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DETERMINING THE ARBITRABILITY OF THE SUBJECT MATTER DISPUTE BY THE NIGERIAN COURTS AND ITS IMPACTS ON THE AWARDS

BY KUDIRAT MAGAJI W. OWOLABI*

Abstract

Globally, the issue of whether a particular subject is capable of being settled by arbitration or not is neither here nor there because it varies from jurisdiction to jurisdiction and besides, peculiarity of each State contributes to the kinds of disputes each State considers arbitrable. Thus, while a particular matter may be arbitrable in a specific State, it might not be in another State. This paper considered the concept of arbitrability from the relevant provisions in the ACA and its Second Schedule. The paper discovered that to determine the question whether a dispute is arbitrable or recourse must be made to Sections 35 and 57 of the Arbitration and Conciliation Act 2004 (ACA) and judicial cases in Nigeria. The paper argued that the narrow interpretation by the Nigerian courts on 'arbitrability' based on these identified provisions of the ACA 2004 which restricts disputes to contractual and commercial disputes only, prevents the enforcement of foreign awards from jurisdictions with liberal interpretation.

1.0. Introduction

Arbitrability regulates disputes that could be determined by arbitration and those disputes which only the national courts have authority to adjudicate and determine thereby restricting such disputes being settled by arbitration.¹ Most domestic laws on arbitration are clear on this by identifying and distinguishing disputes which are arbitrable and those which are not for the purpose of uttering the judicial power of the national courts on certain matters.² Also, party can only exercise the right

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¹ A.Redfern, *Hunter M., Law and Practice of International Commercial Arbitration* (4thedn, Sweet & Maxwell, London, 2004) 5.

² Arbitration and Conciliation Act Cap.A18 LFN 2004, s 52 (2) and its Second Schedule, art V (2). For example, art 2060 of the French Civil Code Act No 75-596,

to enter into an arbitration agreement and the right of enforcing any award given in his favour is determined if dispute is one capable of being resolved by arbitration.³

Globally, the issue of whether a particular subject is capable of being settled by arbitration or not is neither here nor there⁴ because it varies from jurisdiction to jurisdiction and besides, peculiarity of each State contributes to the kinds of disputes each State considers arbitrable.⁵ Therefore, while a particular matter may be arbitrable in a specific State, it might not be in another State.

Nigerian Arbitration and Conciliation Act 2004 (ACA)⁶ which is the primary domestic law on arbitration in Section 52(2)(b)(i) and in its Second Schedule, Article V(2)(a)⁷ empowers courts to decline the enforcement of awards if the nature of the dispute which is the basis for the outcome cannot be resolved through arbitration.⁸ Therefore, where the issue of arbitrability is raised, the court may be asked to intervene. It is pertinent to observe the relevant provisions of the law on the subject matter arbitrability which can be raised to resist application for enforcement of awards in Nigeria.

The paper is divided into five parts. Parts I and V are introductory and conclusion parts respectively. The second part examines the concept of arbitrability, this is done with a view to laying a background on subject matter arbitrability. It examines arbitrability within the framework of the ACA and its second schedule.⁹ The third part reviews judicial decisions in Nigeria within the intended objectives of this paper. The importance of this is to ascertain matters that are not arbitrable and as such incapable of being enforced; this is done through the analysis of the case-law. The purpose of this is to understand the significance of the arbitrability

1975 permits parties through their arbitration agreement to restricts certain disputes from being settled through arbitration, particularly in disputes involving public at large.

³ ACA Cap.A18 LFN 2004, Section 35. Hereinafter refer to as ACA 2004.

⁴ According to s 57 of the ACA 2004, arbitration means commercial arbitration regardless whether it is conducted through ad hoc or any arbitral institution. It further defines commercial as any sort of relationships which is commercial in nature.

⁵ Take for instance, some States such as Saudi Arabia, UEA issues that are not Shariah compliance cannot be subject to arbitration. Whereas in other States, that are non-Muslim States can arbitrate the same disputes without restriction.

⁶ Cap.A18 LFN 2004. Hereinafter refer to as ACA 2004.

⁷ Second Schedule of the ACA, artV(2).

⁸ ACA 2004 determines arbitration in the context of commercial relationships between the parties.

⁹ Second Schedule of the ACA contains New York Convention 1958.

concept in the enforcement proceeding of awards. The fourth part identifies the intersect between arbitrability and public policy ground and discusses the danger in construing these two grounds to mean the same by the courts.

