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Theme: *The Future of Arbitration and ADR in Africa: Developments & Sustainability*

Topic: *Arbitration, Justice, and the Rule of Law*

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INTRODUCTION

> *"Of all mankind's adventure in search of peace and justice, arbitration is among the earliest. Long ago before laws were established, or courts were organised, or judges had formulated the principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes".[1]*

1. I am greatly honoured to be here today and to speak on the topic, Arbitration, Justice, and the Rule of Law within the context of the theme of this Conference.
2. The opening quote lends credence to the facts that the practice of arbitration has long been interlinked with the need to achieve justice in the resolution of disputes arising from human interaction and relationships. This paper is an attempt to show the interplay between arbitration, rule of law and justice in underpinning the attractiveness of arbitration as an alternative dispute resolution mechanism to litigation and to highlight the perceived injustices of arbitration and the arbitral process that would need to be addressed by stakeholders in the arbitration space for arbitration to continue to be attractive to contractual parties.
3. However, before I take a deep dive into the topic, it is imperative to first define the key terms in the topic being discussed.

DEFINITION OF KEY TERMS: ARBITRATION, JUSTICE AND RULE OF LAW

4. **ARBITRATION:** It is axiomatic that there is no universally accepted definition of the term arbitration. However, there are common themes in the different definitions that have been advanced by scholars, jurists and arbitration practitioners, which are widely accepted. For instance, the Black's Law Dictionary defines arbitration as

[1] Frances Keller, American Arbitration: Its History, Functions and Achievements (Reprinted; Beard Books, 2000) 3.

a dispute-resolution process in which disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute.[2] Professor Gary Born defines arbitration as "a process by which parties consensually submit a dispute to a non-governmental decision maker, selected by or for the parties, who renders a binding decision finally resolving the dispute in accordance with neutral, adjudicative procedures affording the parties an opportunity to be heard".[3]

5. Arbitration has also been defined by Henry Brown and Arthur Marriot[4] as the private mechanism for the resolution of disputes which takes place in private pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to the law, after fair hearing. The process derives force principally from the agreement of the parties and in addition, from the State as the supervisor and enforcer of the legal process. Parties may elect to have their arbitration conducted by an arbitration institution (e.g., ICC. LCIA, LACIAC), which is referred to as institutional arbitration or without the involvement of an institution, referred to as ad hoc arbitration.

6. In **Nigerian National Petroleum Corporation v. Lutin Investment Ltd & Anor[5],** the Supreme Court defined Arbitration as"… *the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction*".

7. The above literary and judicial definitions highlight the salient features of arbitration, *to wit*: (i) agreement of parties to arbitrate disputes; (ii) the privacy of proceedings, determination of issues by an arbitral tribunal; (iii) an agreement to resolve disputes outside the framework of national courts; (iv) party autonomy including selection of arbitrator(s); and (v) a final, binding and enforceable determination of the parties' rights and obligations delivered in the form of an award.

8. **JUSTICE** – Next, we move to the concept of justice. There is also no universally accepted definition or notion of the term 'justice'. It has, however, been described

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[2] Blacks' Law Dictionary, 11th Edition, Thompson Reuters, 2019) 119.

[3] Gary Born, International Commercial Arbitration,2nd Ed (Wolters Kluwer 2014) 291

[4] Henry Brown, Arthur Marriott: *ADR: Principles & practice*, 4th Ed (Sweet & Maxwell 2018).

[5] [2006] LPELR-2024 (SC) 37 – 38, paras F – A.

as the quality of being fair and reasonable; the fair and proper administration of laws.[6] Justice can be construed as the impartial adjudication of conflicting claims in a manner that is reasonable, fair and balanced to all parties involved.

