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Judicial Intervention in Arbitration: Unresolved Jurisdictional Issues Concerning Arbitrator Appointments in Nigeria

Abstract

Parties find it difficult to determine which Nigerian High Court should intervene in the appointment of arbitrators due to conflicting judicial precedents. This perennial challenge has defied any legal solution. Considering relevant case law, this article examines the Arbitration and Conciliation Act (ACA) vis-à-vis the Nigerian Constitution. The main argument is that the Nigerian Constitution read alongside the ACA confers the Federal High Court with additional jurisdiction to appoint arbitrators regardless of which court has jurisdiction concerning the underlying dispute. There are also uncertainties regarding the intervention jurisdiction of Nigeria's National Industrial Court to appoint arbitrators. Currently, no other court can exercise intervention jurisdiction in employment disputes. This article analyses recent decisions of the National Industrial Court and argues that this Court can only intervene to appoint arbitrators where both parties request the appointment in a pending action before the Court. It is also argued that decisions concerning the appointment of arbitrators through judicial intervention can be appealed.

Introduction

Many parties involved in commercial dealings have demonstrated a clear preference for arbitration as a means of resolving disputes that arise during commercial transactions.[1] There are several reasons for choosing arbitration over litigation. Examples include simplicity, privacy, and expertise.[2] Arguably, however, the most practical reason for choosing arbitration is to avoid the courts – with all the attendant uncertainties that come with litigation. This is because arbitral decisions are final and binding on the parties.[3] One such uncertainty of litigation is how courts may resolve jurisdictional issues and how long such a determination may last. The possibility of the court's involvement in arbitration cannot be discounted and it may be necessary to take practical measures that discourage parties from unnecessarily seeking or insisting on judicial intervention. In Nigeria, for example, a recent directive from the highest judicial office mandated lower courts to discourage a breach of arbitration clauses.[4] This directive illustrates the tendency of parties to seek judicial intervention in Nigerian arbitration matters despite the emergence of arbitration as a major means of resolving disputes.[5] Jurisdictional questions inevitably arise when parties take a litigious step in Nigeria.

Jurisdictional issues in Nigeria are complex. One such complexity in the Nigerian court system is determining which court should exercise jurisdiction over a dispute. It is important first to understand the rather complicated court structure in Nigeria vis-à-vis jurisdiction. Nigeria is a federation that comprises thirty-six states,

[1] G Born, *International Commercial Arbitration* (2nd edn, 2014, Kluwer Law International) 1.
[2] Ibid at 2. See further, E Robine, "What companies expect of international commercial arbitration" (1992) 9/2 *Journal of International Arbitration* at 31.
[3] B Nigel and C Partasides, *Redfern and Hunter on International Arbitration* (2015, 6th edn, Oxford University Press) at 2.
[4] See the memo ("Re: Arbitration Clause in Commercial Contracts") from the Chief Justice of Nigeria to all courts dated 26 November 2017. On delays and complexities of courts, see CA Candide-Johnson and O Shasore, *Commercial Arbitration Law and International Practice in Nigeria* (2012, LexisNexis) at 7 – 10.
[5] Nigel and Partasides argued that "arbitration is now the principal method of resolving international disputes involving states, individuals and corporations". See Nigel and Partasides above at note 3 at 1.

each of which has a State High Court.[6] The Federal Capital Territory (FCT) also has a High Court.[7] Nigeria has a Federal High Court with various divisions across the Federation.[8] The State High Courts have unlimited jurisdiction subject to the exclusive jurisdictions of the Federal High Court and, since 2010, the National Industrial Court.[9] The High Courts are otherwise courts of coordinate jurisdiction.

Under the Nigerian judicial system, it can be challenging to determine which of the High Courts should have jurisdiction over a dispute because jurisdiction rules are technical and rather complex.[10] Such an impasse often adversely affects litigants who suffer the consequences of "inelegant drafting" and "interest-based interpretations".[11] *Associated Discount House Limited v Amalgamated Trustees Limited*[12] is illustrative. In this case, the respondent challenged the jurisdiction of the Federal High Court over a banker/customer dispute. The Federal High Court upheld the respondent's jurisdictional challenge, declined jurisdiction with respect to the dispute and redirected the parties to the Lagos State High Court. Here again, the respondent challenged the jurisdiction of the State High Court. The jurisdictional challenge was dismissed. The respondent then appealed to the Court of Appeal. The Court of Appeal allowed the appeal, deciding that the State High Court did not have jurisdiction. The appellant then appealed to the Supreme Court which ruled that the State High Court had jurisdiction over the dispute and sent the matter back to the Lagos State High Court for trial after nearly a decade of litigation that did not concern the substance of the case. In *Oladipo v Nigeria Customs Service Board*,[13] the Court of Appeal also observed that the appellant's grievance was not addressed in either the State High Court or the Federal High Court for more than half a decade due to a jurisdictional challenge.[14] Some delays have lasted up to two decades. [15] Such delays highlight the benefits of arbitration. Party autonomy and the potential to expedite dispute resolution underpin arbitration.[16]

This article is based on three major arguments. First, the impasse that arises from the jurisdictional tussle between the Federal and the State High Courts can be resolved to facilitate court intervention in arbitration by interpreting section 251(1) of the Constitution alongside section 57 of the Arbitration and Conciliation Act ("hereafter **the ACA**"). In this context, the Nigerian legislature has conferred additional jurisdiction on the Federal

[6] Constitution of the Federal Republic of Nigeria 1999 (as amended by the 3rd Alteration Amendment Act 2010) – hereafter, "the Constitution" in text and "CFRN" in footnotes, s 270(1).
[7] Ibid, s 255(1). For the purposes of this article, "State High Courts" include the High Court of the FCT except where otherwise stated.
[8] Id at s 249(1).
[9] *NUT Niger State v COSST, Niger State* [2012] 10 NWLR (Pt 1307) 89 at 109.
[10] Abiri CJ argued that "The conflict of jurisdiction between the Federal and State High Courts mocks the efficiency of the judicial system in Nigeria. Statutes that confer jurisdiction on the courts are of no use if the ambits of such jurisdiction are not clearly delimited and unambiguous". See K Abiri, *Identifying and Delineating the Frontiers of the Jurisdiction of the State High Court vis-à-vis other Courts of Coordinate Jurisdiction* (Paper presented at the induction course for newly appointed Judges and Khadis organised by the National Judicial Institute from 15 to 23 June 2015) 28. A decade earlier, the Supreme Court had observed that the jurisdictional struggles between the Federal High Court and the State High Courts was perennial and no easy resolution was in sight. See *Onuorah v Kaduna Refining & Petrochemical Co Ltd* [2005] 16 WRN 1, 14 – 15.
[11] Abiri, above at note 10 at 28.
[12] [2006] 5 SC (Pt 1) 32.
[13] [2009] 12 NWLR (Pt 1156) 563.
[14] Ibid per CC Nweze JCA. See also, *WEMA Securities & Finance Plc v Nigeria Agricultural Insurance Corp* (2015) LPELR-24833(SC). See further on jurisdictional conflicts amongst the Federal and States High Courts in Nigeria: CC Nweze, "Jurisdiction of the State High Court" in E Azinqe (ed), *Jurisprudence of Jurisdiction* (2005, Oliz Publishers) 85 at 90; AG Karibi-Whyte, *The Federal High Court: Law and Practice* (FDP 1986); A Emiola, "Implication and Complications of Federal High Court (Amendment) Decree 1991" (1992)3/8–9 *Justice* 1; Y Fashakin, "Jurisdictional limitation of the Federal High Court in banker/customer relationship" (2003) 7/1 –2 *Modern Practice Journal of Finance and Investment Law* 231 at 234; PC Okorie, "Extent of the jurisdiction of the Federal High Court in fundamental human rights cases in Nigeria: A Review of the Supreme Court Decision in Grace Jack v University of Agriculture, Makurdi" (2004) 2 *Nigerian Bar Journal* 241; O Ogbuinya, *Understanding the Concept of Jurisdiction in the Nigerian Legal System* (Snaap Press Ltd, 2008) 290-333 and ST Hon, *Civil Procedure in Nigeria* (vol 1 Pearl Publishers 2008) 357-384; PN Okoli and CI Umeche, "Jurisdictional conflicts and individual liberty – the encroaching burden of technicality in Nigeria" (2018) 22/4 *The International Journal of Human Rights* 473; E Essien, "The jurisdiction of State High Courts" (2000) 44/2 *Journal of African Law* 264.
[15] See for instance *SPDCN Ltd v Isaiah* [2001] 11 NWLR (Pt 723)168; *Oni v Cadbury Nigeria Plc* (2016) LPELR-26061(SC).
[16] See Robine, "What companies expect of international commercial arbitration" above at note 2.

