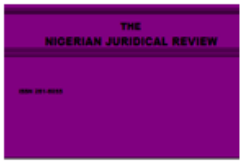

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REEXAMINING THE EFFECT OF PRINCIPLES OF JUDICIAL NON-INTERFERENCE AND *KOMPETENZ-KOMPETENZ* ON THE JURISDICTION OF COURTS IN NIGERIA

Nnaemeka Nweze*

Abstract

Even though the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) does not provide a universal standard on the authority of the arbitral tribunal to determine its jurisdiction otherwise known as kompetenz-kompetenz, the Convention nevertheless does not permit national courts to review arbitral jurisdictional determination. Using the Nigerian Arbitration and Conciliation Act 2004 (ACA) and the new Arbitration and Mediation Act 2023 (AMA) as a starting point, this article investigates the effect of the principle of judicial non-interference within the context of the principle of kompetenz-kompetenz under the antecedent and the new legislation. From a doctrinal point of view, it discusses how the jurisdiction of the court in Nigeria can be ousted by specific provisions in a statute and thus rationalizes the combined effect of principles of judicial non-interference and kompetenz-kompetenz under the Nigerian statute(s) unlike in other national arbitration law. The article specifically finds that the effect of these principles is to oust the jurisdiction of the court from reviewing the arbitral jurisdictional ruling and this has a basis under the Convention, the arbitration legislation, and decisional laws in Nigeria. This serves practical ends. It fills the gap in scholarship and also provides doctrinal leadership that is regrettably lacking in case law in Nigeria. It also creates awareness of the efficiency and finality effect of arbitration seated in Nigeria. This, as a matter of course, is the reason why international businessmen prefer arbitration to litigation.

Keywords: Jurisdiction, Judicial Non-interference, *Kompetenz-kompetenz*, National Court, Ouster Clause

1. Introduction

The fundamental feature that distinguishes arbitration from litigation is procedure. Businessmen who engage in cross-border commercial transactions usually are aware that recourse to the settlement of their commercial dispute using arbitration promises results that are confidential, neutral, flexible,

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efficient, and final. With these objectives in mind, businessmen operating at the international level prefer arbitration to litigation because they are skeptical about bias and the various appellate channels which many national courts are not free from. Consequently, international commercial arbitration has taken centre stage as a more viable alternative to litigation and the practice has received the backing of modern arbitration legislation and international conventions, notably the New York Convention. At the heart of these legal instruments is the desire to reduce at the barest minimum, if not to eliminate completely the intervention of the court in a subject matter of an ongoing arbitration except where the intervention is necessary. This has been achieved in national arbitration laws through the provisions of basic principles of judicial non-interference and *kompetenz-kompetenz*. The principle of judicial non-interference complements the principle of *kompetenz-kompetenz* which simply means the authority of arbitral tribunal to determine its jurisdiction. *Kompetenz-kompetenz* in its basic nature has a universal form only differing in scope or limit across many jurisdictions. As a matter of fact, almost all arbitration laws do not give finality effect to arbitral jurisdictional determinations except the Nigerian legislation. While the provisions of section 12 of the old arbitration legislation did not permit the Nigerian court to second guess arbitral jurisdictional ruling during and after the arbitral process, the AMA under section 14 (5) gives finality effect to jurisdictional finding if the arbitral tribunal pre-empts the jurisdictional challenge pending before the court. This is clearly indicative of the ouster of the court's jurisdiction on that particular subject matter.

However, there is dearth of judicial opinions and scholarly contributions on the question as to whether arbitral jurisdictional rulings oust the jurisdiction of the Nigerian court from reviewing the arbitral authority. This is surprising taking into consideration the doctrinal implication of this topic.

This paper addresses the ouster of the jurisdiction of the court over specific subject matter of international commercial arbitration and its legal bases in the New York Convention, the Nigerian arbitration legislation, and decisional laws in Nigeria. Following the introduction, part 2 discusses the underlying objective of choice of (procedural) law in international commercial arbitration. The choice of applicable law simply determines the extent of judicial intervention in arbitral proceedings. Part 3 briefly examines the meaning of the principle of judicial non-interference under the New York Convention and extensively under the ACA and relatively under the AMA. It examines this principle by and large in conjunction with the principle of *kompetenz-kompetenz* and somewhat with the principle of stay of judicial proceeding. These principles could oust or curtail the jurisdiction of the court depending on the stage of the arbitration. This part further examines the scope of the principle of judicial non-interference. It rationalizes from case law point of view that the combination of principles of judicial non-interference and *kompetenz-kompetenz* under the ACA

operate as ouster clause provision and consequently criticizes contrary scholarly opinions as unwarranted and indeed regrettable. Part 4 concludes the paper.

2. Objective of Procedural Choice of Law in International Commercial Arbitration

One of the primary objectives of most international commercial arbitrations is the parties' freedom to agree upon the law of a particular country to govern the conduct of their arbitration proceeding.[1] This freedom is recognized in the New York Convention[2] and arbitration laws of many countries. It is also contained in the rules of most arbitration institutions. The objective of choice of law that governs arbitration proceedings is a demonstration of the fundamental equality of the parties. The aim is to achieve a neutral and unprejudiced means of international dispute resolution 'in which neither side has an inside track of the court.'[3] Inextricably tied to this objective is the parties desire to determine at the outset the extent of judicial involvement, especially in matters of an ongoing arbitration and approved by foremost international arbitration instruments and national arbitration laws. Inherent in this objective is the desire of businessmen to achieve arbitral procedure that is efficient, less technical, and above all one that may limit or remove entirely arbitrators' findings from judicial second-guessing. In Nigeria, this objective is facilitated by the combination of

[1] The law chosen by the parties to govern the arbitration also known as the *lex arbitri* determines the extent a national court under whose law the proceedings is being conducted may intervene in arbitration. In the absence of parties' agreement on law to govern their arbitration proceedings, the most closely connected law, generally the law of the seat of arbitration regulates the conduct of the arbitral proceedings.

[2] See Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) art V (1) (d) (allowing the refusal to recognize and enforce an arbitral award where arbitral procedure was not in accordance with the agreement of the parties or if the procedure was not in accordance with the law of the place where the arbitration took place). From the point of view of the New York Convention, the significance of parties' choice of procedural law is that it recognizes in clear terms the role of party autonomy so that the applicable procedural law may be different from the law of the seat arbitration if it is so chosen by the parties. The provision of New York Convention art V (1) (d) is a markedly different from the provision of the Geneva Convention on Arbitration Clauses art 2 which provides that 'The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.' See <https://www.newyorkconvention.org/11165/web/files/document/1/6/16019.pdf>accessed 12 March 2023. This provision may correctly suggest stifling of party autonomy on choice of procedural law thereby indicating strict compliance with law of the seat of arbitration. See Gary B Born, International Commercial Arbitration (2d ed 2009) 1253-1254.

