THE ROLE OF THE COURT UNDER THE ARBITRATION AND CONCILIATION ACT 1990

By

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ABSTRACT

Arbitration is an alternative dispute resolution (ADR) process for the fair settlement of disputes under which parties agree to be bound by the decision of a person or persons other than a court of law. A key feature of arbitration is that it is an out of court process. Ironically however, it requires the involvement of the same court to be effective. This paper seeks to critically examine the fundamental roles of the court in an arbitration process as provided for under the Arbitration and Conciliation Act. The right of the court to intervene before, during and after an arbitral proceeding is analyzed in detail. Following the analysis, it considers through decided cases whether the provisions of Article 5 of the UNCITRAL Model Law on International Commercial Arbitration affects the inherent jurisdiction of the Courts to act in arbitral matters.

INTRODUCTION

The use of arbitration as a dispute resolution mechanism has become one of the most sought-after forms of alternative dispute resolution (ADR) in Nigeria. This is since unlike other forms of ADR such as mediation and negotiation; arbitration is regulated by statute which is the Arbitration and Conciliation Act.

One of the fundamental features of arbitration is that it is based on the voluntary agreement between parties that in the event of a dispute, rather than resorting to the courts, they shall submit themselves to a third party known as an arbitrator for the determination of the disputes[1]. The parties under arbitration agree that their dispute shall be resolved outside of the Courts by a third party appointed by them.

Another characteristic of arbitration is that parties usually have the latitude to decide on how an arbitration process should go and be bound by it. This level of flexibility that exists in arbitration is due to the principle of party autonomy which allows the parties to be heavily involved in the dispute resolution process, unlike litigation [2].

Despite arbitration being an out of court process, the Court still has a role to play within the process to ensure its effectiveness and enforceability. The involvement of the Courts in an arbitration process is arguably one of the factors that make arbitration different from other forms of ADR. The Court plays little or no role in mediation

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[1] Redfern A and Hunter M, *Law and Practice of International Commercial Arbitration* 2nd Edition Sweet and Maxwell (1991) 10

[2] Muigua, M, "Role of The Court Under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration" (2010) II *Kenya Law Review* 1, 4

hence the mediation process is completely in the hands of the parties and mediators and as a result the process lacks the tooth to bite[3].

The involvement of the courts in an arbitration process can seem ironic because on the one hand, the reference to arbitration as "ADR" suggests that Courts have nothing to do with arbitration. Yet, for arbitration to function effectively, it must "seek the co-operation of the very public authorities from which it wants to free itself"[4]. However, arbitration is not a separate, free-standing system of justice. It is a system established and regulated by law and as a result, it bears a close relationship to the courts and judicial system which is crucial for an effective arbitration[5].

This view was clearly elucidated by Lord Mustill- according to him:

> "...it is a fact to be faced, and part of facing them is to recognise that now the influence of peer pressure and indeed of simple honour has waned and some other means must be found of protecting this voluntary process from those who will not act as they have agreed. In the end, like it or not, only the courts can furnish this protection, and even the most enthusiastic proponents of party autonomy are bound to recognise that they must rely on the judicial arm of the state to ensure that the agreement to arbitrate is given at least some degree of effect. It is no good complaining that judges should keep right out of arbitration, for arbitration cannot flourish unless they are ready and waiting at the door, if only rarely allowed into the room." [6]

This paper seeks to examine the various roles of the Court. It assesses the power of the court before reference to arbitration, during course of arbitral proceedings and after arbitral award.

SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT

While the relationship between the Courts and arbitration varies from country to country, "swinging between forced cohabitation and true partnership"[7], the arbitration law in Nigeria has sought to strike a balance between judicial intervention and arbitral autonomy. Prior to the enactment of the 1990 Arbitration and Conciliation Act, arbitration in Nigeria was governed by the Arbitration Ordinance of 1958 which gave wide powers to Court to interfere in the running of arbitral proceeding. Section 15 of the Ordinance provided that

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3 ibid

4 Paulsson J, "Arbitration in Three Dimensions" available at http://ssrn.com/abstract=1536093 (accessed on 19th November 2016).