High Court to intervene in arbitration irrespective of the subject matter of the underlying dispute. Thus, where jurisdiction over the underlying dispute is in doubt, litigants should apply to the Federal High Court to intervene in all cases. Second, for employment related disputes over which the National Industrial Court has exclusive jurisdiction, it should not intervene to enforce the arbitration agreement by appointing arbitrators where the parties are unable to appoint. Litigants should seek the National Industrial Court's intervention in appointing arbitrators by instituting a claim before the National Industrial Court and then, by mutual agreement, request the National Industrial Court to appoint arbitrators. Third, the confusion as to whether court interventions in arbitrator appointments in Nigeria can be appealed should be cleared by applying *Skye Bank Limited v Iwu*.[17] Based on this Supreme Court decision, litigants have the right to appeal all final first instance decisions of the High Courts.

There is a foundational necessity to examine the issue of jurisdiction concerning the court's intervention in arbitrator appointment where parties are unable to do so. This article provides a perspective which seems to have escaped any court decision or scholarly commentary. The overarching argument is that section 251(1) of the Constitution read alongside section 57 of the ACA provides additional jurisdiction for the Federal High Court to intervene in arbitration notwithstanding the subject matter of the underlying dispute.[18] If the courts accept this argument, it would mean that the confusion as to which of the High Courts would have jurisdiction can be eliminated by approaching the Federal High Court. This approach will also facilitate access to justice when parties find themselves in the remit of litigation.

Arbitrator Appointments and Access to the Courts

Parties can avoid navigating the landmine of first determining which of the High Courts have jurisdiction to resolve their disputes by choosing arbitration. This advantage is, however, obviated when the parties cannot agree on choice of arbitrator(s) or settle for a third party other than the courts to make the choice for them. In this case, the parties' only recourse will be to seek the court's assistance to help constitute the arbitral tribunal, known as the default procedure.[19] It is critical to determine which of the High Courts parties should approach to assist in the appointment of arbitrators.

Certain court decisions indicate that, pursuant to the ACA, either the Federal High Court or the High Court can exercise jurisdiction to intervene in the appointment of arbitrators irrespective of the underlying dispute.[20] Such decisions conflict with some other decisions and scholarly views that are premised on the superiority of the Constitution over the ACA.[21] They argue the ACA cannot extend the Federal, FCT and State High Courts' jurisdictions to intervene in the appointment of arbitrators irrespective of the subject matter of the dispute.

The emergence of the National Industrial Court as a court of coordinate jurisdiction with the Federal, FCT and State High Courts in 2010 has further complicated the jurisdiction to intervene in the appointment of

[17] (2017) LPELR-42595(SC).
[18] i.e. the jurisdiction conferred by the National Assembly with respect to certain disputes under s 251 of the Constitution.
[19] In summary, where a party fails to appoint an arbitrator within the stipulated time despite having been given due notice to so appoint, the courts can appoint arbitrators when approached by the party who had served notice on the erring party, to ensure the arbitral tribunal is properly constituted to resolve the dispute between the parties. See ACA, s 7(2)(a)(i) -(ii),(b), (3). See further, *Royal Exchange Assurance v Bentworth Finance (Nig) Ltd* [1976] NSCC 648.
[20] ACA, s 57(1). Such decisions will be examined shortly.
[21] The Constitution delineates the jurisdiction of the Federal, FCT and State High Courts. See CFRN ss 249, 255 and 270. The scholarly views are discussed later e.g. at texts to notes 42 and 49.

arbitrators vis-à-vis labour/employment disputes.[22] Given the extensive jurisdiction that the Nigerian Constitution vests in the National Industrial Court, it should have jurisdiction to appoint arbitrators in labour/employment disputes. In three recent decisions examined in this article, the parties had all unsuccessfully requested the National Industrial Court to appoint arbitrators.[23] This amounted to a waste of time. More time and resources would have been wasted if the National Industrial Court exercised jurisdiction, but the Court of Appeal overturned the National Industrial Court's decision. Furthermore, even more time and resources would have been wasted if a party challenged an award based on an alleged irregularity in the appointment of arbitrators because the National Industrial Court lacked jurisdiction.

The question of appealing the decisions of intervening courts is a constant thread that runs through judicial intervention in the appointment of arbitrators. Therefore, it is also necessary to consider whether the decision of the Federal or State High Courts appointing arbitrators can be appealed. There are conflicting judicial decisions and scholarly views in this area. The Supreme Court's recent decision in *Skye Bank Plc v Iwu*,[24] however, supports this article's argument that parties can appeal decisions of the High Courts that concern the appointment of arbitrators.

The Courts and Judicial Officers as Appointing Authority versus the Default Appointment Procedure

There is a need to understand party autonomy vis-à-vis judicial officers appointing arbitrators under Nigerian law. Parties have full autonomy in deciding the composition of the arbitral tribunal. Thus, sections 6 and 7 of the ACA only contain provisions that apply where the parties have failed to reach an agreement. Thus, in constituting the arbitral tribunal, reference will always be made first to the terms agreed by the parties. Their agreement (e.g. on sole arbitrator, multiple arbitrators, specified qualifications etc.) must be given full effect. The court can only intervene and appoint arbitrators in one or more of the following limited exceptions: (1) the parties have failed to agree on a sole arbitrator;[25] (2) a party has failed to appoint its nominated arbitrator;[26] (3) the parties' nominated arbitrators have failed to agree on a presiding arbitrator;[27] (4) the appointing authority specified in the parties' agreement have failed to appoint the arbitrator;[28] or (5) where the parties fail or are unable to replace the arbitrator under section 11 of the ACA to fill a vacancy as a result of the arbitrator's termination or revocation of appointment, removal or withdrawal from office.[29]

The primacy of party autonomy with regard to the appointment of arbitrators can be illustrated through *Backbone Connectivity Network Nigeria Limited and Others v Backbone Technology Network Incorporated*.[30] The Court of Appeal decided that it is only after a party has failed to cooperate in the appointment process and, consequently a party applies to the court to appoint an arbitrator, that the court can intervene and appoint arbitrators. Thus, the court can neither order the parties to appoint arbitrators where there is no application before the court in that respect nor can the court on its own motion appoint arbitrators.