[3] William Park, 'Duty and Discretion in International Arbitration' [1999] (805) (93) *American Journal of International Law* 24.

principles of judicial non-interference and *kompetenz-kompetenz* which the antecedent[4] and the new legislation[5] provide.

3. Principle of Judicial Non-Interference under Nigerian Law

Arbitration laws and the New York Convention recognize the principle of judicial non-interference either directly or indirectly.[6] For instance, the Nigerian AMA section 64 (cognate section of Model Law article 5) expressly provides that 'a court shall not intervene in any matter governed by this Act except where it is provided in this Act.'[7] On the other hand, the New York Convention Article II (3) indirectly provides that:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed

The Convention obligates contracting States not to entertain interlocutory appeals concerning a subject matter of an ongoing arbitration, especially in situations where the arbitral tribunal has delivered a ruling to the effect that it has jurisdiction to determine the dispute (positive *Kompetenz-kompetenz*). According to a scholar:[8]

> Nothing in the New York Convention expressly provides that national courts shall not entertain interlocutory applications concerning the conduct of international arbitrations. Nonetheless, Article II (3) of the Convention provides that national courts shall "refer the parties to arbitration" after ascertaining the existence of a valid arbitration agreement without making provision for any further judicial role in the arbitration proceedings. At the same time that neither Article II (3) nor any other part of the Convention provides for judicial involvement in establishing, monitoring, or overseeing the procedures used in the arbitration. Article V of the Convention defines the role of national court with exclusive reference to recognition and enforcement of arbitral awards.

Irrespective of their treaty obligation under the Convention, national courts in so far as the determination of arbitral authority is concerned have by way of legislation deviated from the mandatory principle of judicial non-interference which Article II (3) of the Convention establishes albeit indirectly.[9] For

[4] ACA s 34 and s 12.
[5] AMA s 64 and s 14.
[6] Gary Born, 'The Principle of Judicial Non-Interference in International Arbitral Proceedings' [2009] (30) *U Pa J Int'l L* 1025.
[7] ACA s 34.
[8] Ibid 1027.
[9] This may be rationalized on the ground that the New York Convention does not provide a universal principle of *kompetenz-kompetenz* thus allowing States under the

instance, English Arbitration Act (EAA) section 1 (c) provides that 'in matters governed by this Part the court should not intervene except as provided by this Part.' In the light of the foregoing, the Nigerian Court of Appeal in the case of *Statoil (Nig) Ltd v NNPC*[10] has drawn a sharp distinction between the meaning of the word 'should' in EAA section 1 (c) on the one hand and the word "shall" in ACA section 34 on the other hand. According to the court,[11]

> The disparity in the wording of section 34 of the Arbitration Act and section 1 (1) of the English Act was adumbrated by the appellants to show that the use of "shall" and not "should" is further evidence that the legislature's intention behind section 34 of the Arbitration Act is to (unlike the English Act strictly) RESTRICT COURTS'INTERVENTION in ARBITRAL PROCEEDINGS.

The purport of the above quote is that once arbitration has begun, the Nigerian ACA does not allow judicial second-guessing of arbitral authority or interlocutory court review of arbitral jurisdictional decisions. Thus, the stage of arbitration governed by the ACA determined whether or not the arbitration agreement limits or ousts the jurisdiction of the court in Nigeria. However, courts and commentators are of the opinion that an arbitration agreement does not oust the jurisdiction of the court in Nigeria irrespective of whether arbitration has commenced or not. Those views as subsection (ii) of this article will show are unwarranted and regrettable because they fail to distinguish the extent and limit of the principle of judicial non-interference in arbitration seated in Nigeria. For example, the principle of judicial non-interference only curtails but does not oust the jurisdiction of the court in entertaining arbitral jurisdictional questions[12] when the prospect of arbitration is still remote. On the other hand, the principle ousts the jurisdiction of Nigerian courts in second-guessing arbitral jurisdictional decisions when arbitration has started particularly under the previous legislation.[13] The only circumstances where judicial assistance might be necessary in aid of arbitration that has already begun include during the appointment of arbitrators,[14] where court orders the

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Convention to develop their various versions of determining the authority of arbitral tribunal to determine its competence to decide a dispute.

[10] [2013] 14 NWLR (Pt 1373).

[11] Ibid 30.

[12] After delivery of award, the prevailing party may seek judicial assistance for the recognition and enforcement of the award or the losing party may seek court's assistance for setting aside the award or its non-recognition and enforcement. See S 52 of ACA. For a comprehensive list of when judicial support in aid of international or domestic arbitration is necessary, see Ezike Edwin Obimma, 'The Validity of Section 34 of the Nigerian Arbitration and Conciliation Act' [2000- 2001] (8) *The Nigerian Juridical Review* 140-142.

[13] According to the UNCITRAL Arbitration Rules art 3 (3) (ACA First Schedule), arbitration is deemed to have commenced when the claimant serves on the respondent a notice of arbitration.

[14] AMA s 7 (4). ACA s 7 (4).

attendance of witness to appear before the tribunal[15] and when award is delivered[16] etc. In sum, the extent and limit of the principle of judicial non-interference in the determination of arbitral authority will be examined within the context of when arbitration has not commenced when arbitration has commenced, and when the final award is delivered.

a. Principle of Judicial Non-Interference before Commencement of Arbitration

A party who agrees to arbitrate a commercial dispute usually the respondent may breach the agreement by commencing judicial action even before he is served with notice of arbitration. In that situation, most national legislation permits their courts to refer the unwilling party to arbitration on a mandatory basis if a request for stay of proceeding is made by the willing party in arbitration usually the claimant. This is in recognition of States' obligation pursuant to New York Convention Article II (3) which the section 5 of AMA implements.[17] The role of Nigerian court in referring parties to arbitration upon application for stay of proceedings is restricted to ascertaining whether or not the arbitration agreement is "null and void", "inoperative" and "incapable of being performed".[18] That is to say that Nigerian court should only conduct a rather superficial examination of whether the arbitration agreement is enforceable or not. In practice however, Nigerian court under the old regime determined the enforceability of arbitration agreement by means of lawsuit whereby it carries out a detail investigation of question regarding the validity of the arbitration agreement or scope of subject matter falling under the agreement.[19] Even though the trend is very likely to continue under the new Act,

[15] AMA s 43. ACA s 23.

[16] AMA s 55. ACA s 52.

