or an arbitral institution as it applies to the arbitrator, the appointing authority or the arbitral institution in question.

(3) This Section does not affect any liability incurred by an arbitrator by reason of the arbitrator's withdrawal under Section 12 of this Act.

Jurisdiction of Arbitral Tribunal

Competence of Arbitral tribunal to Rule on its Jurisdiction.

14. (1) The arbitral tribunal shall rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(2) For the purpose of subsection (1) of this Section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(3) In any arbitral proceedings, a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the points of defence and a party is not precluded from raising such a plea by the fact that it has appointed a participated in the appointment of, an arbitrator.

(4) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings and the arbitral tribunal may, in a case falling either under subsection (3) or (4) of this Section, admit a later plea if it considers the delay justified.

(5) The arbitral tribunal may rule on any plea referred to it under subsection (3) and (4) of this Section, either as a preliminary question or in an award on the merits and such ruling shall be final and binding. If the tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty (30) days after having received notice of that ruling, the Court to decide the matter.

(6) Where the arbitral tribunal rules upon its jurisdiction as a preliminary question, it may continue with the proceedings and make an award notwithstanding that a party has recourse to a Court in respect of such ruling.

15. (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Rules applicable to substance of dispute

(2) Any designation of the law or legal system of a given jurisdiction or territory shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction or territory and not to its conflict of law rules.

(3) Where parties fail to choose or designate any law or legal system of a given jurisdiction or territory as required in subsection (1) of this section, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.

(4) The arbitral tribunal shall not decide ex aequo et bono or as amiable compositeur, unless the parties have expressly authorised it to do so.

(5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall, where established by credible evidence, take account of the usages of the trade applicable to the transaction.

Interim Measures of Protection and Emergency Relief

Appointment of an Emergency Arbitrator

16. (1) A party requiring urgent relief ("Emergency Relief") may, concurrent with or following the filing of a request for a dispute to be referred to arbitration but prior to the constitution of the arbitral tribunal, submit an application for the appointment of an emergency arbitrator to any arbitral institution designated by the parties, or, failing such designation, to the Court.

(2) The party requiring the appointment of an emergency arbitrator shall provide sufficient copies of the application to the arbitral institution or the Court as the case may be, so as to provide one copy for the emergency arbitrator and one copy for each party, who shall be notified of the proceedings in accordance with subsection (6) of this section.

(3) Unless the parties agree otherwise, the application shall include the following information -

a. a statement of the Emergency Relief sought;

b. the name in full, description, address and other contact details of each of the parties;

c. a description of the circumstances giving rise to the application and of the underlying dispute referred to arbitration;

d. the reasons why the applicant needs the Emergency Relief on an urgent basis that cannot await the constitution of an arbitral tribunal;

e. the reasons why the applicant is entitled to such Emergency Relief; and

f. any relevant agreement(s) and, in particular, the arbitration agreement(s).

(4) The application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the application.

(5) If the arbitral institution or Court determines that it should accept the application, it shall, unless the parties otherwise agree, appoint an emergency arbitrator within two (2) business days after the date the application is received.

(6) Once the Emergency Arbitrator has been appointed, the arbitral institution or Court shall, at the expense of the party making the application, immediately notify the Emergency Arbitrator and

other party or parties named in the application, no later than the close of business on the business day following the date the application is granted, or such other time (not exceeding two (2) business days) as the arbitral institution or Court considers to be appropriate in the circumstances. Thereafter, all written communications from the parties shall be submitted directly to the Emergency Arbitrator with a copy to the other party or parties.

(7) Every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute.

(8) A prospective emergency arbitrator shall sign and deliver to the parties a statement of acceptance, availability, impartiality and independence.

(9) This Section and Article 27 of the First Schedule to this Act are not intended to prevent any party from seeking urgent interim measures from a Court under Section 19 of this Act, at any time prior to making an application for such measures, and in appropriate circumstances thereafter pursuant to this Act. Any application for such measures from a competent Court shall not be deemed to be an infringement or waiver of the arbitration agreement.

17. (1) Unless the parties otherwise agree -

Challenge of an emergency arbitrator

(a) A challenge against the appointment of the Emergency Arbitrator must be made within three (3) days from receipt by the party making the challenge of the notification of the appointment or from the date when that party was informed of the facts and circumstances on which the challenge is based, if such date is subsequent to the receipt of such notification.

(b) The provisions of this Act relating to the grounds for challenge of an arbitrator (Section 8 of this Act) shall also apply to the grounds for challenge of an emergency arbitrator.

(2) The arbitral institution or Court that appointed the Emergency Arbitrator will decide the challenge after a reasonable opportunity has been afforded to the Emergency Arbitrator and the parties to provide submissions in writing, but no later than three (3) business days after the date of the challenge.

(3) Where an emergency arbitrator dies, has been successfully challenged, has been otherwise removed, or has withdrawn the arbitral institution or Court shall appoint a substitute emergency arbitrator within two (2) business days thereof.

(4) Where the emergency arbitrator is replaced, the Emergency Relief proceedings shall resume at the stage where the Emergency Arbitrator was replaced or ceased to perform his or her functions, unless the substitute Emergency Arbitrator decides otherwise.

Seat of the Emergency Relief Proceedings

18. (1) If the parties have agreed on the seat of arbitration, such seat shall be the seat of the Emergency Relief proceedings.

(2) Where the parties have not agreed on the seat of the arbitration, the arbitral institution or Court that appointed the Emergency Arbitrator shall fix the seat of the Emergency Relief Proceedings, without prejudice to the arbitral tribunal's determination of the seat of arbitration pursuant to Section 32 of this Act.

(3) Any meetings with the Emergency Arbitrator may be conducted through a meeting in person at any location the Emergency Arbitrator considers appropriate or by video conference, telephone or similar means of communication.

Power of Court to grant interim measures of protection

19. Without prejudice to Section 16 of this Act, a Court shall have the power to issue interim measures of protection for the purposes of and in relation to arbitration proceedings whose seat is in the Federal Republic of Nigeria or in another country as it has for the purpose of and in relation to proceedings in the Courts and shall exercise that power within fifteen (15) days of any application, in accordance with the rules set out in the third schedule to this Act.

Power of arbitral tribunal to Grant Interim Measures

20. (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute or preserve the subject matter of the arbitration itself.

Conditions for Grant of Interim Measures

21. (1) The party requesting an interim measure under Section 20(2)(a), (b) and (c) shall satisfy the arbitral tribunal that -

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under section 20(2)(*d*), the requirements in paragraphs (a) and (b) of subsection 1 of this Section shall apply only to the extent the arbitral tribunal considers appropriate.

Applications for Preliminary Orders

22. (1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request to the arbitral tribunal for an interim measure together with an application for a Preliminary Order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(4) The conditions defined under Section 21(1) of this Act apply to any preliminary order, provided that the harm to be assessed under Section 21(1)(a) is the harm likely to result from the order being granted or not.

Specific regime for preliminary orders

23. (1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication between any party and the arbitral tribunal in relation thereto.

(2) The arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty (20) days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a Court and such a preliminary order does not constitute an award.

Modification, suspension and termination of interim measures and preliminary orders

24. The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative including but not limited to where –

(a) important facts were concealed from the Tribunal;

(b) the interim measures or preliminary order was fraudulently obtained;

(c) facts come to the knowledge of the tribunal, which, if the tribunal had known at the material time, it would not have granted the order; and it is just and equitable in the circumstance to modify, suspend or terminate the order.

Order by the arbitral tribunal for provision of security

25. (1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Disclosure of material change in circumstances

26. (1) The party requesting an interim measure shall promptly disclose any material change in the circumstances upon which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under subsection (1) of this Section.

Costs and damages

27. (1) The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to the party against whom it is directed if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted.

(2) The arbitral tribunal may award such costs and damages at any point during the proceedings.

Recognition and enforcement of interim measures

28. (1) An interim measure issued by an arbitral tribunal shall be binding and, unless otherwise provided by the arbitral tribunal, shall be enforced upon application to the Court, irrespective of the country in which it was issued, subject to Section 29 of this Act.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the Court of any termination, suspension or modification of that interim measure.

(3) The Court to which a request for recognition and enforcement of an interim measure is presented may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Grounds for refusing recognition or enforcement of interim measures

29. (1) Recognition or enforcement of an interim measure may be refused only -

(a) at the request of the party against whom it is invoked if the Court is satisfied that -

(i) such refusal is warranted on the grounds set forth in Section 58(2)(a) (i), (ii), (iii), (iv), (v), (vi) or (vii) of this Act, or;

(ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by a competent authority in the Country in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) if the Court finds that -

(i) the interim measure is incompatible with the powers conferred upon the Court, unless the Court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) any of the grounds set forth in Section 58(2)(b) apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the Court on any ground in subsection (1) of this Section of this Act shall be effective only for the purposes of the application to recognize and enforce the interim measure.

(3) The Court where recognition or enforcement is sought shall not, in making that determination,

undertake a review of the substance of the interim measure.

Conduct of Arbitral Proceedings

Equal treatment of parties

30. In any arbitral proceedings, the arbitral tribunal shall ensure that the parties are –

(a) treated with equality and that each party is given reasonable opportunity of presenting its case; and

(b) accorded a fair resolution of the dispute without unnecessary delay or expense.

Arbitral proceedings Determination of rules of procedure

31. (1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to this Act.

(2) Where the agreed procedure or Rules referred to in subsection (1) of this Section contain no provision in respect of any matter related to or connected with the arbitral proceedings, the arbitral tribunal shall conduct the arbitral proceedings in such a manner as to be consistent with Section 30 of this Act.

(3) The power conferred on the arbitral tribunal shall include the power to determine the admissibility, relevance, materiality and weight of any evidence.

The Seat and Place of the Arbitration.

32. (1) The seat of the arbitration shall be designated –

(a) by the parties to the arbitration agreement or, failing such agreement;

(b) by any arbitral or other institution or person authorised by the parties with powers in that regard or, failing such authorisation;

(c) subject to subsection (2) of this Section, by the arbitral tribunal.