2.0 Subject Matter Arbitrarily under the ACA 2004

The discussion under this section, focuses on the subject matter arbitrability of disputes that can be submitted to the arbitral tribunal. The discussion further analyses those disputes which either by their nature or by relevant laws cannot be arbitrated and the outcome of such arbitration cannot be enforced in Nigeria. s 52(2) (b)(i) of the ACA and its Second Schedule, art V(2)(a) are the focus of this section.

2.1 Arbitral Provisions in Section 52(2) (b) (i) of the ACA and Article V(2)(a) of the Second Schedule

Before an in-depth discussion on s 52(2)(b)(i) and art V(2)(a) of the Second Schedule it is necessary to mention briefly the other provisions on arbitrability. The Second Schedule of the ACA contains numerous provisions for arbitrability directly or indirectly.¹⁰ The relevant provisions are arts I, II and V respectively.¹¹ By art I, the Convention permits a signatory State to be explicit in their domestic arbitration law to the categories of disputes that will be considered 'commercial.'¹² This permits the signatory State to stipulate requirements as to matters that are regarded as being commercial in nature.¹³ This position informed the drafter of ACA to define commercial to cover all kinds of contractual relationships provided it is commercial in nature.¹⁴ The judicial support of this is the case of *Kano State Urban Development Board v. Fanz Construction Co.*¹⁵ where the court held a similar view by defining 'commercial' to mean dealings between parties that are commercial in nature. In essence, any dispute arising from a relationship which is not commercial in nature is not arbitrable in Nigeria.

Another significant provision is art II of the Second Schedule of the ACA.¹⁶ By this provision, signatory States are mandated to abide by any

¹⁰L. Mistelis & S. Brekoulakis, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, London, 2009) 87.

¹¹ Second Schedule of the ACA; New York Convention 1958, 330 U.N.T.S. 38(1959). Hereinafter referred to as New York Convention 1958.

¹² Second Schedule of the ACA, art 1(3); New York Convention 1958, art 1(3).

¹³ Second Schedule of the ACA.

¹⁴ ACA 2004, s 57.

¹⁵ *Kano State Urban Development Board v. Fanz Construction Co* [1990] 4 NWLR (Pt. 142) 1.

¹⁶ New York Convention 1958, art II.

agreement voluntarily entered into by the parties to settle their disputes, whether contractual in nature or not, so long as it is within the power of the arbitral tribunal to sit and hear the matter.¹⁷ Thus, the issues to be determined must fall within those anticipated in the arbitration agreement.¹⁸ Finally, arbitrability can also be invoked via Art V (2) (a) Second Schedule of ACA to challenge an award at the enforcement stage before the court. s 52(2) (b) (i) and its Second Schedule art V (2) (a) of the ACA are identical.¹⁹ Hence, the Second Schedule of the ACA together with the provision of arts I and II establish an imperative for parties to ensure that the nature of their disputes can be settled by arbitration; where the nature of the dispute is inarbitrable so also the outcome becomes forbidden from judicial enforcement.

In Nigeria, the commercial nature of the disputes is the first step that guides the court, where the defence of arbitrability is raised by the aggrieved party.²⁰ s 35 of the ACA further elaborates on the issue of arbitrability. It provides that where certain existing laws in Nigeria have placed restrictions on the submission of any matter to arbitration, the ACA shall not be applicable notwithstanding the presence of an arbitration clause to resolve such disputes by arbitration.²¹ This Section precludes the settlement of some subjects by arbitration particularly where such matters have been prohibited from being submitted to arbitration by other laws.²²

Instances of such prohibitions are found in Companies and Allied Matters Act,²³ Admiralty and Jurisdiction Act,²⁴ Copyrights Right Act,²⁵

¹⁷ Second Schedule of the ACA, art II; New York Convention 1958, art II. Art II(2) further imposed obligation on the courts of the signatory States to enforcement any agreement between parties except where such agreement violates any existing law or where the disputes is incapable of being settled by arbitration.

¹⁸ See Second Schedule of the ACA, art V.

¹⁹ The two provisions allow the party to raise arbitrability of the subject matter as a defence to resist enforcement of award, though the difference lies in their applicability.

²⁰ ACA 2004, s 57.

²¹ Ibid, s 35.

²² M.M.Akanbi, *Domestic Commercial Arbitration in Nigeria: Problems and challenges* (PhD Thesis, Kings College London 2006) 211; *United World Ltd .Inc v. M.T.S Ltd* [1998] 10 NWLR (Pt.568) 117; *Kano State Urban Development Board v. Fanz Construction Co.* [1990] 4 NWLR (Pt.142) 32,33.