[17] AMA s 5 reconciles the difference the between the old section 4 and 5 of the ACA. There are two different provisions for stay of proceedings under the ACA which are s 4 and 5 respectively. While s 4 is mandatory on court to refer parties to arbitration, section 5 is a discretionary obligation on court to refer parties to arbitration. It is outside the remit of this paper to discuss the difference between the two sections or the rationale underlying two seemingly identical provisions in the same Act. This is because much ink has flown into the discussion. See Nduke Ikeyi, 'Enforcing Arbitration Agreements in Nigeria: The Constitutional Question' [2009] (2) *Nigerian Journal of Public Law*. But suffice to say that section 4 reflects Nigerian treaty obligation under the New York Convention Article II (3), hence applicable in international commercial arbitration. On the other hand, section 5 is applicable in domestic arbitration but the provision does not in a matter of domestic arbitration preclude an interested party from bringing his application for stay of proceedings under section 4.

[18] Though these words are conspicuously missing in the provision of s 4 of ACA, they are nevertheless implied terms pursuant to the New York Convention art II (3).

[19] See *Neural Proprietary Ltd v UNIC Inds Plc* [2016] 5 NWLR (Pt 1505) 376-377 (CA); *Res Pal Gazi Const Co v FCDA* (2001) 10 NWLR (Pt 722) 599; *Owners of MV Lupex v Nigerian Overseas Chattering and Shipping Company* (*MV Lupex),*

it does not in any way suggest that the court can entertain the merit of the dispute. To this end, the provisions on stay of proceeding under the Nigerian law curtail the jurisdiction of the court before the commencement of arbitration contrary to a scholarly view[20] which says that the mandatory order of stay under section 4 of ACA had the effect of ousting the jurisdiction of the court.

b. Principle of Judicial Non-interference after Commencement of Arbitration

Immediately the claimant serves on the respondent a notice of arbitration, arbitration is said to have commenced. Because arbitration for good reason is designed to serve as an alternative to litigation, national arbitration laws have designed the principle of *kompetenz-kompetenz* in order to enable experts (arbitrators) chosen by the parties to determine jurisdiction that is conferred on them by the arbitration agreement. When the arbitral tribunal delivers a ruling that the parties' agreement to arbitrate is valid or in existence and that it also covers the dispute (scope) which the parties had agreed to arbitrate upon, the tribunal is said to have made a positive jurisdictional decision. This simply means that the tribunal has jurisdiction to determine the substantive dispute. Nevertheless, almost every national law[21] does not preclude its national court from reviewing arbitral jurisdictional decisions not minding the delay this might cause in certain international commercial transactions such oil and gas industry

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[2003]15 NWLR (Pt 844) 469; *Onward Ent. Ltd v MV "Matrix"* (*Onward case*) [2010] 2 NWLR (Pt 1179] 540 (CA); *Nissan (Nig) Ltd v Yaganathan* [2010] 4NWLR (Pt 1183) 143 (CA); *LSWC V Sakamori Const. (Nig) Ltd* [2011] 12 NWLR (Pt 1262) 581 (CA); *Conoil v Vitol SA* [2018] 9 NWLR (Pt 1625) 23.

[20] See Ikeyi (n 18) 293.

[21] See French Nouveau Code de Procedure Civile (NCPC) art 1458 that postpone judicial review of jurisdictional decision until final award is delivered. This is unlike America where judicial scrutiny of arbitral power is permissible at the inception of the arbitral process. This is pursuant to Federal Arbitration Act (FAA) s 3 & 4. See English Arbitration Act 1996 s 30 and 67; Switzerland's Federal Code on Private International Law (CPIL) 1987, art 186(3) & 190(3); German Code of Civil Procedure (ZPO) s 1040(3); Austrian Arbitration Act 2013 s 592 (3); Costa Rican International Arbitration Law No 8937, art 16(3); Japanese Arbitration Law 2003 art 23(5); New Zealand Arbitration Act 1996 s 16 (3); Spanish Arbitration Act 2003, United Arab Emirate Federal Law No 6 of 2018 s III art (19) 2; Mauritius International Arbitration Act, 2008 s 20 (7); Russian Federation Law on International Commercial Arbitration art 16(3); Kenyan Arbitration Act 1995, s 17(6); Egyptian Law on Arbitration 1994, art 22 (3); Danish Arbitration Act 2005 s 16(3); Dutch Code of Civil Procedure- Netherland art 1052(4); Indian Arbitration and Conciliation Act (1996), s 16(6); Swedish Arbitration Act 1999, s 2. In China, the power to determine the validity of arbitration agreement pursuant to art 20 (of Arbitration Law of the People's Republic of China) lies with the arbitration commission or the people's court instead of the arbitral tribunal. William Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' Boston Univ Sch of Law P L & Legal Theory Paper Series 9 (2007).

where 'liquidity is important, deadlines are short, and licenses are fragile'.[22] The AMA to a certain degree is different from other national arbitration laws. This is to the extent that it permits interlocutory challenge on arbitral jurisdictional findings but creates the opportunity for the arbitral tribunal to pre-empt the jurisdictional challenge by merging the jurisdictional findings (interim award) with the final award even as the matter is pending before the court. Such jurisdictional findings most importantly carry a final and binding effect on the parties. The implication in the light of the foregoing is that businessmen and businesswomen who challenged the arbitral authority would be foreclosed from challenging the arbitral award in setting aside proceedings on the ground of lack of existence of the arbitration agreement[23] or that the agreement was beyond the scope of the dispute submitted to the arbitral tribunal.[24]

However, the Nigerian ACA was markedly different from other arbitration laws including the AMA. It had no provision for judicial scrutiny of jurisdictional decisions on an interlocutory basis and those decisions were meant to carry a res judicata effect Section 12 of ACA stated in full that:

1) An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement.
2) For purpose of subsection (1) of this section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral that the contract is null and void shall not entail ipso jure the [in]validity of the arbitration clause.
3) In any arbitral proceedings a plea that the arbitral tribunal-
    a. does not have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising such plea by reason that he has appointed or participated in the appointment of an arbitrator,
    b. is exceeding the scope of its authority may be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings, and the arbitral tribunal may, in either case, admit a later plea if it considers that the delay was justified.
4) The arbitral tribunal may rule on any plea referred to it under subsection (3) of this section either as a preliminary question or in award on the merits; and such ruling shall be final and binding.

[22] Philip Chong & Blake Primrose, 'Summary Judgment in International Arbitrations Seated in England' [2017] (33) (1) *Arbitration International* 63.
[23] AMA s 55 (3) (a) (ii).
[24] AMA s 55 (3) (a) (v).

