Judicial intervention in arbitral proceedings under Nigeria's arbitration legislation: Supporting or disruptive?

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JUDICIAL INTERVENTION IN ARBITRAL PROCEEDINGS UNDER NIGERIA'S ARBITRATION LEGISLATION: SUPPORTIVE OR DISRUPTIVE?

Abstract

Judicial intervention in arbitration is widely acknowledged by experts as necessary for the effectiveness of the process. This notwithstanding, most jurisdictions limit the extent of intervention so that the object of arbitration which is to obtain the fair resolution of disputes without unnecessary delay, is not defeated. One of such jurisdictions is Nigeria. The Arbitration and Conciliation Act (ACA) 1988 and the Arbitration and Mediation Act (AMA) 2023 control court involvement in arbitral proceedings by restricting intervention to certain stages of the process, perceived as requiring the support of the courts. But in reality, does judicial intervention by the Nigerian courts in arbitral proceedings under these legislation actually support the process? Or does it disrupt it? This article will examine the significance of the well-established arbitral principle of judicial non-intervention as entrenched in Nigerian law and international instruments. It will then assess the role played by the Nigerian courts in arbitration against the backdrop of the instances of court intervention under the ACA 1988 and AMA 2023. Having considered these issues, the article will argue that judicial intervention by the Nigerian courts in arbitral proceedings under Nigerian law is supportive as well as disruptive of arbitration, and then conclude with proposals for entrenching acceptable limits for court intervention in arbitration in Nigeria.

1.1. Introduction

Arbitration as an alternative dispute resolution mechanism is increasingly gaining acceptance in modern commercial environment. Concomitant with the emerging trend is the rising debate within domestic and international arbitration circles on the limits of judicial intervention in arbitral proceedings. This is because, in line with the object of arbitration which is to prevent unnecessary delay and expense in the resolution of disputes,[1] parties who choose arbitration over traditional litigation expect that the process will be completely free from intervention by the courts, and the arbitral award conclusive, final and binding. Unfortunately, this is not often the case because, while the courts can do without arbitration, arbitration cannot always do without the courts.[2] Thus, to protect the independence and integrity of arbitration certain constraints are placed on court involvement in the arbitral process.

[1] Lagos State of Nigeria Arbitration Law, No. 10 of 2009, s 1(a); English Arbitration Act, 1996, s 1(a); Arbitration and Mediation Act 2023, hereinafter referred to as the "AMA 2023", s 1(1).
[2] Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, 2015) 416 para 7.03; see also AMA 2023, s 1(4).

Mainstream international arbitration conventions and most national systems of law restrict court intervention in arbitral proceedings. This is based on the well-established principle of judicial non-intervention (or minimal intervention) which is one of the fundamental principles upon which arbitration is founded. Nigerian law limits judicial intervention in arbitral proceedings. Nigeria recently introduced a new arbitration law, the Arbitration and Mediation Act (AMA) 2023. Prior to this, the Arbitration and Conciliation Act (ACA) of 1988[3] held sway for 35 years. Although, the ACA 1988 is now repealed by the AMA 2023,[4] it remains applicable to pending arbitral proceedings to which it applied before the inception of the AMA 2023.[5] Much of the intervention by the Nigerian courts in arbitral proceedings in recent history has taken place and in some cases, continues to take place pursuant to the ACA 1988. Therefore, the discussion on judicial intervention in this article will focus on the ACA 1988. However, the AMA 2023 replicates the ACA 1988 in parts, and improves upon it in certain respects, therefore, references shall be made to the AMA 2023 as appropriate. Both the ACA 1988 and the AMA 2023 limit intervention, and meticulously delineate the circumstances in which the courts can intervene in arbitral proceedings. But does court intervention in these circumstances actually support the arbitral process or disrupt it? Where exactly is the line between intervention and interference to be drawn?

This article will attempt to address these questions. First, the article will briefly discuss the nature of arbitration as an alternative dispute resolution mechanism. Next, it will attempt to establish a link between the arbitral process and the courts, following which it will look at the legal and institutional framework for the conduct of arbitration in Nigeria. With particular emphasis on the ACA 1988, the article will then examine the various instances of court intervention in the arbitral process against the backdrop of the principle of judicial non-intervention. In so doing, it will consider whether the role of the Nigerian courts in arbitration is actually supportive or disruptive of the process. Having made its deductions, the article will proffer recommendations as appropriate and conclude.

2.1. Nature of Arbitration

Arbitration is a widely recognized procedure for the settlement of disputes in various spheres of commercial activity including, insurance, construction for works, licensing, investment,

[3] Arbitration and Conciliation Act 1988, Cap A18, Laws of the Federation of Nigeria, 2004, hereinafter referred to as the "ACA 1988"; see ACA 1988, s 34.
[4] AMA 2023, s 90.
[5] AMA 2023, s 89

carriage of goods by air, sea and road, amongst others. It is instructive that, despite the significant legal consequences that flow from an arbitration, it is neither defined in the ACA 1988 nor in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (UML) 1985,[6] upon which it is based. The closest the interpretation section of the ACA 1988 comes to a definition of the term is, "arbitration means a commercial arbitration whether or not administered by a permanent arbitral institution".[7] Thus the ACA 1988 does not define the term, but simply limits the scope of its application to commercial arbitrations.[8] This is also the case with the new law, the AMA 2023.[9] Nevertheless, Romilly M.R. in the old English case of *Collins v Collins* defines arbitration as, "…a reference to the decision of one or more persons either with or without umpire of a particular matter in difference between the parties".[10] A fuller description of the concept is that proffered by Halsbury Laws of England.[11] The definition as echoed by Agbaje, JSC in the classic Nigerian case of *Kano State Urban Development Board (KSUDB) v. Fanz Construction Limited*[12] describes an arbitration as, "…the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction." Simply put, arbitration is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.[13]

Arbitration is anchored on four fundamental principles which include, the principle of party autonomy; the principle of arbitrability; the principle of separability; and the principle of judicial non-intervention. Each of these principles are discussed as follows: First, arbitration affords disputants considerable autonomy in the conduct of the arbitral process. The parties are at liberty to determine how the arbitration will be conducted in the sense that they are not only free to choose their arbitrators and the number of arbitrators, but they are free to agree on the laws and the procedure to be applied by the arbitral tribunal in the conduct of the proceedings,[14] amongst other things. Second, arbitrability dictates that the dispute referred to arbitration must

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[6] Hereinafter referred to as the "UML 1985". The UML 1985 was revised in 2006. The ACA 1988 does not incorporate these revisions as it is based on the 1985 Model Law.
[7] ACA 1988, s 57(1); UML 1985, art 2.
[8] ACA 1988, s 57(1).
[9] AMA 2023, s 91(1).
[10] (1858) 26 Beav. 306 at 316.
[11] 4th edn. Vol 2, 256 para 501
[12] [1990] 4NWLR (Pt. 142) 1 at 32 para F.
[13] Bryan A Garner, *Black's Law Dictionary* (9th edn. Thomas Reuters) 119.
[14] UML 1985, art 19(1); however, it must be stated that parties can only determine the procedural rules and applicable laws to the extent that courts can intervene. Therefore, in situations where the courts have powers to intervene, the parties' freedom to contract is circumscribed; see UML 1985, art 5; see also ACA 1988, s 34.

be one that is capable of being resolved by arbitration. Therefore, though party autonomy allows the disputants considerable freedom to contract, they cannot agree to submit a dispute that is not arbitrable to arbitration. Third, separability means that an arbitration agreement which is in the form of a clause inserted in the main contract, is treated in law as a separate and independent contract. So where there is a repudiation or a breach amounting to a termination of the main contract, the arbitration clause survives for the purpose of settling the claims arising out of the breach.[15] Fourth, the principle of judicial non- intervention presupposes that the courts will not intervene with the arbitral process or the outcome in a manner that is inconsistent with the object of arbitration, the expectation of the parties and the law applicable to the arbitration.[16] These distinctive features are profoundly indicative of the nuances that shape the arbitral process.

Arbitration offers a viable alternative to traditional litigation and other consensual alternative dispute resolution (ADR) processes such as negotiation, mediation and conciliation. While arbitral proceedings can be tailored to suit the preferences and conveniences of the parties, court hearings are normally worked into overcrowded court schedules. Whereas arbitral proceedings can be customized to suit the needs of a particular arbitration, court processes work based on 'one size fits all'. Further, arbitration permits privacy and confidentiality and also allows parties the liberty to select persons with the relevant expertise and experience to decide the reference. Again, while the decision of an arbitral tribunal is equal to a judgment of the court and may be enforced as such,[17] the outcomes of the other ADR processes like mediation and conciliation are generally non- binding.[18]

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[15] See *Heyman v Darwin* (1942) AC 356; *Harbour Assurance Company (UK) Ltd v. Kansa General International Insurance Company Ltd* (1993) QB 701; separability means that there is autonomy and independence of the arbitration clause. The principle is entrenched in international arbitration conventions, international and institutional rules of arbitration and the various national arbitration laws; see also UML 1985, art 16(1); UNCITRAL Arbitration Rules 2010, art 23(1); ACA 1988, s 12(2). However, separability is circumscribed where both the main contract and the arbitration clause invalid. For instance, if the subject matter of the underlying contract in respect of which a dispute has arisen is not arbitrable, for instance because a party has alleged that there was no arbitration agreement or induced to sign it, then the main contract as well as the arbitration clause is vitiated. See generally Emilia Onyema, 'The Doctrine of Separability under Nigeria Law' (July –September 2009) 1(1) Apogee Journal of Business, Property and Constitutional Law 65; see also the English case of *Fiona Trust and Holding Corp v. Privalov* [2007] EWCA civ 20.

[16] There is also the closely related principle of *Kompetenz-Kompetenz* which is to the effect that the arbitral tribunal is competent to rule on its own jurisdiction. Therefore, where there is an objection to jurisdiction of the arbitral tribunal, the tribunal has the capacity to rule on its jurisdiction. Essentially, an arbitral tribunal has the power to rule on its own substantive jurisdiction; see ACA 1988, s 12(1); UML 1985, art 16(1). See also *Statoil Nigeria Limited v. Nigerian National Petroleum Corporation* (2013) 14 NWLR (Pt. 1373) 1 and *Nigerian Agip Exploration Limited v Nigerian National Petroleum Corporation* (2014) CA/A/628/2011; [2014]6 CLRN.

[17] *Ras Pal Gazi Construction Company Ltd v. FCDA* [2001] 10 NWLR (Pt. 722) 553.

There are various forms of arbitration, but this article will focus on commercial arbitration. A commercial arbitration may be classified as domestic or international. The ACA 1988 governs both domestic and international commercial arbitration. Where parties, at the time of concluding a commercial contract have their places of business in the same country and the contract is to be performed in that country then any arbitration arising out of that relationship is a domestic commercial arbitration. An international commercial arbitration, on the other hand, is one between persons having their places of business, or carrying on business, in different countries.[19] The AMA 2023 also covers domestic and international commercial arbitration.