5 ibid

6 Malhotra O.P., The Law and Practice of Arbitration and Conciliation LexisNexis (2002).

7 Redfern A and Hunter M, Law and Practice of International Commercial Arbitration 2nd Edition Sweet and Maxwell (1991)

"any arbitrator or umpire may at any stage of the proceedings under reference and shall if so directed by the Court or a judge state in the form of a special case for the opinion of the court any question of law arising in the court of the reference"

Similarly, Section 11(1) of the Ordinance provided that

"In all cases of reference to arbitration, the Court or a judge may from time to time remit matters referred or any of them to the reconsideration of the arbitrators or umpire"

Under the Ordinance, the Court also had the power to sit on appeal over the decisions of arbitrators[8]. These extensive powers given to the court under the law was however curtailed by the enactment of the Arbitration and Conciliation Act which adopted the 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law). Section 34 of the Act which replicates Article 5 of the Model Law lays the foundational principle on the role and intervention of the Court in arbitration and it provides that

> "A court shall not intervene in any matter governed by this Act except where so provided in this Act".

Section 34 sets the limits and clarifies the extent to which a Court can involve itself in arbitration. By this section, the Court can only intervene in an arbitral tribunal as provided for by the Act. The effect of section 34 is that the jurisdiction of the Court in relation to arbitration is severely limited as the Act expunged many of the powers granted to the Court under the 1958 Ordinance[9]. According to Chukwuemerie, the Act strips the courts of enormous powers in respect to arbitration in Nigeria and treats the arbitral tribunal as a special tribunal whose proceedings and affairs cannot be subjected to the controlling powers of the court[10]. It also makes the arbitral tribunal somewhat superior over the Court in relation to arbitration as its decision cannot be appealed before any court.

The implication of section 34 is that while the Court indeed has a role to play, its role becomes very limited and merely supportive- its duty being mainly to give credence to the means of dispute resolution that the parties have agreed upon. The Court's responsibility in arbitration is not akin to the court exercising appellate jurisdiction over the arbitral tribunal[11] nor is its responsibility to 'approach the arbitral process with a meticulous legal eye, endeavouring to pick holes, inconsistencies and faults with the objective of upsetting or frustrating the process of arbitration'[12] irrespective of any element of wrong in the process.

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[8] Chukuwemerie, A. I., *The Nigerian Legal Framework in Studies & Materials in International Commercial Arbitration* Lawhouse Books (2002), 12
[9] Ibid, 88

[10] Ibid
[11] ibid
[12] *Zermalt Holdings v Nu-Life Upholstery Repairs* [1985] 2 EGLR 14 at 15.

ROLE OF THE COURT PRIOR TO COMMENCEMENT OF ARBITRATION PROCEEDINGS

Revocation of Arbitration Agreement

An arbitration agreement requires the assent of both parties so also does the dissolution of such agreement. Section 2 of the Act provides that "unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of parties or by leave of the court or judge".

The effect of section 2 is that once parties have reached an agreement to go into arbitration in the event of disputes that agreement cannot be unilaterally revoked by either of the parties. This aims to ensure that the agreement between the parties is upheld and not arbitrarily frustrated by a party revoking it thereby making such agreement a worthless piece of paper. A situation where a party can unilaterally revoke an arbitration agreement will weaken the credibility of arbitration as an effective alternative dispute mechanism. The revocation of an arbitration agreement according to section 2 will only be binding where both parties have reached an agreement to that effect. Where parties are unable to reach an agreement, one of the parties may commence an action in Court for an order for leave to revoke the agreement between the parties[13]. Where the court is satisfied on justifiable grounds, it can exercise its discretion and grant such order.

In the case of *B. J. Export & Chemical Company Limited V. Kaduna Refining & Petro-Chemical Company Limited*[14], the trial Court granted leave to the Respondent to revoke the arbitration agreement and the arbitrator's authority on the grounds that the Appellant's claim was prima facie fraudulent and therefore not proper subject for arbitration. The Appellant challenged this at the Court of Appeal on the ground that the Court was wrong to have granted such leave. The Court of Appeal in analysing section 2 of the Act held that

> "By this provision on the surface, once parties enter into a valid arbitration agreement, as the parties did in the present case, one of them cannot unilaterally revoke that agreement. However, where a party has a good cause to want to revoke the agreement, that party must apply to the court or judge to be granted leave to do so as was correctly done by the respondent in this case. While it is true that the court has no power under the law to revoke such arbitration agreement between the parties who brought it into being, the court has the power to grant leave to any of the parties to such agreement to go ahead to revoke the same on satisfying the court of good

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[13] Akpata, E. *The Nigerian Arbitration Law in Focus*, West African Book Publishers Limited, Lagos, (1997), pg 21

[14] (2002) LPELR-12175(CA)

> reasons for the need to do so. This is because to my mind, an arbitration agreement like any other contract properly entered into between parties can also be lawfully repudiated before performance".