(2) Where the parties have not designated the seat of the arbitration and they have not authorised any arbitral or other institution to designate the seat of the arbitration, then the seat of the arbitration shall be any place in Nigeria as the arbitral tribunal may determine, unless the arbitral tribunal decides that a place in another Country should be the seat of the arbitration having regard to all the relevant circumstances, including, but not limited to -

(a) the Country with which the parties and the transaction have the closest connection;

(b) the law that the parties have selected to govern their substantive rights under the contract, and

(c) any law that the parties may have chosen to govern the arbitration.

(3) Notwithstanding the provisions of subsections (1) and (2) of this Section, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

(4) In this section the expression "seat of arbitration" means the juridical seat of the arbitration for purposes of determination of the law that will govern the arbitration proceedings (the curial law).

Commencement of arbitral proceedings

33. Unless otherwise agreed by the parties, arbitral proceedings in respect of a particular dispute shall commence on the date on which a written communication containing a request for the dispute to be referred to arbitration is received by the respondent.

Application of Statutes of Limitation to arbitral proceedings

34. (1) The Limitation Act applies to arbitral proceedings as they apply to judicial proceedings.

(2) In computing the time prescribed by the Limitation Act for the commencement of judicial, arbitral or other proceedings in respect of a dispute which was the subject matter of –

(a) of an award which the court orders to be set aside or declares to be of no effect, or

(b) of the affected part of an award which the court orders to be set aside in part, or declares to be part of no effect,

the period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded.

(3) In determining for the purposes of the Limitation Act when a cause of action accrued, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which an arbitration agreement applies shall be disregarded.

(4) In computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded.

Language to be used in arbitral proceedings

35. (1) The parties are free to agree on the language or languages to be used in the arbitral proceedings, but failing such agreement, the language to be used shall be English.

(2) Any language or languages agreed upon by the parties or determined by the arbitral tribunal under subsection (1) of this Section shall, unless the parties or the arbitral tribunal state otherwise, be the language or languages to be used in any written statements by the parties, in any hearing, award decision or any other communication in the course of the arbitration.

(3) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Points of claim and Defence.

36. (1) Within the period of time agreed by the parties or determines by the arbitral tribunal, the claimant shall, in its points of claim, state the facts supporting the claim, the points at issue and the relief or remedy sought, and the respondent shall state, in its points of defence, the response in respect of those particulars, unless the parties have otherwise agreed on the required elements of the points of claim and of defence.

(2) The parties may submit such further statements as they may agree or as the arbitral tribunal may direct.

(3) The parties may submit with their statements under subsections (1) and (2) of this Section, all the documents they consider to be relevant or they may add a reference to the documents, or other evidence they intend to submit during the course of the arbitral proceedings.

(4) Unless otherwise agreed by the parties, a party may amend or supplement its claim or defence during the course of the arbitral proceedings unless the tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it.

37. (1) The parties may agree on the powers exercisable by the arbitral tribunal as regards remedies. Power of the arbitral tribunal as to remedies

(2) Unless otherwise agreed by the parties, the arbitral tribunal has the following powers:

(a) it may make a declaration as to any matter to be determined in the proceedings.

(b) it may order the payment of a sum of money, in any currency claimed by a party.

(c) The tribunal has the same powers as the court –

(i) to order a party to do or refrain from doing anything;

(ii) to order specific performance of a contract (other than a contract relating to land);

(iii) to order the rectification, setting aside or cancellation of a deed or other document.

38. (1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether the arbitral proceedings shall be conducted - Hearing and written proceedings.

(a) by holding oral hearings for the presentation of evidence or for oral arguments; or

(b) on the basis of documents and other materials; or

(c) by a combination of the methods described in paragraphs (a) and (b) of this subsection, and, unless the parties have agreed that no hearing be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if so requested by any party.

(2) The arbitral tribunal shall give the parties sufficient advance notice of any hearing and of any meeting of the arbitral tribunal, held for the purposes of inspection of documents, goods, or other property.

(3) Except on the application for a Preliminary Order under Section 22 of this Act, every statement, document or other information supplied to the arbitral tribunal or other authority by one party shall be communicated to the other party.

(4) Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

(5) Unless otherwise agreed by the parties, the arbitral tribunal may for the purposes of the arbitral proceedings concerned -

a. direct that a party to an arbitration agreement or a witness who gives evidence in proceedings before the arbitral tribunal be examined on oath or on affirmation, and

b. administer oaths or affirmations for the purposes of the examination.

39. (1) The Parties may agree - Consolidation and Concurrent hearing

(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, including arbitral proceedings involving a different party or parties with the agreement of that party or parties; or

(b) concurrent hearings shall be held,

on such terms as may be agreed.

(2) The arbitral tribunal shall not order the consolidation of proceedings or concurrent hearings unless the parties agree to the making of such an order.

40. (1) The arbitral tribunal shall have the power to allow an additional party to be joined to the arbitration, provided that, prima facie, the additional party is bound by the arbitration agreement giving rise to the arbitration. Joinder of Parties.

(2) The arbitral tribunal's decision pursuant to subsection (1) of this Section is without prejudice to its power to subsequently decide any question as to its jurisdiction arising from such decision.

41. (1) Unless otherwise agreed by the parties, if, without showing sufficient cause – Default of a party

a. the claimant fails to state the claim as required under Section 36(1) of this Act, the arbitral tribunal shall terminate the proceedings provided that where a respondent has a counterclaim and has evinced an intention to file same, the proceedings shall not be terminated; or

b. the respondent fails to state the defence as required under Section 36(1) of this Act, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegation; or

c. any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award on the evidence before it.

(2) The parties may agree on any additional powers of the arbitral tribunal for the proper and expeditious conduct of the arbitration in case of a party's default.

(3) Unless otherwise agreed by the parties, if, after stating the claim as required under Section 36(1) of this Act, the arbitral tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing the claim and that the delay-

a. gives rise, or is likely to give rise, to a substantial risk that a fair resolution of the issues in that claim will not be possible, or

b. has caused, or is likely to cause serious prejudice to the respondent,

the arbitral tribunal may make an award dismissing the claim.

(4) Unless otherwise agreed by the parties, if without showing cause, a party fails to comply with any order or directions of the arbitral tribunal, the arbitral tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.

(5) Unless otherwise agreed by the parties, if a claimant fails to comply with a peremptory order of the arbitral tribunal to provide security for costs, the arbitral tribunal may make an award dismissing its claim.

(6) Unless otherwise agreed by the parties, if a party fails to comply with any other kind of peremptory order, then the tribunal may-

a. direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;

b. draw such adverse inferences from the act of non-compliance as the circumstances justify;

c. proceed to an award on the basis of such materials as have been properly provided to it;

d. make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

Power of arbitral tribunal to appoint expert

42. (1) Unless otherwise agreed by the parties, the arbitral tribunal may -

a. appoint one or more experts to report to it on a specific issue to be determined by the arbitral tribunal;

b. subject to any legal privilege that a party may assert, require a party to give to the expert any relevant information or to produce or provide access to any documents, goods or other property for inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, any expert appointed under subsection (1) of this Section shall, after delivering the expert's written or oral report, participate in a hearing where the parties shall have the opportunity of putting questions to the expert and presenting other expert witnesses to testify on their behalf on the points at issue.

Power of Court to order attendance of witness

43. (1) At the request of a party to the arbitral proceedings, a Court or a Judge in Chambers may order that a writ of subpoena ad testificandum or of subpoena duces tecum shall be issued to compel the attendance before any arbitral tribunal of a witness wherever they may be within Nigeria.

(2) The Court or a Judge in Chambers may also order that a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before any arbitral tribunal.

(3) The provisions of any written law relating to the service or execution outside a State of the

Federation of any such subpoena or order for the production of a prisoner, issued or made in civil proceedings by the Court or a Judge in Chambers, shall apply in relation to a subpoena or order issued or made under this Section.

Making of Award and Termination of Proceedings

Decision making by arbitral tribunal

44. (1) In an arbitral tribunal with more than one arbitrator, any decision of the tribunal shall, unless otherwise agreed by the parties, be made by a majority of all its members.

(2) Subject to the provisions of this Act, in any arbitral tribunal, the presiding arbitrator may, if so authorised by the parties or all the members of the arbitral tribunal, decide questions relating to the procedure to be followed at the arbitral proceedings.

Settlement

45. (1) If, during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the arbitral proceedings, and may, if requested by the parties and agreed to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms recorded under subsection (1) of this Section shall -

(a) be in accordance with the provisions of Section 47 of this Act and state that it is such an award; and

(b) have the same status and effect as any other award on the merits of the case.

Award of Interest.

46. (1) The parties may agree on the arbitral tribunal's powers to award interest.

(2) Unless otherwise agreed by the parties the following provisions shall apply -

(a) The arbitral tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers just -

(i) on the whole or part of any amount awarded by the arbitral tribunal, in respect of any period up to the date of the award -

(ii) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment;

(b) The arbitral tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers just in the case, on the outstanding amount of any award (including any award of interest under subsection (2) and any award as to costs);

(c) References in this Section to an amount awarded by the arbitral tribunal include an amount payable in consequence of a declaratory award by the arbitral tribunal.

Form and contents of award

47. (1) The award shall be in writing and shall be signed by the arbitrator or arbitrators.

(2) In arbitral proceeding with more than one arbitrator, the signatures of a majority of all the members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(3) The award shall state -

(a) the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Section 45 of this Act;

(b) the date it was made; and

(c) the seat of the arbitration as agreed or determined under Section 32(1) of this Act, which seat shall be deemed to be the place where the award was made.

(4) Subject to the provisions of Section 54 of this Act, after the award is made, a copy signed by the arbitrators in accordance with subsections (1) and (2) of this Section shall be delivered to each party

Termination of proceedings

48. (1) The arbitral proceedings shall terminate when the final award is made or when an order of the arbitral tribunal is issued under subsection (2) of this Section.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when -

(a) the claimant withdraws the claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on its part in obtaining a final settlement of the dispute; or

(b) the parties agree to the termination of the arbitral proceedings; or

(c) the arbitral tribunal finds that continuation of the arbitral proceedings has for any other reason become unnecessary or impossible.

(3) Subject to the provisions of Sections 49 and 55 (5) and (6) or this Act, the mandate of the arbitral tribunal shall cease on termination of the arbitral proceedings.