3.1. The Relationship between the Arbitral Process and the Courts

Dispute resolution as administered by the courts has always been the traditional method of settling commercial disputes. However, with economic, social, political development and other demands of our ever-evolving world there has been a significant increase in the number of disputes requiring settlement. This has made the process of litigation increasingly protracted, technical and expensive.[20] These challenges impede the expeditious dispensation of justice and so the need to overcome them, means that disputants are increasingly seeking alternative methods of settling disputes when they arise in the course of their business transactions. As earlier noted, arbitration provides a viable alternative because apart from the fact that it allows for speed, flexibility, privacy and confidentiality in the dispute settlement process, it generally culminates in a binding decision.

The choice of arbitration as a dispute resolution mechanism is the choice of a private system of justice and this, in itself, raises questions of public policy.[21] The State may impose constraints upon this freedom through legislation and the courts. Arbitration is a private proceeding with public consequences, so certain types of disputes are kept within the exclusive jurisdiction of the national courts which generally hold hearings in public.[22] This means that some disputes cannot be settled by arbitration. Thus, most countries require that it is only

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[18] However, with the introduction of multi-door court houses, this is gradually changing. This is because once a settlement agreement arising out of these other ADR processes is endorsed by an ADR judge, it becomes enforceable. For example, see s 16(1) of Lagos Multi-Door Courthouse Law 2007.

[19] An arbitration is also classified as international where parties agree that the dispute is to be treated as international; see ACA 1988, s 57(2).

[20] J. Olakunle Orojo and M. Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, (Mbeyi and Associates, 1999) 2.

[21] Blackaby and Partasides (n 2) 415 para 7.02.

[22] Blackaby and Partasides (n 2) 415 para 7.02.

disputes that are, "...capable of settlement by arbitration…" that can be referred to arbitration.[23] For instance, section 251(1) (b) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended)[24] confers exclusive jurisdiction on the Federal High Court to deal with tax disputes so, when the question of arbitrability of tax disputes came up for determination in *Shell Nigeria Exploration and Production & Ors v Federal Inland Revenue Service and Anor,* the Court of Appeal held that such disputes were not arbitrable.[25] Also in *Mekwunye v Lotus Capital Ltd*, it was decided that cases involving allegations of fraud could only be decided by the courts.[26] An award that is based on a dispute that is not arbitrable may be set aside[27] or refused recognition and enforcement by the courts.[28] It must however be stressed that the notion of what is and what is not arbitrable varies from one jurisdiction to another, and may even change over time.[29] While the German Securities Trading Act 1998 partly restricts the resolution of disputes arising thereunder to the national courts,[30] trends in the courts of the United States suggest a gradual movement from non-arbitrability to arbitrability of disputes arising under the US Securities Act 1933.[31] In the case of intellectual property disputes, the law and state practice vary from country to country.[32]

Other constraints placed by the State may relate to the nature or extent of the powers of an arbitral tribunal. For instance, while the ACA 1998 and the AMA 2023 permit arbitral tribunals to appoint experts to provide reports on issues relevant to the proceedings,[33] they do not

[23]Article II (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958, provides that, "each Contracting State shall recognize 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". Also, under article V (2) (a), recognition and enforcement of an award may be refused where the court finds that the subject matter of the dispute is not capable of settlement by arbitration. See the International Bar (IBA) Report on the Concept of Arbitrability, September 2016.

[24] Hereinafter referred to as the "1999 Constitution".

[25] (Unreported) Appeal No CA/A/208/2012, judgment delivered on 31 August 2016; see also *Esso Exploration and Production Nigeria Ltd and Anor v. Nigeria National Petroleum Corporation*, (Unreported) Appeal No CA/A/507/2012, judgment delivered 22 July 2016; see also ACA 1988, s 35(a).

[26] (2018) LPELR-45546(CA).

[27] See ACA 1988, s 48(2) (b) (ii).

[28] See ACA 1988, s 52(2) (b) (ii).

[29] Blackaby and Partasides (n 2) 4.15 para 7.02.

[30] Commercial disputes arising under the German Securities Trading Act 1998 (as amended in 2011) can only be arbitrated where both of the parties are established businesses or companies. This is done to protect vulnerable consumers; see section 37h.

[31] In *Scherk v Alberto-Culver* 417 US 506 (1974), the US Supreme Court held that securities disputes were not arbitrable in international commercial arbitration, however in subsequent cases there have been a turnaround; see *Lipcon v Underwriters* at Lloyd's 148 F.3d 1285 (11th Cir.1998); Blackaby and Partasides (n 2) 116, para 2.138.

[32] Paul O Idornigie and Adebambo Adewopo, 'Arbitrating Intellectual Property Disputes: Issues and Perspectives' (2016) 7(1) The Gravitas Review of Business & Property Law 1.

[33] ACA 1988, s 22(1); UNCITRAL Arbitration Rules 1976, art 27.

empower arbitral tribunals to coercively enforce their orders.[34] Practically speaking, though an arbitration depends on the agreement of the parties, it is still built on the law and depends on that law through the instrumentality of the courts.[35] Therefore, a relationship between the courts and the arbitral process is necessary for the effectiveness of the arbitral process.

The relationship between the two systems has been described as swinging between a forced cohabitation and a true partnership.[36] A forced cohabitation, because in order to preserve and protect the sanctity of the process, arbitration continually seeks to distance itself from judicial parochialism; a true partnership, because an effective arbitral process is dependent on the backing of the courts. In elucidating this point, Lord Mustill states that:

> …on the one hand the concept of arbitration as a consensual process reinforced by the idea of transnationalism leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.[37]

Thus, there is indeed a partnership of some sorts between the two, albeit an uneasy one. However, this partnership cannot be said to be that of equals because while the national courts can exist without arbitration, arbitration cannot exist without the courts.[38] So for the arbitral process to be successful and achieve the desired results, it must be assisted and supported by an effective judicial system which guarantees the rule of law.[39] But while it is acknowledged within domestic and international arbitration circles that arbitration needs the support of the courts for its success, it is necessary to protect and preserve the sanctity of the process by limiting the involvement of the courts, where possible. The reason for this is to ensure that an arbitration does not turn into another protracted court proceeding with all the formalities and red tape associated with it. It must however be stressed that while the courts can set aside or refuse to enforce an award, they cannot inquire into the mode of evaluation of the facts by the arbitral tribunal. They can only disturb the award on technical grounds. This is because the arbitral tribunal is the master of the facts. In any event, a line must be drawn between an

[34] For instance, arbitral tribunals do not have powers to enforce their awards. Enforcement has to be done through the courts under sections 31 and 51 of the ACA 1988.
[35] Blackaby and Partasides (n 2) 416 para 7.03.
[36] Blackaby and Partasides (n 2) 415 para 7.01.
[37] *Coppee Levalin NV v Ken-Ren Fertilisers and Chemicals* [1994] 2 Lloyd's Rep 109 at 116 (HL).
[38] Blackaby and Partasides (n 2) 416 para 7.03.
[39] Dominique Hascher, 'The Courts as Collaborators in the International Dispute Resolution Project' (November, 2015) 81 (4) The International Journal of Arbitration, Mediation and Dispute Management, 443.

intervention to support the arbitral process and an interference which contravenes its object. Accordingly, jurisdictions world over including Nigeria have through the instrumentality of international law and domestic legislation, established boundaries beyond which national courts cannot intervene in the arbitral process.[40] The legislation for the conduct of domestic and international commercial arbitration in Nigeria as well as the essence of the principle of judicial non-intervention as statutorily entrenched in the Nigerian jurisprudence on arbitration will be considered in the succeeding sections.

4.1. The Legal and Institutional Framework for the Conduct of Domestic and International Arbitration in Nigeria

As earlier noted, Nigeria recently introduced the Arbitration and Mediation Act (AMA) 2023 in order to modernise its arbitration law and, "… provide a unified legal framework for the fair and efficient settlement of commercial disputes…"[41] Prior to this, the Arbitration and Conciliation Act (ACA) 1988 governed the conduct of arbitration in Nigeria. Before the inception of the ACA 1988, the Arbitration Ordinance 1914,[42] which was Nigeria's first legislation on arbitration, held sway.[43] The Ordinance applied throughout Nigeria, which was a unitary state at the time. With the division of the country into regions in 1954, the Ordinance became the respective laws of the regions and subsequently that of the various States when it became a Federation. The Ordinance was also applicable to Lagos State as the then Federal Capital Territory. Following the attainment of a republican status in 1963, the Ordinance was designated the Arbitration Act 1914.[44] In 1988, the then military government repealed the Arbitration Act 1914 and promulgated the Arbitration and Conciliation Decree 1988, which was re-designated the Arbitration and Conciliation Act (ACA) 1988 on Nigeria's return to constitutional democracy in 1999.[45] The Arbitration Act 1914, however, remains in the statute books of most of Nigeria's 36 States.[46]

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[40] ACA 1988, s 57(1).
[41] AMA 2023, preamble.
[42] Ordinance No. 16 of 1914.
[43] The Arbitration Ordinance which came into force on the 31st day of December 1914 was based on the English Arbitration Act of 1889.
[44] Cap 13, Laws of the Federation 1958.
[45] See section 315 of the CFRN 1999.
[46]It must be noted that Rivers State and Delta State enacted new arbitration laws in 2019 and 2022 respectively. Lagos State was in fact the first State to enact a new arbitration law. It repealed its Arbitration Law 1914 and enacted the Lagos State Arbitration Law No 10 of 2009; see Adedoyin Rhodes-Vivour, 'Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform', (2006) https://drvlawplace.com/wp-content/uploads/2020/07/ARBITRATION-AND-ADR-AS-INSTUMENTS-FOR-ECONOMIC-REFORM.pdf accessed 10 February 2024; see also Adedoyin Rhodes-Vivour, 'The Federal Arbitration Act and the Lagos State

The ACA 1988 contains provisions applicable to domestic and international commercial arbitrations. Notwithstanding the applicability of the Arbitration Act 1914 to most States in Nigeria, the ACA 1988 has been applied in intra-State commercial arbitration. The ACA 1988 contains three parts and three schedules. Part I of the ACA covers arbitrations generally; Part II deals with conciliation; Part III makes additional provisions in relation to international commercial arbitration and conciliation while Part IV covers miscellaneous matters. The UNCITRAL Arbitration Rules 1976 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 are incorporated in first and second schedules of the ACA, respectively.[47] The UNCITRAL Arbitration Rules 1976 establishes rules for the conduct of *ad hoc* arbitration with the aim of promoting harmonious international economic relations amongst countries with different legal, social and economic systems. The New York Convention on the other hand, simplifies and facilitates the recognition and enforcement of arbitral awards as between contracting states. The primary aim of the Convention is to ensure that foreign and non-domestic arbitral awards are not discriminated against by mandating contracting states to effect the recognition and enforcement of such awards in their jurisdiction in the same way as domestic awards. It is arguably the most universally ratified convention on the recognition and enforcement of arbitration agreements and arbitral awards.[48] The Convention has been ratified by over 160 countries.[49] The UNCITRAL Arbitration Rules 1976 incorporated in the ACA 1998 mandatorily applies in domestic arbitrations,[50] but in international arbitrations, the parties are free to choose these rules or other institutional arbitration rules like the International Chamber of Commerce (ICC) Rules of Arbitration; Stockholm Chamber of Commerce Arbitration Rules and the London Court of International Arbitration (LCIA) Rules, amongst others, to govern the procedure of the arbitration.[51]

Arbitration Law: A Comparison'< https://drvlawplace.com/wp-content/uploads/2020/06/Federal-Lagos-Arbitration.pdf> accessed 10 February 2024.

