Thought Leadership *Reflections*
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Autonomies: **Choice of Law and Courts' Jurisdiction in Nigerian Arbitration**

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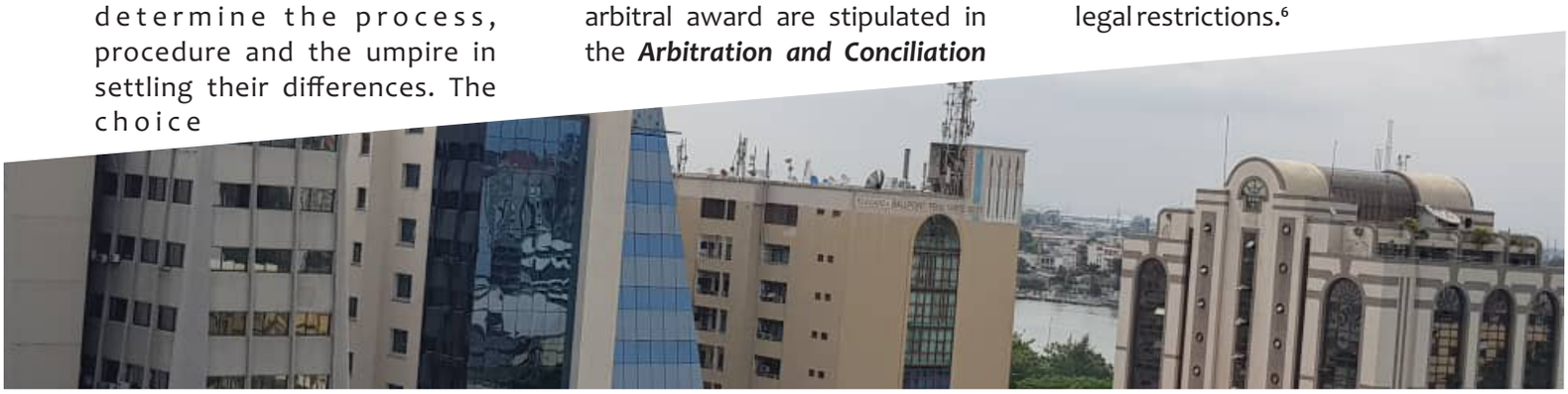
Introduction

Arbitration is widely regarded as a better alternative to litigation for a number of reasons. Litigation is time-consuming due to delays (both deliberate and otherwise) in legal proceedings, it is adversarial and therefore negatively impacts business relationships, and is also expensive.[1] The use of arbitration to avoid litigation and invariably save time, effort and costs has made it a *sine qua non* for most commercial agreements.

The main draw of arbitration is that the parties are essentially in control of their fate. Arbitration affords them the liberty to determine the process, procedure and the umpire in settling their differences. The choice to sidestep the disadvantages of litigation, is just one of the variants of party autonomy.

Conversely, arbitration for all its merits is not self-sufficient. It is not completely independent of the Court system, neither is it entirely dependent on it;[2] arbitration requires the Courts to be effective. Parties have to apply to Court for the enforcement of arbitral awards. However, the experience of some parties is that the technicalities and bureaucracies of the Nigerian judicial system enables lawyers to frustrate the enforcement of awards against their clients. The grounds for challenging an arbitral award are stipulated in the ***Arbitration and Conciliation Act***[3] ***(ACA)***, and ***the Lagos State Arbitration Law***[4] ***(LAL)***.

It has therefore become imperative for solicitors to be meticulous, innovative and thorough in drafting arbitration clauses, with broader objectives than circumventing litigation, as the endgame. Elaborate, clear and unambiguous phraseology contributes to the efficiency of the arbitration process.[5] Consequently, drafting an appropriate, fit for purpose arbitration clause is critical in contract negotiation, since parties can mould their arbitration clause to their preferences, subject to certain legal restrictions.[6]