Correction and interpretation of award and additional award

49. (1) Unless another period has been agreed upon by the parties, a party may, within thirty (30) days of the receipt of an award and with notice to the other party, request the arbitral tribunal -

(a) to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature;

(b) if so agreed by the parties, to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers any request made under subsection (1) of this Section to be justified, it shall, within thirty (30) days of receipt of the request, make the correction or give the interpretation, and such correction or interpretation shall form part of the award.

(3) The arbitral tribunal may, on its own volition and within thirty (30) days from the date of the award, correct any error of the type referred to in subsection (1) (a) of this Section.

(4) Unless otherwise agreed by the parties, a party may within thirty (30) days of receipt of the award, request the arbitral tribunal to make an additional award as to the claims presented in the arbitral proceedings but omitted from the award.

(5) If the arbitral tribunal considers any request made under subsection (4) of this Section to be justified, it shall, within sixty (60) days of the receipt of the request, make the additional award.

(6) The arbitral tribunal may, if it considers it necessary, extend the time limit within which it shall make a correction, give an interpretation or make an additional award under subsection (2) or (5) of this Section.

(7) The provisions of Section 47 of this Act shall apply to any correction or interpretation or to an additional award made under this Section.

Costs

Costs of the arbitration

50. (1) The arbitral tribunal shall fix costs of arbitration in its award and the term "costs" includes:

(a) the fees of the arbitrators;

(b) the travel and other expenses incurred by the arbitrators;

(c) the cost of expert advice and of other assistance required by the arbitral tribunal;

(d) the travel and other expenses of parties, witnesses and other experts consulted by the parties to the extent that such expenses are approved by the arbitral tribunal having regard to what is reasonable in the circumstances;

(e) the costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) administrative costs such as cost of the arbitral institution or the appointing authority, cost of venue, sitting and correspondence;

(g) the costs of obtaining Third-Party Funding; and

(h) other costs as approved by the arbitral tribunal.

(2) The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case

Deposit of costs

51. (1) The arbitral tribunal may, on its establishment, request each party to deposit an equal amount as an advance for the costs referred to in paragraphs (a), (b) and (c) of Section 50(1) of this Act.

(2) During the course of the arbitral proceedings, the arbitral tribunal may request supplementary deposits from the parties.

(3) If the required deposits are not paid in full within thirty (30) days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment; and if such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

Security for costs

52. (1) The arbitral tribunal shall have the power, upon the application of a party, to order any

claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the arbitral tribunal considers appropriate. Such terms may include the provision by that other party of a cross-indemnity, itself secured in such manner as the arbitral tribunal considers appropriate, for any costs and losses incurred by such claimant or counterclaimant in providing security.

(2) The amount of any costs and losses payable under a cross-indemnity under subsection (1) of this Section may be determined by the arbitral tribunal in one or more awards.

(3) In the event that a claiming or counterclaiming party does not comply with any order to provide security under this Section, the arbitral tribunal may stay that party's claims or counterclaims or dismiss them in an award.

Joint and several liability of the parties for arbitrator's fees and expenses

53. (1) The parties are jointly and severally liable to pay the arbitrator such reasonable fees and expenses (if any) as are appropriate in the circumstances.

(2) In this Section, references to arbitrators include an arbitrator who has ceased to act, an arbitral institution and an appointing authority.

Lien on the award

54. (1) The arbitral tribunal or arbitration institution may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators or the arbitral institution.

(2) In the event that the fees and expenses of the arbitrators or the arbitral institution have not been agreed, and the arbitral tribunal or arbitral institution refuses on that ground to deliver an award, a party to the arbitral proceedings may, upon notice to the other parties, the tribunal and, if applicable, the arbitral institution, apply to the Court, which may order that:

(a) the arbitral tribunal or arbitral institution shall deliver the award on the payment into Court by the applicant of the fees and expenses demanded, or such lesser amount as the Court may specify,

(b) the amount of the fees and expenses properly payable shall be determined by such means and upon such terms as the Court may direct, and

(c) out of the money paid into Court there shall be paid out such fees and expenses as may be found to be properly payable and the balance of the money (if any) shall be paid out to the applicant.

(3) For this purpose, the amount of fees and expenses properly payable is the amount the applicant is liable to pay under Section 53 or any agreement relating to the payment of the arbitrators.

(4) No application to the Court may be made unless any available arbitral process for appeal or review of the amount of the fees or expenses demanded has been exhausted.

(5) References in this Section to arbitrators include an arbitrator who has ceased to act.

(6) The leave of the Court is required for any appeal from a decision of the Court under this Section.

(7) Nothing in this section shall be construed as excluding an application under Section 55, where payment has been made to the arbitrators in order to obtain the award.

Recourse against Award

Application for setting Aside an arbitral award

55. (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (3) and (4) of this Section.

(2) An application for setting aside an arbitral award shall not be made on the ground of an error of the face of the award, or any other ground except those expressly stated in subsection (3) of this section.

(3) The Court may set aside an arbitral award if -

(a) the party making the application furnishes proof that -

(i) a party to the arbitration agreement was under some legal incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing such indication, under the laws of Nigeria; or

(iii) that the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present its case; or

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or

(v) the award contains decisions on matters which are beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(vi) the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate; or

(vii) where there is no agreement between the parties under subparagraph (vi) of this paragraph, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act; or

(b) the Court finds -

(i) that the subject matter of the dispute is otherwise not capable of settlement by arbitration under the laws of Nigeria; or

(ii) that the award is against public policy of Nigeria.

(4) An application for setting aside shall not be made after three (3) months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Section 49, from the date on which that request had been disposed of by the arbitral

tribunal.

(5) If the Court is satisfied that one or more of the grounds set out in subsection (3) of this Section has been proved and that it has caused or will cause substantial injustice to the applicant, the court may:

(a) remit the award to the tribunal, in whole or in part, for reconsideration; or

(b) set the award aside in whole or in part.

(6) The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Award Review Tribunal

56. (1) Notwithstanding Section 55(1) of this Act, the parties may provide in their arbitration agreement that an application to review an arbitral award on any of the grounds set out in Section 55(3) of this Act shall be made to an Award Review Tribunal.

(2) Where the parties have agreed that an award shall be reviewed by an Award Review Tribunal, a party who is aggrieved by an arbitral award and who seeks to challenge such award on any of the grounds set out in Section 55(3) of this Act shall, within the same time frame specified in Section 55(4) of this Act, send the other party a written communication indicating its intent to challenge the award (the "Notice of Challenge").

(3) The Notice of Challenge shall include the documents referred to in Section 57(2) of this Act.

(4) Unless the parties otherwise agree -

(a) the Award Review Tribunal shall consist of the same number of arbitrators in the arbitral tribunal that first determined the dispute ("The First Instance Tribunal"); and

(b) the Award Review Tribunal shall be constituted when, in the case of a sole arbitrator, the arbitrator accepts his or her appointment or, where there is more than one arbitrator, when all the arbitrators accept their respective appointments.

(5) The following provisions of this Act shall apply mutatis mutandis to the Award Review Tribunal;

(a) Section 7 (appointment of arbitrators);

(b) Section 8 (grounds for challenge);

(c) Section 9 (challenge procedure);

(d) Section 10 (failure or impossibility to act);

(e) Section 11 (appointment of substitute arbitrator);

(f) Section 12 (resignation, death and cessation of office of an arbitrator);

(g) Section 13 (immunity of arbitrator and arbitral institution);

(h) Section 14 (competence of arbitral tribunal to rule on its on jurisdiction);

(i) Section 30 (equal treatment of parties);

(j) Section 41 (default of a party);

(k) Section 44 (decision making of arbitral tribunal);

(l) Section 47 (form and content of award);

(m) Section 50 (costs) and Article 49 of the First Schedule (fees and expenses of arbitrators);

(n) Section 53 (joint and several liability of the parties for arbitrator's fees and expenses);

(o) Section 54 (lien on the Award).

(6) The parties may agree the procedure to be followed by the Award Review Tribunal, otherwise the Award Review Tribunal shall conduct its proceedings in such manner as it considers appropriate and shall endeavour to render its decision in the form of an award within sixty (60) days from the date on which it is constituted.

(7) An application for enforcement of an award under Section 57 of this Act may be made to the Court notwithstanding that a party has given a Notice of Challenge to the other party under subsection 2 of this Section, save that:

(a) proceedings upon such application for enforcement shall be stayed until after the decision of the Award Review Tribunal has been rendered, and

(b) notwithstanding subparagraph (a) above, the Court may make such orders as to the interim preservation of the subject of the dispute, or as to giving security for the award as may be just in the circumstances of the case.

(8) Where the Award Review Tribunal has set aside the award in whole or in part, a party may apply to the Court to review the decision of the Award Review Tribunal. If the Court decides that the decision of the Award Review Tribunal is unsupportable having regard to the ground on which the Award Review Tribunal set aside the award, the Court shall reinstate the award, or the part of it that was set aside by the Award Review Tribunal.

(9) Where the Award Review Tribunal has affirmed the Award in whole or in part, an application to the Court to set aside the award of the First Instance Tribunal or the award of the Award Review Tribunal, such application may only be made on the grounds set out in Section 55(3)(b)(i) or Section 55(3)(b)(ii) of this Act.

Recognition and Enforcement of Awards

Recognition and enforcement of Awards

57. (1) An arbitral award shall, irrespective of the Country or State in which it is made, be

recognized as binding, and upon application in writing to the Court, be enforced by the Court subject to the provisions of this Section and Section 58 of this Act.

(2) The party relying on an award or applying for its enforcement shall supply -

(a) the original award or a certified copy thereof;

(b) the original arbitration agreement or a certified copy thereof; and

(c) where the award or arbitration agreement is not made in the English language, a certified translation thereof into the English language.

(3) An award may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect.

Refusal of recognition or enforcement of Awards.

58. (1) Any of the parties to an arbitration agreement may request the Court to refuse recognition or enforcement of the award.

(2) Irrespective of the country in which the award was made, the Court may only refuse recognition or enforcement of an award -

(a) at the request of the party against whom it is invoked, if that party furnishes the Court with proof that:

(i) a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have indicated should be applied, or, failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made; or

(iii) the party against whom the award was invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case; or

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or

(v) the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(vi) the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties; or

(vii) where there is no agreement between the parties under sub-paragraph (vi) of this paragraph, that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the law of the country where the arbitration took place; or

(viii) 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; or

(b) if the Court finds –

(i) the subject matter of the dispute is otherwise not capable of settlement by arbitration under the laws of Nigeria; or

(ii) that the award is against public policy of Nigeria.