²³ Cap C20, LFN 2020(Herein after referred to as CAMA). ss 450(1)(d), 548,570,582,732(1),735(1),851(12) &868(1) are explicit with the jurisdiction of the Federal high Courts in companies matters. Alsos251 of the Nigerian Constitution 1999 vest exclusive jurisdiction over matters regulated by the Company and Allied Matters Act, 2020 CAMA on the Federal High Court

²⁴ Cap A5 LFN 2005, s 20(Herein after referred to as AJA).

Trademark Act.²⁶ Each of these laws contains provisions which prohibits the submission of issues arising therefrom to arbitration. Particularly, the Trade Disputes Act²⁷ explicitly prohibits submission of any kinds of trade disputes to arbitration except Industrial Arbitration panel. Basically, industrial disputes must be heard and determined as stipulated in the Trade Disputes Act.²⁸

s. 20 of the AJA provides 'Any agreement by any person or party to any cause, matter or action which seeks to oust the jurisdiction of the court shall be null and void, if it relates to any admiralty matter falling under this Act and if-

- a. the place of performance, execution, delivery, act or default is or takes place in Nigeria; or
- b. any of the parties resides or has resided in Nigeria; or
- c. any of the parties resides or has resided in Nigeria; or
- d. in any admiralty action or in the case of a maritime lien, the plaintiff submits to the jurisdiction of the Court and makes a declaration to that effect or the rem is within Nigerian jurisdiction; or
- e. it is a case in which the Federal Government or the Government of a State of the Federation is involved and the Federal Government or Government of the State submits to the jurisdiction of the Court; or
- f. there is a financial consideration accruing in, derived from, brought into or received in Nigeria in respect of any matter under the admiralty jurisdiction of the court; or

²⁵ Cap 28 LFN, 2004, s 46. The provides that 'the Federal High Court shall have exclusive jurisdiction for the trial of offences or disputes under this Act.'

²⁶ Cap T13 LFN 2004.

²⁷ Cap 432, LFN 1990.

²⁸ Trade disputes mechanisms in Nigeria, as prescribe by the Act are: the Act by the provision of s 4(1) allows internal settlement mechanisms in the resolution of trade disputes; by virtue s 4(2) of the Act, where attempt to settle dispute via the internal settlement mechanism fails, or where no such means of settlement exists, the disputing parties are required within seven (7) days, to meet to resolve the dispute amicably; if mediation fails, the issue is referred to the Minister of Labour and Productivity within three (3) days of the expiration of the mediation period; where deadlock lingers without resolution, the Minister has within fourteen (14) days to refer the matter the Industrial Arbitration Panel or directly to the National Industrial Court or to Board of Inquiry.

- g. under any convention, for the time being in force to which Nigeria is a party, the national court of a contracting State is either mandated or has a discretion to assume jurisdiction, or in the opinion of the Court, the cause, matter or action should be adjudicated upon in Nigeria.'

Ss 20 21& 54 of the Trademark Act must also be mentioned. s 20(1) of the Act provides 'any person may within two months from the date of the publication under section 19 of this Act of notice of an application give notice to the Registrar of opposition to the registration.' s 21(1) states that 'a decision of the Registrar under s 20 of this Act shall be subject to appeal to the court.' s 55 provides that 'in any appeal from a decision of the registrar to the court under this Act, the court shall have and exercise the same discretionary powers as under this act are conferred upon the Registrar.' Hence the opening paragraph of s 56 provides 'where under any of the foregoing provisions of this Act, an applicant has an option to make an application either to the court or to the Registrar.'

However, with the trending view globally, this position of the law in Nigeria seems be obsolete as most States have made issues arising from trade, intellectual propriety, and Copyright arbitrable and the courts in some of these States now recognise the jurisdiction of arbitrators on these subjects.²⁹ It has however been argued that despite the stipulation in s 35 that limits the extent of the application of ACA, all matters are capable of being arbitrated upon under the Act.³⁰ Chukwuemerie contends that only disputes arising from copyright are restricted from being settled by arbitration as every other disputes can be submitted and be settled by a panel of arbitrators.³¹ The scholar rests his argument on the fact that s 46 of the Copyright Act aimed to prohibits the courts or any other body acting in judicial capacity with respect to disputes arising from copyright and vests same on the Federal High Court.³² However, Akanbi is of the contrary view when he states that the drafters of the Copyrights Act was

²⁹Ganz and Others v. Soc. National des Chemins de fer Tunisiens Rev. Arb 478(1991) the Court of Appeal in Paris observed that the allegation of fraud was not itself an obstacle to settle the disputes through arbitration. Disputes involving fraud is arbitrable. Also, in Ste Liv Hidravlika DOO v. SA Diebolt, Jurisdata no. 2008-359055 (2008), the court in France affirmed the right of arbitrator to decide on the legitimacy of an intellectual property right. Likewise, in Deko v G. Dingler et ste Meva 3 Rev. Arb. 1994, the court held that dispute on intellectual property right is arbitrable.