[47] Hereinafter referred to as the "New York Convention". The Convention was made in New York in 1958. Nigeria acceded to it on 17th March 1970. The Convention imposes serious obligations on contracting states. Non-compliance with these obligations constitutes a breach of the States' undertakings under the treaty. The Convention obliges the courts of signatory states to defer to the arbitral jurisdiction when an action is brought under a contract containing an arbitration clause and to recognize and enforce a foreign award without any review of the arbitrator's decision subject to limited exceptions; see articles II and V of the Convention. The third schedule reproduces the UNCITRAL Conciliation Rules 1980.

[48] Charles C. Correll and Ryan J. Szczepanik, 'No Arbitration is an Island: The Role of Courts in Aid of International Arbitration', (2012) 6 (3) World Arbitration and Mediation Review 565.

[49] 'Contracting States'< https://www.newyorkconvention.org/countries> accessed 10 February 2024.

[50] See ACA 1988, s 15(1).

[51] See ACA 1988, s 53.

Although the ACA 1988 replicates some of the provisions of the Arbitration Act 1914, it is mainly based on the UML 1985 which sets out rules for the conduct of international commercial arbitration.[52] The UML 1985 was established to unify and synchronise trade relationships between different countries. To this end, the United Nations General Assembly, in its Resolution 40/72 of 11th December 1985 recommended, "that all states give due consideration to the Model Law on International Commercial Arbitration in view of the desirability of uniformity of the law of arbitral procedures and the special needs of International Commercial Arbitration practice."[53] Generally, it is perceived within international arbitration circles, that jurisdictions that have adopted the UML 1985 are "investor friendly" because they guarantee a minimum of rights in arbitral proceedings and reduce surprises.[54] It must be stressed that the UML 1985 is not a treaty or convention but a template which may be implemented with necessary amendments to suit the peculiarities of the adopting State.[55] In addition, because it caters only for disputes arising out of international commercial transactions, adopting countries remain free to enact laws for the conduct of domestic arbitration.[56] The UML 1985 was revised in 2006. To date about 90 States have adopted the model, with varying degrees of modifications.[57] The UML 1985 is given expression in Nigeria in the form of the ACA 1988, albeit with minor amendments.

With the introduction of the AMA 2023, the ACA 1988 is now repealed. However, it continues to apply to pending arbitral proceedings to which it applied before the AMA 2023 was introduced.[58] To this extent, it remains relevant. The AMA 2023, on the other hand, is applicable to international commercial arbitration, inter-State commercial arbitration and other commercial arbitration within Nigeria commenced after it (AMA 2023) took effect.[59] It may also apply to intra-State commercial arbitration where parties so choose. The AMA 2023 is

[52] The UNCITRAL Model Law was adopted on the 21st day of June 1985 by the United Nations General Assembly. It aims to provide a framework for the conduct of international commercial arbitration so that where the parties cannot agree on certain procedural issues, the arbitration would still be viable and capable of being completed. The Model Law was revised in 2006.The revision made was with respect to the form of the arbitration agreement and interim measures. These amendments were the subject of due deliberation and extensive consultations with Governments and interested circles. The ACA 1988 does not incorporate these amendments as it is based on the 1985 Model Law.

[53] United Nations General Assembly, Resolution 40/72 of 11 December 1985.

[54] Rhodes-Vivour, 'Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform' (n 46).

[55] Orojo and Ajomo (n 20) 20.

[56] Orojo and Ajomo (n 20) 20.

[57] UNCITRAL, 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006'< https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status > accessed 28 January 2024.

[58] AMA 2023, s 89.

[59] AMA 2023, ss 1(5) and 89.

based on the 2006 revision of the UML 1985(UML 2006). It contains three parts and three schedules. Parts I, II and III cover arbitration, mediation and miscellaneous provisions, respectively. The first schedule contains rules that may apply to arbitration proceedings conducted pursuant to the Act. As with the ACA 1988, the second schedule incorporates the New York Convention. The third schedule contains the Arbitration Proceedings Rules 2020 which are applicable to court proceedings for the determination of arbitration claims (applications) made to the court.[60]

It is important to note that one of the policy objectives of the UNCITRAL in preparing the UML 1985 was to liberalise international arbitration by limiting court intervention in arbitral proceedings.[61] Therefore section 34 ACA 1988, in line with the objectives of the UML 1985 and the dictates of the principle of judicial non-intervention, restricts court involvement in arbitral proceedings. Section 64 AMA 2023 replicates this principle. The Nigerian courts designated to determine, in the first instance, applications emanating from arbitral proceedings are the State High Courts, the High Court of the Federal Capital Territory and the Federal High Court.[62]

4.1.1. The Principle of Judicial Non-Intervention

The principle of judicial non-intervention is a fundamental theme underlying the conduct of domestic and international arbitration. The principle is very important to the success of the arbitral process, especially international arbitration because it guarantees that the process can be conducted without the delays, uncertainties and other challenges associated with unguarded interference by national courts. [63] Therefore, judicial non-intervention presupposes that by choosing to settle disputes through arbitration, the parties have made a conscious decision not to submit to the jurisdiction of the courts,[64] and to this extent the courts should intervene, only where necessary.

Mainstream international arbitration conventions and national arbitration statutes recognize the significance of the application of the principle to arbitral proceedings. Article 5 of the UML 1985 restricts the circumstances in which the courts may intervene in arbitral matters when it

[60] For instance, these rules will apply to court proceedings for the determination of an application to set-aside an award, to stay proceedings, for grant of interim measures of protection amongst other things; see AMA 2023, Third Schedule, art 1.
[61] Orojo and Ajomo (n 20) 19.
[62] ACA 1988, s 57(1); AMA 2023, s 91(1).
[63] Gary Born, 'The Principle of Judicial Non-Interference in International Arbitral Proceedings' (2009) 30(4) University of Pennsylvania Journal of International Law 999.
[64] Paul O Idornigie, Commercial Arbitration Law and Practice in Nigeria (2015 Lawlords Publications) 316.

provides that, *"in matters governed by this Law, no court shall intervene except where so provided in this law."* The Report of the UML 1985[65] provides a useful insight into what the exact intendment of the UNCITRAL is in limiting the instances of curial intervention in arbitral proceedings. It states that:

> Resort to intervention by a court during the arbitral proceedings was often used only as a delaying tactic and was more often a source of abuse of the arbitral proceedings than it was a protection against abuse. The purpose of article 5 was to achieve a certainty as to the maximum extent of judicial non-intervention, including assistance, in international commercial arbitration, by compelling the drafters to list in the Model Law on International Commercial Arbitration all relevant instances of court intervention…[66]

Similarly, the UNCITRAL Analytical Commentary on the Draft Model Law states that the effect of article 5 would be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law.[67] The UML 1985 seeks to prevent the arbitrary application of the inherent jurisdiction and powers of the courts in arbitral proceedings by expressly limiting the instances in which the courts can intervene. This allows for certainty and also assures the participants in the arbitral process of the circumstances in which court involvement may be required. The UML 1985 allows intervention only where an application is brought before it to: stay court proceedings; order interim measures of protection; appoint an arbitrator; challenge the appointment of an arbitrator; to remove an arbitrator for failure or impossibility to act; challenge of jurisdiction order the attendance of a witness; set aside an arbitral award; recognize and enforce an award; refuse to recognize and enforce an award.[68] It must however be noted that the words, "in matters governed by this Law…" have been interpreted to allow room for intervention by the courts in areas not covered by the Model Law. According to Lord Mustill:

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[65] Report of the United Nations Commission on International Trade Law on the work of its eighteenth session 3-21 June 1985, General Assembly Official Records: Fortieth Session Supplement No. 17 (A/40/17) United Nations document A/40/17, para 63 < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/yb_1985e.pdf> accessed 11 February 2024.
[66] ibid.
[67] Analytical Commentary on draft text of a Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law Eighteenth Session Vienna. 3 - 21 June 1985, United Nations document A/CN.9/264, art 5, para 2, p 18 < https://digitallibrary.un.org/record/85728> accessed 11 February 2024.
[68] See UML 1985, arts 8, 9, 11, 13, 14, 16, 27, 34, 35 and 36.

> …the Commission (UNCITRAL) envisaged that in the field of international commercial arbitration wholly distinct regimes of judicial intervention would be in force at the same time. In 'matters governed by this law', the code takes effect , and no relief may be sought in any other circumstances…*But in matters not governed by the law, the courts of the enacting state may continue to offer all such remedies in all such circumstances as are available under existing law.* [69]

In support of this position, the UNCITRAL Secretariat states that article 5 applies only to those matters which are actually regulated by the Model Law. [70] Thus, in matters not regulated by the UML 1985 the courts would be able to intervene as article 5 does not exclude court intervention in those instances. This article disagrees with these views for the following reasons: First, the word "shall" as used in article 5 connotes a duty and a mandate.[71] It is an imperative command to the courts to intervene in arbitral proceedings, *only*, in the circumstances listed in the UML 1985. Second, the general wording of article 5 is clear and unambiguous and does not call for an interpretation other than a literal one. Third, in preparing the UML 1985, one of the policy objectives adopted by the UNCITRAL was to liberalise international commercial arbitration by limiting the role of the national courts. Clearly, the position taken by the UNCITRAL would have an opposite effect by encouraging unrestricted court involvement in arbitral proceedings, thereby contradicting this objective. Fourth, the limits of curial intervention have remained a hot topic within domestic and international arbitration circles for some time now.[72] Therefore, it is thought that if the UNCITRAL actually intended that courts could intervene in matters not covered by the UML 1985, it would have made this clear. Consequently, in the absence of a stipulation to that effect, the courts can only intervene in arbitral proceedings in the specified instances.

These views are reflective of the pro-arbitration stance of the Nigerian courts on the subject. Section 34 of the ACA 1988 which is *impari materia* with article 5 of the UML 1985, limits the scope for court involvement in arbitral proceedings. It provides that, "a court *shall* not intervene in any matter governed by this Act except where so provided in the Act".[73] Section 64(1) of the AMA 2023 also contains a similar provision.[74] Accordingly, in *Abuja*

[69] Lord Mustill 'A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law' (1990) 6 Arb Intl 3.
[70] ibid.
[71] *Statoil Nigeria Limited* (n 16).
[72] Correll and Sczepanik (n 48).
[73] ACA 1988, s 34.
[74] AMA 2023, s 64.

Environmental Protection Board v Mahaj Nigeria Limited,[75] it was held that, "a court cannot delve into matters pertaining to arbitration awards as if it is an appellate court, it can only exercise the powers prescribed under the Arbitration and Conciliation Act." [76] Also, in *Statoil Nigeria Limited v. Nigerian National Petroleum Corporation,*[77] the respondent contended that although section 34 disallowed intervention in areas covered by the ACA 1988, it does not exclude intervention in circumstances where the ACA 1988 is silent. The Court of Appeal held that:

> The provisions of section 34 of the Arbitration and Conciliation Act are mandatory in that the word "shall" is one that does not accommodate a flexible interpretation of the directives being given therein….it is very clear from the intendment of the legislature that the court cannot intervene in arbitral proceedings outside those specifically provided. Where there is no provision for intervention, this should not be done.[78]

The same sentiments were expressed in the Court of Appeal case of *Nigerian Agip Exploration Limited v Nigerian National Petroleum Corporation,*[79] where it was held on appeal from the Federal High Court, that neither the Federal High Court nor any High Court can exercise jurisdiction in arbitral causes and matters, except where so provided for in the ACA 1988 according to the provision of section 34.