1. See Orojo and Ajomo, ***'Law and Practice of Arbitration and Conciliation in Nigeria'***, *(Mbeyi & Associates, 1999), pp. 2 -5; Greg Nwakoby,* ***'The Law and Practice of Commercial Arbitration in Nigeria'***, *(2nd ed., 2014), pp.62-66;* and Candide-Johnson and Shasore, ***'Commercial Arbitration Law and International Practice in Nigeria'***, *(Lexis Nexis, 2012), pp. 9-11.* See also: Gaius Ezejiofor, ***'The Law of Arbitration in Nigeria'***, *(Longman, 2005), pp. 12-15* for a discussion of the merits and demerits of arbitration. Of particular interest are scenarios when arbitration may turn out to be more expensive option; and Oyekunle and Ojo, ***'Handbook of Arbitration and ADR Practice in Nigeria'***, *(LexisNexis, 2018), pp 12-15;* and *pp. 16-17* (***Para 2.4, When litigation is preferable to arbitration***).
2. ***Section 34*** of Nigeria's ***Arbitration and Conciliation Act Cap. A18, Laws of the Federation of Nigeria (LFN) 2004 (ACA)***, forbids the interference of Courts in arbitration governed by the ACA, except in certain circumstances provided therein.
3. See full citation in footnote 2 above. The ***ACA*** takes after the ***UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law).***
4. ***Cap. A11, Laws of Lagos State 2015,*** is an example of State legislation; many States in Nigeria also have their own ***Arbitration Laws.***
5. See Daniel Odupe, ***'Efficiencies: Optimizing Alternative Dispute Resolution Options For Contract Effectiveness'***, *LeLaw Thought Leadership, August 2018*: https://lelawlegal.com/add111pdfs/Efficiencies_ Optimizing_ADR_Options_Daniel.pdf (accessed 01.05.2021).
6. The Courts will not enforce a contract which is illegal, contrary to public policy or permit the recovery of benefits under such contracts: ***Macaulay v. RZB of Austria [1999] 4 NWLR (Pt. 600), 599.***

For example, *can parties contract for their arbitration to be resolved in accordance with a foreign arbitral law?* This article discusses the position of the law in Nigeria and the attitude of the Courts in Nigeria to such agreement by parties and the need for the law to keep pace with the ever changing clime of the world.

Challenges of Arbitration in Nigeria

Arbitration is an alternative dispute resolution adopted by parties to have all disputes arising from their agreements resolved by a third party, outside of the judicial system. According to ***Black's Law Dictionary***,[7] it is *"a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputes parties and whose decision is binding."* The Supreme Court (SC) in ***NNPC v. Lutin Investment***[8] described it as: *"a 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."*

As previously mentioned, arbitration is widely considered as the best method for the settlement of commercial disputes.[9] It is preferred to the judicial system as its procedure is private, more flexible, less time consuming, less expensive and technical than litigation. Arbitration seeks to eliminate such obstacles clogging up the wheel of commerce and enterprise.

Arbitration culminates in the making of an award which is final and binding.[10] Thus, it is unnecessary for parties contracting under the ***ACA and LAL*** to include a clause to that effect. According to a learned author, in some jurisdictions such as France, Russia, Switzerland, and Belgium, it is now acceptable for parties to waive their recourse rights to court, regarding the arbitral award.[11] The problem of enforcement however arises when a party neglects, fails or refuses to comply with the award.

Arbitral tribunals lack the power to compel compliance as only the Courts are vested with judicial powers over *"all matters between persons and to all actions and proceedings relating thereto, for the determination of any question as to his/her civil rights and obligations."*[12] Thus, an application has to be made to the Court for the enforcement of awards as stipulated by the arbitral law pursuant to which the arbitration was conducted.[13]

Although arbitral awards are final,[14] this does not obliterate the rights of the dissatisfied party to challenge the award under grounds provided by the law.[15] Thus, there could be litigation to convince the Court to either: set aside the award,[16] refuse its enforcement,[17] or invalidate the award - in which case, the dispute would be remitted to the arbitral tribunal for a reconsideration.[18]