³⁰A.I Chukwuemerie, 'Public Policy and Arbitrability under the UNCITRAL Model Law' in Chukwuemerie A.I(ed) *Studies & Materials in International Commercial Arbitration* (Lawhouse Books, Port Harcourt, 2002)124.

³¹ Ibid, 114.

³²A.I Chukwuemerie, (n30) 114-123.

not to prohibits arbitration in copyright matters but to restrict the wide powers conferred on the State High Courts to the exclusive jurisdiction of the Federal.³³ No justification in the ACA2004 to restrict the scope of arbitrability in some certain situations identified in the Companies and Allied Matters Act (CAMA),³⁴ Admiralty and Jurisdiction Act,³⁵ (AJA) and Copyright Act.³⁶

The provision of s 35 is fraught with many challenges, uncertainty and lack of uniformity especially with regard to the manner in which the courts approach the concept of arbitrability. This exhibits probable challenge to the award-creditor who seek to enforcement an award originates from copyrights, intellectual properties, maritime or trade disputes. It is therefore pertinent to do an analysis of the judicial responses and highlight the period when courts will consider the nature of a particular dispute arbitrable or inarbitrable.

3.0 Judicial Responses on the Arbitrality of the Subject Matter Dispute

Several decisions of the courts have provided an insight to some subject that are not capable of settlement by arbitration.³⁷ In *Ogunwale v. Syrian Arab Republic*,³⁸ it was observed that arbitrability ground can be raised where the award dealt with the disputes which are outside the expected disputes anticipated in the agreement. In other word, the arbitral tribunal must reach a decision based on the disputes submitted which must also be commercial in nature.³⁹ This position is premised on s 57 that limits arbitration to commercial issues and that of art II, Second Schedule of ACA which empowers the court to ensure implementation of arbitration agreement that intends to settle a dispute which is capable of being heard and determined through arbitration.⁴⁰ Furthermore, criminal matters in Nigeria are not arbitrable.⁴¹

³³M.MAkanbi, 'Contending without Being Contentious: Arbitration, Arbitrators and Arbitrability' (paper delivered on 152 Inaugural Lecture on Thursdays, 13th Nov., 2014)19. Available at <<https://www.unilorin.edu.ng/UII/152.pdf>> accessed on 12 May, 2022.

³⁴Cap C20 LFN, 2004.

³⁵Cap A5 LFN, 2005.

³⁶Cap 28 LFN, 2004.

³⁷United World Ltd Inc v. M.T.S Ltd [1998] 10 NWLR (Pt. 568) 116.

³⁸[2002] 9 NWLR (Pt. 771) 127.

³⁹ACA 2004, s 57.

⁴⁰s 52(2) (a) (iv) and Second Schedule of the ACA, art V(1)(c) permit enforcing courts in Nigeria to refuse an application for enforcement if award deals with issues not contemplated by the parties or where the award is not within the terms of arbitration agreement.

⁴¹Ibid.

However, parties can opt for Plea Bargain in certain criminal matters as legislated under the Administration of Criminal Justice Act 2015.⁴² The reason why criminal cases are inarbitrable is that national courts are vested with exclusive jurisdiction to hear and determine criminal matters.⁴³ Also, dissolution of marriage conducted under the Marriage Act is not arbitrable in Nigeria.⁴⁴ Furthermore, illegal contracts cannot be resolved through arbitration since upholding such contacts will violate public policy of Nigeria.⁴⁵ Tax related disputes are by virtue of courts' pronouncements in *Esso Petroleum and Production Nigeria Ltd & SNEPCO v. NNPC*⁴⁶ and *Shell (Nig.) Exploration and Production Ltd & 3 Others v. Federal Inland Revenue Service* cannot be submitted before the arbitral tribunal for resolution.⁴⁷ The Appellate court in *MV MSC Agata & Anor v. Comet Shipping Agencies Nig. Ltd*,⁴⁸ observed that any dispute that requires declaration of title to property or/and rights of parties to property cannot be heard and determined by an arbitral tribunal.⁴⁹