The enactment of the ACA 1988 was intended to mark a departure from the traditional close supervision of the courts.[80] Section 15 of the Arbitration Act 1914 permitted general intervention in arbitral proceedings.[81] The courts had wide-ranging powers, which included powers to direct an arbitral tribunal at any stage of the proceedings to state a case for the opinion of the court on any question of law arising in the course of the proceedings. This meant that the courts could intervene at any stage of the proceedings. The provision was prone to abuse as it could be used to delay and frustrate arbitral proceedings.[82] So, to reinforce the principle

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[75] (2021) LPELR-55590(CA).
[76] (2021) LPELR-55590(CA).
[77] *Statoil Nigeria Limited* (n 16).
[78] *Statoil Nigeria Limited* (n 16).
[79] CA/A/628/2011; [2014] 6CLRN; see also *Federal Inland Revenue Service v. Nigerian National Petroleum Corporation* (Unreported) Suit No. FHC/ABJ/CS/774/2011. However, a contrast must be drawn with the recent case of *Shell Petroleum Development Company of Nigeria Limited v Cresta Integrated Natural Resources Limited,* CA/L/331M/2015 (Unreported), judgment delivered on 21 December 2015.
[80] Sara Lembo, 'The 1996 UK Arbitration Act and the UNCITRAL Model Law - A Contemporary Analysis' (PhD Thesis, Universita' Luiss Guido Carli 2010) < https://core.ac.uk/download/pdf/34703553.pdf >accessed 11 February 2024.
[81] See section 15 of the repealed Arbitration Act 1914.
[82] Orojo and Ajomo (n 20) 313.

of party autonomy and reduce the abuse occasioned by frivolous applications by parties for statement of case for the opinion of the courts, amongst other things, it became necessary to enact section 34 of the ACA 1988 which permits intervention by the courts *only* where an application is made to: stay court proceedings; appoint an arbitrator; order interim measures of protection; challenge the appointment of an arbitrator; order the attendance of a witness; revoke an arbitration agreement; set aside an award; remit an award; recognize and enforce an award; refuse to recognize and enforce an award.[83] The AMA 2023 reproduces these specific instances of intervention and creates additional powers of intervention in matters certain areas.[84] Even though the ACA 1988 and the AMA 2023 have dispensed with powers of general intervention, for arbitration to be effective, it is still necessary to involve the courts, hence the specific instances of intervention outlined in both legislation. The various instances of court intervention in arbitral proceedings under Nigerian law shall now be examined against the backdrop of the role of the courts and the support they provide, if any.

5.1. An Examination of the Role of the Courts in Arbitral Proceedings under Nigeria's Arbitration Legislation

The relationship between the courts and the arbitral process has been described as a relay race in which each partner has a different role to play at different times. According to Lord Mustill:

> Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of dispute the baton is in grasp of the court; for at the stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the courts can in case of need lend its coercive powers to the enforcement of the award. [85]

[83] See ACA 1988, ss 4, 5,7,9,23,2,29,30, 31, 32, 48, 51 and 52.
[84] It confers more powers on the courts in matters concerning interim measures of protection. Courts can also intervene in matters relating to arbitrators' fees, appointment of emergency arbitrators and review of the decisions of the novel Award Review Tribunal (ART).
[85] Lord Mustill, 'Comments and Conclusions', in: international Chamber of Commerce (ICC) (ed.) *Conservatory Provisional Measures in International Arbitration: 9th Joint Colloquium* (ICC, 1993) p. 118: in Blackaby and Partasides (n 2) 418 para 7.07.

So in an ideal world, intervention should only occur at two stages - at the start and at the end of arbitration. In reality, however, the position is not very straightforward as the courts may need to get involved where something goes wrong in the course of the arbitration, so that the arbitral process is not derailed.[86] Thus where during proceedings there is need to make third-party orders or subpoena a witness, the courts may get involved. Accordingly, there are actually three stages in which the courts may intervene in arbitration and these include: (1) at the beginning of the arbitral process; (2) during the arbitral process and; (3) at the end of the arbitral process.

5.1.1 Judicial Intervention at the Beginning of the Arbitral Process

At the beginning of an arbitration, the courts may intervene to ensure that the process is not frustrated. Under the ACA 1988 and the AMA 2023, there are two instances in which the courts may intervene at this stage. These include to order a stay of court proceedings where a party initiates court action in the face of an agreement to arbitrate and to appoint arbitrators where the parties cannot agree on an arbitrator. These instances are discussed in further details below.

5.1.1.1 Stay of Court Proceedings

In some cases, a party to an arbitration agreement may choose to initiate court proceedings, rather than arbitral proceedings. In the rare event of acquiescence by the respondent, the arbitration agreement is considered waived and the court proceedings will begin.[87] However, having agreed to arbitrate any disputes which may arise in the course of the business relationship between the parties, the respondent would normally seek to enforce the agreement rather than submit to the jurisdiction of the courts.[88] In this case, the respondent may apply to the courts to stay the court proceedings and enforce the arbitration agreement.

The ACA 1988 empowers the courts to intervene in these circumstances. The stay of proceedings regime under the ACA 1988 is bifurcated in the sense that an application may be

[86] ibid.
[87] In *Carlen (Nigeria) Ltd. v. University of Jos* (1994) 1 NWLR (Pt. 323) 631 S.C, it was held that where a defendant fails to raise the issue of arbitration clause and rely on same at the early stage of the proceeding but rather takes positive steps in the action he would be deemed to have waived his right under the arbitration clause; Blackaby and Partasides (n 2) 419 para 7.10.
[88] Blackaby and Partasides (n 2) 419 para 7.10.

made under section 4(1)[89] or section 5(1).[90] For the courts to grant an application for stay made under section 4(1), the respondent must make their application no later than when submitting their first statement on the substance of the dispute. [91] Under, section 4(2), the arbitral proceedings for which a stay is sought may commence or continue while the stay application to the court is pending. For section 5 (1), such application would only be granted where the applicant makes it after appearance and before delivering any pleading or taking steps in the proceedings. [92] The slightest step is enough to preclude the application. In *NPMC Ltd v. Compagne Noga I & I.SS,*[93] it was held that a request for 30 days within which to file statement of defence constituted a step in the proceedings. However, for section 4, taking of mere formal steps will not deprive an applicant of the right to a stay. It is mandatory for the court to stay proceedings and refer parties to arbitration where an application is brought under section 4(1), as opposed to the courts discretionary powers under section 5(1).

It is not clear why there were two distinct regimes under the ACA 1988 providing for virtually the same relief. This may be the result of an oversight on the part of the drafts person. Section 4(1) partly reflects the provisions of article 8(1) UML 1985 which sets rules for international commercial arbitration,[94] while section 5(1) ACA 1988 is a replica of section 5 of the Arbitration Act of 1914 which was designed to oversee domestic arbitration.[95] It has been submitted that there is a conflict between the two sections which are both contained in Part I of the ACA 1988 and as earlier noted, Part I deals with arbitrations generally. According to Orojo and Ajomo, being a reflection of section 8(1) of the UML, section 4(1) should ideally, have been contained in Part III of the Act which deals with international arbitration. To buttress this argument, they state that, "…it is understandable that in international arbitration, stay of proceedings should be relatively mandatory, since it is highly desirable that parties should be made to keep their agreement to arbitrate rather than go to a domestic court for resolution of

[89] Section 4 (1) of the ACA 1988 provides that, "…a court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration…".
[90] Section 5(1) of the ACA 1988 reads thus, "… 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."
[91] ACA 1988, section 4(1); See also *Kano State Urban Development Board v Fanz Construction Co. Ltd* [1990] 4 NWLR (Pt.142) 1.
[92] ibid.
[93] (1977) 1 NMLR 223.
[94] See article 8 of the UML 1985.
[95] See section 5 of the Arbitration Act 1914.

their dispute…".[96] While this article agrees that it is only logical that section 4(1) should have been contained in Part III for clarity, expediency and certainty in international arbitration, it submits that a party to an international arbitration who seeks a stay of court proceedings is not precluded from proceeding under section 4(1) just because it is in Part I. This is because Part I covers both domestic and international arbitration. The party could also rely on article II(3) of the New York Convention to make the application. As already mentioned, Nigeria fully implements the New York Convention. To this extent, where Nigeria is the seat of arbitration or Nigerian law is chosen as the proper and substantive law of the arbitration agreement, the respondent could invoke article II(3) to stop court proceedings initiated in disregard of an agreement to arbitrate. The courts of jurisdictions implementing the New York Convention are obliged to grant a stay in such circumstances unless they find that the arbitration agreement is null and void, inoperative or incapable of being performed.[97] In any case, it must be noted that the confusion created by this bifurcation has now been cleared by the AMA 2023 which incorporates section 4(1)(2) ACA 1988 with some minor modifications, but omits section 5 altogether.[98]

Despite the issues raised, the role of the courts in this area is undoubtedly critical to arbitration because they prevent a party who seeks to frustrate the process from doing so. The efficacy and success of the arbitral process is said to be, "…dependent on the underlying support of the courts which alone have the power to rescue the system when one party seeks to sabotage it…"[99] In *Sino-Afric Agricultural & Ind. Co. Ltd v. Ministry of Finance Incorporated*,[100] where the claimant began court proceedings instead of complying with an arbitration agreement, the Court of Appeal held that the defendant had a remedy, which was a stay of proceedings pending determination of arbitration. Thus, by granting stays in deserving cases, the courts encourage arbitration to thrive as an alternative dispute resolution mechanism.

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[96] Orojo and Ajomo (n 20).

[97] Article II (3) 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" (emphasis added). It must be noted that sections 4(1) and 5(1) ACA 1988 do not contain the underlined proviso. So does it mean that where an application for stay is made in a domestic arbitration, the courts would grant it even where the arbitration agreement is null and void? While the provisions of section 4(1) are somewhat restrictive, section 5(2) (a) provides that the court should grant a stay if it is satisfied that there are "sufficient grounds" for the relief to be granted. It is thought that in such circumstances the applicant should proceed under that section.

[98] AMA 2023, s 5(1)(2).

[99] Blackaby and Partasides (n 2) 415 para 7.01.

[100] (2014) 10 NWLR (PT 1416) 515.