9. Perhaps the reason there is no universally accepted definition of justice is because the notion of justice is very subjective. It is shaped by individual perceptions and idiosyncrasies. There is a world of difference between what justice means to a claimant and what it means for a defendant. As noted by David Miller, "conceptions of justice vary … at one extreme, some conceptions interpret justice as wholly concerned with what individuals can claim under existing laws and social conventions … at the other extreme stand conceptions of justice which posit some ideal principle of distribution such as equality, together with a 'currency' specifying the respect in which justice requires people to be made equally well off, and then refuse to acknowledge the justice of any claims that do not arise directly from the application of this principle".[7]

10. There is no denying that the law functions as a tool in the administration of justice with the primary objective being the need to balance the society's competing interests and the society must perceive the results as so. This is the basis of the much retorted saying within the Nigerian litigation system "*justice should not only be done, but manifestly be seen to be done*."[8] What this connotes is that a reasonable man with no affiliation to the issue in dispute or the point for consideration, should be able to confidently state that having regard to all the facts of the case, the conclusion or decision given is just. This fine dance of balance is the fulcrum of social justice. This fine balance is the main aim of the law and what every dispute resolution mechanism seeks to achieve.

11. According to H.L.A Hart[9], justice connotes that individuals are entitled to a certain relative position of equality which should be respected in the vicissitudes of social life when burdens or benefits fall to be distributed. It is something to be restored when it is disturbed. Hence justice is traditionally thought of as maintaining or

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6 Blacks' Law Dictionary, (n 2) 942.

7 Miller, David, "Justice", *The Stanford Encyclopaedia of Philosophy* (Fall 2021 Edition), Edward N. Zalta (ed.), available at<https://plato.stanford.edu/archives/fall2021/entries/justice/, accessed 02 November 2022.

8 The Admin & Exec. of the Estate of Abacha v. EKE-SPIFF & Ors [2009] LPELR-3152 (SC) 36-37, para F; Danladi v Dangiri & Ors [2014] LPELR-24020 (SC) 88, para F.

9 H.L.A Hart, *The Concept of Law* (ELBS Oxford, 1986) 156.

restoring a balance or proportion and its leading precepts are often formulated as - treat like cases alike and treat different cases differently. Hart asserts that "the connection between this aspect of justice and the very notion of proceeding by rule is obviously very close. Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule without prejudice, interest or caprice. This close connection between justice in the administration of the law and the very notion of a rule has tempted some famous thinkers to identify justice with conformity to law". Hart further considers as key requirements of justice, the twin principles of natural justice – *nemo judex in causa sua*[10] and *audi alterem partem*[11], as they act as guarantees of impartiality or objectivity, and are designed to ensure that the law is applied objectively.

12. The revered jurist, Justice Oputa, provided interesting summation of the importance of the law to the administration of justice when he opined that the judge should appreciate that in the final analysis, the end of law is justice. He further stated that the judge should endeavour to see that the law and the justice of the individual case he is trying, go hand in hand and that after all said and done, the law is, or ought to be, but a handmaid of justice[12]. In **Josiah v. State**[13], his lordship further held that "*justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even only a two-way traffic. It is really a three-way traffic – justice for the appellant accused of a heinous crime of murder; justice for the victim, the murdered man, the deceased, 'whose blood is crying out to heaven for vengeance' and finally justice for society at large – the society whose social norms and values had been desecrated and broken by the criminal act complained of*".

13. It is noteworthy that at the heart of acceptability and confidence in any dispute resolution mechanism is the belief by the disputing parties that justice would be

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10 "Let no one be a judge in his own case".

11 "Hear or listen to both sides of the cause or matter".

12 Professor P.Ehi Oshio "A Fight Between Law and Justice At The Supreme Court: The Tenure Elongation Case Revisited", available at http://www.nigerianlawguru.com/articles/practice%20and%20procedure/A%20FIGHT%20BETWEEN%20LAW%20AND%20JUSTICE%20AT%20THE%20SUPREME%20COURT,THE%20TENURE%20ELONGATION%20CASE%20REVISITED.pdf, accessed 03 November 2022.

13 [1985] 1 NWLR (Pt. 1) 125 at 141, paras F-H.

done. Pro-arbitration practitioners hold the view that of the major factors driving the clamour and shift from litigation to private methods of dispute resolution is the lack of faith of the citizens in the traditional court system[14]. This is particularly due to concerns that going to court may not produce a just outcome, due to the deficiencies in the system; delay in adjudication, cost, the seeming pre-eminence of technical justice over substantial justice, amongst others. Arbitration, therefore, promises the opposite of these deficiencies and has fast become a favourite dispute resolution mechanism, for these reasons. Consequently, arbitration is seen as offering a much easier system for facilitating a just outcome, including but not limited to the fact that the process is party controlled and there are less technicalities.