The combined effect of the principle of judicial non-interference under section 34 of ACA and the principle of *kompetenz-kompetenz* just cited above indicates that where there is no permission for judicial intervention over a subject matter or issue concerning the determination of arbitral authority, Nigerian court therefore is ousted of jurisdiction on that particular subject matter. Generally, the underlying reason parties choose to arbitrate instead of litigate is to enable the arbitral tribunal to assume exclusive jurisdiction in determining the parties dispute in a final and binding manner. Irrespective of the fact that only the ACA gave the arbitral tribunal the exclusive jurisdiction to determine its own jurisdiction and which determination shall not be subject to judicial second-guessing,[25] there is however no judicial authority in Nigeria that has treated the authority of arbitral tribunal seated in Nigeria as exclusive. Instead of engaging in prima facie review, case law shows that judges in Nigeria delve into a comprehensive examination of the existence or validity of arbitration agreements even when arbitration has commenced including those seated in a foreign country. Regarding arbitration seated in a foreign jurisdiction, national courts should defer to the parties' choice of law, and a fortiori declines jurisdiction on the basis of the principle of judicial non-interference. Thus, the principle of judicial non-interference strongly complements parties' choice of law as it is the court of the seat of arbitration that has the authority to entertain questions regarding the validity or existence of the arbitration agreement. Beyond the foregoing, one judicial authority in Nigeria, the case of *Shell Petroleum Development Company of Nigeria Limited v Crester Integrated Natural Resources Limited (SPDCN)*[26] has held that the principle of judicial non-interference and the Act itself does not apply in international commercial arbitration.[27]

[25] See text to n 22. Identifying that virtually all arbitration law permits their national courts to review arbitral authority.

[26] [2016] 9 NWLR Pt1517.

[27] The decision in *SPDCN* does not represent the law in Nigeria as it is inconsistent with the rule of *stare decisis.* The principle is paramount in the jurisprudence of common law jurisdictions like Nigeria because it guarantees certainty and predictability to law and demands that judges of subordinate courts are bound to follow decisions of higher courts and Supreme Court where facts are similar.[27] See *NIWA v SPDCN Ltd* [2020] 16 NWLR (Pt 1749) 165,166. Nigerian court over the years has been consistent in enforcing arbitration agreement especially those with foreign seat. See *Res Pal Gazi Const Co v FCDA* (2001) 10 NWLR (Pt 722) 599; *Onward Ent. Ltd v MV "Matrix"* (*Onward case*) [2010] 2 NWLR (Pt 1179] 540 (CA); *Nissan (Nig) Ltd v Yaganathan* [2010] 4 NWLR (Pt 1183) 143 (CA); *LSWC V Sakamori Const. (Nig) Ltd* [2011] 12

In *SPDCN*, the applicant sought an order of injunction restraining the respondent themselves, their management, agent, representative, or solicitors from continuing or proceeding with International Court of Arbitration (ICC) No 21012/TO between the applicant and the respondent. The arbitration was commenced vide a notice of arbitration dated 20 April 2015 and served by the respondent solicitor Messrs Clifford Chance LLP of 10 Upper Bank Street Wharf London E145JJ United Kingdom. The respondent filed a preliminary objection challenging the jurisdiction of the court to entertain the matter or to grant an injunction in restraint of arbitration proceedings pursuant to section 34 of the ACA. In its brief of argument, the respondent further submitted that since the gravamen of the application for anti-arbitration borders on the alleged illegality of the arbitration agreement, that a 'court of law can only have jurisdiction after the issue of jurisdiction has been raised before the tribunal and the tribunal has determined it'[28] pursuant to section 12 of ACA (*kompetenz-kompetenz*). The court unanimously held among other things that the principle of judicial non-interference under section 34 and by virtue of section 58 applies only in domestic arbitration and not in international commercial arbitration.

In its opinion, the court acknowledged that section 34 of ACA is a mandatory provision that prohibits a court from intervening in arbitral proceedings except as the Act may otherwise provide. Responding to the respondent's argument, the court observed that 'section 34 is only applicable to matters governed by the Act so that if it is found in any proceeding that the particular facts and circumstances do not come within the purview of the Act, the provision of section 34 cannot apply with full force.'[29] Therefore, the court took the position that ACA does not apply in international commercial arbitration by virtue of section 58 which says that the 'Act shall apply throughout the federation.' What the court is simply saying in effect is that principles of judicial non-interference

NWLR (Pt 1262) 581 (CA); *Neural Proprietary Ltd v UNIC Ins Plc* [2016] 5 NWLR (Pt 1505) 376-377 (CA); *Conoil v Vitol SA* [2018] 9 NWLR (Pt 1625) 23.

[28] *SPDCN* ibid 330. Although the respondent counsel erroneously made the argument on *Kompetenz-kompetenz* pursuant to s 12 of ACA, it should have argued instead that the court ought to decline jurisdiction in order to enable the arbitral tribunal seated in London or the English court determine issues of validity or existence of the arbitration agreement. When national court declines jurisdiction in that manner, it is said to have exercised its power of negative *kompetenz-kompetenz*.

[29] Ibid 306.

under the ACA apply only in domestic arbitration and not in international commercial arbitration[30] that is seated abroad.

The outcome of the opinion is partly well founded from point of view of the pragmatic principle that regulate arbitration under the section 34 of ACA: it precludes court from intervening in subject matter of arbitral proceeding except as the Act may otherwise provide. The doctrinal underpinning of the opinion is however clearly questionable. The court's parochial interpretation of section 58 of ACA as a basis for limiting the scope of ACA and particularly the principles of judicial non-interference and *kompetenz-kompetenz* to domestic arbitration only does not just contradict prior decisional laws and the practice of arbitration in Nigeria but it also does not correlate with Nigerian enviable status in world trade and investment rating[31] considering that investors are often wary of systems that do not enforce contracts.[32] Further, the court's interpretation

[30] International commercial arbitration could be non-domestic or foreign in nature. It is non-domestic where parties are resident or are doing business in the same jurisdiction but have chosen a foreign seat/law as a procedural framework for the conduct of their arbitration. International commercial arbitration is foreign where parties who are from different nationalities and are also doing their business or are resident in different countries agree to submit their commercial dispute to arbitration. Parties can enter into non-domestic or foreign arbitration agreement by means of telephone, telegram, telex, electronic mail and other modern means of communication (submission agreement) or through a clause in their contractual document (arbitration clause).