The Courts will certainly need to tread carefully in exercising its discretion in such instances in order not to be seen as encouraging the breach of a valid agreement. It must give due consideration to the equal treatment of the parties in exercising its discretion.

Power to Stay Proceedings

It is an established principle of law that the mere existence of an arbitration agreement does not automatically oust the jurisdiction of the Court to decide on a case[15]. Where in the event of a dispute, a party institutes an action in Court contrary to the arbitration agreement and the other party does not object to it, the court shall have the jurisdiction to hear the dispute in such circumstances.

Although, the Arbitration and Conciliation Act[16] does not expressly give the Court the power to compel a party to go to arbitration, the Court is impliedly vested with such authority through its power to order for stay of proceeding provided for under the Act. The Courts will usually be called upon to stay legal proceedings in a situation where parties previously agreed to submit to arbitration in event of disputes and either of the parties instead of initiating arbitration proceedings where a dispute arose commences legal action against the other party. A defendant keen on going to arbitration as opposed to litigation can request that the court stays the proceeding and orders that parties go to arbitration. The Court in such circumstances can make an order to put on hold or suspend the legal proceeding in Court to give effect to the arbitration. This power is discretionary in nature and the Act lays down certain guidelines that the court must take into consideration in exercising its discretion. According to Section 5,

> A court to which an application is made under subsection (1) of this section may, if it is satisfied-
> (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and
> (b) that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

Furthermore, the Court will also take into consideration whether the party applying for a stay of proceedings has apart from entering appearance, taken any other step in the proceeding[17]. This factor is very crucial for the court in exercising its discretion as

[15] *Scotts v Avery* (1855) 5 H.L.C 811
[16] Section 4 and Section 5
[17] Section 4 & 5 Arbitration and Conciliation Act

where the applicant has taken any other action apart from entering appearance in the matter; it is presumed that the applicant has elected to go for litigation as opposed to arbitration. The effect of the applicant's action is that "the Court has become seized of the dispute and it is by its decision and by its decision alone, that the rights of the parties are settled"[18]. Also, "the arbitral tribunal if it has ever come to existence will become *functus officio*"[19]

As to what constitute "a step in the proceedings", it has been held that any application that is made in furtherance of the proceedings before the Court amounts to a step in the proceeding. Hence, where a party seeks for an extension of time within which to file a statement of defense[20] or seeks an order for pleadings[21] or issues summons[22], such party will be deemed to have taken a step in the proceedings and the court is precluded from referring such to arbitration.

In the case of *Kano State Urban Development Board v Faz Construction Co. Ltd*[23], the respondent/claimant brought an action against the appellant/defendant for breach of a construction contract between the parties although the said contract contained an arbitration clause. When the case came for hearing, Counsel for the appellant /defendant applied for pleadings as he argued the defendant was not liable and the court so ordered. Both parties then filed their pleadings in Court. On the next adjourned date, the claimant's counsel applied to the Court that the case be referred to arbitration under the arbitration clause in the Contract. This was however opposed by the Defendants Counsel. The trial judge referred the case to the Chief Judge who under the contract was to appoint the arbitrators. When the matter came before the Chief Judge, Counsels for both parties requested that the case be referred to arbitration and the Court granted the request. The matter was arbitrated upon and award was granted in favour of the Claimant/Respondent. The Defendant/Appellant applied for the setting aside which was dismissed by the High Court. An appeal was made to the Court of Appeal and one of the grounds was that the Chief Judge erred in law in allowing the matter to proceed to arbitration after the appellant/defendant had taken a step in the proceeding before the High Court by filing pleadings. The Court of Appeal dismissed the appeal and held that it was at the discretion of the court to refer a matter to arbitration in so far as both parties have agreed to submit to arbitration. The fact that the appellant who had initially opposed transferring the matter to arbitration later changed its mind and requested for it did not make any difference- if both parties later agreed to go to arbitration, the Court was right in exercising its discretion in favour of arbitration.