14. Evidently, the need to achieve justice cannot be divorced from any dispute resolution mechanism, and in the case of arbitration, to remain relevant as a dispute resolution tool, it must produce just outcomes, not just to the disputing parties, but also to the society at large. Unlike other alternative disputes resolution mechanisms such as mediation and negotiation which are settlement centric and do not require strict application of the law or even the basic tenets of the Rule of law, an arbitrator is considered as a private judge whose decisions have a binding effect and are enforceable in law, thus reflecting in private proceedings the role of a civil court of law.[15] Some authors have argued that the fact that the process is party regulated does not connote that it deviates from or is detrimental to the notion of doing justice which the judicial institutions represent. In reality, arbitration is a next of kin to the traditional court system.[16]

15. **Rule of law** - This is a fundamental principle under which all persons, institutions, and entities are accountable to laws that are (i) publicly promulgated (by making laws known and accessible to everyone); (ii) equally enforced (that is, laws are applicable to everyone without discrimination); (iii) independently adjudicated (that

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14 https://iaals.du.edu/blog/public-trust-and-confidence-legal-system-way-forward accessed 03 November 2022 https://www.thisdaylive.com/index.php/2022/08/09/we-have-taken-arbitration-to-other-african-countries/ accessed 03 November 2022

15 O'Callaghan v Coral Racing [1998] EWCA Civ 1801.

16 Frank D. Emerson, History of Arbitration Practice and Law (1970) 19 *Clev. St. L. Rev.* 155. available at https://engagedscholarship.csuohio.edu/clevstlrev/vol19/iss1/19, accessed 01 November 2022.

is, laws are administered by independent courts, arbitral tribunals, etc and through impartial proceedings); and (iv) consistent with international human rights principles (that is, laws are applied in a way that advances human rights principles such as fair hearing, access to justice/access to court or other adjudicatory bodies, determination- judicial, quasi-judicial or administrative- within a reasonable time).[17]

16. The rule of law has its roots in ancient Greece, specifically in Aristotle's philosophy.[18] It found expression in the idea that the law could act as the most efficient and legitimate barrier against the discriminatory and arbitrary power of the ruler.[19] Aristotle himself addressed the issue in his seminal work "Politics" in which he compared the advantages of being ruled by 'the best man or by the best laws'. He further noted that law had certain advantages as a mode of governance as laws are laid down in general terms, well in advance of the particular cases to which they may be applied.[20]

17. According to Plato, the rule of law is the principle that no one is exempt from the law, even those who are in positions of power. Consequently, the essence of the rule of law is to serve as a safeguard against tyranny.[21]

18. A definitive statement on the rule of law in modern times is that offered by A.V. Dicey in his seminal book "Introduction to the Study of the Law of the Constitution", where he defined the rule of law to be the absolute supremacy or predominance of the regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness or even wide discretionary power of the government.[22] According to him, there are three major principles governing the rule of law which

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17 Administrative Office of the U.S. Courts, "Overview of Rule of Law"- https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law, accessed 01 November 2022.

18 Edward M. Harris, 'Antigone the Lawyer, or the Ambiguities of Nomos' in Edward Harris and Lene Rubinstein (eds), The Law and Courts in Ancient Greece (2004), 19, quoted in Christopher May, 'The Rule of Law: Athenian Antecedents to Contemporary Debates' (2012) 4 *Hague Journal on the Rule of Law* 235 at 240.

19 Ibid. 240.

20 Miller, David, "Justice", *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition), Edward N. Zalta (ed.), available at URLhttps://plato.stanford.edu/archives/fall2021/entries/justice/, accessed 02 November 2022.