5.1.1.2. Appointment of Arbitrators

Parties to an arbitration agreement are free to choose a procedure for the appointment of arbitrators.[101] They may also choose the arbitrator(s) and the number of arbitrator(s) to be appointed.[102] The procedure for the appointment of arbitrators may be expressed in the arbitration agreement or in the rules of an arbitral institution adopted by the parties. The ACA 1988 provides the procedure for the appointment of arbitrators. Where parties fail to specify a procedure, the default procedure under the ACA 1988 will apply. In domestic arbitration under section 7(2) (b) ACA 1988, where the parties choose a one-man tribunal, they must agree on an arbitrator who is acceptable to both of them. If they fail to agree on an arbitrator, either of them can apply to the court to appoint an arbitrator.[103] In the case of a three-tier panel, each party is required to appoint one arbitrator and the two arbitrators chosen are then required to appoint the third arbitrator in accordance with section 7(2)(a). The third arbitrator would normally be the chairman or presiding arbitrator. If the two appointed arbitrators cannot agree on a third arbitrator, the court on application of one of the parties, would make the appointment.[104] The appointment by the court is regarded as if it was done by agreement of the parties and so, the arbitration would usually proceed in the usual manner. An appointment made in these circumstances is not subject to appeal.[105] In international arbitration, the same rules apply except that the appointment is made by the "appointing authority".[106] The AMA 2023 contains similar provisions, except that aside the courts and appointing authorities, appointments may also be made by an arbitral institution in Nigeria.[107] Further, unlike the ACA

[101] ACA 1988, s 7(1).
[102] Under section 6 ACA 1988, where the parties have failed to make this decision, the number of arbitrators shall be presumed to be three. In contrast, under the section 15(3) of the English Arbitration Act 1996 the presumption is in favour of a sole arbitrator, unless the parties agree otherwise. Odd numbers are preferable in order to ensure majority decisions and that there are no ties. But where the parties choose only two arbitrators, an additional arbitrator will be appointed if there is a deadlock.
[103] The application for appointment must be made within 30 days of the disagreement on the choice of an arbitrator.
[104] ACA 1988, s 7(2).
[105] ACA 1988, s 7(4); however, the court in *Nigerian Agip Oil Company Ltd v. Kemmer & Ors* (2001) 8 NWLR (Pt.716) 506 held that section 7(4) cannot override the right of appeal conferred by section 241 of the 1999 Constitution.
[106] The term appointing authority is not defined by the Act, however section 54 which in Part III of the ACA 1988 and which has nothing to do with appointment of arbitrators which is in Part I, defines appointing authority to mean the Secretary-General of the Permanent Court of Arbitration at the Hague. This creates confusion and has been criticised as such because an understanding of the role of an "appointing authority" would show that it cannot mean the Secretary-General of the Permanent Court of Arbitration. Appointing authorities are usually specialist professional institutions or trade associations or specialist arbitration bodies or persons. Under the article 6 and 7 of the UNCITRAL Arbitral Rules 1976, it is provided that appointment should only be made by the Secretary-General where the appointing authority designated by the parties to perform this function fails to do so. It has been submitted that this is a better approach to handling nominations; see Idornigie (n 64) 197 - 198; see generally section 44 ACA 1988 and articles 6 and 7 of the UNCITRAL Arbitration Rules 1976.
[107] AMA 2023, s 7(3) and (4).

1988, it provides for emergency arbitrators to be appointed by an arbitral institution designated by the parties or the courts on application of a party that requires emergency relief.[108] The arbitral institution or the courts are also empowered to decide any challenge against such appointment. [109]

The courts clearly impact the arbitral process in a positive way by supporting its proper commencement and continuance where a disagreement between the parties threatens to undermine it. In *Bendex Engineering v. Efficient Petroleum Nigeria Ltd*,[110] one of the issues for determination on appeal to the Court of Appeal was whether the High Court could appoint arbitrators. It was held that the High Court had the jurisdiction under sections 7 and 57(1) ACA 1988 to appoint arbitrators where the agreement between the parties contained no comprehensible appointment procedure and where one of the parties failed to appoint an arbitrator despite being put on notice by the other party to do so. In performing this function, however, the court must always be mindful of the fact that success of the process would really depend on the selection of an arbitrator whom both parties can agree is a good compromise which they can trust and respect.[111] Hence, in making the appointment, the court has to be mindful of any required qualifications and other considerations that would secure the appointment of an independent and impartial arbitrator.[112]

5.1.2 Judicial Intervention during the Arbitral Process

The courts may also intervene during arbitral proceedings in a number of instances. Under the ACA 1988 and the AMA 2023, such intervention may concern hearing an application for an order of interim measure to protect and preserve property or for the challenge of the suitability of an arbitrator. It may also concern a request to compel attendance of witnesses before an arbitral tribunal. Further, the courts may intervene to revoke an existing arbitration agreement. Additionally, the AMA 2023 empowers the courts to recognise and enforce interim measures of protection or refuse to recognise and enforce same. These instances are discussed further in the succeeding sub-sections.

5.1.2.1 Interim Measures of Protection

[108] AMA 2023, s 16.
[109] AMA 2023, s 17 (2).
[110] (2001) 8 NWLR (Pt. 715) 333; see *Magbagbeola v. Sanni* (2002) 4 NWLR (Pt. 756) 193.
[111] Lembo (n 80).
[112] AMA 2023, s 7(5) (b).

In the course of an arbitration, there may be a need to ensure that the subject matter of the dispute does not waste away or depreciate to the detriment of the either party.[113] Thus, it may be necessary for the arbitral tribunal to take measures to preserve evidence, to protect assets, or to maintain the status quo pending the outcome of the arbitral proceedings.[114] Such measures are usually referred to as interim measures of protection,[115] and are usually meant to act as holding orders until a final decision is made by the tribunal.[116] Such orders may be necessary because if the tribunal has to wait until an award is made to resolve any issues pertaining to the subject matter of the dispute, it may result in hardship to either of the parties. [117] For instance, such measure may be applied to effect the sale of perishable goods. It may also be used to conserve the evidential value of property.[118] An interim measure may come in the form of an: interlocutory injunction to protect property; order to appoint a receiver to protect property; order for detention, custody and preservation of property, amongst other things. Under section 13(1) ACA 1988 arbitral tribunals are empowered to order interim measures of protection. They may direct either of the parties to safeguard the property in dispute until the proceedings are concluded.[119] As with the ACA 1988, section 20(1) AMA 2023 empowers arbitral tribunals to grant interim measures of protection. However, unlike the ACA 1988, such interim measures are binding, and can be recognised and enforced by the courts upon an application to do so.[120] They courts may also refuse to recognise and enforce such interim measures.[121] Another notable introduction by the AMA 2023, is the power conferred on arbitral tribunals in section 22(1) to grant *ex parte* applications, albeit on a limited basis. This power is reflective of article 17(B) UML 2006. This is a welcome development because while the ACA 1988 confers powers on arbitrators to take interim measures of protection against parties to the proceedings, they cannot grant *ex parte* orders which may be necessary where it is likely that the opposing

[113] Orojo and Ajomo (n 20) 179.
[114] Blackaby and Partasides (n 2) 421 para 7.14.
[115] They are also known as "interim or conservatory measures" or "provisional or conservatory measures". No matter what name they are called, they are intended to operate as holding orders, pending the outcome of arbitral proceedings.
[116] Blackaby and Partasides (n 2) 421 para 7.15.
[117] Orojo and Ajomo (n 20) 179.
[118] ibid.
[119] ACA 1988, s 13; see also section 44 of the English Arbitration Act 1996; see also *Cetelem SA v Roust Holding Ltd* [2005] EWCA Civ 618, were the English Court of Appeal, pending arbitration granted a freezing order to prevent a respondent from disposing or dealing with shares to protect a disputed right to purchase under a share purchase agreement.
[120] AMA 2023, s 28(1).
[121] AMA 2023, s 29 (1).

party may seek to hide relevant assets. Such order may also be useful where it is necessary to freeze the bank account of a party in order prevent the transfer of funds abroad.

The powers of the arbitral tribunal under section 13(1) ACA 1988 and the section 20(1) AMA 2023 do not extend to instances where the property for which protection is sought is in the custody or control of a third party. In fact, the wording of section 20(2) AMA 2023 suggests a preclusion of third-party orders.[122] For instance, an order directed at a bank to reveal information about an account it holds for a party would not be enforceable against the bank.[123] This is because the powers of arbitral tribunal are largely limited to the parties to the reference.[124] In litigation, however, orders of preservation or protection may be directed at third parties because Nigerian courts are inherently empowered to grant such orders against parties and non-parties within its jurisdiction. So, by virtue of article 26(3) of the UNCITRAL Arbitration Rules 1976 and article 26(9) AMA 2023 Arbitration Rules, the courts would entertain requests for third party orders where they are sought in the context of arbitration. The articles state that, "…a request for interim measures addressed by any party to the court shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement…"[125] It is also important to note the commendable novel provision in section 19 AMA 2023 which, following from the UML 2006, expressly and unambiguously empowers the courts to issue interim measures of protection in relation to arbitrations seated within and outside Nigeria.[126] Based on these provisions, an application could generally be made to the court for interim measures to be taken, irrespective of whether they are directed at a party or a third party. The courts are required to decide such application within 15 days.[127]

Clearly, the ACA 1988 confers very limited powers on arbitral tribunals on matters concerning the interim measures of protection. Although, the AMA 2023 makes some commendable improvements, the support and assistance of the Nigerian courts in this area is still necessary to ensure that the prevailing party does not get a hollow award. As mentioned above, arbitral tribunals cannot grant third-party orders for the simple reason that their powers are restricted to the parties, so such orders would have to be granted by the courts. Also, the arbitral tribunal cannot order interim measures of protection until the tribunal is duly constituted. So where critical evidence may disappear or the subject matter of the dispute is at risk of dissipation and

[122] See also UML 2006, art 17(2).
[123] Blackaby and Partasides (n 2) 422 para 7.18.
[124] ibid.
[125] UNCITRAL Arbitration Rules 1976, art 26(3) and AMA Arbitration Rules, art 26(9).
[126] AMA 2023, s 19.
[127] AMA 2023, s 19.

cannot wait until the tribunal is established for it to grant interim measures, the court may be required to handle such an emergency.[128] Therefore, court intervention in this area remains necessary.

5.1.2.2 Challenging the Suitability of an Arbitrator

An arbitrator may be challenged on the grounds that he does not meet the requirements of independence and impartiality and of appropriate qualification.[129] Under section 8(3) ACA 1988, a challenge to jurisdiction of the arbitrator may be raised where circumstances exist that gave rise to justifiable doubts as to their impartiality or independence or where the arbitrator lacks the qualifications agreed by the parties.[130] Similar rules applies with regards to international arbitration under section 45(3). Where a challenge is raised on these grounds, the aggrieved party may activate the challenge procedure under the arbitration agreement. In the absence of an agreed challenge procedure, the arbitral tribunal may decide on the challenge under section 9. It must be noted that there is an apparent conflict with article 12 of the UNCITRAL Arbitration Rules 1976 which provides that such a decision could be made by the court or the appointing authority. However, the conflict is resolved by article 1 of the UNCITRAL Arbitration Rules 1976 which provides that in the event of a conflict between the ACA 1988 and the UNCITRAL Arbitration Rules 1976, the ACA 1988 will prevail. Regardless, it would appear that in these circumstances, parties would submit such challenge to the jurisdiction of the courts for a decision. It is thought that court involvement is a more transparent method of dealing with such issues, particularly allegations of bias. Intervention by the courts at this stage would ensure that any avenues for challenge of the award at the end of the arbitration are blocked well in advance. Accordingly, the AMA 2023 permits the challenging party to request the court to decide the challenge where a challenge to the arbitral tribunal is unsuccessful.[131]

5.1.2.3 Taking Evidence

There may be situations where the arbitral tribunal may need to compel the attendance of a witness before it. In such cases, the assistance of the courts would be required because arbitral tribunals generally lack powers to compel the attendance of third parties especially where they

[128] Blackaby and Partasides (n 2) 422 para 7.17.
[129] Orojo and Ajomo (n 20) 135.
[130] ACA 1988, s 8(3).
[131] AMA 2023, s 9(3).

cannot be convinced to appear voluntarily.[132] Under section 23(1) ACA 1988, the court may issue a *subpoena ad testificandum* to secure the attendance of a witness in arbitral proceedings to testify or a *subpoena duces tecum* to produce documents. The powers of the courts extend to compulsion of incarcerated potential witnesses.[133] In the exercise of these powers, the courts will apply the same rules that apply to service or execution of a subpoena outside a state of the Federation as applicable in civil proceeding in the High Court.[134] These provisions are reproduced in section 43 AMA 2023.