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[22] See s 254C (1) of the CFRN and s 7 of the National Industrial Court Act 2006 on the exclusive jurisdiction of the National Industrial Court.
[23] *Ravelli v Digitsteel Integrated Services Ltd*, Suit No: NICN/LA/559/2016, Kanyip J (16 February 2018); *Prakash v Orleans Invest Holdings*, Suit No: NICN/LA/521/2017, Bassi J (5 March 2018); *Michael Ajilore v KLM Airlines*, Suit No: NICN/LA/617/2017, Bassi J (31 May 2018).
[24] Above at note 17.
[25] ACA s 7(2)(b).
[26] ibid s 7(3)(a).
[27] ibid s 7(3)(b).
[28] ibid s 7(3)(c).
[29] See JO Orojo and MA Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (1999, Mbeyi & Associates) 121.
[30] [2015] 14 NWLR (Pt 1480) 511.

A party cannot appoint arbitrators upon default of the other party except where the agreement so provides.[31] A party must have been notified to appoint or concur in the appointment of an arbitrator prior to the court exercising jurisdiction to appoint arbitrator upon default of the party.[32] Only parties to an arbitration agreement have legal standing to apply to the court to appoint an arbitrator.[33] Considering the 'list procedure', there are detailed guidelines on the appointment of sole arbitrators,[34] and multi-member arbitral tribunals.[35]

Judicial officers usually appoint arbitrators in two capacities: (1) where the arbitration agreement names a judicial office holder in which case he is constituted an appointing authority and (2) where the intervention jurisdiction of the court is invoked. It is necessary to draw a distinction between a judicial officer as appointing authority by agreement of the parties and appointment of an arbitrator by the court in default of the parties. In the former, the judicial officer performs a personal and not a judicial function and as such, the judicial process need not determine the procedure for appointment.[36] In such a case, the judicial officer acts as appointing authority by agreement of the parties in the same manner as any qualified office holder could act as appointing authority if the parties agree. The situation is different when the judicial officer exercises the default appointment powers under section 7(2)(a) and (b) of the ACA. Where the parties have agreed that a judicial officer should appoint the arbitrator, they merely need to ask the judicial officer to do so. The default mode of appointment by the courts is activated is only when the judicial officer has failed or is unable to appoint the arbitrator pursuant to the parties' agreement. The court does not exercise judicial powers where the judicial officer is constituted as appointing authority based on the parties' agreement. Thus, the question of jurisdiction does not arise. *Celtel Nigeria BV v Econet Wireless Limited*[37] illustrates the distinction between the judge acting as appointing authority and the default appointment procedure. The arbitration agreement specified the Chief Judge (CJ) of the Federal High Court as appointing authority. Econet applied to Ukeje CJ to appoint an arbitrator. Ukeje CJ declined to appoint any arbitrator. As a result, Econet applied to the Lagos State High Court to appoint an arbitrator in default of the parties. Whilst this application was pending at the Lagos State High Court, Econet applied to Mustapha CJ who had succeeded Ukeje CJ at the Federal High Court. Mustapha CJ then appointed arbitrators. The Court of Appeal noted that the action of Mustapha CJ was proper in view of the arbitration agreement, notwithstanding the pending application at the Lagos High Court for judicial intervention. Mustapha CJ, as the successor of Ukeje CJ, could therefore consider a fresh request for the appointment of arbitrators. As the court observed: "It is only after a decision is reached under Section 7(3) of the ACA that the point of no return is reached… That is why there is no right of appeal from the decision of the appointing authority in Section 7 of the ACA".[38]

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[31] *Campagnie Generale de Geophysique v Etuk* [2004] 1 NWLR (Pt 853) 20 at 49; *Fidelity Bank Plc v Jimmy Rose Co Ltd* [2012] 6 CLRN 82 at 92.
[32] *City Engineering Ltd v Nigerian Airports Authority* [1999] 11 NWLR (Pt 625) 76 at 86.
[33] *Kano State Oil and Allied Products Limited v Kofa Trading Company Limited* [1996] 3 NWLR (Pt 436) 244 at 247.
[34] See art 6(2) of the Arbitration Rules – made pursuant to ACA ss 15(1) and 53 and annexed as ACA schedule I. see also s 7(2)(b). For further insight on the rationale behind such guidelines, see PO Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (LawLords 2015) 194 – 198. On the need to comply with arbitrator qualifications prescribed by the arbitration agreement, see ACA s 7(5). See *Rahcassi Shipping Company SA v Blue Star Line Ltd* [1967] 3 ALL ER 301. In this case, the English High Court decided that the appointment of an arbitrator who lacked qualifications specified in the arbitration agreement was void.
[35] Arbitration Rules, Arts 7(2)(a)(b), 7(4) and 8(2).
[36] G Ezejiofor, "Appointment of an arbitrator under the Nigerian law: the procedure and powers of an appointing authority – Nigerian Paper Mills Limited v Pithawalla Engineering GMBH" (1997)/4 *The Arbitration and Dispute Resolution Law Journal* 349 at 351 – 352. Nwakoby, however, contended that such a function would be a judicial one because the application for the appointment of arbitrators should be heard in court. GC Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd edn, 2014, Snaap Press Ltd) 51. See also, GC Nwakoby, "The constitutionality of section 7(4) and 34 of the Arbitration and Conciliation Act: Chief Felix Ogunwale v Syrian Arab Republic revisited" (2003) 1/3 *Nigerian Bar Association Law Journal* 345 at 353.
[37] (2014) LPELR-22430(CA). cf *Econet Wireless Ltd v Econet Wireless Nigeria Ltd*, Suit No FHC/L/CS/839/2003 (5 November 2004).
[38] Ibid.

The jurisdictional issues addressed in this article arise only when the parties invoke the default appointment jurisdiction of the courts. Jurisdictional issues do not arise when the parties agree that a judicial officer should appoint the arbitrator. Regarding international arbitration, the courts cannot intervene to appoint arbitrators if the parties fail to do so. Where the parties fail to designate an appointing authority, the Secretary-General of the Permanent Court of Arbitration at The Hague is automatically constituted as appointing authority.[39]

Subject Matter Jurisdiction in Arbitrator Appointments

The ACA defines "Court" to mean either the State High Court or the Federal High Court or the FCT High Court.[40] The Nigerian Constitution, pursuant to which the ACA itself was enacted, created the various courts and specified their jurisdictions.[41] The question is whether the parties can approach any of the High Courts mentioned in the ACA to seek judicial intervention in the arbitral tribunal constituting process or whether they must approach only the High Court (i.e. Federal or State) exercising jurisdiction in the subject matter area of their dispute.