7. Bryan A. Garner (ed.), ***'Black's Law Dictionary'***, (Thomson Reuters, 9th ed. (2009)), p. 119.
8. ***(2006) LPELR-2024-(SC) 37-38F-A.***
9. *"Arbitration awards are usually handed down within a few months of the occurrence of the dispute-in most cases the time is stipulated in the terms of reference-and funds need not be tied up for long periods. To a businessman especially, time is money and the vexatious delays in litigation, the interruptions caused by recurrent consultations and legal hearings and the mental disruptions accompanying controversies of this sort are all inimical to the proper formulation of business policies and the efficacious pursuit of business activities."* See Tiewul Azadon, and Francis A. Tsegah, ***'Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice.'*** *The International and Comparative Law Quarterly, Vol. 24, No. 3, 1975, pp. 393–418 at 396:* http://www.jstor.org/stable/758776 (accessed 18.05.2021).
10. ***Sections 31(1) ACA*** and ***56(1) LAL***.
11. *"In practice, parties may opt for such clauses because they hope to waive additional proceedings on the merits of their dispute following the tribunal's award. To this end, exclusion agreements are mostly successful at waiving substantial appeals before arbitral tribunals and institutions, as well as national court review of the merits of an arbitrator's decision, insofar as such review exists."* See Catherine Bratic, ***'The Parties Hereby Waive All Recourse...But Not That One.' Why Parties Adopt Exclusion Agreements and Why Courts Hesitate'***, *International Bar Association, 05.10.2018:* https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=c8d82ee3-cb34-4113-a63c-7fff919639ee (accessed 19.05.2021).
12. ***Section 6(6) Constitution of the Federal Republic of Nigeria 1999 as amended***.
13. See ***Okpuruwu v. Okpokam [1998] 4 NWLR (Pt. 90), 554 at 587*** where *Oguntade JSC* held that *"It must always be borne in mind that the decision of an arbitrator whether native or orthodox lacks intrinsic or inherent force until pronounced upon by a competent judicial authority."*
14. The effect of an arbitral award being final is that the Courts would not review the substance of the award. Furthermore, the Courts does not sit on appeals over arbitration awards as they are not empowered to determine whether or not the findings of the arbitrators and their conclusions were wrong in law. See Candide-Johnson and Shasore ***(supra)***, p.43; 183 and ***Baker Marine Nig. Ltd. v. Chevron Nig. Ltd (supra)***.
15. ***Sections 29(2), 30(1) 32 ACA; and 55(2) LAL.***
16. ***Section 30(1) ACA.***
17. ***Sections 52 ACA and 57 LAL***.
18. ***Sections 29(3) ACA and 55(3) (a) LAL.***

Parties then find themselves at the corridor of the judicial system - which they strove to circumvent by their submission to arbitration, in the first instance. The choice to fully exercise their rights of appeal against unfavourable decisions of the Court, frustrate the (timely) enforcement of the award. For instance, in ***Araka v. Ejeagwu***[19] the award was given in 1994 and during enforcement proceedings at the High Court (HC), an application was filed to set it aside or alternatively, for the matter to be remitted back to the arbitrator. The HC remitted the matter to the arbitrator for reconsideration on the ground that he originally acted beyond the limits of his jurisdiction. However, after exhaustive appeals, the SC held in 2000 that the motion to set aside the award was incompetent for being filed out of time and ordered the HC to relist the motion for the recognition and enforcement of the award. This led the parties back to the enforcement starting point, after 6 (six) long years!

In ***Home Development Ltd v. Scancila Contracting Co. Ltd,***[20] the appeal took nine (9) years, (from 1985 to 1994). The SC upheld the decisions of both the HC and the Court of Appeal (CA) that the motion to set aside the award was incompetent. ***Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.***[21] lingered for 10 years. The HC set aside the award and same was upheld by the CA. The SC affirmed the HC and CA decisions. ***Taylor Woodrow (Nig.) Ltd v. S.E. GMBH***[22] took 6 years for the HC, CA and SC to deliver similar decisions dismissing the move to set aside the award and ***Commercial Assurance v. Alli***[23] took 12 years.

The foregoing is akin to what made *Ogundare JSC* in ***Savoia Limited v. Sonubi***[24] to remark that: *"it has always been thought that proceedings by way of arbitration is a quick way to resolution of disputes between contracting parties, when compared with the tardy proceedings of a law court. This case appears to cast some doubt on the truism of this belief."*

Party Autonomy in Nigerian Arbitration

Contracting parties have the right to freely enter into agreements, and the concomitant right to decide on the acceptable terms of such agreements. This is what is known as the principle of party autonomy. It has been defined as the *"freedom of the parties to construct their contractual relationship in the way they see fit."*[25]

Party autonomy is the cornerstone of arbitration,[26] whereby parties contract that their disputes would not be litigated. It is the right of the parties to choose their arbitrator or arbitral tribunal, the procedure to be adopted, the place/seat, the language of arbitration, the governing law, etc.[27] The Courts are enjoined to give effect thereto where an intention to submit to arbitration has been expressed in the agreement.