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[18] *Doleman &Ors v Ossett Corporation* (1912) 3 KB 257, 268 -269, Per Fatayi-Williams JSC in *Obembe v Wemabod Estates* (1977) 5 S.C, 115

[19] ibid

[20] *Obembe v Wemabod Estates*

[21] *Vestings v Nigerian Railway Corporation* (1964) Lagos High Court Reports 135

[22] *Chappell v North* (1891) 2 Q.B p252

[23] (1986) 5 NWLR (PT. 39) 74

Appointment and Challenge of Arbitrators

Section 7 of the Act recognises the right of the parties to appoint their arbitrators by making provisions for the procedure for such appointment in the agreement. The Act however envisaged a situation where an arbitration clause fails to make provision for the procedure for appointing the arbitrators or either of the party has failed to comply with the procedure provided for or both parties are unable to reach an agreement on who to appoint as an arbitrator. In such circumstances, the Act empowers the Court to intervene in order to avoid a deadlock.

Where the parties fail to reach an agreement on the number of arbitrators to be appointed within 15 days after the receipt by the respondent of the notice of arbitration, it is deemed that the arbitrators to hear the matter shall be three in number[24]. Where the parties agreed that there should be a sole arbitrator but failed to make provision for the procedure for the appointment of the arbitrator and the parties are unable to agree on who to appoint, "the appointment shall be made by the court on the application of any party to the arbitration agreement made within thirty days of such disagreement"[25].

Similarly, where the parties agree that there should be three arbitrators but fails to outline the procedure for their appointment, Section 7 provides that "each party shall appoint one arbitrator and the two thus appointed shall appoint the third" arbitrator. Where however "a party fails to appoint the arbitrator within thirty days of receipt of request to do so by the other party or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointments, the appointment shall be made by the court on the application of any party to the arbitration agreement"[26].

It is also possible that the arbitration agreement makes provision for the procedure for appointing the arbitrators but either of the parties or a third party fails to act as required. In such circumstances, "any party may request the court to take the necessary measure"[27].

The court in exercising any of its above-mentioned power is obliged to have due regard to any qualifications required of arbitrator by the arbitration agreement and such other consideration as are likely to secure the appointment of an independent and impartial arbitrator. Hence, where the Act requires the appointment of an Architect as the arbitrator the Court is compelled to comply with the requirement, doing otherwise can make the appointment voidable if not void[28]

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[24] Section 6 read in conjunction with Article 5 of the Arbitration Rules contained in the First Schedule to the Act
[25] Section 6
[26] Section 7
[27] Section 7(3) Arbitration and Conciliation Act
[28] Akpata, pg 33

B. COURT'S ROLE DURING THE PROCEEDINGS

Power to Order Attendance of Witnesses

During the arbitral proceeding, it will be necessary for the arbitrators to conduct an oral hearing and have access to necessary documents to obtain evidence. The arbitral tribunal however lacks the coercive power to compel a person to appear before it or to produce a document. The power to do so lies only with the Court and even the parties cannot confer upon the arbitrator such powers. Hence, to secure the attendance of a witness or the production of documents, a party to the proceedings shall apply to the Court for a *writ of subpoena*[29]. *A subpoena ad testificandum* compels a witness to appear before the Court or tribunal while subpoena *duces tecum* compels a person to make available documents relevant for a proceeding. Upon such application, the Court in its discretion may order the issuance of the necessary writ.

Interim Measure of Protection

During an arbitral proceeding, it might be necessary for steps to be taken to protect the subject-matter in question from irreparable damage or to maintain the status quo pending the outcome of the proceedings. Such step is known as an interim measure of protection. The arbitral tribunal has the power to order that either of the party takes interim measure of protection to safeguard the subject matter. [30] The Court also has the power to make an order of interim measure of protection against a party upon the application of the other party. This can occur where for example the arbitral tribunal is yet to be constituted and there is need for the *res* to be protected[31]. This will however not constitute taking a step in the proceeding and as such a "request for interim measures addressed by any party to court shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement"[32].

Also, the power of the tribunal to order interim protection is only applicable against the parties. The Tribunal cannot make such order where the property in question is in the custody of a third party. In such circumstances, it is only a court of law that can make an effective order for the protection.