21 Preethi Ramanujam "Development of the Rule of Law", available at https://www.legalserviceindia.com/legal/article-85-development-of-the-rule-of-law.html#:~:text=The%20Rule%20of%20Law%20was,was%20later%20developed%20by%20A.V, accessed 29 October 2022.

22 A.V Dicey, *Introduction to the Study of the Law of the Constitution (*Eight Edition, The Macmillan Company, 1915) 120.

are the principle of impartiality, the principle of equality and the rights and liberties of individuals.

19. The impartiality principle states that no one should face punishment from the State unless a crime or legal violation has been established to the satisfaction of the regular courts of the land. This implies that no one should be punished for a crime that is not expressly mentioned in a statute and there should be no discrimination in how the law is applied because everyone in a State or association has a moral obligation to observe the law.

20. The principle of equality means that all persons within the State, irrespective of rank or condition, should equally be subject to the law of the land. All the acts of the government and the citizens must be within the realm of the law. It is upon this context that the law is looked upon as the protector of all persons.

21. The third principle on right and liberties of individuals is concerned with protecting citizens liberty and fundamental human rights. For the rule of law to flourish, the Constitution must explicitly identify and protect the citizens' fundamental human rights and liberties. These rights and liberties include right to life, right to fair hearing, freedom of expression, freedom of thought, conscience and religion, etc.

22. Notably, the United Nations[23] has defined the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

23. Having examined the notions, contours and essence of the rule of law in the society, it is imperative to examine the interplay of the concept with justice in ensuring a just and egalitarian society. The examination will provide the framework for a

[23] United Nations, "What is the Rule of Law?", available at https://www.un.org/ruleoflaw/what-is-the-rule-of-law-archived/#:~:text=The%20Secretary%2DGeneral%20has%20described,and%20which%20are%20consistent%20with, accessed 25 October 2022.

critical analysis of the interplay between the rule of law and arbitration (as a dispute resolution mechanism) in achieving justice.

24. Some of the areas in which the question of compliance with the rule of law in arbitration may be raised are whether due process is followed in constituting the tribunal and challenging its membership, the enforcement of interim measures issued by arbitral tribunals, whether the process for recognition and enforcement arbitral awards conform with the rule of law and the scope of intervention of the court in arbitral proceedings. We will address these issues in the course of the presentation.

THE INTERPLAY BETWEEN JUSTICE AND RULE OF LAW

25. There is no gainsaying that doing justice is the end goal of the application of rule of law. The whole essence of publicly making laws which are applicable to everyone without exception, ensuring that they are adjudicated on by independent bodies or persons through an unbiased process, is to ensure that laws are fairly administered, and everyone is treated fairly and equally. The rule of law and its observance is an attribute of whether justice is truly attained or not in a society. The elements of rule of law are impartiality, equality of all men before the law, supremacy of the law and independence of the judiciary.[24] It is however not sufficient for the rule of law to be upheld; the judicial process and its outcomes must also be perceived to be legitimate and fair by the public.[25]

26. The rule of law is a means to an end of justice; the equal treatment of everyone before the law is integral to a just society. The tenet of equality before the law is cardinal to both concepts of rule of law and justice. Both ideals are inextricably linked, and it has been said that without equality, true justice cannot exist; and without a way to deliver just verdicts that ensure impartial treatment, the meaning of equality is nothing more than an unenforced altruism[26].

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[24] Ibid.

[25] Danladi v. Dangiri & Ors [2014] LPELR-24020 (SC) 88, para F.

[26] Cynthia Yue "Equality and Justice: History and Ideals", available at https://equaljusticeunderlaw.org/thejusticereport/2018/8/29/equality-and-justice-history-and-ideals, accessed 15 November 2022.

27. Taking cognisance of the above highlighted relationship between justice and rule of law, the germane issue to be examined in the ensuing paragraphs is to what extent has arbitration advanced these values and their end goal?

ARBITRATION: IS JUSTICE AND RULE OF LAW BEING ENTHRONED?

28. The core objective of the discuss is to analyse some of the features of arbitration and its implication on the administration of justice and the observance of the ethos underlying the application of the rule of law. This analysis will entail a consideration of different factors that impact on the notions of justice in relation to parties to arbitration, the arbitration process, and contractual provisions with respect to arbitration.