In ***The Owners of the M.V. Lupex v. Nigerian Overseas Chartering and Shipping Limited,***[28] the SC held that: *"the mere fact that a dispute is of a nature eminently suitable for trial in a court is not sufficient ground for refusing to give effect to what the parties have, by contract, expressly agreed to. So long as an arbitration clause is retained in a contract that is valid and the dispute is within the contemplation of the clause, the court ought to give due regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed by them."* Consequently, the Courts usually give effect to the literal and ordinary meaning of the contracts.[29]

19. ***[2000] 15 NWLR (Pt. 692), 684.***
20. ***[1994] 8 NWLR (Pt. 363), 252.***
21. ***(2006) LPELR-715 (SC).***
22. ***[1993] 4 NWLR (Pt. 286), 127.***
23. ***[1992] 3 NWLR (Pt. 232), 710.***
24. ***[2000] 12 NWLR (Pt. 682), 539 at 544E.***
25. Abdulhay Sayed, ***'Corruption in International Trade and Commercial Arbitration'***, (Wolters Kluwer, 2004), *p. 159.*
26. Jamshed Ansari, ***'Party Autonomy in Arbitration: A Critical Analysis'***, *Researcher (2014) 6(6), pp. 47-53 at 47:* http://www.sciencepub.net/researcher/research0606/010_25323research060614_47_53.pdf (accessed 14. 05.2021).
27. Sunday Fagbemi, ***'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?'***, *Afe Babalola University: Journal of Sustainable Development and Policy, Vol. 6 No.1 (2015), pp. 223-246 at 223:* https://www.ajol.info/index.php/jsdlp/article/view/128033 (accessed on 14.05.2021).
28. ***[2003] 15 NWLR (Pt. 844), 469 at 491G-H.***
29. ***Cotecna International Ltd v. Churchgate (Nig) Ltd. & Anor. [2010] 18 NWLR (Pt. 1225), 346 at 383.***

Party Autonomy under Nigerian Arbitration Law

The principle of party autonomy underpins the ***ACA and LAL.*** Indeed ***section 34 ACA***[30] states that: *"a Court shall not intervene in any matter governed by this Act except where so provided in this Act."* ***Section 57 ACA*** then went ahead to define Court as including State HC, Federal HC and HC of the FCT (HC FCT). Furthermore, where a party in violation of the arbitration agreement institutes an action in Court prior to commencing arbitral proceedings, the Court is empowered to order a stay of proceedings and to refer the parties to arbitration.[31]

*Notable **ACA** Provisions Recognising Party Autonomy*

Parties have the power to choose the procedure for the appointment, and the number of arbitrators.[32] They also have the right to determine the procedure to be adopted in challenging an arbitrator,[33] and the appointment of a substitute arbitrator, in the event of a successful challenge of an arbitrator.[34] Parties are also free to choose the seat of arbitration,[35] the language of the arbitral proceedings,[36] and the commencement date[37] cum duration of the arbitration.[38] The arbitral procedure to be adopted by the arbitrator is as agreed[39] by the

parties, as well as the powers of the arbitrator or tribunal to appoint experts.[40] The ***ACA*** also recognises the right of parties to decide on the applicable arbitral rules in the determination of the dispute.

It is appropriate to specify the substantive law that would govern the contract that is, the law by which the contract is to be interpreted or construed.[41] However, arbitration agreements are treated separately and are not affected by the contract in which they are inserted.[42] The arbitration clause is regarded in law as a separate contract and it survives the repudiation or breach of the main contract.[43] This principle has been codified in ***sections 12 (2) ACA*** and ***19(2) LAL.***

Position of Nigerian Courts on Choice of Governing Arbitration Law

Section 47 ACA provides that: *"the arbitral tribunal shall decide the dispute in accordance with the rules in force in the country whose laws the parties have chosen as applicable to the substance of the dispute."* With regards to international arbitration, ***section 53 ACA*** also permits parties to an international commercial agreement to choose either the ***ACA, UNCITRAL Arbitration Rules*** or any other international rule acceptable to the parties.