(3) Where an application to set aside or suspend an award has been made to a court referred to in subsection (2)(a)(viii) of this Section, the Court before where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Provisions applicable only to international arbitration

Appointment in default

59. Where under an agreement for an international arbitration:

(a) no procedure is agreed for the appointment of an arbitrator, and

(b) no appointing authority is designated or agreed to be designation by the parties,

the Director of the Regional Centre for International Commercial Arbitration Lagos shall be deemed to be the appointing authority designated by the parties, and the provisions of Section 7(2) of this Act shall apply.

Application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

60. Without prejudice to Sections 57 and 58 of this Act, where the recognition and enforcement of any award made in an arbitration in a Country other than Nigeria is sought, the New York Convention on the Recognition and Enforcement of Foreign Awards set out in the Second Schedule to this Act shall apply to any award, provided that:

(a) the Country is a party to the New York Convention; and

(b) that the differences arise out of a legal relationship, whether contractual or not, considered commercial under the laws of Nigeria.

Provisions relating to Third-Party Funding

Abolition of torts of maintenance and champerty

61. The torts of Maintenance and Champerty (including being a common barrator) do not apply in relation to third-party funding of arbitration. This Section applies to arbitrations seated in Nigeria and to arbitration related proceedings in any court within Nigeria.

Disclosure of Third-Party Funding

62. (1) If a Third-Party Funding agreement is made, the party benefitting from it shall give written notice to the other party or parties, the arbitral tribunal and, where applicable, the arbitral institution, of the name and address of the Third-Party Funder.

(2) Such written notice shall be made:

(a) for a funding agreement made on or before the commencement of the arbitration – at the commencement of the arbitration; or

(b) for a funding agreement made after the commencement of the arbitration – without delay as soon as the funding agreement is made.

(3) Where a Respondent has brought an application for security for cost based on the disclosure of Third-Party Funding, the Tribunal may allow the funded party or its counsel to provide the Tribunal with an affidavit stating whether under the funding arrangement, the Funder has agreed to cover adverse costs order. The affidavit shall be a relevant consideration to the tribunal's decision on whether to grant security for costs.

General – applies to domestic, international and convention arbitrations

Waiver of right to object

63. A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Extent of court intervention

64. (1) A Court shall not intervene in any matter governed by this Act, except where so provided in this Act.

(2) All applications to Court in respect of any matter governed by this Act shall be in accordance with the Rules set out in the Third Schedule.

Extent of application of this Act to arbitration

65. This Act shall not affect any other law by virtue of which certain disputes –

(a) may not be submitted to arbitration; or

(b) may be submitted to arbitration only in accordance with the provisions of that or another law

Extension of time

66. Notwithstanding the provisions of this Act, the arbitral tribunal may, if it considers it necessary, extend the time specified for the performance of any act under this Act.

Part II

Scope of application of this Part

MEDIATION

Part II(A): General Provisions

67. (1) This Part applies to:

(a) International commercial mediation;

(b) domestic commercial mediation;

(c) domestic civil mediation;

(d) domestic and international settlement agreements resulting from mediation; and concluded in writing by parties to resolve a commercial dispute;

(e) where the parties have agreed in writing that this Part should apply to the dispute.

(2) This Part does not apply to:

(a) disputes emerging from rights and obligations settlement of which would be void under Nigerian law,

(b) cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement;

(c) that have been recorded and are enforceable as an arbitral award;
(d) that have been approved by a court or concluded in the course of proceedings before a court; or

(e) that are enforceable as a judgment of a court in this Country.

(3) This Part applies irrespective of the basis upon which the mediation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

Interpretation

68. (1) In the interpretation of this Part, regard is to be had to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Part which are not expressly settled in it are to be settled in conformity with the general principles on which this Part is based.

Variation by agreement

69. Except for the provisions of Section 73 (3) of this Act, the parties may agree to exclude or vary any of the provisions of Part II(B).

Commencement of mediation proceedings

70. (1) When the initiation of a mediation procedure is prescribed by a special statute as a condition for the conduct of judicial or other proceedings, or if the parties have agreed when concluding the agreement to try to resolve the dispute through mediation before resorting to judicial or other proceedings, the party concerned shall propose to the other party, in writing, the conclusion of a mediation agreement.

(2) If a party that invited another party to mediate does not receive an acceptance of the invitation within 30 days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate.

(3) Any party can propose to the other parties, a recourse to mediation process, regardless of all the other judicial or arbitral proceedings, before, during or after the initiation of the judicial proceedings.

(4) During any arbitral, judicial, administrative or other proceedings, the body conducting the proceedings may, recommend to the parties to resolve their dispute in mediation proceedings in accordance with the provisions of this Part if it assesses that there exists the possibility of resolving the dispute by mediation.

(5) The date of commencement of the mediation process shall be the date that the agreement to mediate was signed, where this is drawn up in writing after a dispute has arisen, or, in case of reference to mediation by a court, the date the court made its decision or, in any other case, on the date when the mediator took the first step to start the mediation process.

Suspension of Limitation Period

71. (1) When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended.

(2) Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time (or day?) the mediation ended without a settlement agreement.

Number and appointment of mediators

72. (1) There shall be one mediator, unless the parties agree that there shall be two or more mediators.

(2) The parties shall endeavor to reach agreement on a mediator or mediators, unless a different procedure for their appointment has been agreed upon.

(3) A party may seek the assistance of a mediation provider that keeps a list of qualified mediators in connection with the appointment of mediators. In particular:

(a) a party may request such a mediation provider to recommend suitable persons to act as mediator; or

(b) a party may request that the appointment of one or more mediators be made directly by such a mediation provider, and the appointment made by the institutions so approached shall be final and binding on the parties.

(4) In recommending or appointing individuals to act as mediator, the mediation provider shall have regard to such considerations as are likely to secure the appointment of an independent and impartial mediator and, where appropriate, shall take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties.

(5) When a person is approached in connection with his possible appointment as mediator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. A mediator, from the time of his appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him. If such circumstances exist, the mediator shall be permitted to act as a mediator only if the parties agree thereto.

Conduct of mediation, fees and expenses

73. (1) The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted, and the parties shall attend and participate in the mediation in good faith.

(2) Failing agreement on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may jointly express and the need for a speedy settlement of the dispute.

(3) In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case. The mediator's obligations shall be equal vis-à-vis all parties. He shall promote communication between the parties and shall ensure that the parties are integrated into the mediation process in an appropriate and fair manner.

(4) The parties and the mediator may agree that all or any of the mediation sessions are to be carried out by electronic means, by videoconference or other similar means of transmission of the voice and/or image, provided that the identity of the parties concerned are ensured and compliance with the principles of mediation laid down in this Part.

(5) The mediator may, with the agreement of the Parties, at any stage of the mediation proceedings, make proposals for a settlement of the dispute but shall not have the right to impose a settlement on the parties. The proposal may be based on what the mediator deems appropriate in view of what the parties have brought forward in the mediation.

(6) A mediator shall be entitled to a fee and reimbursement of expenses incurred in connection with mediation unless he has agreed to mediate without a fee. The parties bear their own costs and unless the parties agree otherwise, the fee and expenses of the mediator as well as the fees of the mediation provider shall be borne by the parties in equal shares.

Communication between mediator and parties

74. The mediator may meet or communicate with the parties together or with each of them separately as he considers necessary.

Disclosure of information

75. When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation. However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information may not be disclosed to any other party to the mediation.

Confidentiality

76. Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required:

(a) under the law; or

(b) for the purposes of implementation or enforcement of a settlement agreement;

(c) is necessary in the interests of preventing or revealing;

(i) the commission of a crime (including an attempt or conspiracy to commit a crime),

(ii) concealment of a crime, or

(iii) a threat to a party; or

(d) It is necessary for the protection of public order, but only under the conditions and in the scope prescribed by law.

Admissibility of evidence in other proceedings

77. (1) A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) an invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

(b) views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(c) statements or admissions made by a party in the course of the mediation proceedings;

(d) proposals made by the mediator;

(e) the fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(f) a document prepared solely for purposes of the mediation proceedings.

(2) Subsection 1 of this Section applies irrespective of the form of the information or evidence referred to therein.

(3) Subject to the provisions of Section 76 of this Act, the disclosure of the information referred to in subsection 1 of this Section shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of subsection 1 of this Section, that evidence shall be treated as inadmissible.

(4) The provisions of subsection 1, 2 and 3 of this Section apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.

(5) Subject to the limitations of subsection 1 of Section, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a mediation.

Termination of mediation proceedings

78. The mediation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the mediator, to the effect that further efforts at mediation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of the mediation provider administering the mediation, if any, on the date of the declaration; or

(e) By a declaration of a party to the other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated, on the date of the declaration.

Mediator acting as arbitrator

79. Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Resort to arbitral or judicial proceedings

80. Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings.

Immunity for mediators and mediation providers

81. Mediators and mediation providers are not liable for anything done or omitted in the discharge or purported discharge of their functions as provide in this Part, unless their action or omission is shown to have been in bad faith.

Binding and enforceable nature of settlement agreements

82. (1) If the parties conclude an agreement settling a dispute, the mediator shall participate in the preparation and drafting of the settlement agreement, if the parties to agree.

(2) Subject to the provisions of Section 87 of this Act, the settlement agreement resulting from the mediation is binding on the parties and enforceable in court as a contract, consent judgment or consent award.

Requirements for reliance on settlement agreements

83. Subject to the provisions of Section 87 of this Act:

(1) A party relying on a settlement agreement shall supply to the Court of this State:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the mediation provider that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the Court.

(2) The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or

mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

(3) If the settlement agreement is not in an official language of this State, the Court may request a translation thereof into such language.

(4) The Court may require any necessary document in order to verify that the requirements of this Section have been complied with.

(5) When considering the request for relief, the Court shall act expeditiously.