There is considerable force in the argument that, although the ACA defines a court to mean either of the Federal or State High Courts or the High Court of the Federal Capital Territory, the High Court to which an application for appointment of an arbitrator in default of the parties' selection should be made is the High Court which would have had jurisdiction over the dispute but for the arbitration clause.[42] This argument is predicated on the fact that the ACA is inferior to the Constitution. Thus, the ACA cannot amend the constitutional delimitation of the court's jurisdiction.[43] The argument may be supported by certain High Court decisions[44] and recent decisions of the Court of Appeal in *Chevron USA INC v Brittania-U Nigeria Limited*[45] and *Federal University of Technology Akure v BMA Ventures Nigeria Limited.*[46] There are, however, certain other decisions to the effect that Nigerian High Courts have coordinate jurisdiction to intervene in aid of arbitration.[47]

Apparently, courts and scholars have not considered the effect of the Supreme Court's decision in *Magbagbeola v Sanni.*[48] This case is critical to understanding relevant case law and how it should be interpreted in light of the current Nigerian arbitration regime and the Nigerian Constitution.[49] In that case, the parties had

[39] ACA ss 44(2) and 54(2).
[40] Ibid s 57(1).
[41] CFRN, s 251 (jurisdiction of the Federal High Court), s 257 (jurisdiction of the FCT High Court) and s 272 (jurisdiction of the State High Court).
[42] See for instance, Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* above at note 36 at 47, "The constitutionality of Section 7(4) of the Arbitration and Conciliation Act: Chief Felix Ogunwale v Syrian Arab Republic revisited" above at note 36 at 5; OO Olatawura, "Constitutional foundations of commercial and investment arbitration in Nigerian law and practice" (2014) 40/4 *Commonwealth Law Bulletin* 657 at 683 and OO Olatawura, "Nigeria's appellate courts, arbitration and extra-legal jurisdiction: facts, problems, and solutions" (2012) 28/1 *Arbitration International* 63.
[43]Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* above at note 35 at 48. See also Adedoyin Rhodes-Vivour, *Commercial Arbitration Law and Practice in Nigeria* (LexisNexis 2016) 638.
[44] See *Afocon Nig Ltd v Registered Trustees of Ikoyi Club 1936* [1996] FHCLR 371; *Imani & Sons Ltd v Bill Construction Co Ltd*, Suit No: FHC/L/CP/358/97, Belgore CJ (9 March 1998). See further, *Access Bank Plc v Akingbola* [2014] 3 CLRN 124 where the Lagos State High Court refused to register a decision of the English Courts on the basis that the subject matter was constitutionally within the exclusive jurisdiction of the Federal High Court. For the argument that courts should interpret relevant laws in a manner that promotes legal certainty and predictability, see PN Okoli, "Subject matter jurisdiction: the recognition and enforcement of English judgments in Nigeria and the need for a universal standpoint" (2016) 17 *Yearbook of Private International Law* 507.
[45] (2018) LPELR-43519(CA). According to this Court of Appeal decision, where the Federal High Court lacks jurisdiction over the substantive suit, the Court also lacks the jurisdiction to enforce the arbitration agreement by ordering the parties to proceed to arbitration save to apply s 22 of the Federal High Court Act and transfer the matter to an appropriate court.
[46] (2018) LPELR-44429(CA): the Federal High Court has no jurisdiction to enforce an arbitral award on a dispute predicated on a simple contract.
[47] See *Knight Frank & Rutley v Delta Steel Co Ltd*, Suit No: FHC/L/CS/383/95, Belgore, CJ (5 August 1995); *Tidewater Marine Intl Inc New Orleans (formerly known as Tidex Intl Inc) v Consolidated Oil Ltd Lagos* [1996] FHCLR 324; *Grinaker-LTS Construction Nig Ltd v UACN Property Development Co Ltd*, Suit No: FHC/L/CS/935/10, Idris J (21 February 2011).
[48][2005] 11 NWLR (Pt 936) 239, Katsina-Alu, JSC at 247 – 253.
[49] Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* above at note 35 at 46 and Rhodes-Vivour, *Commercial Arbitration Law and Practice in Nigeria* above at note 43 at 182 – 184 cited this case but did not consider its impact on the question. The respondent in *Federal University of Technology Akure v BMA Ventures Nigeria Limited* above at note 46 cited *Magbagbeola v Sanni* above at note 48 at the

entered into a partnership agreement to protect their interests in Commerce Lords Nigeria Limited of which they were promoters. Commerce Lords Nigeria Limited was in receivership. A dispute then arose between the parties. The respondent, relying on the arbitration clause in the partnership agreement, approached the Lagos State High Court to appoint an arbitrator. The appellant objected to the Lagos State High Court's jurisdiction to appoint an arbitrator, claiming that the dispute involved the running of a company (an item which was within the exclusive jurisdiction of the Federal High Court). The Lagos High Court and the Court of Appeal dismissed the objection. Both courts drew a distinction between the receivership pending at the Federal High Court and the Lagos State High Court dispute which merely sought to determine the rights of the parties under the partnership agreement of which the arbitration clause formed a part. The underlying dispute was predicated on a breach of the partnership agreement and could not be subsumed under companies' proceedings as the appellant claimed. The appellant was dissatisfied with the decision of the two courts. The appellant further appealed to the Supreme Court, which affirmed the findings of both lower courts that the underlying dispute did not concern how Commerce Lords Nigeria Limited operated – a matter over which the Federal High Court has exclusive jurisdiction. The underlying dispute rather concerned the interests of both parties considering their partnership agreement on how to share proceeds from Commerce Lords Nigeria Limited. Thus, the Supreme Court decided that the Lagos High Court had jurisdiction to appoint an arbitrator.

Magbagbeola v Sanni, however, did not clear the confusion arising from conflicting decisions of the lower courts because all the courts determined that the underlying dispute was founded on a partnership deed and not the management of an incorporated entity under the Companies and Allied Matters Act as erroneously canvassed by the appellant. The Lagos High Court before which the application to appoint an arbitrator was brought had underlying jurisdiction over the substantive claims. Therefore, *Magbagbeola v Sanni* should not support any argument that the Federal or State High Courts can intervene in arbitration irrespective of subject matter of the underlying dispute. This is because the reason for a court's decision is anchored to the facts.[50] Thus, the Supreme Court's pronouncement (per Katsina-Alu JSC) on the competence of both lower courts to appoint an arbitrator was *obiter*.

Nevertheless, the Supreme Court's pronouncement in *Magbagbeola v Sanni* can be justified by separating the parties' dispute from the agreement to arbitrate. Clearly, the agreement to arbitrate is separable from the parties' contract.[51] Thus, the right of action in cases where judicial intervention is sought in the appointment of arbitrators is simply based on the default of a party in appointing an arbitrator as prescribed by the ACA and not the cause of action underlying the dispute. Either of the High Courts should have jurisdiction as prescribed by the

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Court of Appeal which, however, did not consider the case in its decision that the Federal High Court had no jurisdiction to enforce an arbitral award predicated on simple contract. This is because under s 251 of the Nigerian Constitution matters of simple contract are within the exclusive jurisdiction of the State High Courts. See *Adelekan v Ecu-Line NV* [2006] 12 NWLR (Pt 993) 33 at 52 *Osun State Government v Dalami (Nig) Ltd* [2007] 9 NWLR (Pt 1038) 66 at 91-92; *P & C.H.S. Co. Ltd v Migfo (Nig) Ltd* [2012] 18 NWLR (Pt 1333) 555 at 600 and *Onuorah v Kaduna Refinery and Petrochemical Company* [2005] 6 NWLR (Part 921) 391 at 405.