In ***Continental Sales Limited v. R. Shipping Inc.***,[44] the CA applied the ***English Arbitration Act 1996*** pursuant to the agreement of the parties to refer their disputes to arbitration, in accordance with the English Act. Therefore, there is no doubt that the Courts would accede to the parties' choice in an International arbitration. However, would the Court apply the agreed foreign arbitral law in a domestic arbitration?[45]

30. ***Section 59 LAL.***
31. ***Sections 5 ACA and 6 LAL. The Owners of the M.V. Lupex v. Nigerian Overseas Chartering and Shipping Limited (supra); Neural Proprietary Limited v. Unic Insurance Plc [2016] 5 NWLR (Pt. 1505), 374 at 384.*** This principle originated from the *locus classiccus* of ***Scott v. Avery (1856) 10 ER 1121.*** It is a provision by the parties which makes the submission to arbitration and the rendering of an award a condition precedent to instituting an action in Court.
32. ***Sections 6 and 7(1) (2) (a)(i), (ii) and (b) ACA and 7 and 8 LAL.***
33. ***Sections 9(1) ACA and 11 LAL.***
34. ***Sections 11 of ACA and 11(4) LAL.***
35. ***Sections 16(1) ACA and 18 LAL.***
36. ***Sections 18(1) ACA and 36 LAL.***
37. ***Sections 17 ACA and 32 of LAL.***
38. ***Sections 17 ACA and 33 LAL.***
39. ***Sections 20 ACA and 39 LAL.***
40. ***Section 22 ACA.***
41. See Olakunle Orojo and Ayodele Ajomo ***(Supra),*** *p.28.*
42. ***Sections 12(1) ACA and 19(2) LAL***. See ***Stabilini Visinoni Ltd v. Mallinson & Partners Ltd [2014] 12 NWLR (Pt. 1420), 134.*** See also Tinuade Oyekunle and Bayo Ojo, ***'Handbook of Arbitration and ADR Practice in Nigeria'***, *(Lexis Nexis, 2018), p.54.*
43. See Orojo and Ajomo (***Supra***), *p. 100.* See also ***Heyman v. Darwin Ltd (1942) AC.356 at 373*** where it was held that *"… although further performance of the obligations undertaken by each party in favour of the other may cease, the contract survives for the purpose of measuring the claims arising out of the breach and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract failed, but the arbitration clause is not one of the purposes of the contract."*
44. ***[2013] 4 NWLR (Pt. 1343), 67.***
45. A domestic arbitration involves parties who at the time of concluding the contract were resident and/or carrying on business in Nigeria. See for example, Orojo and Ajomo, ***(supra),p 52.***

The Nigerian *locus classicus* on choice of foreign law is the SC's decision in ***Sonnar (Nig.) Ltd & Anor. v. Partenreedri M.S. Nordwind & Anor.***[46] In that case, the parties (the Plaintiffs were Nigerians while the 1st Defendant was a ship owner in Germany) entered into an admiralty contract evidenced by a Bill of Lading for the importation of rice from Germany to Nigeria. The Bill of Lading contained a clause that *"any dispute arising under this bill shall be decided in the country where the 'Carrier' has his principal place of business and the law of such country shall apply except as provided elsewhere herein."*

The Plaintiffs then sued at the FHC in Nigeria for damages for breach of contract arising from non-delivery of par boiled long grain rice shipped to Lagos from Bangkok. Both the FHC and the CA gave effect to the choice of law. Yet, the SC allowed the appeal and held per *Oputa JSC* thus:

> *"...our Courts should not be too eager to divest themselves of jurisdiction conferred on them by the Constitution and by other laws, simply because parties in their private contracts chose a foreign forum and a foreign law. Courts guard, rather jealously, their jurisdiction and even where there is an ouster of that jurisdiction by Statute it should be by clear and unequivocal words. If that is so, as indeed it is, how much less can parties by their private acts remove the jurisdiction properly and legally vested in our Courts? Our Courts should be in charge of their own proceedings. When it is said that parties make their own contracts and that the Courts will only give effect to their intention as expressed in and by the contract that should generally be understood to mean and imply a contract which does not rob the Court of its jurisdiction in favour of another foreign forum."*[47]