Because the courts can only exercise jurisdiction over persons within its jurisdiction, it is thought that section 23 ACA 1988 and section 43 AMA 2023 will not apply where the person whose attendance is sought resides outside Nigeria. In jurisdictions such as the United Kingdom the position is clearer. Section 43(3) of the English Arbitration Act (EAA) 1996 expressly provides that an application to compel attendance may only be made to the courts where the witness whose attendance is sought is in the United Kingdom. So, in international arbitrations, this may prove to be very tricky because potential witnesses are likely to reside outside the jurisdiction of the court. In any event, the role of the courts in assisting tribunals to take evidence is crucial to ensuring that justice is done between the parties.

5.1.2.4. Revocation of the Arbitration Agreement

A party, who for a good reason, seeks the revocation of an arbitration agreement may apply to the courts for this purpose.[135] Section 2 ACA 1988 provides that, "unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the court or a judge". Thus, where a revocation is sought and the arbitration agreement is silent as to the modalities for its revocation, the party who seeks this relief may apply to the court for leave to revoke the agreement if the other party refuses to give their consent. The ACA 1988 does not specify the circumstances in which the court would grant leave, however, in accordance with the general rules of the law of contract, it is has been argued that a situation that amounts to a repudiatory breach, such as a supervening issue of

[132] Blackaby and Partasides (n 2) 432 para 7.32; see also UML 1985, art 27.
[133] ACA 1988, s 23(2); under section 23(3) where the service or execution of a *subpoena* is sought to be effected outside a state of the Federation, the rules of service as are applicable in civil proceedings shall also apply here. For the Federal High Court, leave for service outside jurisdiction is not required because its jurisdiction extends throughout Nigeria as a whole. However, if it is a State High Court or High Court of the FCT, leave to serve outside jurisdiction will be needed.
[134] ACA 1988, s 23(3). The order of subpoena is not granted as a general rule, thus the party who seeks such assistance must show that the evidence is relevant; see Orojo and Ajomo (n 20) 124.
[135] Orojo and Ajomo (n 20) 321.

law which renders continuation of the performance of the arbitration agreement illegal or a supervening impossibility which sabotages the attainment of the objects of the arbitration agreement, would suffice. In the English case of *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation*,[136] the claimant delayed the prosecution of the claim to such an extent that a fair hearing of the matter became unattainable. The question for determination was whether the court or arbitral tribunal could terminate the arbitral proceedings for want of prosecution just as the courts do in litigation. Although the House of Lords held that neither the courts nor the tribunal had the powers to do so, it has been submitted with regards to the ACA, that since section 2 empowered the courts to revoke an arbitration agreement on the application of a party, then the courts should be able to exercise such power where there is a repudiatory breach sabotaging the objects of the arbitration agreement, such as in *Bremer Vulkan's* case.[137]

The AMA 2023 contains a provision that is somewhat like section 2 ACA 1988. Section 3 AMA 2023 provides that, "subject to section 5(1), and unless the parties agree otherwise, an arbitration agreement is irrevocable." Although, section 3 AMA 2023 does not expressly empower courts to revoke arbitration agreement as with section 2 ACA 1988, its short title reads "Arbitration agreement irrevocable except by agreement or leave of court". Also, the fact that section 3 AMA 2023 applies subject to section 5 AMA 2023 which empowers courts to stay proceedings, "unless it [court] finds that the agreement is void, inoperative or incapable of being performed,"[138] indicates that the draftsman intended the courts to play a role in the revocation of arbitration agreements where a party refuses to consent to revocation of the agreement.

5.1.3 Judicial Intervention after the Arbitral Process

The role of the courts in arbitration extends beyond the end of the arbitral process. On the conclusion of arbitral proceedings, and the rendition of an award, the ACA 1988 and the ACA

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[136] 1981 A.C.909.

[137] Orojo and Ajomo (n 20) 1322; however, at the Court of Appeal stage of the Bremer Vulkan's case, it was held that the claimants in an arbitration had an obligation not to delay the prosecution of their claim to extent that the purpose of the arbitration becomes frustrated. And as the claimants had done so, the respondent had the right to treat the claimants' conduct as a repudiation of the arbitration agreement and having elected to rescind it, the court would dismiss the claim. In reversing the Court of Appeal judgement, the House of Lords, per Lord Fraser of Tullybelton and Lord Scarman, reasoned that, "…since the parties were equally under an obligation to keep the procedure moving, both were under an obligation to apply to the arbitrator to prevent inordinate delay and, since the plaintiffs [respondents] had made no such application, they were not entitled to rely on the defendants'[claimants] breach as giving them the right to treat the agreement as at an end…".

[138] AMA 2023, s 5(1).

2023 permit the courts to intervene: to set aside the award; to remit the award for reconsideration by arbitral tribunal; to recognise and enforce the award or to refuse to recognise and enforce the award. Under the AMA 2023, the courts may also intervene where there is a disagreement between the arbitral tribunal and the parties about the arbitration expenses and fees. These instances of intervention are discussed further below.

5.1.3.1 Arbitrators' Fees

The parties to an arbitration are jointly and severally liable for the reasonable fees and expenses of the arbitrator.[139] Under section 54 AMA 2023, where there is a disagreement about the fees and expenses that are due to the arbitral tribunal and it has refused to deliver the award as a result, the courts may intervene to resolve the issue upon the application of a party.[140] Amongst other things, the courts may order that the arbitral tribunal shall deliver the award where the party pays the fees, or a lesser amount specified by the court, into the court.[141] Court intervention in this case may only be sought where, "…every available arbitral process for appeal or review of the amount of the fees or expenses demanded has been exhausted."[142] The ACA 1988 neither provides for exercise of lien on awards nor for court intervention in these circumstances. Although section 54 AMA 2023, somewhat, expands the instances of court intervention, it is laudable because a statutory right of lien which is backed by the courts reinforces arbitrators' entitlement to payment for work done. Besides, the mechanism obviates the need for arbitrators to bring separate court action for outstanding fees. Also, as the courts have the power to determine, "… the amount of fees and expenses properly payable",[143] this innovation ensures that parties are not charged unreasonably and incommensurately. On the whole, the mechanism will ensure that arbitration as an alternative dispute resolution mechanism is preserved and strengthened.

5.1.3.2 Setting Aside Awards

An award is the final decision by an arbitrator on matters submitted to him in a particular reference. It is final and binding on the parties once it is rendered[144] except a request is made

[139] AMA 2023, s 53(1).
[140] AMA 2023, s 54(2).
[141] AMA 2023, s 54(2)(a); see also AMA 2023, ss 54(2)(b) and (c).
[142] AMA 2023, s 54(4).
[143] AMA 2023, s 54(2)(b).
[144] UNCITRAL Arbitration Rules, art 34(2); *United Nigeria Insurance Co. Ltd v Stocco* (1973) NCLR 231; *Attah v Amoah* (1930) 1 WACA 16.

for a correction[145] or an additional award.[146] The principle that underpins the doctrine of finality of an award is that the parties have selected "judges" whom they trust will act impartially and independently conduct the arbitration with fairness and regularity.[147] It is implied in an arbitration agreement that having chosen the arbitral tribunal themselves, the parties will accept the decision of the tribunal as fair and just. In some cases, however, a party may feel aggrieved by the decision and so, may seek some form of recourse against the award.[148] There is no right of appeal against an award under Nigerian law as is the case under the EAA.[149] However, this does not mean that a dissatisfied party is left without a remedy in deserving cases. Under the ACA 1988, a party who is dissatisfied with the award of the arbitral tribunal may apply to the court to set aside the award under sections 29(1) or 30(1) ACA 1988 in domestic arbitration or section 48 in international arbitration. The grounds upon which the application may be made are either jurisdictional or procedural or both.

Sections 29(1) and 30(1) provide for challenge on purely procedural grounds. Under section 29(1), the court may set aside the award on the grounds that it deals with matters outside the scope of the arbitration.[150] But where the award includes matters within as well as outside the scope of the arbitration and these matters are not so intertwined that they cannot be differentiated, then the court may save those within the scope of the arbitration.[151] Under section 30(1), an award may also be set aside on either of two additional grounds. The first of these grounds is where misconduct is shown on the part of the arbitrator. The ACA 1988 does not specify what actions may amount to misconduct, however the Supreme Court in *Taylor Woodrow (Nig) Ltd v SE GMBH Ltd*,[152] cites examples of acts which may constitute misconduct some of which include, exceeding of authority by the arbitrator and failure to act

[145] Where there is an error in computation or any clerical or typographical error or other error of a similar nature, the arbitral tribunal is empowered under various institutional codes and national laws to effect corrections as necessary; see UML 1985, arts 33(1) and (2); AMA 2023, s 49(1).
[146] In some cases, an arbitrator may need to make an additional award after the final award has been made. This is usual where the arbitral tribunal renders an award which does not cover all the claims referred to it. Hence some institutional arbitration rules and domestic laws empower the arbitrator to grant an additional award in such circumstances. Such award must fulfil the requirements as to form and content in order to be enforceable. See UNCITRAL Arbitration Rules, art 39; LCIA Arbitration Rules, art 27(3); UML1985, art 33(3); AMA 2023, s 49(4).
[147] Orojo (n 20) 269.
[148] Orojo (n 20) 267.
[149] Section 69 of the English Arbitration Act 1996 allows for limited right of appeal.
[150] ACA 1988, section 29(2); see also *Paris Lapeyre v Sauvage* [2001] Rev Arb 806, where the Paris Court of Appeal found that a tribunal exceeded its mission by awarding a party damages in an amount that significantly exceeded the damages claimed. See also Blackaby and Partasides (n 2) 584.
[151] ACA 1988, s 29(3).
[152] (1993) 4NWLR (Pt. 144) 386; see also *Savoia Ltd. v. Sonubi* (2000) 12 NWLR (Pt.682) 539.

fairly. In *Mutual Life & General Insurance Ltd v. Kodi Iheme*,[153] it was held that an arbitrator who wrongfully admitted and acted on evidence which went to the root of the question submitted to him, was guilty of legal misconduct and his award would be set aside. Second, if it was proven that the proceedings or the ensuing award was improperly procured, the award could be set aside. Improper procurement may result from an inappropriate relationship between the arbitrator and a party or the party's counsel or representative which involves giving and taking of bribe. Where any of these grounds are made out, the courts will set-aside the award. In *Arbico (Nig) Ltd v. Nigerian Machine Tools Limited*,[154] the Court of Appeal affirmed the decision of the High Court and refused to set aside an award when the appellant failed to make out any of the grounds under section 29 and 30.