[50] See Oputa JSC in *Adegoke Motors v Adesanya* [1989] 5 SCNJ 80: "… the expression of every judge, including the justices of this court, must be taken with reference to the facts and peculiar circumstances of the case on which he decides otherwise the law will get into extreme confusion. That is why in this judgment, I repeatedly said that the facts frame the issues for decision." See further, *Babatunde v PAS &TA Ltd* [2007] 13 NWLR (Pt 1050) 113 at 157; *Albiom Construction Ltd v Rao Investment & Properties Ltd* [1992] 1 NWLR (Pt 219) 583 at 598; *Audu v AGF* [2012] LPELR-19653 SC; *Bhojwani v Bhojwani* [1996] 6 NWLR (Pt 451) 663; *Oyeneye v Odugbesan* [1972] 4 SC 244; *Obi-Odu v Duke (No 2)* [2005] 10 NWLR (Pt 932) 120; *Bamgboye v Unilorin* [1999] 10 NWLR (Pt 622) 200; *Salami v NNN Ltd* [1999] 13 NWLR (Pt 634) 315 at 330 and *Abacha v Fawehinmi* [2000] 4 SC (Pt II) 1.

[51] ACA, s 12(2). See also, *NNPC v Klifco Nig Ltd* [2011] 10 NWLR (Pt 1255) 209; *Heyman v Drawins Ltd* [1942] AC 356 at 374; *Stabilini Visinoni Ltd v Mallinson & Partners Ltd* [2014] 12 NWLR (Pt 1420) 134 per Nimpar JCA: "….An arbitration agreement generally exist as a clause in a contract agreement is usually treated separately regardless of what the contract is all about. It is a special clause not affected by the main contract though part of the contract agreement". See further, G Nwakoby, "International commercial arbitration agreement – issue of autonomy in arbitration practice" (2003) 7 *Modern Practice Journal of Finance and Investment Law* 310 at 323.

ACA. The State High Courts can exercise jurisdiction based on both the ACA and the fact that simple contracts fall within their exclusive jurisdiction.[52] The Federal High Court can exercise jurisdiction based on the ACA itself and section 251(1) of the Constitution:

> *Notwithstanding anything to the contrary contained in the Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of National Assembly the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters.*

Thus, the ACA confers additional jurisdiction on the Federal High Court with respect to the enforcement of the contract to arbitrate. Consequently, the Federal High Court's jurisdiction to intervene in arbitration is not limited by subject matter jurisdiction or the subject matter of the substantive action. A combined reading of section 57 of the ACA and section 251(1) of the Constitution supports this argument. If the law is that jurisdiction to intervene is limited to only the court with subject matter jurisdiction over the substantive dispute, then only the State High Courts are limited in their intervention jurisdiction to constitute arbitral tribunals.[53] The Nigerian Court of Appeal's decisions in *Chevron USA INC v Brittania-U Nigeria Limited*[54] and *Federal University of Technology Akure v BMA Ventures Nigeria Limited*[55] are, therefore, inaccurate because in both cases the Court of Appeal decided that the Federal High Court did not have jurisdiction to enforce arbitral awards predicated on simple contract. A harmonious and progressive interpretation of the relevant statutory provisions do not support such appellate decisions.

The need to consider party autonomy vis-à-vis access to the courts is underscored by the increasing importance of the National Industrial Court. As earlier noted, the Federal High Court, State High Courts and the National Industrial Court are all courts of coordinate jurisdiction. In principle, therefore, no court is superior to the other court is subject to its jurisdictional delineations.

Appointment of Arbitrators vis-à-vis the Jurisdiction of the National Industrial Court

The National Industrial Court has exclusive jurisdiction to determine several matters, including "industrial relations and other matters arising from the workplace… matters incidental thereto or connected therewith."[56] In principle, this jurisdiction does not conflict with the exclusive subject matter jurisdiction of the Federal High Court and the general jurisdiction of the State High Courts.[57] By the Constitution, applications for judicial intervention in arbitration should be made to the National Industrial Court in disputes relating to

[52] See *P & CHS Co Ltd v Migfo (Nig) Ltd* [2012] 18 NWLR (Pt 1333) 555; *Oliver v Dangote Ind Ltd* [2009] 10 NWLR (Pt 1150) 467; *KLM Royal Dutch Airlines v Taher* [2014] 2 NWLR (Pt 1393) 137; *Adelekan v Ecu-Line NV* [2006] 12 NWLR (Pt 993) 33; *NUT Niger State v COSST, Niger State* [2012] 10 NWLR (Pt 1307) 89 at 109 and *Onuorah v Kaduna Refinery and Petrochemical Co* [2005] 6 NWLR (Pt 921) 393.

[53] This would be subject to the outcome of the intervention jurisdiction of the National Industrial Court considered below.

[54] (2018) LPELR-43519(CA): where the Federal High Court lacks jurisdiction over the substantive suit, the court also lacks the jurisdiction to enforce the arbitration agreement by ordering the parties to proceed to arbitration save to apply the Federal High Court Act, s 22 and transfer the matter to an appropriate court.

[55] (2018) LPELR-44429(CA): the Federal High Court has no jurisdiction to enforce an arbitral award on a dispute predicated on a simple contract.

[56] CFRN, s 254C (1)(a).

[57] See CFRN, s 254C (1) and National Industrial Court Act 2006, s 7 on the exclusive jurisdiction of the National Industrial Court generally. See also CFRN, s 272 (on the Federal High Court) and CFRN, s 251(1) (on the State High Courts). See also, Okoli and Umeche above at note 14 at 481.

labour/employment matters.[58] However, the National Industrial Court is not contemplated in sections 7(2) and 57(1) of the ACA which provides for judicial intervention in arbitrator appointments and specifies the courts that can intervene. In *Ravelli v Digitsteel Integrated Services Limited,*[59] counsel for the applicant unsuccessfully argued that the ACA was impliedly amended to include the National Industrial Court as one of the courts that can intervene in the appointment of arbitrators.

Jurisdictional delineations considering the ACA and the Constitution do not provide a definitive solution to challenges in the area of arbitration. Section 57(1) of the ACA lists the courts that can exercise intervention jurisdiction in arbitration. The National Industrial Court is omitted. In this regard, it should be noted that the ACA, promulgated in 1988, predated the establishment of the National Industrial Court as a court of coordinate jurisdiction with the Federal and State High Courts. The National Industrial Court was vested with exclusive jurisdiction over labour and employment matters in 2010.[60]

The earlier decision of the National Industrial Court in *Gregory v West African Oil Field Services Ltd*[61] arguably strengthened the view that the National Industrial Court could intervene in arbitration to appoint arbitrators. The claimant was employed as Chief Operating Officer of the respondent company (West African Oil Field Services). His employment was terminated by a letter dated 22 December 2011. Relying on section 254(c)(1)(a) and (d) of the Constitution, the claimant had obtained an interim injunction by an *ex parte* application restraining his employers from effecting the termination of his employment. The respondent applied to the National Industrial Court to discharge the interim injunction citing an arbitration clause requiring disputes arising from the employment contract to be arbitrated in London in accordance with the International Chamber of Commerce (ICC) Arbitration Rules. The claimant argued that the arbitration clause would oust the exclusive jurisdiction of the National Industrial Court over labour/employment disputes. The National Industrial Court discharged the interim injunction. Upholding the arbitration clause in the employment contract Adejumo J stated:

> [….] *Once the court comes to the conclusion that parties have agreed to refer disputes to arbitration, the court in line with the well established notion that parties are bound to honour their contractual obligations should enforce the arbitration agreement. This Court does not share the view that by inserting an arbitration clause in the CSA, the parties have agreed to oust the jurisdiction of this court under section 254(c)(1) as contended by the claimant/respondent's counsel*.[62]

Notwithstanding this decision, section 57(1) of the ACA which only lists the Federal and State High Courts as courts exercising intervention jurisdiction in arbitration was recently interpreted to exempt the National Industrial Court from exercising jurisdiction to intervene in arbitration to appoint arbitrators in default of the parties. This interpretation is evident in three cases: *Ravelli v Digitsteel Integrated Services Limited,*[63] *Prakash v Orleans Invest Holdings*[64] and *Ajilore v KLM Airlines.*[65]

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[58] See CFRN, s 254C (3): The National Industrial Court is empowered to exercise "appellate and supervisory jurisdiction over an arbitral tribunal… in respect of any matter that the National Industrial Court has jurisdiction to entertain."; Under the CFRN s 254C(4), the National Industrial Court is empowered to "…entertain any application for the enforcement of the award, decision, ruling or order made by any arbitral tribunal… connected with, arising from or pertaining to any matter of which the National Industrial Court has the jurisdiction to entertain."
[59] Above at note 22 at 15.
[60] See s 254C (1) of the CFRN.
[61] [2012] 5 CLRN 176.
[62] Ibid 178.
[63] Above at note 23.
[64] Ibid.
[65] Ibid.