29. A good starting point is to examine why arbitration as a dispute resolution mechanism has become more attractive to the pro-arbitration practitioners and what are the downsides of arbitration.

Advantages of Arbitration

30. One quick attraction that arbitration has over litigation is the flexibility it offers to parties. Parties to an arbitration clause are at liberty to choose their arbitrator, the venue of their arbitration, the law applicable to the arbitration proceedings and the general conduct of the arbitration proceedings. I invite you to mirror this flexibility against filing a suit in Lagos State for example. You will first have to go through the rigorous process of filing and e-filing. Then you will wait about one month for assignment of the suit to a judge and to obtain a permanent suit number. Then you get a date. At this point, the progress of the suit is totally at the mercy of the Court and the Defendant. This is not very sustainable for commercial transactions where parties are more likely to be unwilling to continue their contractual relationship while the dispute is still being resolved. This is where arbitration becomes quickly attractive. Unlike litigation, parties can make safe projections on the conduct of the proceedings and the time frame for the proceedings.

31. Also, there is less strict compliance with the technical points of law or laws of evidence. Arbitration proceedings is concerned with the merit of the dispute and not the technical or procedural points. This epitomises the essence of arbitration in achieving justice in determining the substantive issues between parties as

against the likelihood of technical justice that does not meet the ends of justice of a case that is usually the case in litigation, and which is becoming predominant in the decisions of our courts.

32. Another advantage arbitration has over litigation and which ensures justice in the arbitration process is the impartiality that is usually assured by reason of the selection of arbitrator(s). Parties to an arbitration agreement can choose their sole arbitrator or arbitrators and are actively involved in the selection process of an arbitrator. Hence, the parties have some confidence in the impartiality of the arbitrator. This cannot be said of litigation where the parties have no say or role in the selection of judges. We will further discuss this later as this notion may not be entirely advantageous.

33. Similarly, parties to an arbitration proceeding can manage their cost. Unlike litigation where statutory fees are compulsory, parties can by selecting a convenient venue and electing a cost-effective sole arbitrator manage the expense incurred in resolving their dispute.

34. Furthermore, unlike litigation which is a public hearing, arbitration proceedings are private between parties and parties are not under any obligation to open the doors of the proceedings to the public. The importance of this cannot be overemphasized. Business secrets and details can be retained under wraps and will ordinarily not be littered in the media to the detriment of business owners.

35. In Nigeria, the Courts are encouraged not to set aside arbitral awards except for limited circumstances some of which include; where the arbitration clause is invalid or non-existent, where there is a breach of fair hearing or where there is an error on the face of the award.[27] This is advantageous over litigation where parties are free to contest innocuous points and even take them on appeal before a merits decision has been delivered in the substantive dispute.

36. Notwithstanding the foregoing, arbitration in Nigeria is not all smooth sailing, it indeed has its downsides too. Some of the disadvantages are considered hereunder.

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[27] Section 29 of the Arbitration and Conciliation Act, CAP A18, LFN, 2004.

Disadvantages of Arbitration

37. One downside to arbitration that jumps at me is the illusory finality that arbitration has. Although we say that arbitration proceedings are final, parties (especially in Nigeria) after delivery of award will usually commence a litigation process in respect of the award which in some instances is fought all the way to the Supreme Court. The case of **Nitel v. Okeke**[28] in instructive in this regard. In this case, the Notice of Arbitration was issued on 16.12.1996 and the final award was delivered on 15.09.1998. The Appellant sought to set aside the award and this issue was taken from the High Court of Lagos State to the Supreme Court. The Supreme Court delivered its judgment on 27.01.2017 where the Court affirmed the judgments of the High Court and Court of Appeal upholding the award, albeit after 19 years of the delivery of the award. The pertinent question is why didn't the parties first start out with litigation if the dispute was going to get to the Supreme Court in the first place. It appears the finality of arbitration is only an expensive illusion.

38. Arbitration can also be more expensive than litigation. Notable arbitrators do not come in cheap. Also, since parties may eventually end up in Court, the parties may end up paying twice or thrice what they would have ordinarily spent in litigation.