The grounds for set-aside in international arbitration conducted pursuant to the ACA 1988 are more extensive and are contained in section 48 which is *impari materia* with article 34 of the UML 1985. The section which is a mix of both jurisdictional and procedural grounds, lists nine instances in which a set aside application could be granted some of which include: that the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or he was otherwise unable to present his case or;[155] that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties,[156] amongst other things.[157] Also, the court may of its own volition set aside an award where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, or that the award is against public policy of Nigeria. It must be noted that the ACA 1988 does not provide for challenge on substantive grounds.

Unlike the ACA 1988, the AMA 2023 deals with the question of the courts' power to set aside an arbitral award in just one section. Section 55(1) of the AMA 2023 provides that, "recourse to a court against an arbitral award may be made only by an application for setting aside…" The grounds for such application are listed in section 55(3) and are precisely the same as the

[153] (2013) All FWLR 336.
[154] (2002) 15 NWLR (Pt. 789) 7.
[155] ACA 1988, s 48(a) (iii).
[156] ACA 1988, s 48(a) (vi).
[157]The other grounds under section 48,upon which a party may apply for a set aside include that a party to the arbitration agreement was under some incapacity; 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; that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or; that 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 submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

jurisdictional and procedural grounds listed in section 48 of the ACA 1988.[158] As with the ACA 1988, there is no provision for challenge on substantive grounds. However, unlike the ACA 1988, in addition to proving the existence of one or more of the grounds for set-aside, the applicant is also required to show that they have suffered or will suffer injustice as a result of the existence these ground(s),[159] the import being that it may be more difficult to have an award set-aside. It has been argued that this will limit court intervention and promote finality of awards.[160] This article agrees because parties may be discouraged from filing set-aside applications, unless of course the courts take a liberal approach to determining what actions or omissions constitute "substantial injustice". Generally, the application for set aside is made by originating summons, accompanied by an affidavit stating the grounds for challenging the award.[161] It must be made to the court within three months of date of the award.[162] Failure to comply with the stipulated time frame renders the action time-barred. [163] Where an award, or part of it is set aside, the effect is that it divests the award or part of it of any legal effect and so, renders it unenforceable.[164] The arbitrator is also disseized of the reference, the import being that the whole of the arbitral process must be recommenced. [165]

It is pertinent to note that the AMA 2023 introduces the Award Review Tribunal (ART) which has powers to set-aside or uphold an award rendered by an arbitral tribunal. Parties may, in their arbitration agreement, agree to the review of the award by an ART on any of the set-aside grounds listed in section 55(3). [166] The ART is to be composed of arbitrators who shall render their decision (award) within 60 days of the date the constitution of the tribunal.[167] A party that is dissatisfied with the decision of the ART may apply to the court to review it.[168] This is akin to the current mechanism for setting aside or annulment of awards under the ICSID

[158] AMA 2023, s 55(3).
[159] AMA 2023, s 55(5).
[160] Elizabeth Oger-Gross and Tolu Obamuroh, 'New Arbitration Regime Comes into Force in Nigeria' (21 June 2023)<https://www.whitecase.com/insight-alert/new-arbitration-regime-comes-force-nigeria> accessed 29 January 2024.
[161] Idornigie (n 64) 293.
[162] AMA 2023, s 55 (4).
[163] *Araka v Ejeagwu* (2000) 15NWLR (Pt. 692) 684.
[164] Idornigie (n 64) 13.
[165] It is important to note that it is not in all cases that an arbitration may be recommenced where an award has been set aside. If a set-aside is granted on grounds which fundamentally impacts the validity of the arbitration agreement such that the agreement is adjudged null and void, the arbitration cannot be recommenced because an arbitration cannot arise out of an invalid arbitration agreement. However, if the annulment is as a result of a procedural defect, for instance, failure to allow a party present his case then the arbitration agreement remains valid and can be resubmitted for arbitration. The court in this case may order that a new arbitral tribunal be constituted to conduct proceedings afresh; see Orojo and Ajomo (n 20) 290.
[166] AMA 2023, s 56(1).
[167] AMA 2023, ss 56(4) (a) and 56(6).
[168] AMA 2023, s 56(8).

Convention, only that there is no additional recourse to the courts under the Convention. Under article 52(3) of the Convention, applications for annulment of awards are decided by an *ad hoc* Committee of three persons appointed from the Panel of Arbitrators,[169] none of whom shall have been a member of the arbitral tribunal which rendered the award. After hearing the application, the Committee can in the same manner as a court of law annul the award or any part of it. Any annulment made in these circumstances is binding on the parties.[170] The ART is a welcome development as it would likely save the time that parties would otherwise expend in seeking a set-aside order from the Nigerian courts. However, given that arbitration could be expensive, it is thought that reference to an ART would place extra layer of costs on the disputing parties.

Be that as it may, court involvement at this stage of arbitral proceedings, especially under the ACA 1988 (which does not provide for ART) is critical as it affords a dissatisfied party a "right of appeal", though on technical grounds. This notwithstanding, in dealing with set-aside or review requests, the court, despite its wide powers must always bear in mind that the parties already chose to have their dispute referred to arbitration as opposed to regular courts of competent jurisdiction. So, it should always be reluctant to interfere with the arbitral tribunal's jurisdiction, unless it is compelled to do so.[171]

5.1.3.3 Remission of Awards

In climes such as the United Kingdom, courts are empowered to wholly or partly remit awards to arbitral tribunals for reconsideration where it deems it appropriate to do so. In fact, the English courts shall only set aside an award where it finds that a remission would not be appropriate in the circumstances.[172] The Arbitration Act of 1914, expressly conferred the Nigerian courts with such powers of remission under section 11(1) which provided that, "in all cases of reference to arbitration, the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire." However, under the ACA 1988 there is no express or direct powers to remit awards, rather the powers are implied by virtue of section 29(3), which permits a court before which an application to set aside an award is brought to, "…suspend proceedings for such period as it may determine to

[169] The Panel of Arbitrators and Conciliators consist of a list of arbitrators and conciliators available for selection to ICSID Tribunals, Conciliation Commissions and ad hoc Committees. It is usually used to make appointments where parties fail to agree on a nominee; see ICSID Convention 1965, arts 12 – 16.
[170] ICSID Convention 1965, art 52(3).
[171] *Arbico (Nig) Ltd v. Nigerian Machine Tools Limited* (2002) 15 NWLR (Pt. 789) 7.
[172] English Arbitration Act 1996, s 68.

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." The courts' exercise of the powers to grant this remedy is dependent upon an application to set aside an award being made to the courts because it can only be exercised in the course of hearing an application for a set-aside as opposed to the position under section 11(1) of the Arbitration Act 1914 where powers of remission could be invoked at any point where a reference was made to the court. However, it must be noted that the AMA 2023 expressly confers powers of remission on the courts.[173] But as with the ACA 1988, such powers may only be exercised in the course of determination of a set-aside application.[174] This power to remit awards means that courts help to ensure that some awards are saved from complete failure thereby saving some of the time and expense that would otherwise be channelled towards conducting completely new arbitration proceedings.

5.1.3.4. Recognition and Enforcement of Awards

One of the fundamental elements of every arbitration agreement is that the parties will comply with the decision of the arbitral tribunal by carrying out the award. International, and institutional rules of arbitration, for instance, article 32(2) of the UNCITRAL Arbitration Rules 1976, enjoins parties to carry out the award without delay. Thus, awards are generally self-executing[175] but where the losing party fails to comply with the decision the courts could assist the prevailing party to enforce the award.[176] This is because arbitral tribunals do not have powers of enforcement. Under the ACA 1988, the courts are empowered under sections 31 and 51 to recognise and enforce domestic and foreign awards, respectively. The AMA 2023, on the other hand, deals with the courts' powers to recognise and enforce domestic and foreign awards in just one section, that is, section 57(1) which provides that, "an arbitral award shall irrespective of the country or state in which it is made, be recognised as binding, and on application in writing to the court, be enforced by the Court…."[177] For foreign awards, an application for enforcement could also be made under article IV of the New York Convention. Although section 57 (1) of the AMA 2023 shares the same objectives with article IV of the New York Convention, it has a broader reach because it will apply to awards made in the countries that are not signatories to the Convention. The New York Convention, on the other hand, will not apply to awards made in non-member States. It will only apply to an award made

[173] AMA 2023, s 55(5)(a); See also s 55(6) which replicates section 29(3) of the ACA 1988.
[174] See generally section 55 of the AMA 2023.
[175] Idornigie (n 64) 292.
[176] Enuma U Moneke, 'Strengthening the Legal Regime for the Recognition and Enforcement of Arbitral Awards in Nigeria' (2018) 9(3) The Gravitas Review of Business and Property Law 18, 26-27.
[177] AMA 2023, s 57(1).

in a contracting State and where there is reciprocal treatment of international awards. Section 51 of the ACA 1988 also has the same effect. In all, an award may be enforced by leave of the court.[178] The application for leave is made *ex parte* by originating summons but, the court may direct that notice be given to the other party.[179] Where the application is successful, the award may be enforced the same way a judgement or order of the court is enforced.[180]

5.1.3.5. Refusal to Recognize and Enforce Awards

An application to enforce an award would usually be granted by the courts except a request is made for refusal of recognition and enforcement of the award.[181] Under the ACA 1988, such request may be brought under section 32 and 52 ACA 1988 in domestic and international arbitration, respectively. Section 52(2)(a) ACA 1988 specifies grounds upon which such an application may be made in international arbitration. The grounds are similar to the grounds for set-aside under section 48 which, as earlier noted, pertains to international arbitration.[182] Thus, an applicant could seek refusal of recognition and enforcement of an award on the basis that that they were not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or that they were otherwise unable to present their case. Where a case is made out on any of the grounds listed, the courts will grant the request. Unlike section 52, section 32 of the ACA 1988 does not specify grounds upon which an application may be based. However it has been submitted that the principles of common law will apply in such cases and so, where the applicant is able to establish that the award is a nullity, it would constitute sufficient grounds to refuse recognition and enforcement of the award in domestic arbitration.[183] Again, the new AMA 2023 deals with the courts' powers of refusal of recognition and enforcement in only one section, that is, section 58. The section replicates section 52 ACA 1988 and applies to awards arising out of both domestic and international arbitration. The grounds upon which an application for refusal of recognition and enforcement may be based are like those contained

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[178] AMA 2023, s 57(3).

[179] *Imani & Sons Ltd v. Bill Construction Company Ltd* (1999) 12 NWLR (Pt. 630) 254. The application is accompanied by an affidavit to which the arbitration agreement and the award or copies thereof should be attached as required by section 32(2) ACA 1988, which is now section 57(2) AMA 2023; see *Ebokan v Ekwenibe & Sons Trading Co* (2001) 2 NWLR (Pt. 696) 32 where one of the issues in contention was the proper interpretation of section 31(2) of the ACA 1988 which is now section 57(3) of the AMA 2023.

[180] AMA 2023, s 57(3); a foreign award may also be enforced by registration under the Foreign Judgments (Reciprocal Enforcement) Act Cap F35 Laws of the Federation 2004. It may also be enforced by bringing court action on the award.

[181] Idornigie (n 64) 292.

[182] However, an additional ground is included in section 52(2)(a) (viii) namely, "…that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made…".