[31] Nigeria is one of the richest countries in sub Saharan Africa with numerous mineral deposits apart from oil and gas and with an estimated population of over two hundred and nine million people as at 3 April 2021. See https://www.worldometers.info/world-population/nigeria-population/ Nigeria is also a destination hub for investment in Africa and continues to remain one of Africa largest economy with foreign direct investment to the tune of $2.6 billion in the year 2020 despite the global corona virus pandemic. See https://guardian.ng/business-services/nigeria-attracts-2-6bn-fdi-in-2020-amid-global-downturn/.These are good indices of a viable legal system that enforces contracts. The Nigerian judiciary is relentless in ensuring that this trajectory continues to improve by strengthening the legal frame work for dispute resolution through Rules of Court which purpose is to ensure that commercial agreements are honoured thereby promoting justice between disputing parties. See *Gbenga v APC* [2020] 14 NWLR (pt 1744) 257, 258 (SC). For instance, on 26 May 2017, the Chief Justice of Nigeria, Walter Onnoghen vide a "circular" directed all Heads of Court to issue Practice Directions to ensure that parties' abide by the terms of their arbitration agreement and for court not to entertain action instituted in breach of this agreement with a substantial against a party who brings such actions. See <https://punchng.com/judges-must-enforce-arbitration-clause-cjn/> accessed 16 January 2023.

[32] See TE Carbonneau, 'The Exercise of Contract Freedom in the Making of Arbitration Agreements' [2003] (36) *VJTL* 1195.

of section 58 is inconsistent with the framework for arbitration and enforcement of the arbitration agreement that the ACA established.[33] In addition, the opinion violates party autonomy in choice of law because the court in *SPDCN* should have exercised its power of negative *kompetenz-kompetenz* in order to enable the arbitral tribunal or English court to determine question of the validity of the arbitration agreement in accordance with the English law.[34]

However, assuming the *SPDCN* arbitration was seated in Nigeria, the mere service on the respondent of the notice of arbitration ought to have precluded the court from determining jurisdictional questions or even second-guessing jurisdictional decision made by the tribunal on an interlocutory basis or after the final award is made. This is indicative of ouster of court's jurisdiction and there is generally a plethora of decisional laws that underpin ouster of court's jurisdiction in Nigeria.

Before a national court can exercise judicial power on any matter, it must have subject matter jurisdiction which must be conferred on it statutorily. This is

[33] It is safe to say that section 58 can only be regarded as mere piece of inelegant draftsmanship to the extent that it does not provide for exceptions clause similar to Model Law article 1 (2) or for purporting to limit the scope of ACA to domestic arbitration. In fact, it is incongruous to think that the framers of section 58 or indeed the entire ACA intended to exclude arbitration agreement with foreign seat from recognition and enforcement especially by mean of principles of judicial non-interference and *kompetenz-kompetenz*. The ACA was demarcated into four parts. Part I made provisions for domestic and international commercial arbitration. Under that Part, the principles of judicial non-interference and *kompetenz-kompetenz* were mandatory provisions under sections 34 and 12 and both were applicable to domestic and international commercial arbitration. Part II of the Act was on conciliation. Part III made provisions for additional provisions relating to international commercial arbitration. Under part III, section 53 allowed parties (as it happened in SPDCN) the freedom to reject the applicability of the Nigerian law (procedural law or *lex arbitri*) in favour of a preferred foreign seat (law) or any international arbitration rule as may be agreed by the parties. In fact, this provision most importantly further shows the irrelevance of section 58. Part IV of the Act was on miscellaneous. The Act had two schedules. The first schedule dealt on UNCITRAL Arbitration Rules while the second schedule by virtue of section 12 of the Constitution of Federal Republic of Nigeria[33] implemented Nigeria's treaty obligation under the New York Convention.

[34] If a national court does not enforce parties' choice of law in a situation where it grants anti-arbitration injunction over arbitration seated abroad, that court would be seen to be colluding with a recalcitrant respondent to breach the agreement to arbitrate. See Cindy G Buys, 'The Arbitrators' Duty to Respect the Parties Choice of Law in Commercial Arbitration' [2005] (79 (1) *St John's Law Review* 63.

because the judicial power of the court otherwise known as "inherent power"[35] of the court is different from the statutory power of the court. According to the Nigerian Supreme Court in *Okwuosa v Gomwalk*[36]

> Power and jurisdiction are not the same. Whereas jurisdiction is the right the court has in law to hear and determine the dispute between the parties, power on the other hand, is the authority it has to take decisions and make binding orders with respect to matters before it. It is for this reason that in the Constitution, section 6 deals with the judicial powers of courts generally while the enabling and establishment provisions of the Constitution, dealing with each court clearly set out the jurisdiction of each court.

Again, the power of the court in Nigeria to grant an injunction is a mere codification of the court's inherent power or inherent jurisdiction as it is sometimes called. This power however is in abeyance if there is no complementary or corresponding subject matter jurisdiction.[37] As a matter of fact, States may "oust" or "strip" the national court of its subject matter jurisdiction by specific and unambiguous words in a statute.[38] When that happens, the legislature for instance may vest that subject matter jurisdiction on the arbitral tribunal exclusively and with complementary judicial support necessary for efficient arbitral process. Where the authority of the arbitral tribunal is exclusive and the arbitral findings are not subject to judicial interrogations as section 12 of ACA unambiguously stated , such as a matter of course is indicative of the ouster of jurisdiction of the court. Conversely, where an arbitral tribunal makes a jurisdictional decisions pursuant to section 14 (5) and (7) of the AMA, the decision has a preclusive effect on the parties and the

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[35] On the status of inherent jurisdiction *vis a vis* statutory jurisdiction of court, the Nigerian Supreme Court per Augie JSC in *Customary Court of Appeal Edo State v Aguele*[35] quoted affirmatively the ratio of Iguh JSC in *Gombe v PW (Nig) Ltd*[35] to the effect that:

> The inherent power of a court of record is entirely supplementary to and dependent on the statutory jurisdiction of the court in a cause. A court may have or exercise jurisdiction in respect of a cause or matter within its jurisdiction …. It has however, no inherent power or jurisdiction over a cause or matter not within its jurisdiction. An inherent power or inherent jurisdiction is not and has never been known to be distinct or separate jurisdiction. No inherent power can add to the jurisdiction of any court of record where no jurisdiction to entertain a cause had not been vested in the Constitution or statute law. Inherent power is only exercisable to enhance statutory jurisdiction in a cause or matter within the jurisdiction of the court.

[36] [2017] 9 NWLR (Pt 1570) 277 per Eko JSC at p 277 para a-c; *Akande v Alagbe* [2000] 15 NWLR (Pt 690) 358.

[37] *CCB v (Nig) Plc v Masterpiece Chemicals* [2000] 12 NWLR (Pt 682) 584.

[38] In America, Congress has the power to determine, terminate or curtail the jurisdiction of courts as article III of the American Constitution stipulates. Thus, it is important to emphasize that jurisdiction of court can be ousted or circumscribed by specific provision in a statute such as s 12 of ACA or provision in a Constitution.

jurisdiction of the Nigerian court assuming the jurisdictional challenge is yet to be determined by the court.