The analysis of cases above shows that the courts in Nigeria adopt and apply a very restrictive approach towards the concept of arbitrability, this is evidence in the judicial attitudes in interpreting the concept as the approach of the courts not anywhere close to lenience. Hence, restricting the scope of arbitrability to commercial and contractual issues is a sign of weakness in the Nigerian arbitration law considering the usual cramming

⁴² L.A.Ayinla, Ayodele J. & B.A.Ahmed, 'The AJC Act 2015, Plea Bargain and Other Innovations: Review towards Peaceful Resolution in Nigeria' (2016) 1(2) K.I.U. J. H, 257-275; L.A.Ayinla, G.H Olusola & B.A.Ahmed, 'Applicability of ADR and Plea Bargaining in the Nigerian Criminal Justice System' (2014) 2(2) A.N.U. Law J.; C.A.Oguabor, C.C Obi-Ochiabutor & E.L.Okiche., 'Using Alternative Dispute Resolution (ADR) in the Criminal justice System: Comparative Perspective' (2013) 6, Bassey Andah J, 215 238, 218.

⁴³ J.Lew, L. Mistelis & S.Kroll, *Comparative International Commercial Arbitration* (Kluwer Law Int'l, Hague, 2003) 689.

⁴⁴ Marriage Act Cap M6 LFN 2004, s 2; D.Eyongndi, 'Settlement of Matrimonial Disputes in Nigeria through Alternative Dispute Resolution'. <http://www.academia.edu/34100242/SETTLEMENT_OF_MATRIMONIAL_DISPUTES_IN_NIGERIA_THROUGH_ALTERNATIVE_DISPUTES_RESOLUTION.docx> accessed on 18 July 2018. However, researcher disagrees with the contention of Eyongndi that in a requirement to present certificate of conciliation, for the parties to establish have gone through amicable settlement before filing of divorce is an evidence that, arbitration may also be suitable to resolve divorce petition. Hence, the researcher of this thesis disagrees with this because, conciliation cannot be equate with the conciliation with no binding force.

⁴⁵ R.M.A & F.C v. U.E.S Ltd [2011] 9 NWLR (Pt. 1252), 415-416, paras H-B.

⁴⁶ Unreported Appeal NO CA/A/507/2012, delivered on 22nd July, 2016.

⁴⁷ Unreported Appeal NO CA/A/ 208/2012, delivered on 31st August 2016.

⁴⁸ [2014] 1 NWLR (Pt. 1388) 270.

⁴⁹ Ibid.

of the courts with judicial cases in Nigeria. This paper is of the view that the courts should be more concern with an express and implied submitted disputes identified in the arbitration agreement. Some jurisdictions have taken a liberal approach and as such Nigeria should not be an exception. For instance, in China, following the court's decision in *Jilin Chemical* case, a tortious matter can now be arbitrated once there is a valid agreement to that effect.⁵⁰ Equally, in *Ganz and Others v. Soc. National des Chemins de fer Tunisiens*,⁵¹ the court in Paris held that the allegation of fraud in a dispute did not itself debar the arbitral tribunal from hearing and determining the matter and affirmed that fraud is arbitrable.⁵² Also, in France the appellate court permitted an arbitration proceeding that involved an issue concerning the legitimacy of an intellectual property right.⁵³ Equally, in *Deko v G. Dingler et ste Meva*,⁵⁴ the court held that disputes on the intellectual property right is arbitrable. In view of the above analysis, courts in Nigeria should take a more liberal approach to the arbitrability issue which can be achieved by amending the extant arbitration regime. Hence, if the law intends to provide utmost opportunity to parties to proceed with arbitration, the issue of arbitrability should be stretched to include the liberal interpretation to matters that are not commercial or contractual in nature.

3.1 Impacts of Section 20 of the AJA as it relates to Sections 4 and 5 of the ACA.

Specifically, it is essential to consider the concept of arbitrability in admiralty matters as applicable in Nigeria. There are divergent opinions on the issue of arbitrability in the admiralty matters, some consider the subject arbitrable,⁵⁵ while others are of the contrary view.⁵⁶ s 20 of the Admiralty Jurisdiction Act (AJA)⁵⁷ declares invalid any arbitration agreement between the parties that prohibits the power of the court in hearing disputes related to admiralty.⁵⁸ In essence, courts will not stay a

⁵⁰ *Jilin Chemical Industrial Co Ltd v. WP International Group Inc.* (2005) Min Si Zhong Zi No. 1, SPC Ruling, May 10, 2005.

⁵¹ Rev. Arb 478(1991).