84. Subject to the provisions of Section 87 of this Act:

Grounds for refusing to grant relief

(1) The Court may refuse to grant reliefs at the request of the party against whom the relief is sought only if that party furnishes to the Court proof that:

(a) A party to the settlement agreement was under some incapacity; and/or

(b) The settlement agreement sought to be relied upon:

(i) is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the Court;

(ii) is not binding, or is not final, according to its terms; or

(iii) has been subsequently modified; and/or

(c) The obligations in the settlement agreement:

(i) have been performed; or

(ii) are not clear or comprehensible; and/or

(d) Granting relief would be contrary to the terms of the settlement agreement; and/or

(e) There was a failure by the mediator to disclose to the parties' circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

(2) The Court of this State may also refuse to grant reliefs if it finds that:

(a) Granting relief would be contrary to the public policy of this State; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State.

Parallel applications or claims

85. If an application or a claim relating to a settlement agreement has been made to a Court, an arbitral tribunal or any other competent authority which may affect the relief being sought under Section 83, the Court of this State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

General principles

Unless otherwise provided in this Part:

86. (1) A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this Part.

(2) If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State, and under the conditions laid down under these provisions, in order to prove that the matter has already been resolved.

Part IIC: Provisions Applicable to International Settlement Agreements only

Application of the Convention on International Settlement Agreements Resulting from Mediation

87. Without prejudice to Sections 81 and 83 of this Act, where the enforcement of any international settlement agreement made in a State other than the Federal Republic of Nigeria is sought, the Convention on International Settlement Agreements Resulting Mediation set out in the Fourth Schedule to this Act ('the Singapore Convention') shall apply to any such international settlement agreement, provided that:

(a) the State is a party to the Singapore Convention; and

(b) that the differences arises out of a legal relationship, whether contractual or not, considered commercial under the laws of Nigeria.

PART III

Receipt of written communication

Miscellaneous

88. (1) Unless otherwise agreed by the parties, any communication sent under or pursuant to this Act shall be deemed to have been received -

(a) when it is delivered to the addressee personally or when it is delivered to his place of business, habitual residence or mailing address; or

(b) where a communication cannot be delivered in accordance with paragraph (a) of this subsection, when it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it.

(2) A communication shall be deemed to have been received on the day it is delivered under

subsection (1) of this Section.

(3) The provisions of this Section shall not apply to communications in court proceedings.

89. (1) This Act shall not apply to an arbitration agreement concerning an arbitration, which has commenced before coming into force of this Act, but shall apply to an arbitration commenced on or after the coming into force of this Act. Saving and Transitional Provisions.

(3) Subject to Subsection (1) of this Section, the repeal of the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004 shall not prejudice or affect any proceedings, whether or not pending at the time of the repeal, in respect of any right, privilege, obligation or liability and any proceedings taken under that Act in respect of any such right, privilege, obligation or liability acquired, accrued or incurred under the Act may be instituted, continued or enforced as if the Act concerned had not been repealed.

90. The Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004 is repealed. Repeal

91. (1) In this Act, unless the context otherwise requires – Interpretation

"Arbitrator" means a person to whom a reference is made for determination and includes substitute or emergency arbitrator.

"Arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

"Arbitration" means a commercial arbitration whether or not administered by a permanent arbitral institution;

"Commercial" for the purposes of this Act should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature whether contractual or not, including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road;

"Court" means the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court, unless the parties otherwise agree. Save that, for the purposes of appointment of an arbitrator (including an emergency arbitrator) "Court" means the Chief Judge of any of the Courts mentioned above, sitting as a Judge in Chambers;

"Death" includes, in the case of a non-natural person, dissolution or other extinction by process of law;

"Judge" means a judge of the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court;

"Mediator" means a third -party neutral and includes a sole mediator or two or more mediators, as the case may be;

"Mediation" means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator/s") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute;

"Mediation provider" means any public or private entity (including court-related mediation schemes) which manages or administers a mediation process conducted by a mediator.

"Party" means a party to the arbitration agreement or to mediation or any person claiming through or under him and "parties" shall be construed accordingly;

"Preliminary Order" means an order or a direction of the arbitral tribunal that accompanies or precedes a requested interim measure to ensure that the grant of that measure is not rendered nugatory by any act of the parties;

"Third-Party Funder" means any natural or legal person who is not a party to the dispute but who enters into an agreement either with a disputing party, an affiliate of that party, or a law firm representing that party, in order to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases, and such financing is provided either through a donation or grant or in return for reimbursement dependent on the outcome of the dispute or in return for a premium payment.

"Third-Party Funding Agreement" means a contract between the Third-Party Funder and a disputing party, an affiliate of that party, or a law firm representing that party, in order to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases, and such financing is provided either through a donation or grant or in return for reimbursement dependent on the outcome of the dispute or in return for a premium payment.

(2) Where a provision of this Act, other than Sections 13 and 81, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party, including an institution, to make that determination.

(3) Where a provision of this Act -

(a) refers to the fact that parties have agreed or that they may agree; or

(b) in any other way refers to an agreement of the parties,
such agreement includes any arbitration rules referred to in the agreement.

(4) Where a provision of this Act, other than Section 41(1)(a) or 48(2)(a) refers to a claim, such claim includes a counterclaim, and where it refers to a defence, such defence includes a defence to such counterclaim.

(5) An arbitration is international if -

(a) the parties to an arbitration agreement have, at the time of the conclusion of that

agreement, their places of business in different Countries; or

(b) one of the following places is situated outside the State in which the parties have their places of business -

i. the seat of the arbitration if determined in, or pursuant to the arbitration agreement;

ii. any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State.

(6) An arbitration is interstate if –

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different Federating States within the Federal Republic of Nigeria;

(b) the Federating State in which the seat of arbitration is situated is different from the Federating State or States in which the parties have their places of business;

(c) the place where a substantial part of the obligations of the commercial relationship is to be performed or the place where the subject matter of the dispute is most closely connected is situated in a Federating State, which is different from the Federating State or States in which the parties have their places of business;

(d) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one Federating State within the Federal Republic of Nigeria.

(7) For the purposes of subsections (5) and (6) of this Section -

(a) If a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement;

(b) If a party does not have a place of business, reference shall be made to his or her habitual residence.

(8) A mediation is "international" if:

(a) The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different Countries; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to

be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

(9) For the purposes of subsection (8) of this Section:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to mediate; or

(b) if a party does not have a place of business, reference is to be made to the party's habitual residence; or

(c) if the parties agree that the mediation is international.

(10) In the interpretation of this Act, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith and the Court may also have recourse to the travaux preparatoires of the UNCITRAL Model Law on International Commercial Arbitration and Model Law on International Commercial Mediation.

(11) Questions concerning matters governed by this Act which are not expressly settled in it are to be settled in conformity with the general principles on which this Act is based.

92. This Act may be cited as the Arbitration and Mediation Bill, 2022. Short title

SCHEDULES

FIRST SCHEDULE
[Section 31(1)]
Arbitration Rules

SECTION I. INTRODUCTORY RULES

Scope of Application

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the Arbitration and Mediation Act, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.

2. These Rules shall govern the arbitration, except that where any of these Rules is in conflict with a provision of this Act, the Provisions of this Act shall prevail.

Notice, Calculation of Periods of Time

Article 2

1. A notice, including a notification, communication or proposal, may be transmitted by any means of

communication that provides or allows for a record of its transmission.

2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.

3. In the absence of such designation or authorization, a notice is:

a. received if it is physically delivered to the addressee; or

b. deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.

5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a request for arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address.

6. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Written communication requesting arbitration

Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a written communication containing a request for the dispute to be referred to arbitration (the "written communication" or the "request").

2. Arbitral proceedings shall be deemed to commence on the date on which the written communication is received by the respondent.

3. The written communication shall include the following:

a. a demand that the dispute be referred to arbitration;

b. the names and contact details of the parties;

c. identification of the arbitration clause or the separate arbitration agreement that is invoked'

d. identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;

e. a brief description of the claim and an indication of the amount involved, if any;

f. the relief or remedy sought;

g. a proposal as to the number of arbitrators (i.e. one or three), language and seat of arbitration if the parties have not previously agreed thereon.

4. The written communication may also include:

a. a proposal for the designation of an appointing authority referred to in Article 6, paragraph 1;

b. a proposal for the appointment of a sole arbitrator referred to in Article 8, paragraph 1;

c. notification of the appointment of an arbitrator referred to in Article 9 or 10;

d. the points of claim referred to in Article 20.

5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the written communication containing a request for the dispute to be referred to arbitration, which shall be finally resolved by the arbitral tribunal.

Response to the written communication requesting arbitration

Article 4

1. Within 30 days of the receipt of the written communication containing a request for the dispute to be referred to arbitration, the respondent shall convey to the claimant a response to the said written communication, which shall include:

a. the name and contact details of each respondent;

b. a response to the information set forth in the notice of arbitration, pursuant to Article 3, paragraphs 3 (c) to (g).

2. The response to the written communication requesting arbitration may also include:

a. any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction;

b. a proposal for the designation of an appointing authority referred to in Article 6, paragraph 1;

c. a proposal for the appointment of a sole arbitrator referred to in Article 8, paragraph 1;

d. Notification of the appointment of an arbitrator referred to in Article 9 or 10;

e. a brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought;

f. a written communication containing a request for the dispute to be referred to arbitration in accordance with Article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.

g. the points of defence and counterclaim (if any) referred to in Article 21.

3. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the written communication requesting arbitration, or an incomplete or late response to the said written communication, which shall be finally resolved by the arbitral tribunal.

Representation and Assistance

Article 5

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated in writing to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance.

Designated and Appointing Authorities

Article 6

1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Director of the Regional Centre for International Commercial Arbitration – Lagos (hereinafter called the "RCICAL"), one of whom would serve as appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Director of the RCICAL to designate the appointing authority.

3. Where these Rules provide for a period of time within which a party must refer a matter to an appointing authority and no appointing authority has been agreed on or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation.

4. Except as referred to in Article 49, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Director of the RCICAL to designate a substitute appointing authority.

5. In exercising their functions under these Rules, the appointing authority and the Director of the RCICAL may require from any party and the arbitrators the information they deem necessary and they shall give the parties and,

where appropriate, the arbitrators, an opportunity to present their views in any manner they consider appropriate. All such communications to and from the appointing authority and the Director of the RCICAL shall also be provided by the sender to all other parties.

6. When the appointing authority is requested to appoint an arbitrator pursuant to Articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the written communication containing a request for the dispute to be referred to arbitration and, if it exists, any response to the said written communication.

7. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

SECTION II. COMPOSITION OF THE ARBITRAL TRIBUNAL

Number of Arbitrators

Article 7

1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the written communication containing a request for the dispute to be referred to arbitration the parties have not agreed that there shall be only one arbitrator, one arbitrator shall be appointed.

2. Notwithstanding paragraph 1, if no other parties have responded to a party's proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or parties concerned have failed to appoint a second arbitrator in accordance with Article 9 or 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in Article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.

Appointment of Arbitrators (Articles 8 to 10)

Article 8

1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

a. The appointing authority shall communicate to each of the parties an identical list containing at least three names;

b. Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

c. After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

d. If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under Article 8.

Article 10

1. For the purposes of Article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.

2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.

3. In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

Disclosures by and challenge of arbitrators** (Articles 11 to 13)

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall confirm their availability and disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in Article 13 shall apply.

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in Articles 11 and 12 became known to that party.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.

3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it further and in that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by:

(a) the appointing authority, arbitral institution or the Court (as the case may be) that appointed the arbitrator; or

(b) where a party appointed the arbitrator, the Court.

Replacement of an Arbitrator

Article 14

1. Subject to paragraph 2, in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in Articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

2. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and the remaining arbitrators to express their views: (a) appoint the substitute arbitrator; or (b) after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Repetition of hearings in the event of the replacement of an Arbitrator

Article 15

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the parties decides otherwise.

Exclusion of liability

Article 16

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the emergency arbitrator, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

SECTION III. ARBITRAL PROCEEDINGS

General Provisions

Article 17

1. Subject to the Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that, the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party in accordance with Section 40 of the Act, provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Seat and Venue of Arbitration

Article 18

1. If the parties have not previously agreed on the seat of the arbitration, the seat of arbitration shall be

determined by the arbitral tribunal having regard to the circumstances of the arbitration. The Award shall be deemed to have been made at the seat of arbitration.

2. The arbitral tribunal may meet at any location (venue) it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

Language

Article 19

1. Subject to an agreement by the parties, the arbitral tribunal shall promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the points of claim, the points of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used at such hearings.

2. The arbitral tribunal may order that any documents annexed to the points of claim or points of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Points of Claim

Article 20

1. Unless the points of claim was contained in the written communication containing a request for the dispute to be referred to arbitration, the claimant shall, within a period of time to be determined by the arbitral tribunal, communicate its points of claim in writing to the respondent and to each of the arbitrators.

2. The points of claim shall include the following particulars:

a. the names and addresses of the parties;

b. a statement of the facts supporting the claim;

c. the point at issue;

d. the relief or remedy sought;

e. the legal grounds or arguments supporting the claim.

3. A copy of any contract or other legal instrument out of which or in relation to which the dispute arises and of the arbitration agreement, if not contained in the contract or other legal instrument, shall be annexed to the points of claim.

4. The points of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contains references to them.

Points of Defence

Article 21

1. Unless the points of defence was contained in response to the written communication containing a request for the dispute to be referred to arbitration, the respondent shall, within a period of time to be determined by the arbitral tribunal, communicate its points of claim in writing to the respondent and to each of the arbitrators.

2. The points of defence shall reply to the particulars (b), (c), (d) and (e) of the points of claim (Article 20, paragraph 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

3. In its points of defence, or at a later stage in the arbitral proceedings, if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

4. The provisions of Article 20, paragraphs 2 to 4, shall apply to a counterclaim, a claim under Article 4, paragraph 2(f), and a claim relied on for the purpose of set-off.

Amendments to the claim or defence

Article 22

During the course of the arbitral proceedings, either party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to the other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Pleas as to the jurisdiction of the Arbitral Tribunal

Article 23

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the points of defence, or with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an

award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

Further written statements

Article 24

The arbitral tribunal shall decide which further written statements, in addition to the points of claim and the points of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Periods of time

Article 25

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the points of claim and points of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

Interim measures

Article 26

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to -

a. Maintain or restore the status quo pending determination of the dispute;

b. Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

c. Provide a means of preserving assets out of which a subsequent award may be satisfied; or

d. Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that -

a. Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

b. There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a)

and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Emergency Arbitrator Proceedings

Article 27

Conduct of Emergency Relief Proceedings

1. Taking into account the urgency inherent in the Emergency Relief proceedings and ensuring that each party has a reasonable opportunity to be heard on the Application, the Emergency Arbitrator may conduct such proceedings in such a manner as the Emergency Arbitrator considers appropriate. The Emergency Arbitrator shall have the power to rule on objections that the Emergency Arbitrator has no jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration clause(s) or of the separate arbitration agreement(s), and shall resolve any disputes over the applicability of this Article and of Section 16 of the Act.

Decisions of the Emergency Arbitrator

2. Any decision of the Emergency Arbitrator shall take the form of an Order (the "Emergency Decision") shall be made within fourteen (14) days from the date on which the file is received by the Emergency Arbitrator. This period of time may be extended by agreement of the parties.

3. The Emergency Decision may be made even if in the meantime the file has been transmitted to the arbitral tribunal.

4. Any Emergency Decision shall:

a. be made in writing;

b. state the date when it was made and summary reasons upon which the Emergency Order is based (including a determination on whether the Application is admissible under Section 16 of the Act and whether the Emergency Arbitrator has jurisdiction to grant the Emergency Relief); and

c. be signed by the Emergency Arbitrator.

5. Any Emergency Decision shall fix the costs of the Emergency Relief proceedings and decide which of the parties shall bear them or in what proportion they shall be borne by the parties, subject always to the power of the arbitral tribunal to determine finally the apportionment of such costs in accordance with Section 50 of the Act. The costs of the Emergency Relief proceedings include the Emergency Arbitrator's fees and expenses and the reasonable and other legal costs incurred by the parties for the Emergency Relief proceedings.

6. Any Emergency Decision shall be recognised and enforced in the same manner as an interim measure under to Section 28 of the Act and shall be binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to comply with any Emergency Decision without delay.

7. The Emergency Arbitrator shall be entitled to order the provision of appropriate security by the party seeking Emergency Relief.

8. Any Emergency Decision may, upon a reasoned request by a party, be modified, suspended or terminated by the Emergency Arbitrator or the arbitral tribunal (once constituted).

9. Any Emergency Decision ceases to be binding:

a. if the Emergency Arbitrator or the arbitral tribunal so decides;

b. upon the arbitral tribunal rendering a final award, unless the arbitral tribunal expressly decides otherwise;

c. upon the withdrawal of all claims or the termination of the arbitration before the rendering of a final award; or

d. if the arbitral tribunal is not constituted within 90 days from the date of the Emergency Decision. This period of time may be extended by agreement of the parties.

10. The Emergency Arbitrator's decision shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the Emergency Decision. The arbitral tribunal may modify, terminate or annul the Emergency Decision or any modification thereto made by the Emergency Arbitrator.

11. The arbitral tribunal shall decide upon any party's requests or claims related to the Emergency Relief proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.

General provisions

12. Subject to subparagraph 15 of this Article, the Emergency Arbitrator shall have no further power to act once the arbitral tribunal is constituted.

13. The Emergency Arbitrator procedures set out in this Article are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent Court at any time.

14. In all matters not expressly provided for in this Article, the Emergency Arbitrator shall act in the spirit of the Act and these Rules.

15. The Emergency Arbitrator shall make every reasonable effort to ensure that an Emergency Decision is valid.

Evidence

Article 28

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.

2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

3. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his points of claim or points of defence.

4. At any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

5. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Hearings

Article 29

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.

3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.

4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

Experts appointed by the Arbitral Tribunal

Article 30

1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

3. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

5. At the request of either party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, either party may present expert witnesses in order to testify on the points at issue. The provisions of Article 29 shall be applicable to such proceedings.

Default

Article 31

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:

a. The claimant has failed to communicate its point of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;

b. The respondent has failed to communicate its response to the written communication containing a request for the dispute to be referred to arbitration or its points of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Consolidation

Article 32

1. In deciding whether to consolidate proceedings or to hold concurrent hearings, the arbitral tribunal shall take into account the circumstances of the case, which may include, but are not limited to where:

(a) one or more arbitrators have been nominated or confirmed in more than one of the arbitrations, and if so, whether the same or different arbitrators have been confirmed; or

(b) all of the claims in the arbitrations are made under the same arbitration agreement; or

(c) the claims are under more than one arbitration agreement, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of the same transaction or series of transactions, and the tribunal finds the arbitrations to be compatible.

2. A Request for Consolidation shall include:

(a) the names and addresses, telephone numbers, and email addresses of each of the parties to the arbitrations, their counsel and any arbitrators who have been appointed or confirmed in the arbitrations;

(b) a request that the arbitrations be consolidated;

(c) a copy of the arbitration agreement(s) giving rise to the arbitrations;

(d) a reference to the contract(s) or other legal instrument(s) out of or in relation to which the Request arises;

(e) a description of the general nature of the claim and an indication of the amount involved, if any, in each of the arbitrations;

(f) a statement of the facts supporting the Request (including, where applicable, evidence of all parties' written consent to consolidate the arbitrations);

(g) the points at issue;

(h) the legal arguments supporting the Request;

(i) the relief or remedy sought;

(j) comments on the appointment of the arbitral tribunal if the Request is granted, including whether to preserve the appointment of any already appointed or confirmed arbitrators; and

(k) confirmation that copies of the Request and any exhibits included therewith have been or are being served simultaneously on all other relevant parties and any appointed or confirmed arbitrators.

3. The Request for Consolidation shall not be rendered incompetent by any controversy with respect to the sufficiency of its contents as set out in Article 32(2). Any such controversy shall be finally resolved by the arbitral tribunal.

Effect of Consolidation

Article 33

1. Where the arbitral tribunal decides to consolidate two or more arbitral proceedings, the arbitral proceedings shall be consolidated into the arbitral proceedings that commenced first, unless all parties agree or the arbitral tribunal decides otherwise taking into account the circumstances of the case.

2. The consolidation of two or more arbitral proceedings is without prejudice to the validity of any act done or order made by a Court in support of the relevant arbitral proceedings before it was consolidated.

3. Where the arbitral tribunal decides to consolidate two or more arbitrations, the parties to all such arbitrations shall be deemed to have waived their right to designate an arbitrator. In these circumstances, the Director of the Regional Centre for International Commercial Arbitration, Lagos shall appoint the arbitral tribunal in respect of the consolidated proceedings.