In *Ravelli v Digitsteel Integrated Services Limited*[66] the applicant filed originating motion at the National Industrial Court seeking the appointment of an arbitrator to resolve a dispute with his erstwhile employers. He relied in part on article 22 of his employment contract dated 17 August 2012 (arbitration clause) and section 7(2)(b) of the Act (default appointment provision). When the motion came up for argument on 28 March 2017, Kanyip J on the Court's own motion, raised the issue of the National Industrial Court's jurisdiction to appoint an arbitrator pursuant to the ACA and asked the parties to address him on the point. Kanyip J then ruled as follows:

i. The ACA applies only to commercial disputes. Employment and labour disputes fall outside the ambit of the ACA.[67]

ii. The fact that the Constitution[68] expressly grants exclusive jurisdiction to the National Industrial Court over trade disputes under the Trade Disputes Act[69] which expressly excludes the ACA from application to trade disputes[70] strengthens the view that the Act was not meant to be applied to labour/employment disputes.

iii. Case law authorities clarify that the ACA applies only to commercial disputes. Labour/employment disputes are not commercial disputes.[71]

iv. The ACA expressly listed the Federal, State and FCT High Courts as courts exercising jurisdiction under the Act and leaves out the National Industrial Court.

Kanyip J rejected the argument of the claimant. The claimant had argued that, considering the extensive jurisdiction which the Constitution conferred on the National Industrial Court with respect to labour/employment matters, the National Industrial Court should be included wherever the Federal and State High Courts are mentioned in the ACA to ensure the National Industrial Court has jurisdiction to intervene in arbitration concerning labour/employment matters and thus appoint arbitrators. Kanyip J emphasised that "the Arbitration and Conciliation Act itself recognises the fact that it does not cover all issues".[72] For example, issues that concern a violation of the Constitution or any statute cannot be submitted to arbitration tribunals.[73] Kanyip J further observed that the ACA focused solely on commercial disputes and, therefore, the jurisdiction which the Constitution conferred on the National Industrial Court did not apply to the case in question.[74]

Kanyip J essentially declared that the arbitration clause in employment contracts could not be enforced in Nigeria. In view of the National Industrial Court's extensive jurisdiction over labour/employment matters under the Constitution, the claimant could not have approached the Federal or State High Courts to appoint the arbitrator. His only option would be to institute an action at the National Industrial Court, making the arbitration clause

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[66] Ibid.

[67] *Ravelli v Digitsteel Integrated Services Ltd* above at note 22 13, citing the ACA, s 57(1):

> *"Arbitration" means a commercial arbitration whether or not administered by a permanent arbitral institution…*
> *"Commercial" means all relationships of a commercial nature, including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road.*

The Court also found the long title to the Act relevant: "An Act to provide a unified framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation". See further, A Asouzu, "Arbitration and Judicial Powers in Nigeria" (2001) 18/6 *Journal of International Arbitration* 617 at 627 on the ACA applying only to commercial disputes.

[68] CFRN s 254(c)(1)(b).

[69] Cap T8 LFN 2004 ("**TDA**" hereafter), s 12.

[70] Ibid s 12.

[71] Citing *Maritime Academy of Nigeria v AQS* [2008] All FWLR (Pt 406) 1872 at 1890; *Compagnie Generale de Geophysique v Etuk* [2003] LPELR-5516(CA).

[72] *Ravelli v Digitsteel Integrated Services Ltd* above at note 22 at 14.

[73] *Statoil (Nigeria) Ltd v FIRS* [2014] LPELR-23144(CA).

[74] CFRN s 254(C)(1).

redundant. On the applicant's inability to proceed with the arbitration, Kanyip J stated that: "the applicant foisted on himself the position of helplessness that he complains of…" because he could have instituted an action against the respondent.[75] This, however, contradicts the purpose of arbitration agreements which is to take dispute resolution outside the purview of the courts based on party autonomy.

Bassi J adopted Kanyip J's reasoning in *Prakash v Orleans Invest Holdings*[76] and *Ajilore v KLM Airlines*.[77] *Ajilore v KLM Airlines* was also an application for judicial intervention of the National Industrial Court in the appointment of arbitrators. Here, the employment contract had specified that the sole arbitrator would be the employer's (defendant/respondent's) General Manager. The employee (claimant) objected to this and applied to the National Industrial Court to instead appoint an arbitrator pursuant to the Act. Bassi J declined to appoint arbitrator, adopting Kanyip J's position and decided that the court could not make any orders that would give effect to the Act.[78] The application was struck out. Interestingly, however, Bassi J was willing to apply order 29(1) of the National Industrial Court of Nigeria Rules 2017 to refer the matter to an arbitrator if the parties had agreed on this point and the application was made under the Rules rather than the ACA.[79] This approach indicates that the National Industrial Court is not averse to settlement of employment disputes by arbitration. The arbitration in the National Industrial Court must be by agreement of the parties while the suit is pending in this court and subject to the court having ordered the arbitration.

Although Bassi J did not consider if it was fair for an employment contract to stipulate that the employer's General Manager should be the arbitrator, *Ajilore v KLM Airlines* demonstrates the possible unfairness in subjecting an employee to his own employer's agent as a sole arbitrator despite the likelihood of conflicting interests.[80] This unfairness is complicated by the reluctance of the court to appoint an arbitrator. Thus, in *Prakash v Orleans Invest Holdings*[81] Bassi J, further adopting Kanyip J's reasoning on the inapplicability of the Act to labour/employment matters, refused to stay proceedings under the ACA to require the parties to proceed to arbitration. Bassi J rather assumed jurisdiction to determine the dispute, notwithstanding the arbitration clause.