C. POST AWARD ROLE OF THE COURTS

Recognition and Enforcement of Arbitral Award

An arbitral award is a determination on the merits by an arbitration tribunal in an arbitration proceeding and is analogous to a judgment in a court of law. The award in this case represents the judgment of the tribunal. Despite this however, unlike a judgment which has force until set aside, the decision of an arbitral tribunal lacks intrinsic force until pronounced upon by a competent judicial authority[33]. In the case

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[29] Section 20, 23
[30] Section 13
[31] Apkata, 44
[32] Article 22 of the Arbitration Rules
[33] *Ofomata & Ors v Anoka & Ors* (1974) 4 E.C.S.L.R. 251, 253

of *Okechukwu v Etukokwu*, the Court held that "...in law, an arbitral award per se lacks enforcement or enforceability. It does not carry any element of sanction until a court of law, by its judicial power, breathes enforcement or sanction on it. At the completion of the arbitration, the award is a toothless dog which cannot bite until a court of law gives teeth to it"[34].Hence, the fact that an award is recognised as binding does not automatically make it enforceable.

Generally, a party seeking to enforce an arbitral award can make an application to the Court in writing for the enforcement of the award together with the duly authenticated original or certified copy of the award and the original or duly certified copy of the arbitration agreement. The Court summarily enforces the award as it treats it as an existing judgment and only seeks to enforce it. This form of enforcement will usually be adopted where there is no objection to the award, or where the objections raised are such as can be easily disposed of[35]. Where there is however objection as to the validity of the award, it would be more appropriate that an action be commenced, and an application is made to enter judgment in terms of the award and so to enforce the judgment by one or more of the usual forms of execution[36]. This was the position of the Court in *Commerce Assurance Limited V. Alhaji Buraimoh Alli*[37] where it held that

"It is well settled that the procedure by action upon an award is one that ought to be pursued where the objections raised are such as to render the validity of the award a matter of doubt. Where there is no objection to the award, or where the objections raised are such as can be easily disposed of, the summary procedure is prompt and convenient; but where there are matters which may gravely affect the validity of the award, then it is proper that they should be dealt with by an action in which the facts can be fully ascertained, and no order should be made giving leave to proceed summarily under the award".

Setting Aside of Arbitral Award

It is a well-established principle that an arbitral award once granted is final and a dissatisfied party cannot appeal against the decision. This according to Nnaemeka-Agu, J.S.C (as he then was) "is based on the underlying principle that parties to a dispute have a choice. They may resort to the normal machinery for administration of justice by going to the regular courts of the land and have their disputes determined both as to the fact and to the law, by the courts. Or, they may choose the arbitrator to

[34] [1998] 8.N.W.L.R (Pt. 562) 513 at 529 -530.
[35] *ln re Books & Co. and Peters Rushton & Co. Ltd.* (1919) 1 K.B. 491 at 496.

[36] (1992) 3 NWLR (Pt.232) 710
[37] Commerce Assurance Limited V. Alhaji Buraimoh Alli (1992) 3 NWLR (Pt.232) 710

be the judge between them. If they take the latter course, they cannot, when the award is good on the face of it, object to the award on grounds of law or of facts"[38].

Where a party seeks to challenge an arbitral award, the only available option is to apply to the Court to set it aside; the Court lacks the power to alter an award as it can only set it aside or remit it to the arbitrator[39]. This option is however not available to the dissatisfied party till eternity. The Act provides that such party must apply to the Court to set it aside within three months from the date which the award was granted otherwise the party loses the right to set aside the award[40]. In the case of *Commerce Assurance Limited V. Alhaji Buraimoh Alli*[41], one of the issues before the Supreme Court was whether the Court was competent to review the award of damages under section 16 of the Court of Appeal Act if the trial Judge in the lower court found it excessive. The Court held that "A person who has submitted to an arbitration cannot turn to the court to ask it to review the award when he believes that it is too high". It further held that

where a person affected by an arbitration award wishes to have it set aside, he must apply timeously, and before the successful party takes steps to enforce the award or have a judgment entered in his favour in terms of the award. Applying the above principles to the present case, it follows that much as the learned trial Judge had criticised the award as rather too high, the award, which was made over ten years ago, stands as the learned Judge has no powers to tamper with it. The award could not be treated as just a court judgment on appeal before the learned Judge".[42]

In exercising its power to set aside an award, the Court must exercise extreme caution in order not to be seen as usurping the power of the arbitrators. The Court may set aside an award where it is established that the arbitral tribunal lacked jurisdiction or exceeded the scope of its jurisdiction[43]. It may also set aside the award where there is proof that the award was improperly procured[44] or that the arbitrator has misconduct himself in the course of the proceedings or the arbitrator misconduct himself[45]. However, the fact that the arbitrators made a mistake of law or did not properly assess the evidence is not considered to be a ground for setting their award aside or denying it recognition and enforcement. The premise of this intentional omission is that the job of the Court in such circumstances is "to ensure that required procedures are followed and other statutory criteria are met. But if these criteria are satisfied, the work of the Court is done"[46].