4. Where any arbitrator ceases to act under this Article, it shall be without prejudice to -

(a) the validity of any act done or order made by that arbitrator before his or her appointment ceased;

(b) the arbitrator's entitlement to fees and expenses subject to Section 50(2) of this Act; and

(c) the date when any claim or defence was raised for the purpose of applying any Statute of Limitation or any similar rule or provision.

5. The parties shall not object to the validity and/or enforcement of any award made by the arbitral tribunal in the consolidated proceedings on the basis of the arbitral proceedings under Section 39 of the Act.

Request to Join a Third Party

Article 34

1. An existing party to the arbitral proceedings wishing to join an additional party to the arbitration shall submit a Request for Joinder to the arbitral tribunal. The arbitral tribunal may fix a time limit for the submission of a Request for Joinder.

2. The Request for Joinder shall include the following:

(a) the names and addresses, telephone numbers, and email addresses of each of the parties in the existing arbitration, and the additional party;

(b) a request that the additional party be joined to the arbitration;

(c) a reference to the contract(s) or other legal instrument(s) out of or in relation to which the request arises;

(d) a statement of the facts supporting the request;

(e) the points at issue;

(f) the legal arguments supporting the request;

(g) the relief or remedy sought; and

(h) confirmation that copies of the Request for Joinder and any exhibits included therewith have been or are being served simultaneously on all other parties and the tribunal.

3. The Request for Joinder shall not be rendered incompetent by any controversy with respect to the sufficiency of its contents as set out in Article 33(2). Any such controversy shall be finally resolved by the arbitral tribunal.

Answer to Request for Joinder by a Third Party

Article 35

1. The additional party, to whom a Request for Joinder is addressed, shall submit to the tribunal an Answer to the Request for Joinder within fifteen (15) days of the receipt of the Request for Joinder.

2. The Answer to the Request for Joinder shall include the following -

(a) the name, address, telephone numbers, and email address of the additional party and its counsel if different from the description contained in the Request for Joinder;

(b) any plea that the Arbitral tribunal has been improperly constituted and/or lacks jurisdiction over the additional party;

(c) the additional party's comments on the particulars set forth in the Request for Joinder;

(d) the additional party's answer to the relief or remedy sought in the Request for Joinder;

(e) details of any claims by the additional party against any other party to the arbitration;

(f) confirmation that copies of the Answer to the Request for Joinder and any exhibits included therewith have been or are being served simultaneously on all other parties and the arbitral tribunal.

Request by a Third Party to Join the arbitration

Article 36

A third party wishing to be joined as an additional party to the arbitration shall submit a Request for Joinder to the arbitral tribunal. The provisions of Article 34 shall apply to such Request for Joinder.

Comments on the Request for Joinder by existing parties to the arbitration

Article 37

The other parties to the arbitration shall submit their comments on the Request for Joinder to the arbitral tribunal within 15 days of receiving a Request for Joinder pursuant to Article 34 or 36 and such comments may include but are not limited to the following particulars -

(a) any plea that the arbitral tribunal lacks jurisdiction over the additional party;

(b) comments on the particulars set forth in the Request for Joinder;

(c) answer to the relief or remedy sought in the Request for Joinder;

(d) details of any claims against the additional party; and

(e) confirmation that copies of the comments have been or are being served simultaneously on all other parties and the tribunal.

General provisions on Joinder

Article 38

1. Where an additional party is joined to the arbitration, the date on which the Request for Joinder is received by the arbitral tribunal shall be deemed to be the date on which the arbitration in respect of the additional party commences.

2. The parties waive any objection, on basis of any decision to join an additional party to the arbitration, to the validity and/or enforcement of any award made by the arbitral tribunal in the arbitration.

Closure of hearings

Article 39

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon application of a party, to reopen the hearings at any time before the award is made.

Waiver of right to object

Article 40

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

SECTION IV. THE AWARD

Decisions

Article 41

(a) When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitral tribunal.

(b) In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorises, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Form and effect of the Award

Article 42

1. The arbitral tribunal may make separate awards on different issues at different times.

2. All awards shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the seat of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.

5. The award may be made public only with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a Court or other competent authority.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

Applicable Law, Amiable Compositeur

Article 43

- The arbitral tribunal shall apply the rules law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the arbitral tribunal to do so.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

Settlement or other grounds for termination

Article 44

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reasons not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of Article 42, paragraphs 2, 4 and 6, shall apply.

Interpretation of the award

Article 45

(a) Within thirty days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.

(b) The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of Article 42, paragraphs 2 to 6, shall apply.

Correction of the award

Article 46

1. Within thirty days after the receipt of the award, a party, with notice to other parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical error, or any error of similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within forty-five days of receipt of the request.

2. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.

3. Such corrections shall be in writing and shall form part of the award. The provisions of Article 42, paragraphs 2 to 6, shall apply.

Additional award

Article 47

1. Within thirty days after the receipt of the termination order of the award, a party, with notice to the other parties, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.

2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its awards within sixty days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.

3. When an award or additional award is made, the provisions of Article 42, paragraphs 2 to 6, shall apply.

Definition of costs

Article 48

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

2. The term "costs" includes only-

a. The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with Article 49;

b. The reasonable travel and other expenses incurred by the arbitrators;

c. The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

d. The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

e. The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

f. Any fees and expenses of the appointing authority as well as the fees and expenses of the Director of the RCICAL;

g. The cost of third-party funding;

h. Other Costs

3. In relation to interpretation, correction or completion of any award under Articles 45 to 47, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

Fees and expenses of Arbitrators

Article 49

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If there is an appointing authority and it applies or has stated that it will apply a schedule or particular method for determining the fees for arbitrators in international cases, the arbitral tribunal in fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case.

3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within fifteen days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within forty-five days of receipt of such a referral, the

appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.

(a) When informing parties of the arbitrators' fees and expenses that have been fixed pursuant to Article 48, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;

(b) Within fifteen days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Director of the RCICAL;

(c) If the appointing authority or the Director of the RCICAL finds that the arbitral tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within forty-five days of receiving such a referral, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;

(d) Any such adjustments shall either be included by the arbitral tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of Article 46, paragraph 3, shall apply.

4. Throughout the procedure under paragraphs 3 and 4, the arbitral tribunal shall proceed with the arbitration, in accordance with Article 17, paragraph 1.

5. A referral under paragraph 4 shall not affect any determination in the award other than the arbitral tribunal's fees and expenses; nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal's fees and expenses.

Allocation of costs

Article 50

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

Deposit of costs

Article 51

1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in Article 48, paragraphs 2 (a) to (c).

2. During the course of the arbitral proceedings, the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon or designated, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal that it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within thirty days after the receipt of the requests, the arbitral tribunal shall so inform the parties, in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an account to the parties of the deposits received and return any unexpended balance to the parties.

ANNEX

Model arbitration clause for contracts

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Arbitration and Mediation Act in force in the Federal Republic of Nigeria.

Note. For Arbitration, parties should consider adding:

(a) The appointing authority shall be ... [name of institution or person];

(b) The number of arbitrators shall be ... [one or three];

(c) The seat of arbitration shall be ... [town and country];

(d) The language to be used in the arbitral proceedings shall be ... .

Model statements of independence pursuant to Article 11 of the Rules

No circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration.

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.

Circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to Article 11 of the Arbitration Rules in the First Schedule to the Arbitration and Mediation Act of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement.] I confirm that those circumstances do not affect my independence and impartiality. I shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.

SECOND SCHEDULE

[Section 60(1)]

CONVENTION ON THE RECOGNITION AND ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS JUNE 10, 1958

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of difference between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.

2. The terms "arbitral awards" shall include not only awards made by arbitrator, appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

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

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

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

Article III

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) the duly authenticated original award or a duly certified copy thereof; and

(b) the original agreement referred to in Article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing an indication thereon under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that-

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V paragraph (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention of the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in Article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter, any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned,

whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the governments of such territories.

Article XI

1. In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) with respect to those Articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal government shall to this extent be the same as those of Contracting States which are not federal states;

(b) with respect to those Articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) a federal state party to this Convention shall, at the request of any other contracting state transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provisions of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations-Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under Article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself, bound to apply the Convention.

Article XV

1. The Secretary-General of the United Nations shall notify the States contemplated in Article VIII of the following:

(a) signature and ratifications in accordance with Article VIII;

(b) accessions in accordance with Article IX;

(c) declarations and notifications under Articles I, X and XI;

(d) the date upon which this Convention enters into force in accordance with Article XII;

(e) denunciations and notifications in accordance with Article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French and Spanish texts should be equally authentic, shall be deposited in the archives of the United Nations.

- The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in Article VIII.

THIRD SCHEDULE

[Section 64(2)]

ARBITRATION PROCEEDINGS RULES 2022

Interpretation

1. In these Rules -

"arbitration claim" means any application to a High Court under the Arbitration and Mediation Act 2022

(a) to revoke an arbitration agreement under Section 3 thereof;

(b) to stay proceedings under Section 5 thereof;

(c) to determine the challenge of an arbitrator under Section 9 thereof;

(d) to appoint, remove or substitute an emergency arbitrator under Sections 16 and 17 thereof;

(e) to grant interim measures of protection under Section 19 thereof;

(f) to recognize or enforce an interim measure of protection under Section 28 thereof;

(g) to refuse recognition or enforcement of an interim measure of protection under Section 29 thereof;

(h) to subpoena a witness to attend under Section 43 thereof;

(i) In respect of the fees of an arbitrator under Section 54 thereof;

(j) to set aside an award under Section 55 thereof or review the decision of an Award Review Tribunal under Section 56 thereof;

(k) to recognise and enforce an award under Section 57 thereof;

(l) to refuse recognition and enforcement of an award under Section 58 thereof.

Starting the claim

2. (1) Except where sub-rules 2 and 3 of this Rule applies, an arbitration claim shall be started by the issue of an Originating Motion.

(2) An application under Section 5 of the Act to stay legal proceedings shall be made by notice of motion to the court seised of those proceedings.

(3) An application under Sections 16 or 17 of the Act for the appointment, challenge or replacement of an emergency arbitrator; or under 18 of the Act to fix the seat of the Emergency Relief Proceedings, shall be contained in a written communication addressed to the appropriate Court as defined under Section 91(1) of the Act.