Clearly, the National Industrial Court is reluctant to appoint arbitrators under the ACA. This court would rather exercise jurisdiction to determine the dispute.[82] Where the parties agree after an action has been filed at the National Industrial Court that the matter be referred to arbitration and make an application to the Court in this regard, the judge will then consider referring the dispute to arbitration.[83]

In all the cases analysed, the arbitral tribunal would have determined the employment claims rather than the National Industrial Court on the basis of an arbitration clause entered at a time the employee was subordinate

[75] *Ravelli v Digitsteel Integrated Services Ltd* above at note 23 at 15.
[76] Above at note 23.
[77] Ibid.
[78] *Ajilore v KLM Airlines* above at note 23 at 8.
[79] This provides: "In any action before the Court, the Court may at any time order the whole cause or matter or any question or issue of facts arising therein to be tried before a special referee, officer of the Court, or arbitrator as agreed by the parties."
[80] See AJS Colvin, "An empirical study of employment arbitration: case outcomes and processes" (2011) 8/1 *Journal of Empirical Legal Studies* 1 – 23 for results of a study of employment arbitrations demonstrating how arbitration was disadvantageous to employees in the US. Win rates for employees was a mere 21%, far lower than obtained in litigation. In the few cases where the employees won, compensation awarded was far lower when compared to litigation. Gross provides two important supporting arguments here: first (in the context of empirical studies), "repeat-player advantage garnered by parties with superior bargaining power harms those with weaker bargaining power"; second, the "discounting of bargaining endowments weakens both the legitimacy of these settlements and the legitimacy of arbitration as a dispute resolution process". See JI Gross, "Bargaining in the (murky) shadow of arbitration" (2019)/24 Harvard Negotiation Law Review 185, 189-190.
[81] Above at note 23.
[82] Compare with the English position in *Clyde & Co LLP v Bates Van Winkelhof* [2011] EWHC 668 (QB): an employee has a statutory right to approach an employment tribunal for resolution of his complaints. The employer cannot therefore insist that the dispute be submitted to arbitration. See G Bamodu, "Judicial support for arbitration in Nigeria: on interpretation of aspects of Nigeria's Arbitration and Conciliation Act" (2018) 62/2 *Journal of African Law* 255 at 276.
[83]National Industrial Court of Nigeria Rules 2017, Order 29(1); *Ajilore v KLM Airlines* above at note 23 at 8.

to the employer. The question of imbalance of bargaining power invariably arises. There is merit in the approach of Bassi J requiring the parties to agree on a resolution by arbitration when the dispute has already arisen and is before the National Industrial Court. An arbitration clause in an employment contract which is usually on a take-it-or-leave-it basis is potentially unfair from the employee's perspective. The ability of the employee to opt out of the arbitration and retain his job should be a relevant factor in determining the enforceability of the arbitration clause.[84] In *Faber v Menard, Inc*[85] an employee successfully argued that an arbitration clause in his employment agreement was procedurally unconscionable because of his weak bargaining power and financial standing compared to his employer's. The United States Court of Appeals (Eighth Circuit) decided that the arbitration clause was unenforceable. This decision was partly because the employee was told that he must either agree to participate in the arbitration program or be replaced.

The weak bargaining power of employees is particularly important in the Nigerian context. In principle, one of the advantages of arbitration is less expenses. However, this is not always the case and in Nigeria employees may find arbitration expensive. In fact, litigation is often a cheaper option for employees because the cost of filing relevant documents is very minimal.[86] Any costs awarded against the employee are also very minimal. On the other hand, employees (especially low and mid-level) will find arbitrators' fees prohibitive and possible costs will be significant. There is, therefore, much to recommend in the argument that employees should not be required to pay the arbitrator(s) fees and other arbitration expenses to facilitate the enforcement of arbitration agreements with respect to employment contracts.[87] Nevertheless such approach raises a different issue of power balance during proceedings if one party pays the arbitrator's fees.

The Finality of the Court's Arbitrator Appointment Decision in the Arbitration Act

Apart from the controversy concerning which of the High Courts has jurisdiction to intervene to assist in the appointment of arbitrators, there is also controversy as to whether a party dissatisfied with the courts' appointment can appeal the decision appointing the arbitrator.[88] Under section 7(4) of the ACA, the decision of the Federal and State High Courts on court appointed arbitrators is final and not subject to appeal. In *Ogunwole v Syrian Arab Republic* the respondent was a tenant of the appellant.[89] The tenant, upon vacation of the property, demanded a refund of the unused rent as provided in the tenancy agreement. The appellant only refunded a part of the outstanding sum claiming the difference had been used to restore the premises to a tenantable position. The respondent then gave notice of arbitration in accordance with the tenancy agreement, appointing an arbitrator. The

[84] S Hickox, "Ensuring Enforceability and Fairness in the Arbitration of Employment Disputes" (2010)16 *Widener Law Review* 101 at 113. Citing *Davis v O'Melveny & Myers, LLC,* 485 F.3d 1066, 1074-75 (9th Cir. 2007).
[85] 267 F. Supp. 2d 961, 977 (N.D. Iowa 2003), rev'd, 367 F.3d 1048 (8th Cir. 2004).
[86] For the argument that "arbitration is not always practical as it is sometimes expensive in relation to the value of the claim", see PN Okoli, *Promoting Foreign Judgments: Lessons in Legal Convergence from South Africa and Nigeria* (2019, Wolters Kluwer) 14-15.
[87] Hickcox above at note 84 at 107, citing *Cole v Burns Int'l Sec. Servs.,* 105 F.3d 1465, 1476-77 (D.C. Cir. 1997). See further, TP Gies and AW Bagley, "Mandatory Arbitration of Employment Disputes: What's New and What's Next?" (2013) 39/3 *Employee Relations Law Journal* 22.
[88] See GC Nwakoby, "Appointment of arbitrators" (2001) 5/3 *Modern Practice Journal of Finance and Investment Law* 355 and "The Constitutionality of Section 7(4) and 34 of the Arbitration and Conciliation Act: Chief Felix Ogunwale v Syrian Arab Republic revisited" above at note 36 at 353; MM Akanbi "Appointment of arbitrators: law and practice" (2001)5/1 *Nigeria Law and Policy Journal* 26; PO Idornigie "The default procedure in the appointment of arbitrators: is the decision of the court appealable?" (2002) 68/4 *Arbitration: The Journal of the Chartered Institute of Arbitrators* 397 and "Nigeria's appellate courts, arbitration and extra-legal jurisdiction—facts, problems, and solutions: a rejoinder" (2015) 31 *Arbitration International* 171 at 174; CE Ibe, "Party autonomy and the constitutionality of Nigerian Arbitration and Conciliation Act 1988, Sections 7(4) and 34" (2011)28/5 *Journal of International Arbitration* 493; OO Olatawura, "Constitutional foundations of commercial and investment arbitration in Nigerian law and practice" (2014)40/4 *Commonwealth Law Bulletin* 657 and "Nigeria's appellate courts, arbitration and extra-legal jurisdiction: facts, problems, and solutions" (2012) 28/1 *Arbitration International* 63.
[89] [2002] 9 NWLR (Pt 771) 127.

appellant failed to appoint an arbitrator and the respondent thus applied to the court under section 7(2) of the ACA, for a court appointed arbitrator. The respondent's application was granted, and the court appointed Ajomo arbitrator. The appellant then appealed to the Court of Appeal which dismissed the appeal, citing sections 7 and 34 of the ACA under which no appeal could be entertained with respect to the court's appointment of arbitrators.[90] Scholars, legal practitioners and commentators have seriously debated the finality of the court's decision appointing an arbitrator. In justifying the restriction of appeals, for example, it has been argued that a party can challenge the court appointed arbitrator under section 8(3) of the ACA.[91] The rationale behind this argument is that rather than appeal the decision of the court in appointing an arbitrator, it is better to challenge the arbitrator before the arbitral tribunal. Furthermore, since this option of a challenge is available, the decision of the court in appointing an arbitrator is not final and is thus not affected by section 241 of the Constitution that guarantees a right to appeal final decisions of the High Courts. This argument is insightful, but section 8(3) of the ACA only provides limited grounds for challenging an arbitrator. These grounds may be juxtaposed with the myriad of reasons for which the decision of a court may be appealed, including the grounds of procedure adopted by the court. Besides, it is unfair and undermines legal certainty to allow a party who either failed to raise objections to the appointment of an arbitrator during the court proceedings or whose objections have already been dismissed by a competent court to raise such an objection at the arbitral tribunal.