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[38] Commerce Assurance Limited V. Alhaji Buraimoh Alli (1992) 3 NWLR (Pt.232) 710
[39] Commerce Assurance Limited V. Alhaji Buraimoh Alli (1992) 3 NWLR (Pt.232) 710
[40] Commerce Assurance Limited V. Alhaji Buraimoh Alli (1992) 3 NWLR (Pt.232) 710
[41] Commerce Assurance Limited V. Alhaji Buraimoh Alli (1992) 3 NWLR (Pt.232) 710ibid
[42] ibid
[43] Section 29(2)
[44] Section 30(1)
[45] Section 30

[46] Ball M. "The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration" 2006 22(1) *Arbitration International* 73, *82*

RESTRICTION ON COURT INTERVENTION AND THE INHERENT JURISDICTION OF THE COURT

The drafters of Article 5 of the UNCITRAL Model Law which was adopted as Section 34 of the Arbitration Act intended an absolute prohibition on intervention by the Court in circumstances other than those specified in the Model Law. The *travoux preparatoire on* Article 5 makes this very clear. According to the UNCITRAL Analytical Commentary on the Draft Model Law[47]

> Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of the courts. It merely requires that any instance of court involvement be listed in the model law. **Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law**. The resulting certainty of the parties and the arbitrators about the instances in which court supervision is to be expected seems beneficial to international commercial arbitration. (Emphasis added)

The effect of Article 5 extends beyond merely restricting unnecessary intervention by the Court and goes as far as excluding the inherent jurisdiction of the Court to intervene in arbitral matters. This erosion of the inherent jurisdiction has not gone down well with many Model Law jurisdictions. One argument has been that since the restriction in Article 5 applies only in matters governed by the Model Law, the Courts will reserve the right to intervene where the matter relating to arbitration is not governed by the Law. Another argument is that there is need for the Court to be able to intervene where there is procedural abuse of process by parties. Where the Court is prevented from intervening in such circumstances, the efficiency and fairness of arbitration as a whole will be compromised. The question of interpretation and application of Article 5 has arisen in developed jurisdictions that have adopted the Model Law and the Courts have not allowed the Article 5 restriction to prevent them from intervening where they deem it necessary.

In the case of *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush*[48], the Claimant applied to the Court for an order preventing a challenged arbitrator from continuing the arbitral proceeding pending a Court review of the challenge. The Claimant argued that although the Model Law which was adopted made no provision for such, the Court had the inherent jurisdiction to grant an injunction. The High Court of Singapore rejected this argument stating that the Model Law does not contain a specific provision granting the court such power and relying on the inherent jurisdiction of the Court in granting the order would go against the objective of the

47 Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration, XVI UNCITRAL Y.B. 104, 112, Art. 5, 2 (1985)

48 Mitsui Engineering & Shipbuilding Co Ltd v Rush [2004] 2 SLR 14, [2004] SGHC 26

Model Law for minimal Court intervention in arbitral proceedings. It was for the arbitrator and not the Courts to decide whether to stay an arbitral proceeding under the Model Law.

In *China Ocean Shipping Co., Owners of the M/V Fu Ning Hai v Whistler International Ltd., Charters of the M/V Fu Ning Hai*[49], the Claimant sought an order from the Court to compel a party to arbitration who refused to disclose its place of business to avoid posting security for the costs of the arbitration and the arbitral tribunal lacked the power to grant orders requiring compliance with such a fundamental requirement. Although the Model Law did not make provisions for such powers, the Hong Kong Court granted the order to the Claimant. According to the Court, the Article 5 restriction on Courts applied only to matters governed by the Law and since the issue of security for costs was not provided for under the law, it was not governed by the Model Law. Hence the Court could not be precluded from making the order.