⁵² Ibid, 480.

⁵³ *Ste Liv Hidravlika DOO v. SA Diebolt*, Jurisdata no. 2008-359055 (2008).

⁵⁴ 3 Rev. Arb. 1994.

⁵⁵ A.I Chukwuemerie., (n30) 124.

⁵⁶ M.M Akanbi, 'Examining the Concept of Arbitrability under Nigerian Domestic Arbitration Laws' (2005) 3(1) Nig. Bar J, 26; P.O Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Lawlord Press, Nigeria, 2015) 283.

⁵⁷ Cap. A5, LFN 2004.

⁵⁸ Admiralty Jurisdiction Act Cap. A5, LFN 2004 (hereinafter referred to as AJA). A.A Daibu & L.A Abdulrauf., 'Challenges of s 20 of the admiralty Jurisdiction Act to International Arbitration Agreement' (2015), 6(4), *Gravitas Rev. Bus. L. & Prop. L.* 16-25, 20.

proceeding merely because an agreement between parties contain an arbitration clause. Originally, this provision was supposed to apply only to foreign jurisdiction clause, that is, where arbitration proceedings intended to be conducted outside Nigeria.⁵⁹ However, from all indications, the pronouncements of Nigerian courts have revealed that the provision of s 20 is not only applicable in cases of foreign jurisdiction clause but also in any arbitration clause that ousts the jurisdiction of the Nigerian courts.⁶⁰ Hence, it is necessary to examine the impact of the provision of s 20 of AJA as it relates to provisions of Sections 4⁶¹ and 5⁶² of the ACA.

The contentious issue between the ACA 2004 and AJA is that, AJA empowers courts to disregard the arbitration clause and proceed with jurisdiction in admiralty matters.⁶³ On the other hand, ACA mandates courts to encourage parties to go into arbitration and charged courts to stay proceeding while waiting for the outcome of the matter before the arbitral tribunal particularly, where there is an existing arbitration agreement.⁶⁴ Consequently, Nigerian courts have had to contend with the seemingly contradictory statutory provisions of these two laws. That is, the stipulation of the AJA which forbids arbitration in admiralty matters on one side and the provisions of ss 4 and 5 of the ACA which encourage and ensure the compliance with the arbitration clause, on the other hand. In *Owners of the MV Lupex v. Nigerian Overseas Chartering and Shipping Ltd*,⁶⁵ the disputes involved violation of a charter agreement and the Plaintiff initiated an action for breach in the High Court. The Defendant invoked the court to stay the court hearing to allow settlement outside the courtroom as provided in ss 4 and 5 of the ACA. The Federal High Court and the appellate court declared the arbitration agreement invalid and declined to stay of proceedings since it's against public policy in Nigeria to debar courts in admiralty matters.⁶⁶ However, since

⁵⁹F.Egede, 'Foreign Maritime Arbitration Clauses: Applicability and enforcement in Nigeria' <http://www.businessdayonline.com/ARCHIVE/index.php?option=com_content&view=article&id=5611:foreign-maritimearbitration-clauses-applicability-and-enforcement-in-nigeria-&catid=133:legal-indignity&Itemid=557>. accessed on 23 January 2018.

⁶⁰A.A Daibu&L.AAbdulrauf, (n58) 19.

⁶¹ Section 4 permits court to order for the stay of proceedings and authorise parties to settle their disputes through arbitration particularly where there is an existing arbitrable clause.

⁶²S 5 afford parties an opportunity to approach court to stay proceedings where an action has been filed on a disputes that is subject to arbitration agreement.

⁶³AJA 2004, s 20.

⁶⁴ACA CapA18 LFN 2004, ss 4 and 5.

⁶⁵[1994] 5 NSC 182.

⁶⁶Ibid, 200.