Generally, apart from the combined effect of provisions of principles of judicial non-interference under section 64 of AMA and *Kompetenz-kompetenz* under section 14 (5) and (7) the Act (the equivalent of sections 34 and 12 (4) of the ACA), there are indeed judicial authorities in Nigeria that underpin the ouster of the court's jurisdiction under specific provisions in some other legislation. A good example of such legislation is section 18 (1) of Recovery of Public Funds and Property which provides that 'no action shall lie or be maintained in any court of law in respect of any matter under the edict'. In *Diamond Bank Ltd v Ugochukwu,*[39] the respondent operated two accounts referred to as 'Unachukwu Ugochukwu' with the appellant, a duly authorized and licensed commercial bank. One of the account was a current account in the name of AL-CLEMENT with two signatories namely Alfred Amobi Ugochukwu and Uzoma Onuoha. A dispute later arose between the two signatories in connection with the operation of the current account resulting in the respondent writing exhibit "D" to the appellant wherein he dropped the signature of 'Uzoma Onuoha.' Subsequently, the respondent gave cheques to some people for payment but the cheques were dishonoured and the words 'incomplete mandate' were written on them because the cheques were signed by the respondent alone. The cheques were admitted in evidence and marked exhibits 'E' 'F' 'G' and 'H'. The accounts of the respondent were later frozen on the orders of the Imo State Task Force for the Recovery of Public Funds and Property headed by a High Court Judge which was empanelled under the Recovery of Public Funds and Property (Special Provisions) Edict 1985 of Imo State. It was alleged that the respondent used the contract to defraud the Imo State Government and the appellant was ordered to transfer the funds in the account to the account of the Imo State Government. The orders were marked exhibits 'S' and 'T'. The respondent was dissatisfied with the refusal of the appellant to honour the cheques on grounds of 'incomplete mandate" and the orders of the Task Force freezing and transferring the funds in the accounts to the Imo State Government. The respondent instituted an action at the High Court and the court entered judgment in its favour and that was also affirmed at the Court of Appeal. The appellant appealed to the Supreme Court. The Supreme Court considered the provision of section 18 (1) of the Recovery of Public Funds and Property (Special Provisions) Edict, 1985 and held per Onnoghen JSC that 'in the circumstance and having regard to the facts and applicable law, I resolve the issue in favour of appellant. I find no reason to consider the other issues raised for determination as they have become irrelevant'. The court further held that 'jurisdiction may be

[39] [2016] 9NWLR (Pt 1517) 430.

ousted by statute, or Decree or Edit such as section 18 (1) of the Recovery of Public Funds and Property (Special Provision) Edict 1985.'[40]

The effect of where the jurisdiction of the court is ousted or curtailed by statute or legislation is to render the court incompetent to entertain that matter. In *Tumsah v Federal Republic of Nigeria,*[41] the Court of Appeal per Mukhtar JCA held that:

> Where the unlimited jurisdiction of a court is curtailed by statute or the Constitution as to the subject matter or cause of action or as to the person who can bring the action, such curtailment renders the court incompetent to adjudicate over a matter which has been taken outside its power by such statute or the Constitution. In this case, in view of the clear and unambiguous provisions of the Recovery of Public Property (Special Provisions) Act, particularly sections 1 and 8 thereof, the ist respondent's reference to the wide ambit of the jurisdiction of the High Court of the FCT under section 257 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and section 330 of the administration of Criminal Justice Act does not avail the ist respondent.

Further, in *FRN v Solomon*[42] the Supreme Court per Odili JSC succinctly held that:

> For a fuller understanding it is trite that where the rules of court or any other rules whatever have curtailed an otherwise unlimited jurisdiction of a court and this can be by a specific statute or even the constitution as to the subject matter or cause of action or as to the person who can bring the action, such curtailment renders the court incompetent, stripped of its power to adjudicate over the said matter as what has happened is that such matter is outside the

[40] Apart from "ousting" or "stripping" a court of its jurisdiction, various words or phrases have been used in case law to describe situations where court may not possess the requisite jurisdiction over a matter. See Daniel D Birk, 'The Common-Law Exceptions Clause: Congressional Control of Supreme Court Appellate Jurisdiction in Light of British Precedent' [2018] (63) (2) *Villanova Law Review* (citing reported cases states that '[a] court's jurisdiction could be "abolished," "abrogated," "dismembered," "dissolved," or "extinguished." A court might be "barred," or "prohibited from proceeding" in a case, or "interdicted from taking cognizance" of it. It could be "denuded," "deprived," "disrobed," or "stripped" of its jurisdiction, or it might be "ousted" or "outed" of it. Some courts were "enjoined" from "meddling" or "intermeddling" in particular cases, and others had their jurisdiction over cases "taken away absolutely." And this is just the beginning. Jurisdiction could be adjusted, altered, circumscribed, confined, converted, diminished, impaired, limited, prohibited, regulated, restrained, restricted, secluded, or suppressed, depending on the circumstances and the scope of withdrawal'.

[41] [2018] 17 NWLR (Pt 1648) 249, 268 para f.

[42] [2018] 7 NWLR (Pt 1618) p 223 para d-e. See also *FRN v Okey Nwosu* [2016] 17 NWLR (Pt 1541) 242; *Diamond Bank Ltd v Ugochukwu* [2016] 9 NWLR (Pt 1517) 193.

> confines of the power of the court and that limitation has been done by statute or constitution. It follows that where a tribunal or special court is set up to adjudicate over specialized matters, the power of the regular courts created under the Constitution will be ousted in respect of such specialized matters.

From the foregoing, the dichotomy between the rhetoric and the result of the above judicial decisions is regrettable when this is analyzed within the context of the effect of principles of judicial non-interference and *kompetenz-kompetenz* on the jurisdiction of the court in Nigeria over an international commercial arbitration that had already commenced. For example, proponents of the unconstitutionality of section 34 of ACA with respect to the finality effect of arbitral decisions on issues such as jurisdictional determinations under section 12 (4) and appointment of arbitrators under section 7 (4) are of the view that arbitration agreement should not restrict a citizen's right of access to court. A leading arbitration scholar[43] in Nigeria contends that:

> The lawmakers have no power to legislate a statute which extinguishes the right of fair hearing conferred on persons by the Constitution. Indeed the rule of fair hearing which is based on the twin pillars of *audi alteram partem* and