Originating Motion:

3. (1) An Originating Motion commencing an arbitration claim shall -

(a) include a concise statement of -

(i) the remedy claimed;

(ii) any question on which the claimant seeks the decision of the Court;

(b) give details of any arbitration award challenged by the claimant, identifying which part or parts of the award are challenged and specifying the grounds for the challenge;

(c) show that any statutory requirements have been met;

(d) specify under which Section of the Act the claim is made;

(e) identify against which (if any) of the defendants, a cost order is sought;

(f) specify the person on whom the Originating Motion is to be served, stating their role in the arbitration and whether they are defendants.

(2) Unless the court orders otherwise an Originating Motion shall be served on the defendant within one (1) month from the date of issue.

Service out of the jurisdiction

4. (1) The court may give permission to serve an Originating Motion out of the jurisdiction if -

(a) the claimant seeks to set aside an arbitration award made within the jurisdiction;

(b) the claimant –

(i) seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award; and

(ii) the seat of the arbitration is or will be within the jurisdiction.

(2) An application for permission under sub-rule 1 of this rule shall be supported by an affidavit -

(a) stating the grounds on which the application is made; and

(b) showing in what place or country the person to be served is, or probably may be found.

(3) An order giving permission to serve an Originating Motion out of the jurisdiction shall specify the period within which the defendant may enter appearance to the claim.

Notice

5. (1) Where an arbitration claim is made pursuant to Section 8 of the Act, each arbitrator shall be a defendant.

(2) Where notice shall be given to an arbitrator or any other person it may be given by sending him a copy of -

(a) the Originating Notice of Motion; and

(b) any affidavit in support.

(3) Where the Act requires an application to the court to be made on notice to any other party to the arbitration, such notice shall be given by making that party a defendant.

Hearings

6. The court may order that an arbitration claim be heard either in public or in private.

Enforcement of arbitration awards and interim measures of protection

7. (1) An application to enforce an award or an interim measure of protection in the same manner as a judgment or order shall be made by Originating Notice of Motion.

(2) The supporting affidavit shall -

(a) exhibit the arbitration agreement and the original award or decision containing the interim measure of protection, or in either case certified copies of each;

(b) state the name and the usual or last known place of abode or business of the applicant and the person against whom it is sought to enforce the award or interim measure of protection;

(c) state, as the case may require, either that the award or interim measure of protection has not been complied with or the extent to which it has not been complied with at the date of the application.

Case Management

8. (1) The following rules apply unless the court orders otherwise.

(2) A defendant who does not contest any or all of the remedies claimed may file a notice stating such fact, and a court or judge in chambers may grant such uncontested remedy or remedies without an oral hearing.

(3) A defendant who contests any or all of the remedies claimed and who wishes to rely on evidence before the court shall file and serve his counter-affidavit -

(a) within 21 days after the date by which he was required to enter appearance; or,

(b) where a defendant is not required to enter appearance, within 21 days after the service of the Originating Notice of Motion.

(4) A claimant who wishes to rely on evidence in reply to the counter-affidavit filed under rule 7(2) shall file and serve his reply affidavit within 7 days after the service of the defendant's counter-affidavit.

(5) Except in the case provided for in sub-rule (5) of this rule, an arbitration claim shall be entered on the court's list such that its first hearing is not later than thirty (30) days after service of the originating motion on the defendant, or in the case of multiple defendants, on the defendant last served.

(6) Where a defendant is served outside the jurisdiction pursuant to permission given under rule 3 of these rules, an arbitration claim shall be entered on the court's list such that its first hearing is not later than forty (40) days after service of the originating motion on the defendant served outside the jurisdiction, or in the case of multiple defendants, on the defendant last served.

(7) Not later than two (2) days before the hearing date, the claimant shall file and serve a written brief of arguments which lists succinctly -

(a) the issues which arise for decision;

(b) the grounds of relief (or opposing relief) to be relied upon;

(c) the submissions of fact to be made with the references to the evidence; and

(d) the submissions of law with references to the relevant authorities.

(8) Not later than the day before the hearing date the defendant shall file and serve a skeleton argument which lists succinctly -

(a) the issues which arise for decision;

(b) the grounds of relief (or opposing relief) to be relied upon;

(c) the submissions of fact to be made with the references to the evidence; and

(d) the submissions of law with references to the relevant authorities.

(9) Unless a party specifically requests an oral hearing, the court may decide the entire arbitration claim or particular issues arising in it without an oral hearing.

Appeals

9. Rules 10 to 13 of these Rules shall apply to appeals from a High Court to the Court of Appeal and from the Court of Appeal to the Supreme Court in all arbitration claims as defined in rule 1 above, hereafter referred to as "arbitration appeals".

10. It shall not be necessary for the Registrar of a High Court or the Registrar of the Court of Appeal to prepare a record in respect of an arbitration appeal, and accordingly the record for the purpose of such appeal shall be prepared in the manner set forth in rule 11 of these Rules.

11. (1) The appellant shall, either simultaneously with filing his notice of appeal or within fourteen (14) days thereafter prepare for the use of the Justices a record comprising –

(a) the index;

(b) certified true copies of documents and proceedings which the appellant considers relevant to the appeal; and

(c) a certified true copy of the notice of appeal.

(2) If the respondent considers that the documents and proceedings filed by the appellant are inaccurate or are not sufficient for the purposes of the appeal, he shall, within a period of seven (7) days after service on him of the record filed by the appellant, file any further or other documents that he wishes to file.

(3) In all arbitration appeals the provisions of the Court of Appeal Rules and the Supreme Court Rules for the time being in force in relation to the filing of briefs of arguments in civil matters shall apply mutatis mutandis upon the filing of the record of appeal pursuant to rule 11 above.

Case Management on Appeals

12. An arbitration appeal shall be entered on the court's list such that its first hearing is not later than six months

after the filing of the record of appeal pursuant to rule 11 above.

13. Unless a party specifically requests an oral hearing, the court may decide the entire arbitration appeal or particular issues arising in it without an oral hearing.

Effect of Default

14. If, in an arbitration claim or an arbitration appeal, a claimant or appellant seeks to set aside an arbitral award, or seeks refusal of recognition or enforcement of an interim measure of protection, and such claimant or appellant fails to comply with

(a) any of the time limits set out in rules 3(2), 8(6) and 11(1) of these rules, or;

(b) the time limits for the filing of briefs of arguments as set out in the rules of the Court of Appeal and the Supreme Court for the time being in force in relation to civil appeals,

the arbitral award or interim measure of protection shall immediately become enforceable, unless the court otherwise orders.

Costs

15. The rules of the High Courts, Court of Appeal and the Supreme Court for the time being in force shall apply in relation to costs in all arbitration claims and arbitrating appeals, so however that the term "costs" shall include -

(a) all expenses actually incurred by the successful party, including his travel expenses and the travel and other expenses of his witnesses;

(b) the costs for legal representation of the successful party, to the extent that the court or a taxing officer considers that such costs are reasonable.

Application

16. These rules shall apply to all arbitration claims and arbitration appeals instituted on or after the date of commencement of the Arbitration and Mediation Act.

17. The rules of procedure in civil matters for the time in force in the High Courts, Courts of Appeal and the Supreme Court shall apply to arbitration claims and arbitration appeals only in respect of such matters and to such extent as provision has not been expressly made in these rules.

FOURTH SCHEDULE

CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDATION 7th August 2019
[Section 87]

Article 1. Scopeofapplication

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

a) The settlement agreement signed by the parties;

b) Evidence that the settlement agreement resulted from mediation, such as:

i. The mediator's signature on the settlement agreement;

ii. A document signed by the mediator indicating that the mediation was carried out;

iii. An attestation by the institution that administered the mediation; or

iv. In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

b) The method used is either:

i. As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

ii. Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to

grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

a) A party to the settlement agreement was under some incapacity;

b) The settlement agreement sought to be relied upon:

i. Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

ii. Is not binding, or is not final, according to its terms; or

iii. Has been subsequently modified;

c) The obligations in the settlement agreement:

i. Have been performed; or
ii. Are not clear or comprehensible.

d) Granting relief would be contrary to the terms of the settlement agreement;

e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

f) There was a failure by the mediator to disclose to the parties' circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

a) Granting relief would be contrary to the public policy of that Party; or
b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6. Parallel Applications or Claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other Laws or Treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:
a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;
b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article;

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.
Reservations and their confirmations shall be deposited with the depositary.

Article 9. Effect on Settlement Agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10 Depositary

The Secretary- General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the

number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Party to the Convention", "Parties to the Convention", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention:
a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or
b) as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:
a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;
b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;
c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into Force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention

shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

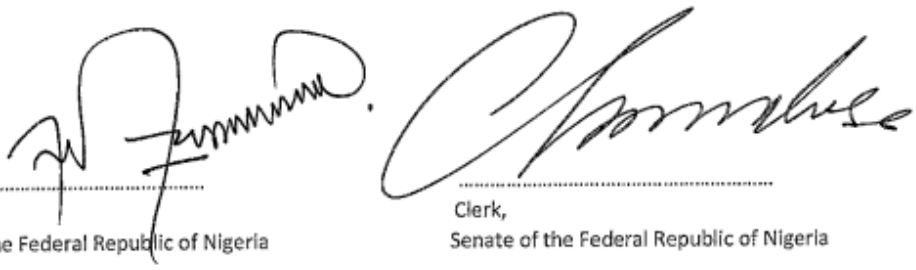
MODEL MEDIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by mediation, the mediation shall be governed by the Mediation Law of the Arbitration and Mediation Act (*) LFN and under the mediation rules agreed upon by the parties, failing which the mediation shall be conducted in any manner as the mediator considers appropriate, taking into account the circumstances of the case, and the need for a speedy settlement of the dispute.

EXPLANATORY MEMORANDUM

This Bill seeks to repeal the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004 and enact the Arbitration and Mediation Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation; make applicable the convention on the recognition and enforcement of foreign arbitral awards (new york convention) to any award made in Nigeria or in any contracting state arising out of international commercial arbitration, the convention on the international settlement agreements resulting from mediation (the Singapore convention)

THIS BILL WAS PASSED BY THE SENATE ON TUESDAY, 10TH MAY, 2022



.....
President,
Senate of the Federal Republic of Nigeria

.....
Clerk,
Senate of the Federal Republic of Nigeria