This decision was followed by the CA in ***Lignes Aerienenes Congolaise v. Air Atlantic Nigeria Limited***[48] and ***Ahmadu Bello University v. VTLS Inc.***[49]

Impact of ***Sonnar v Norwind*** *on Party Autonomy Arbitration*

This writer contends that the ***Sonnar case*** *(supra)* ought not to apply to arbitration laws. Our position is strengthened by ***section 47 ACA*** and the concurring dictum of the learned *Oputa JSC* (at *p. 545)* that a statute can permit parties to choose a foreign law.[50] The words of ***section 47 ACA*** are clear and unequivocal. It is an established position of the law that such words in statute should be given their natural meaning. This is line with the approach of the SC in ***Dankwambo v. Abubakar***[51] when it held that the *"the golden rule of interpretation of statutes is that where the words used in a statute are clear and unambiguous, they must be given their natural and ordinary meaning, unless to do so would lead to absurdity or inconsistency with the rest of the statute."*

Furthermore, the choice of a foreign arbitral law does not in itself oust the jurisdiction of the Court to act over the matter subsequently. What determines the jurisdiction of the Court is the substantive law governing a contract.[52] Therefore, where the contract is made to be subject to Nigerian law, then the Court invariably has jurisdiction over the matter. Adopting a foreign arbitral law merely presents a situation for the Court to apply the principles of the chosen law in the disputes between the parties in line with the doctrine of *pacta sunt servanda*[53] and the freedom to contract.

This was the view of the SC in ***Mainstreet Bank Capital Ltd & Anor v. Nigeria Reinsurance Corporation Plc***[54] where it held thus: *"Where parties opt for arbitration, they are free to choose how the arbitration is conducted, including the law that guides the process, provided that the procedure and the law agreed upon are not against public policy. The duty of the court is to respect and pronounce upon the wishes of the parties and not to make a contract for them or rewrite the one they have already made for themselves."*

46. ***[1987] 4 NWLR (Pt. 66), 520.***
47. ***(Supra), at 545B-C.***
48. ***[2006] 2 NWLR (Pt. 963), 49.***
49. ***(2020) LPELR-5805 (CA).***
50. Although this dictum was not in the leading judgment, but the lower Courts referred to it in similar cases.
51. ***[2016] 2 NWLR (Pt. 1495), 157 at 180E-G.***
52. ***Araka v. Ejeugwu [1999] 2 NWLR (Pt. 589), 107 (CA).***
53. ***Ibe & Anor v. Bonum (Nig.) Ltd. (2019) LPELR-46452 (CA) 1A-D.***
54. ***[2018] 14 NWLR (Pt. 1640), 423 at 444 C-E.***

Conclusion

Parties have the right to contract freely. The onus is on lawyers to examine all angles within the parameters of the law to provide adequate shield for Clients whilst drafting Arbitration Clauses and not merely to circumvent litigation.

The challenges associated with the enforcement of arbitral awards in Nigeria has seriously undermined the effectiveness of arbitration as an alternative means of dispute resolution. Arbitration would only be effective where there is an efficient and effective judicial system and not one which relies on a weak legal process for its enforcement and validity. The first step towards doing that is for Counsel to halt the practice of challenging, *wily nily*, all awards and to respect the awards. Some school of thought believes that this practice is actuated by self-interest (by counsel to earn fees), otherwise clearly unmeritorious challenges should not be filed in the first place.

Worthy of reference here is the dictum of *Rhodes-Vivour, JSC* in ***Metroline (Nig). Ltd. v. Dikko***[55] thus:

"it is time litigants fully understand, respect and appreciate the nature of arbitration agreements they freely enter in to. It is the duty of Counsel to explain the nature of these agreements and not encourage their clients to disregard them when they get unfavourable awards."

It is recommended that the Courts be more accommodating of the right of parties in their choice of law notwithstanding the decisions of the superior Courts in Nigeria and be open minded in their interpretation of the ***ACA.***

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55. ***Supra***, at ***445***