Some other scholars have argued that the statutory provision which restricts appeals was made during the Nigerian military era when decrees were supreme. Thus, it is doubtful that the provision would be valid unless the Constitution is amended to provide for such exceptions.[92] This view is supported by *Nigerian Agip Oil Company Ltd v Kemmer*, [93] where the Court of Appeal decided that the decision of a High Court appointing an arbitrator is appealable considering section 241 of the Constitution which provides that litigants are entitled to appeal the decisions of the Federal and State High Courts. However, the effect of conflicting decisions of the Nigerian Court of Appeal remains challenging.[94] Thus, case law is unclear as to whether parties can appeal decisions concerning the appointment of arbitrators. Similar issues were earlier raised with respect to whether decisions of the National Industrial Court could be appealed to the Court of Appeal. Some earlier decisions of the Court of Appeal indicate that all decisions of the National Industrial Court could be appealed.[95] There are also later decisions of same Court of Appeal that not all decisions of the National Industrial Court could be appealed, except criminal or fundamental rights decisions.[96] Because of the conflicting decisions, the law on the right to appeal National Industrial Court decisions was rather unclear until the parties in *Skye Bank Plc v Iwu* requested the Court of Appeal to state a case for the Supreme Court's guidance.[97] The Supreme Court ruled that all first

[90] See also *Nig Agip Oil Co Ltd v Kemmer* [2001] NWLR (Pt 716) 506, 525; *Bendex Eng v Efficient Petroleum Nig Ltd* [2001] 8 NWLR (Pt 715) 338.
[91] Ibe above at note 88.
[92] Orojo and Ajomo above at note 29 at 121.
[93] Above at note 90 at 525 – 526.
[94] Some commentators argue that where decisions of the Court of Appeal conflict lower courts are free to apply anyone of them. See E Essien, "Conflicting rationes decidendi: the dilemma of the lower courts in Nigeria" (2000) 12 African Journal of International and Comparative Law 20. Other commentators argue that the later decision prevails. See CO Idahosa, *The Doctrine of "Stare –Decisis" and Judicial Precedent: the Need for Lower Courts to be Bound by Decisions of the Superior Courts of Record* (Paper delivered at the Conference of All Nigeria Judges of the Lower Courts held between 21st–25th November, 2016) 17. See further, *Bronik Motors v Wema Bank* (1983) 1 SCNLR 296, *CBN v Zakari* (2018) LPELR-44751(CA), *Osakwe v Federal College of Education* (2010) 3 SCNJ 529 at 546.
[95] *Local Government Service Commission, Ekiti State v Jegede* (2013) LPELR-21131, *Local Government Service Commission, Ekiti State v Bamisaye* (2013) LPELR-20407, *Local Government Service Commission, Ekiti State v Olamiju (*2013) LPELR- 20409, *Local Government Service Commission, Ekiti State v Asubiojo* (2013) LPELR-20403, *Federal Ministry of Health v The Trade Union Members of the Joint Health Sectors Unions* (2014) LPELR-2354 (CA).
[96] *Coca-Cola (Nig) Ltd v Akinsanya* [2013] 18 NWLR (Pt 1385) 225, *Lagos Sheraton Hotel & Towers v HPSSSA* [2014] 14 NWLR (Pt 1426) 45.
[97] Above at note 17

instance decisions of the National Industrial Court could be appealed. According to Eko JSC in that case, the decisions of the National Industrial Court should not be final and conclusive as to prevent an appeal. In other words, "the right to appeal against the decision of a first instance Court or tribunal is a basic Constitutional right".[98] Considering section 36(2) of the Constitution which provides a right to appeal, the correct position of the law was stated in *Nigerian Agip Oil Co Ltd v Kemmer*.[99] There is a right to appeal the decision of the High Court in appointing an arbitrator. If such issues arise again, the Court of Appeal could state a case for the Supreme Court's directions or be guided by the Supreme Court's attitude on appeals as seen in *Skye Bank Plc v Iwu*.[100] This approach is consistent with constitutional provisions that guarantee access to the courts. Although arbitration clauses should discourage litigation, there should be a contextual consideration of circumstances where parties will suffer injustice if they do not have a right to appeal. Such injustice is complicated by the peculiarities of Nigeria where litigants are sometimes unable to access any court due to jurisdictional conflicts between the Federal High Court, State High Courts and the National Industrial Court.[101]

Conclusion

Generally, legal principles that concern the appointment of arbitrators are straightforward. In Nigeria, however, complexities can arise when courts need to appoint arbitrators. Thus, the High Courts have jurisdiction to appoint arbitrators where the parties fail to do so but there is no legal certainty as to which High Court: State High Court, Federal High Court or the National Industrial Court. The rules on whether the Federal, FCT and State High Courts in Nigeria have jurisdiction under section 57 of the ACA, irrespective of the subject matter of the underlying dispute, are unclear and riddled with conflicting authorities. The prudent course would be to apply for the appointment of arbitrators in either the Federal High Court or the State High Court that ordinarily exercises jurisdiction over the underlying dispute. However, determining which High Court has subject matter jurisdiction can be a complex and uncertain process. Where it is unclear which High Court should exercise subject matter jurisdiction over the dispute, the Federal High Court should *prima facie* have jurisdiction to appoint arbitrators since the Nigerian Constitution read alongside the ACA has vested the Federal High Court with additional jurisdiction.[102] With regard to labour/employment disputes, clearly, none of the High Courts can exercise jurisdiction to intervene in the appointment of arbitrators.[103] Based on case law analysis, the National Industrial Court is unlikely to enforce the arbitration clause in an employment contract by appointing an arbitrator. Nevertheless, the decision of the National Industrial Court in *Ajilore v KLM Airlines* strongly suggests that the National Industrial Court is not averse to submission agreements.[104] In such a case, the appropriate course is to institute an action at the National Industrial Court and the parties can agree to refer the matter to arbitration as directed by the National Industrial Court. On this basis, the National Industrial Court can appoint an arbitrator pursuant to order 29(1) of the National Industrial Court of Nigeria Rules 2017 and not under the ACA which the National Industrial Court has clearly ruled does not apply to labour/employment disputes.

[98] ibid.
[99] Above at note 90.
[100] Above at note 97.
[101] Above at note 14.
[102] This is considering a combined reading of ACA, s 57 and CFRN, s 251(1).
[103] CFRN s 254C(1)(a)(3) & (4).
[104] Above at note 23.

There is considerable legal uncertainty as to whether litigants can appeal any decision of the High Courts concerning the appointment of arbitrators. [105] Until there is a clear resolution of this issue, *Skye Bank Plc v Iwu* is instructive and should provide guidance to discourage any curtailment of the right to appeal.[106] In this context of judicial intervention in arbitrator appointments, the prospect of parties having difficulties in accessing the courts due to jurisdictional conflicts over which they lack control is unfair and undermines arbitration.

[105] *Ogunwole v Syrian Arab Republic Nigerian* above at note 89 and *Agip Oil Company Ltd v Kemmer* above at note 88). See further, *Bendex Eng v Efficient Petroleum Nig Ltd* above at note 90).
[106] Above at note 97.