39. I must mention that impartiality that might exist in arbitration is rather illusory. Judges are usually held up to a high standard of impartiality by law and the NJC, same is not true in arbitration. The sword of a disciplinary committee does not hang over the head of an arbitrator and due to this, he is not compelled to remain without compromise, be fair and impartial to parties in the reference or a third-party interest.

40. Despite the directive of the then Chief Justice of Nigeria, his lordship Honourable Justice Walter Onnoghen and a couple of decisions of our Courts to the effect that arbitral proceedings must be given full effect and arbitral awards are final, the courts have yet to take a firm stand in support of arbitration. Parties and lawyers alike still flood the Courts with disputes arising from contract with arbitration agreements and with applications to set aside arbitral awards on flimsy grounds.

41. Based on the foregoing, it is glaring that the advantages of arbitration above epitomise the justice factor in arbitration through the interplay of arbitration as a

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dispute resolution mechanism and the rule of law in achieving a just outcome in the resolution of disputes. The advantages underpin some of the 'perceived injustices' of the arbitral process. However, there are other significant 'perceived injustices' of the mechanism which would be examined in the ensuing paragraphs.

Extending Arbitration Agreement to non-signatories

42. Arbitration is based on party autonomy as epitomised in an arbitration agreement in which parties' consent to refer a dispute between then to arbitration for resolution. The consent of parties is a crucial element of arbitration agreement; without which there will be no binding arbitration agreement and reference to arbitration[29].Thus, theoretically only signatories of an arbitration agreement can be and should be parties to a reference and be bound by any award rendered. However, in Nigeria, as in some jurisdictions, the Courts have held that non-signatories of the agreement can be parties to the arbitration proceedings or be allowed to challenge the proceedings where such joinder in the proceedings is not possible.

43. In the recent case of **Metroline (Nig) Ltd & Ors v Dikko**[30], the Court of Appeal held: *"In the instant case, the 5th Appellant cannot be said to be a party to the contract but cannot be denied as an interested party in this case … His joinder in the proceedings of the arbitrator and the Lower Court was apt and proper. Without it being in the proceedings, the whole enquiry will have collapsed. There is therefore nothing wrong with the decision of the lower Court allowing the Court or Tribunal to make a pronouncement on the rights and obligations of the 5th Appellant".* Therein lies the conundrum upon a reflection of the import of the decision vis-à-vis the notions of justice and the rule of law. Wherein lies the justice of taking a party against his/its will to arbitration? Is consent to arbitrate no longer a salient element with respect to arbitration agreements? Such extension of arbitration agreements to non-parties, against their wishes, cannot by any stretch of argument meet the ends of justice. A party has the right to choose the mode of resolution of any dispute it has with another party and justice is not served where a party is 'hauled' into the

[29] Dam Samuel, Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law (1989) 96.

[30] [2018] LPELR-46853 (CA) Pp 17-24.

halls of arbitration as an unwilling participant. Whatever the outcome of the arbitration process, there will always be an impression of injustice being meted to the unwilling participant.

44. The fact that this raises the issue of justice has been buttressed in decisions of our Courts refusing to stay proceedings and referral the parties to arbitration where one of the parties to a suit is not a party to the arbitration agreement. In the recent decision of the Lagos State High Court, the Court, amongst other reasons, refused to grant stay and refer the parties to arbitration on the ground that the justice of the case would be best met if the court adjudicated the dispute since one of the parties was a non-party to the arbitration agreement. According to his lordship, "*…the Court is convinced by argument of Claimant Counsel that resort to arbitration may be difficult if not impossible as a result of presence of the 2nd Claimant, who is not a party to the Technical Partnership Agreement, in the transaction. Also, in line with the proisions of Section 5(2)(a) of the Arbitration and Conciliation Act, the Court is not satisfied that the appliciation for stay of proceedings ought to be granted*."