[43] Muhammed Mustapha Akanbi, 'Examining the Effect of Section 34 of the Arbitration and Conciliation Act of 1988 on the Jurisdiction of Courts in Nigeria' [2009] (2) (2) *Nigerian Journal of Public Law* 305-306. See also Greg Chukwudi Nwakoby, 'The Courts and the Arbitral Process in Nigeria' [2004] (4) (1) *UNIZIK Law Journal* 20 (arguing that that the issue as to whether the arbitral tribunal should determine question pertaining to its jurisdiction depends on the stage of the proceedings at which the issue was raised. If the issue of jurisdiction is raised at the stage of arbitral proceedings when the matter is still before the arbitrators, the arbitral tribunal shall pursuant to section 12(1) of the Act determine the issue and any party who is aggrieved as to the interim or interlocutory award made by the arbitral tribunal shall apply to the court to set it aside and declare that the tribunal has no jurisdiction to determine the issue in contention. Within the context of international commercial arbitration, it is submitted that the view of the learned writer is not correct. A careful examination of section 12 (1) (3) (4) ACA show that the decision of the arbitral tribunal on interim or preliminary award is final with regards to any plea referred to it under section 12(1) (3) ACA. Maybe the learned writer bases his reasoning on the provisions of Article 16(3) of the Model law which though was adopted by the ACA section 12 (4) but was modified by ACA to exclude the right of an aggrieved person to have recourse to court on such preliminary questions and decision on jurisdiction. In domestic arbitration, a party that is dissatisfied with the arbitral award has three months' time period within which he can bring application for setting aside the award. See s 29 of ACA. This provision does not apply in setting aside of international arbitral award. For setting aside international award, see s 48 of ACA. For further similar unwarranted opinions, see also John Funsho Olorunfemi, 'The Effect of Arbitration Agreement on the Jurisdiction of the Court in Nigeria' [2009] (2)*Nigerian Journal of Public Law* 309; Ikeyi (n 15) 296,297; Obimma (n 10) 148 quoted in G Ezejiofor, 'Appointment of an Arbitrator under the Nigerian Law: The Procedure and Powers of an Appointing Authority- *Nigerian paper Mills ltd v Pithawalla Engineering, GMBH'*, [1995] (7*)* (3) *African Society of International and Comparative Law* 663-667.

> *nemo judex in causa sua* is accepted by every civilized jurisdiction as a *sine qua non* to a proper and fair adjudication. Access to courts is an inviolable right guaranteed by the Constitution and any attempt by the legislature to stifle such a right by excluding the judicial review of the decisions of the arbitral tribunal will not only be anachronistic but will erode the confidence of parties in the arbitral system, for it is unreasonable to expect a party raising an objection to the jurisdiction of the tribunal to continue to participate in the arbitral process. Indeed the intention of the lawmakers of attempting to prevent the dilatory tactics of the parties under the challenge procedure is no doubt desirable but when the effect of the exclusion of judicial review of the courts is juxtaposed against the implications of the provisions of section 34, it becomes apparent that there is a danger of denying parties of the right to a fair hearing. A provision that shuts out an aggrieved party from the courts by making the arbitral tribunal the final forum on the question of jurisdiction is arbitrary and discriminatory. In the light of the foregoing, it is submitted that section 34 cannot be invoked to prevent a party from seeking a right of action in court when his civil rights and obligations are in danger of being violated or adversely affected to do so will infringe on the constitutional right of such a party.

Other critics disagree that the purpose of the restriction which section 34 of the ACA stipulated is to promote party autonomy and the use of arbitration as a more efficient alternative to litigation so that the judicial power of the court is not necessarily ousted but postponed because 'if there are problems along the line … then the judicial powers of the courts which were only postponed will be invoked to see that justice is done.'[44] There is no doubt that prior to the rendition of the award, 'problems along the line' specifically as it concerns the question of the finality of the arbitral jurisdictional decision designed in such a manner that precludes judicial second-guessing of the arbitral jurisdictional decisions. This is a Nigeria policy objective whose aim is to create a single forum for dispute resolution that would enable arbitrators chosen by the parties to determine disputes conclusively.[45] Further, 'in parts of the world lacking a tradition of judicial independence, the business community may prefer no judicial review at all, taking its chances with potential arbitrators misbehavior as the lesser of two evils.'[46] In sum, it is safe to say that counsel did not seize the

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[44] Obimma (n 13)140-151.

[45] See *Harbour Assurance Co v Kansa General International Insurance Co* (*Harbour II*) [1993] QB 701 (CA) (holding *inter alia* that the rationale for separability doctrine (arbitration agreement) is to promote party autonomy in international commercial dispute resolution and to also have a "one stop adjudication" system). See Julian DM Lew, 'Does National Court Involvement Undermine the International Arbitration Process' [2009] (24) (3) American University International Law Review 491, 492, 509; Philip Landolt, 'The Inconvenience of Principle: Separability and *Kompetenz-kompetenz*' [2013] (30) (5) *International Arbitration* 514, 517, 525.

[46] See William W Park, *Why Courts Review Arbitral Award* Festschrift fur Karl-Heinz Bockstiegel 598. (2001)

opportunity to advice their client on the need to maximize the benefits which the ACA promised it potential users and the reason is obvious.The Nigerian courts and scholars did not understand the doctrinal underpinning of the principles of judicial non-interference and *kompetenz-kompetenz* under the ACA, hence no available literature on the subject matter as much as it could be researched. .[47] Excepting the risk of wasting the time of parties who may discover at the end of arbitration that they indeed never agreed to arbitrate,[48] ACA might have guaranteed legitimacy and finality of the arbitral process between actual parties compared to other 'statute[s] that allows challenge only for defects related to procedural regularity [but] may allow wiggle room for an overzealous judge to examine a dispute's legal merits under the guise of correcting arbitrator excess of authority'.[49] Relatedly, even though section 14 (6) of AMA allows an aggrieved party to seek judicial review of jurisdictional decision within 30 days

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<http://www.williamwpark.com/documents/Why%20Courts%20Review%20Awards.pdf.> accessed 4 February 2023.

[47] Businessmen invariably choose arbitral seat with the knowledge of provisions of the *lex arbitri*. See Lord Mance, *Arbitration-a Law unto itself?* 30th Annual Lecture Organized by the School of International Arbitration and Freshfields Bruckhause Deringer 16 <https://www.supremecourt.uk/docs/speech-151104.pdf> accessed 25 January 2023; Landolt (n 42) 518; Sally-Ann Underhill and M Cristina Cárdenas *Awards: Early Stage Consideration of Enforcement Issues* in J W Rowley QC, E Gaillard and GE Kaiser (eds), *The Guide to Challenging and Enforcing Arbitration Award*s 6,7 (London: Law Business Research Limited 2019).