[183] Orojo (n 20) 292.

in section 52(2)(a) ACA 1988.[184] It is also pertinent to note that in international arbitration, such application for refusal of recognition and enforcement could be made by virtue of article V of the New York Convention.[185]

Viewing this aspect of court involvement from a critical standpoint, it appears that court intervention at this stage necessarily undermines an award. Where parties can successfully obtain the refusal of recognition and enforcement of an award, the finality and currency of that award is compromised.[186] Be that as it may, arbitral tribunals have no powers aside that conferred on them by national legislation. This means that court involvement is necessary to enable arbitral tribunals to coercively enforce their awards.[187]

Generally, the role played by the Nigerian courts in the instances of intervention discussed above shows that court involvement is crucial for the effectiveness of the arbitral process. But does intervention in those instances also disrupt arbitral proceedings?

6.1. Does Judicial Intervention Disrupt the Arbitral Process?

By limiting the involvement of the Nigerian courts in arbitral proceedings, the ACA 1988 and the AMA 2023 positively distinguish themselves from the Arbitration Act 1914 which allowed intervention by the courts at virtually all stages of the arbitral process. However, even in supporting the arbitral process in the permitted instances of intervention discussed above, the courts disrupt arbitral proceedings, at times frustrating the object of obtaining resolution of disputes without unnecessary delay and expense. This is because applications emanating from arbitral proceedings are not given priority in the order of listing in the High Court where they are filed. So, in a good number of cases where applications are made, the speedy determination of these applications may be hindered by delays, formalities and technicalities concomitant with the prosecution of cases in the Nigerian courts.[188] For instance, the determination of an application to court for the appointment of an arbitrator could take months. Again, an application to enforce an arbitral award usually has to queue behind a long list of other applications for leave for enforcement of court judgements. So also, applications to set aside

[184] AMA 2023, s 58 (2)(a).
[185] New York Convention, art V.
[186] Lembo (n 80).
[187] Correll and Szcepanik (n 48).
[188] See generally Epiphany Azinge and Enuma Moneke (eds), *The Role of Costs and Adjournments in the Expeditious Dispensation of Justice in the Nigerian Courts* (NIALS Press 2014); Peter A Anyebe 'Towards Fast Tracking Justice Delivery in Civil Proceeding in Nigeria', in E Azinge and D Dakas (ed) *Judicial Reform and Transformation in Nigeria* (NIALS Press 2012); Jude Cocodia, 'Identifying Causes for Congestion in Nigeria's Courts via Nonparticipant Observation: A Case Study of Brass High Court, Bayelsa State, Nigeria' (2010) 1 (1.1) International Journal of Politics and Good Governance 1.

awards. A good example is the "catastrophic delays" in the determination of the application to set-aside the award made in the case of *IPCO (Nigeria) Limited v Nigeria National Petroleum Corporation*.[189] According to Blackaby and Partasides, the destination of an arbitration is an award.[190] Thus, the assumption is that an arbitration ends when an award is made and this is because it is expected that based on the agreement to be bound by the decision of the arbitrator, the losing party would honour the award, obviating the need for enforcement proceedings. But in reality, awards are not always voluntarily complied with. An arbitration cannot be said to have reached its destination if the prevailing party is yet to reap benefits of the award and if they are yet to reap the benefits, it then means that the object of arbitration is defeated.

Aside, the delays in the speedy disposal of cases in the Nigerian courts, there is the issue of anti-arbitration injunctions. An anti–arbitration injunction is simply an order of a court prohibiting arbitral proceedings. Usually such an order should be sought where for instance, a party starts arbitration proceedings in the absence of an arbitration agreement or where the subject matter of the dispute is not arbitrable. However, in recent times parties (usually state entities in developing countries) have sought such injunctions to frustrate arbitration proceedings commenced by a foreign company,[191] the primary aim being to have the dispute adjudicated by their own courts. [192] Jurisdictions such as Ethiopia,[193] Indonesia, Pakistan, Bangladesh, India and have shown an inclination to protect state entities by the grant of anti-arbitration injunctions.[194] Anti-arbitration injunctions as granted in these circumstances undermine the very essence of arbitration as an alternative dispute resolution method. The ACA 1988 and the AMA 2023, like most national systems of law, do not give the Nigerian courts the powers to grant anti-arbitration injunctions. As earlier noted, the pro-arbitration stance of the Nigerian courts is evident in the Court of Appeal cases of *Statoil Nigeria Limited v Nigerian*

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[189] *IPCO v Nigeria National Petroleum Corporation* [2015] EWCA Civ 1144; see Emilia Onyema, 'IPCO v NNPC Saga and Liability of Nigerian Legal System (*The Guardian, Nigeria*) 22 December 2015<https://guardian.ng/features/law/ipco-v-nnpc-saga-and-liability-of-nigerian-legal-system/>accessed 25 April 2023; see also Enuma U Moneke, 'Strengthening the Legal Regime for the Recognition and Enforcement of Arbitral Awards in Nigeria' (2018) 9(3) The Gravitas Review of Business and Property Law 18, 38-39.
[190] Blackaby and Partasides (n 2) 501 para 9.01.
[191] Doak Bishop and Spalding Houston, 'Combating Arbitral Terrorism: Anti-Arbitration Injunctions Increasingly Threaten to Frustrate the International Arbitral System' < https://www.yumpu.com/en/document/view/23975713/combatting-arbitral-terrorism-anti-arbitration-king-spalding > accessed 11 February 2024.
[192] Sharad Bansal and Divyanshu Agrawal, 'Are Anti-Arbitration Injunctions a Malaise? An Analysis in the context of Indian Law' (2015) 31 Arbitration International 613.
[193] *Salini Construttori S.P.A. v. The Federal Democratic Republic of Ethiopia Addis Ababa Water and Sewerage Authority* Case No. 10623/AER/ACS, 21 ASA BULL. 82 (2003).
[194] Bansal and Agrawal (n 192).

National Petroleum Corporation[195] and *Nigerian Agip Exploration Limited v Nigerian National Petroleum Corporation.*[196] However, in the 2016 case of *Shell Petroleum Development Company of Nigeria Limited v Cresta Integrated Natural Resources Limited*,[197] the Nigerian Court of Appeal departed from this stance.[198]

7.1. Proposals for Entrenching Acceptable Limits for Judicial Intervention

In sum, while it is commendable that the ACA 1988 and AMA 2023 already allows only specific intervention in arbitral proceedings, there is need to impose further limits on the extent of judicial intervention by the Nigerian courts. Accordingly, the article makes the following recommendations:

7.1.1. Power to Summon Witnesses

Conferring more powers on arbitral tribunals than they presently have is one way of further limiting the amount of time and expense spent in court to secure one order or the other. For instance, tribunals should be empowered to issue *subpoena*, at least to witnesses within its jurisdiction (which would be the seat of arbitration). Countries such as the United States of America empower arbitral tribunals to issue summons witnesses to appear. Under section 7 of the US Federal Arbitration Act 1925, arbitral tribunals are permitted to summon witnesses within jurisdiction to appear to give evidence or to disclose relevant evidence in their possession. Such summons are usually served in the same manner as *subpoenas* to appear and testify before a court of law. Giving such powers to arbitral tribunals would limit court involvement, which would then only become necessary where the person summoned has refused to appear. This should be considered in future amendments to the AMA 2023.

7.1.2. Direct Enforcement of Arbitral Awards

[195] (2013) 14 NWLR (Pt. 1373) 1.
[196] CA/A/628/2011; [2014] 6CLRN; see also *Federal Inland Revenue Service v. Nigerian National Petroleum Corporation* (Unreported) Suit No. FHC/ABJ/CS/774/2011. CA/L/331M/2015.
[197] CA/L/331M/2015; SC.765/2107.
[198] See generally, PO Idornigie and EU Moneke, 'Arbitration Injunctions in Nigeria' (2016) 82 (4) The International Journal of Arbitration, Mediation and Dispute Management 438; it is pertinent to note that in arriving at the decision in *Shell Petroleum Development Company of Nigeria Limited*, the Court of Appeal also considered that had the application for injunction been filed in the London courts it would have been granted because of their inclination to grant such application. But it is pertinent to note that the London courts would only grant such anti-arbitration injunctions in exceptional cases such as where the arbitration agreement is not valid; see *Weissfisch v Anthony Julius* [2006] EWCA CIV 218. This is a sharp contrast to the position in the national courts of some developing countries who frustrate the international arbitral system by engaging in judicial protectionism of indigenous companies and government departments.

It is thought that dispensing with the requirement for leave of court to enforce arbitral awards and empowering tribunals to directly enforce awards would save significant time and expense that would otherwise be incurred by the judgment creditor in trying to secure such order.[199]

7.1.3. Review and Amendment of the State Arbitration Laws

The Arbitration Act 1914 remains in the statute books of most of the States in Nigeria as Arbitration Law 2014. The import of this is that so far as intra-State arbitration is concerned, the courts still have powers of general intervention, save for cases where the parties apply the ACA 1988 or AMA 2023. Therefore, it is imperative that these States bring their arbitration laws in line with modern developments. The ACA 1988 is now repealed, therefore the AMA 2023 would be a good point for States to start because it allows only specific intervention, and to a great extent it is tailored to suit the demands of modern day arbitration. It must however be stated that Lagos State, Nigeria repealed the Arbitration Law 2014 in 2009 and enacted the Lagos State Arbitration Law.[200] The Lagos State Arbitration Law 2009 has been lauded because it makes some far-reaching modifications and additions. It also limits judicial intervention.[201] Also, Rivers State and Delta State have enacted their own arbitration laws and repealed the Arbitration Law 2014.[202] Like the ACA 1988 and the AMA 2023, these laws allow only specific intervention in arbitral proceedings.[203]

8.1. Conclusion

The goal of achieving the expeditious dispensation of justice continues to elude the Nigerian judicial system. Regrettably, this challenge negatively impacts the arbitral process because though section 34 ACA 1988 and section 64 AMA 2023 are, without question, a striking declaration of the independence of arbitration from the courts, the courts cannot be entirely excluded from arbitration.[204] Indeed, it is said that "…the bad side of having a law which provides for intervention by the courts is that arbitration cannot avoid being infected with the disease of delay, what you do not have you cannot give…"[205] Be that as it may, in all arbitral proceedings under the ACA 1988 and AMA 2023, the sanctity of arbitration must always be

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[199] See also Anthony Idigbe, 'Court Control of Arbitral Process', (2006) <www.academia.edu/8189698/COURT_CONTROL_OF_ARBITRAL_PROCESS> accessed 10 February 2024.
[200] See generally, the Lagos State Arbitration Law; Delta State and Rivers State have also enacted new arbitration laws and repealed the Arbitration Act 1914.
[201] Lagos State Arbitration Law, art 59(1).
[202] See the Rivers State Arbitration Law 2019 and Delta State Arbitration Law 2022.
[203] Rivers State Arbitration Law 2019, s 63; Delta State Arbitration Law 2022, s 8.
[204] Blackaby and Partasides (n 2) 417 para 7.06.
[205] Idigbe (n 199).

protected in order to achieve its object, which is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay and expense. Hence there should be additional restrictions on judicial intervention in arbitral proceedings, where possible. In instances where court intervention cannot be entirely removed, the courts should always consider that parties who have opted for arbitration have done so because they want the dispute resolved within the shortest possible time. Therefore, the Nigerian courts should ensure that interventions in the instances permitted do not last for longer than is necessary. In essence, the line between intervention and interference should clearly be drawn at the point where such involvement begins to militate against the realisation of the contractual expectation of the parties which is to settle their differences within the shortest possible time.