In the *Carter Holt Harvey Ltd v Genesis Power Ltd*[50] the High Court of New Zealand was required to determine whether the Court had jurisdiction to grant a stay of arbitration. Carter Holt Harvey entered into a contract with Genesis Power Ltd who also entered into an agreement with Rolls Royce in regard to some parts of its contract with Carter Holt. The contract was improperly performed and as a result, Carter Holt sued both Genesis for breach of the contract and Rolls Royce for negligent advice and physical damage caused by the breach. In the course of the Court proceedings, Genesis commenced international arbitral proceedings against Rolls Royce pursuant to the arbitration clause for breach of contract and for a claim of indemnity or contribution from Rolls Royce for any liability that Genesis might have to Carter Holt in the Court proceedings.

Rolls Royce argued before the arbitral tribunal that the arbitral proceedings brought should be stayed as it amounted to duplication of claim which could lead to a possibility of double liability for Rolls Royce. The Arbitrator refused to stay the arbitration and Rolls Royce made an interlocutory application for an order staying the arbitration. In determining whether it had jurisdiction to grant such order, the Court held that it retained its inherent jurisdiction to stay arbitral proceedings, despite the Article 5 admonition. It noted that the limitation in Article 5 applied only to matters governed by the New Zealand Act which largely replicates the Model Law. Having examined the drafting history of the Model Law, the Court concluded that the Model Law did not purport to be a comprehensive code on all matters relating to arbitration. Nor did the Model Law embody a complete code of judicial intervention in arbitral proceedings. It held that it had the jurisdiction to grant the anti-arbitration injunction in order to prevent abuse of processes.

In order to avoid the application and interpretation problem of Article 5, the drafters of the English Law on arbitration sought to preserve the inherent jurisdiction of the Courts. Section 1 of the Arbitration Act 1996 of England which is the equivalent to Article 5 of the Model Law provides that "in matters governed by this Part the Court

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[49] [1999] HKCFI 693.
[50] [2006] 3 NZLR 794 (HC).

should not intervene except as provided by this part". The use of "should" in section 1 is in contrast with the mandatory "shall" of Article 5. The effect of this is that "an absolute prohibition on intervention by the Court in circumstances other than those specified in Part 1 of the English Act was not intended"[51]. The drafters of the Act considered a mandatory prohibition to be inappropriate as the Model Law did not "occupy the whole ground"[52] in relation to intervention by the Court in arbitration. In order to allow for Court to exercise its inherent jurisdiction, it drew a distinction between when the matter was governed by the Model Law and when it was not. According to its report

> "...contrary to what might at first sight be assumed - namely that the entire code of intervention by a court is to be found in the Model Law and nowhere else - the Commission envisaged that in the field of international commercial arbitration two 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, and no other forms of relief may be granted, besides those set out in the Law. 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. Accordingly, in order to ascertain which of the two regimes is applicable in a particular case, it must be determined whether that case is a 'matter governed by' the Law." [53]

While it is unclear what approach the Nigerian Courts will take when faced with similar cases, it is clear that Courts in Model Law jurisdictions have been reluctant to surrender their inherent jurisdiction as envisioned by Article 5. As such, Article 5 has been interpreted in such a manner that allows the Court to intervene where necessary particularly where there is need to prevent abuse of process.

CONCLUSION

While arbitration is indeed an out of court process, the involvement of the court in the process is necessary and justifiable. This is because the strength and effectiveness of the process is derived majorly from the complementary role the court has to play in ensuring that the wheel of arbitration is not clogged by either of the parties. Without the court's capacity to intervene, the process of arbitration would not hold much water. On the other hand, however, in order to ensure that the arbitral process is not usurped by the Court and that arbitration is not just another name for litigation, the Arbitration and Conciliation Act has limited its powers and it can only intervene in

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[51] Williams A.R, "Defining the Role of The Court in Modern International Commercial Arbitration", Herbert Smith Freehills - SMU Asian Arbitration Lecture, Singapore, (2012), p17

[52] *AES Ust Kamenogorks Hydropower Plant LLP v Ust Kamenogorsk Hydropower Plant* [2011] EWCA Civ 647, [2012] 1 All ER (Comm) 845

[53] 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.

accordance with the provisions of the Act. This is necessary in order to ensure a balance between judicial intervention and arbitral autonomy is achieved. It however remains to be seen whether the Nigerian Courts will follow the footsteps of other Model Law jurisdictions and intervene contrary to Section 34 where it considers an abuse of process imminent.