[48] Such risk is usually inherent in complex commercial transactions that may raise complicated issues such agency, corporate piercing of the veil, successor in title etc. But in commercial transactions of a simple nature, a non-party can explore any of the following three options where the existence of arbitration agreement is in issue. First, a non-party may decide to participate in the proceedings in order to contest the substantive jurisdiction of the arbitral tribunal. Second, a non-party to arbitration may choose not to participate in the arbitration and await the award of the arbitral tribunal on jurisdiction or final award in order to challenge it in court. See George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' [2012] (37) (1) *Yale Journal of International Law* 30; Cf Kaufmann-Kohler 'How to Handle Parallel Proceedings: A Practical Approach to Issues Such as Competence-Competence and Anti-Suit Injunctions' [2008] (2) (1) *Dispute Resolution International* 111, 112. Judicial review in order to set aside such award is a remedy for vexatious proceedings. See Park (n 3) 9, 10. Third, non-party can always approach a court of competent jurisdiction to determine the existence of arbitration agreement without necessarily awaiting a ruling from the arbitral tribunal. See NYC art II (3); Model Law art 8 (1); English Arbitration Act s 9 (4). French Code of Civil Procedure 2011, art 1448 provides that the only ground upon which court can entertain a subject matter of arbitration agreement is where arbitral tribunal is yet to be constituted and if the arbitration agreement is manifestly null and void. See also Mattias Scherer and Werner Jahnel, 'Anti-Suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective' [2009] (4) *International Arbitration Law Report* 73.

[49] Park (n 48) 597, 598

after the decision was made, the Act leaves devil in the detail. There is every likelihood that the arbitral tribunal may conclude the arbitration proceeding and render a final award while the jurisdictional challenge is pending in the court. The implication is that the parties may eventually waste their time and resources in a tribunal that never had the jurisdiction to determine the dispute. This concern just as in the antecedent legislation is very likely to arise in elaborate business arrangements that could give rise to complex difficulties involving non-signatories To this end,, the AMA just like its predecessor is a law of unintended consequences as far the Nigerian version of *kompetenz-kompetenz* is concerned.[50] The Nigerian legislature failed to understand that, even though arbitral proceedings would go more smoothly and easily even if the tribunal pre-empts the jurisdictional challenge that is awaiting judicial review, this approach would probably end up being very counterproductive and raising questions about the effectiveness of arbitration.

c. Principle of Judicial Non-Interference after Rendition of Award

Despite the foregoing, businessmen and businesswomen who are direct parties in a simple and uncomplicated commercial transaction may choose to save cost and eliminate delay in determining their rights and obligations by choosing the Nigeria AMA as their preferred seat of arbitration. Should for any reason questions relating to the existence/validity or scope of the arbitration agreement ever occur, such questions and the determination (award) thereof would legitimately be outside the remit of judicial second-guessing in a setting aside or non-recognition and enforcement proceedings assuming the tribunal renders the final award while the challenge is pending in the court. In international commercial arbitration where the Nigerian ACA was the governing law, the jurisdiction of the Nigerian court remained ousted in determining arbitral jurisdictional decisions on an interlocutory basis and even after an award is delivered. Therefore, a party who challenged the award from the point of view of the existence/validity and scope of the arbitration agreement should be foreclosed from doing so if he had raised but lost such a challenge before the tribunal. The point therefore should be made at the outset that section 29 of the ACA was inapplicable concerning setting aside international commercial arbitral awards. Section 29 of the ACA stated that:

1. A party who is aggrieved by an arbitral award may within three months –
   a) From the date of the award; or
   b) In a case falling under section 28 of this Act, from the date of the request for an additional award is disposed of by the arbitral tribunal, by way of an application for setting aside, request the to

[50] Nnaemeka Nweze and Festus Okechukwu Ukwueze, 'The Effects of Arbitral Jurisdictional Decision on National Courts' [2023] (16) (2) *Contemp. Asia Arb J* 198,199.

set aside the award in accordance with subsection (2) of this section.

2. The court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of submission to arbitration so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside.
3. the court before which an application is brought under subsection (1) of this section may, at the request of a party where appropriate, suspend proceedings for such period as it may determine to afford the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action to eliminate the grounds for setting aside of the award.

Section 29 above applied in setting aside of domestic arbitration award. This position is supported by a contiguous provision of the Act, section 30 which stated that arbitral award may be set aside if 'an arbitrator has misconduct[ed] himself, or where the arbitral proceedings, or award, has been improperly procured'. Clearly, sections 29 and 30 both dealt with recourse against an award or setting aside the domestic award. In contrast, section 48 contained grounds for setting aside an international arbitration award, and the section clearly did not include misconduct of the arbitrator as one of the grounds nor prescribe a statutory time frame within which a party may apply to set aside an international arbitral award. Once there is a contestation of the jurisdiction of the arbitral tribunal regarding the existence/validity or scope of the arbitration agreement and whereof a decision is made by the tribunal to the effect that it has jurisdiction, a party should be barred from setting aside the award on such same grounds. This is based on the principle of estoppel per *res judicata*. However, it is safe to argue that a party who did not raise such jurisdictional challenge during arbitral proceedings should not be precluded from challenging the award in setting aside proceedings even if the tribunal addressed itself *suo motu* that it had jurisdiction over the matter. Hence, section 48 of ACA still stated that an award may be set aside if a party provides proof that the arbitration agreement was not valid or that the award contains decision(s) that are outside the scope of the parties' dispute.In sum, the arbitral landscape in Nigeria today is that when an arbitral tribunal pre-empts the Nigerian court on issues of arbitral authority, the party who brought the challenge proceedings may only seek to set aside the award on any other grounds under section 55 (3) (a) and (b) of AMA as follows:

i. that a party to the arbitration agreement was under some incapacity,
ii. That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case, or
iii. That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or
iv. That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties unless such

agreement was in conflict with a provision of this Act from which the parties cannot derogate, or

(b) if the court finds-

i. that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or

ii. That the award is against public policy of Nigeria.

4. Conclusion

Legal systems have various policy objectives regarding the determination of jurisdiction of arbitral tribunals. Barring exceptional situations where judicial support for arbitration might be necessary, Nigeria's policy objective is a donation of exclusive jurisdiction to an arbitral tribunal to determine jurisdictional questions in a final and binding manner. Even though section 14 (6) of AMA permits interlocutory challenge on jurisdictional decisions, there is every possibility owing to the overcrowded court's docket that the tribunal may conclude the arbitral process before the judicial determination of the matter. The aim of the Nigerian version of *kompetenz-kompetenz* in the light of the foregoing is to ensure efficiency in arbitration by ousting the jurisdiction of the Nigerian court from judicial scrutiny of jurisdictional decision in setting aside or recognition/proceeding. This saves time and resources for commercial parties and may contribute to increasing Nigerian chances of becoming a destination hub for international commercial arbitration. Considering the dearth of scholarship and decisional laws on the effect of principles of judicial non-interference and *kompetenz-kompetenz* on the jurisdiction of the court in Nigeria, it is safe to say that this article provides doctrinal and theoretical leadership that would assist Nigerian courts in finding a basis for a judicial hands approach on the subject matter of arbitral authority particularly in situations where the tribunal pre-empts the jurisdictional challenge pending in the court.