the *Owners of the MV Lupex* case was decided there have been numerous contradictory pronouncements of the court in this area of law.⁶⁷ Therefore, the vital issue is the enforceability of maritime arbitration agreement/ awards based on the express stipulations in s 20 of the AJA. In *MV Panormod Bay v. Olam Nigeria Plc*,⁶⁸ the disputed issue was whether s 20 can impliedly prevail over ss 2⁶⁹ and 4 of the ACA where contractual agreement between the parties contained foreign jurisdiction clause. The court observed that AJA operates as a limitation against any arbitration clauses whether intended for foreign or local courts in Nigeria. s 20 therefore serves as a restriction as regards arbitration agreements in admiralty matters particularly to those agreements having Nigeria as the forum. The appellate court in this case, appeared not to have considered the provision of s 10 of AJA which permits the court to stay a proceeding pending arbitration in suitable cases whether in Nigeria or away.⁷⁰ Contrarily, in 2004 the Supreme Court ruled on the appeal in *Owners of the MV Lupex v. Nigerian Overseas Chartering and Shipping Ltd*,⁷¹ which was earlier decided by the court below in 1994 that, the autonomy of the parties is paramount and the courts must obey and implement arbitration agreements where parties have decided to resolve their maritime disputes via arbitration. However, in *Onward Enterprises Ltd v. MV Matrix & 2 Ors*,⁷² the court aligned itself with the reasoning adopted by the Supreme Court in *Owners of the MV Lupex*. The Court of Appeal in *Onward Enterprises* case explicitly departed from its previous decision in *MV Panormos Bay v. Olam Nigeria Plc*.⁷³ Several years later, the Supreme Court had another instance to rule on s 20 of AJA in *JFS Investment Ltd v. Brewal Line Ltd*,⁷⁴ but this time, the court refused the jurisdiction of arbitral tribunal to hear and determine admiralty matters in spite of the presence of arbitration clause inserted in the contract between the parties. The Supreme Court pronouncement here contradicts its

⁶⁷Daibu A.A & Abdulrauf L.A., 'Challenges of Section 20 of the admiralty Jurisdiction Act to International Arbitration Agreement' (2015) 20; Egede F., 'Foreign Maritime Arbitration Clauses: Applicability and enforcement in Nigeria' <http://www.businessdayonline.com/ARCHIVE/index.php?option=com_content&view=article&id=5611

:foreign-maritimearbitration-clauses-applicability-and-enforcement-in-nigeria-&catid=133:legal-indignity&Itemid=557>. accessed on 23 January 2018.

⁶⁸ [2004] 5 NWLR (Pt. 865)1.

⁶⁹ Section 2 makes arbitration agreement between parties irrevocable unless agreed otherwise or by leave of court.

⁷⁰A.A Daibu & L.A Abdulrauf, (n58) 20.

⁷¹ [2003]15 NWLR (Pt. 844)469.

⁷² [2010] 2 NWLR (Pt. 1179) 530,556.

⁷³ [2004] 5NWLR (Pt. 865)1.

⁷⁴ [2010] 18 NWLR (Pt. 1225)SC 495.

earlier verdict in 2004 in the case of *Owners of the MV Lupex v. Nigerian Overseas Chartering and Shipping Ltd.*⁷⁵

The analysis of cases above therefore shows the effect of two conflicting laws in Nigeria relating to arbitration. The courts are not helping the situation from the cases analysed above. There is need for steadiness and consistency in the pronouncements of the Nigerian courts on the issue of arbitrability of the admiralty disputes. It is desirable for the Supreme Court to set out precedents on this issue that the courts below will follow. The court cannot continue to appropriate and at the same time expropriate on the same issue. As it stands currently, each case is to be decided on its own merit.

Theoretically, arbitrability overlaps with public policy grounds as stipulated in the ACA 2004 and, its Second Schedule for resisting an enforcement of awards.⁷⁶ It is imperative to discuss this intersection

4.0 Dangerous Connection between Arbitral and Public Policy

When an application is made under s 51 to enforce the award, the other party may request the court to refuse to recognise and enforce such award.⁷⁷ s 52 of the ACA contains grounds for refusing recognition and enforcement of foreign award in Nigeria. The aggrieved party can bring an application under s 52 on the following grounds⁷⁸: where there is incapacity of the parties⁷⁹, or invalid arbitration agreement⁸⁰, lack of due process⁸¹, on jurisdictional issues⁸²; or where award contains decisions or matters which are beyond the scope of submission to arbitration⁸³, or where the composition of the tribunal or procedure not in accordance with arbitration agreement or relevant law,⁸⁴ or the award is not yet binding or has been set aside or suspended.⁸⁵ The courts can also refuse enforcement if finds the subject matter inarbitrable⁸⁶ or/and where award

⁷⁵ [2003]15 NWLR (Pt. 844)469.

⁷⁶ F. Junita, 'Public Policy Exception in International Commercial Arbitration-Promoting Uniform Model Norms' (2012)5 (1) Contemporary. Asia Arb. J., 45-81, 49.

⁷⁷ C. A Candide-Johnson and O. Shasore, *Commercial Arbitration Law and International Practice in Nigeria* (LexisNexis, US, 2012)99.

⁷⁸ ACA 2004 s 52(2); *Continental Sales Ltd v R Shipping Inc.* [2013] 4 NWLR, 88, para C-F; *Sundersons Ltd. v C.S. PTE Ltd* [2015]17 NWLR (1488), 373, paras C-G.

⁷⁹ ACA 2004, s 52(2)(a)(i).

⁸⁰ *Ibid*, s 52(2)(a)(ii).

⁸¹ *Ibid*, s 52(2)(a)(iii).

⁸² *Ibid*, s 52(2)(a)(iv).

⁸³ *Ibid*, s 52 (2)(a)(v).

⁸⁴ *Ibid*, s 52 (2)(a)(vi) &(vii).

⁸⁵ *Ibid*, s 52(2)(a)(vii).

⁸⁶ *Ibid*, s 52 (2) (b) (i).

is in conflict with public policy of Nigeria.⁸⁷ The first set of the defenses however, which can be raised by the aggrieved party are intended to safeguard the parties against private injustice, and the second set serves as an explicit catchall for the enforcement of a country's own vital interests. These grounds for refusal of enforcement of foreign awards however, are of considerable importance. They represent an internationally accepted standard because they are identical with the grounds in the New York Convention 1958, as contained in the Second Schedule of the ACA.⁸⁸

The concept of arbitrability and Public policy are intertwined. Some scholars observed that the provisions for the concept of arbitrability in the ACA, s 52(2) (b) (i) and Second Schedule, art V (2) (a) may not necessarily required as a separate ground because arbitrability forms essential ingredients of the public policy.⁸⁹ Contrary to this view is that, though arbitrability is the most essential requirements under most States' arbitration laws, they do not certainly reflect essential national policies.⁹⁰

The subject matter arbitrability is relevant particularly at the enforcement stage since an award cannot be enforced unless the nature of the disputes can be resolved through the means of arbitration. Arbitrability issue is determined by reference to the existing arbitration law of the enforcing States however, where it is being invoked at the proceedings before the arbitral panel the preferred arbitration law adopted in the arbitration agreement regulates the issue of subject matter arbitrability.⁹¹ Ordinarily, the concept of arbitrability is habitually detached from public policy and as such, the two are though intertwines but treated distinctly in this paper. Hence, it may be not an easy task to segregate between the arbitrability and public policy exception and other interrelated grounds stipulated in the ACA and in its Second Schedule which are available to the parties to resist the enforcement in Nigeria.

The sphere of public policy is so extensive that it could as well be considered the only relevant ground for resisting an award since the other grounds listed in ACA s 52(1) and (2) (i) and its Second Schedule, arts V (1) and V (2) (a) could be regarded as essential components through

⁸⁷ Ibid, s 52 (2)(b)(ii).

⁸⁸ The first four of these grounds also appear in the European Convention of 1961. A Commentor on that Convention has described these grounds for refusal as grounds 'common to most system of judicial review award at the seat of the arbitration.

⁸⁹ Ibid.

⁹⁰ J.R. Sever, 'The Relaxation of Inarbitrability and Public Policy Checks on U.S and Foreign Arbitration: Arbitration Out of Control?' (1991) 65 Tul. L.Rev, 1661-1691, 1664.

⁹¹ V.Laxic, 'The Impart of Uniform law on National Law: Limits on Possibilities- Commercial Arbitration in Netherlands' (2009) 13 (2) E.J.C.L.I, 1-21. <<http://ejcl.org/132/art132-3.pdf>> accessed on 15 January 2022.

which the public policy exception is created.⁹² It therefore seems not difficult to see why some scholars advocate limiting public policy exception to substantive issues.⁹³ However, as this paper has shown, it is necessary for courts to distinguish these grounds and avert mixing them.

5.0 Conclusion

This paper considered the concept of arbitrability from the relevant provisions in the ACA and its Second Schedule. The paper discovered that to determine whether a dispute is arbitrable or not, recourse must be made to Sections 35 and 57 of the ACA and judicial cases in Nigeria were reviewed. The paper discovered that to determine the question whether a dispute is arbitrable or recourse must be made to Sections 35 and 57 of the Arbitration and Conciliation Act 2004 (ACA) and judicial cases in Nigeria. The paper argued that the narrow interpretation by the Nigerian courts on 'arbitrability' based on these identified provisions of the ACA 2004 which restricts disputes to contractual and commercial disputes only, prevents the enforcement of foreign awards from jurisdictions with liberal interpretation.

⁹²Ibid.

⁹³A.G.Maurere, *Public policy exception under the NEW York Convention, History, Interrelation and Application* (New York: Jurisnet, 2012) 70.