Cost of Arbitration and Access to Justice

45. There is a sense in which the cost associated with a dispute resolution mechanism may constitute a denial of justice. It is truism that justice must first be accessed before it is enforced or dealt. Bringing it home, arbitration must first be accessible to the ordinary man before it meets the ends of justice for the ordinary man. However, arbitration has become increasingly expensive and unaffordable for average people, therefore denying ordinary people access to justice. As Babatunde Ajibade, SAN puts it in his article titled "Much Ado About the Cost of Arbitration",[31] arbitration is clearly more expensive than litigation where "the emoluments of the adjudicator (judge) and the cost of the infrastructure (court rooms) and the administration (registry and support staff) are largely borne by the State."

46. The parties will provide the resources for the venue of arbitration and will also pay the arbitrator in addition to providing resources to ensure adequate support for the

[31] Babatunde Ajibade SAN: Much Ado About the Cost of Arbitration; available on https://spaajibade.com/much-ado-about-the-cost-of-arbitration-dr-babatunde-ajibade-san-fciarb/, accessed on 17.11.2022

arbitrator. The parties will also likely instruct counsel to represent them at the proceedings and will of course have to pay their counsels. All of these makes arbitration more expensive than litigation. Insofar as arbitration remains expensive, its advantages cannot be exploited by the ordinary man to meet the ends of justice for himself.

47. While it is true that the ultimate burden of the cost for an arbitration proceeding will eventually be borne by the losing party. However, it is not uncommon to see arbitration agreements where parties have expressly agreed that the costs and expenses related to the proceedings are to be borne by each party. In such circumstances, the party with the lower bargaining power is almost left with no option than to forego his claim owing to the potential cost that a loss in the proceedings may portend for business interest.

48. In the United States of America for instance, the U.S House of Representatives recently voted to advance the Forced Arbitration Injustice Repeal Act (H.R. 963)[32], a bill which would effectively invalidate all pre-dispute mandatory arbitration agreements in employment, antitrust, consumer and civil rights disputes. Much of the clamour for the passage of the bill is rooted in the need to protect individuals from giving up their right of access to court in exchange for a costlier and time-consuming dispute resolution process where they would be unable to match the financial capability of the opposing party.

Cost of Arbitration and Impartiality of Arbitrator

49. Another side to the issue of cost in arbitration is that the imbalance in parties bargaining power also become more pronounced during the appointment and selection of the arbitrator or the tribunal. Unlike the traditional court system where the judge is selected by the State, arbitrator selection is done entirely by the parties or through a nominated institution or an appointing body. As such, the likelihood that the party with the upper purchasing power will nominate a widely experienced arbitrator whose scale of fees or charge would significantly increase the cost of the proceedings is almost certain.

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32 Ruth Green: Employment rights: Time's up for mandatory arbitration; available at https://www.ibanet.org/article/5D0F1755-72F2-4DFD-99A9-F8726A8C5299, accessed 15 November 2022.

50. For instance, a dispute between an International Oil Company and a subcontractor, the Oil company is more likely to nominate an arbitrator who is a thought leader or subject matter expert in the specific dispute area. Whereas, the Subcontractor may not be so familiar with the experts in that field. Thus, any nomination whether jointly or individually would most likely result in the appointment of an arbitrator with a very high charge out rate.

Choice of Seat of Arbitration and the Ends of Justice

51. Parties are at liberty to choose the seat of arbitration. Where the parties are from different jurisdictions and the administration of justice system of one of the parties is chosen, this will tilt the scale of justice to favour the party who has his/its home seat as the seat of arbitration. This is popularly called the hometown advantage. This is because that party will be at home and will be familiar with the dispute resolution mechanisms of the seat of arbitration and would usually employ that knowledge to his/its advantage.

INSTITUTIONAL BIAS IN INTERNATIONAL ARBITRATION

52. As international arbitral tribunals and institutions have become increasingly popular for the resolution of investor-state and complex commercial disputes, the use of private decision-making dispute resolution mechanisms has come under heavy scrutiny and intense criticism. Particularly, there are concerns about the impartiality of arbitrators and arbitral institutions suggesting that arbitral decision-making is biased, apparently favouring investors and multinationals against states and weaker parties such as in disputes involving developing or third-world countries or companies and entities registered in underdeveloped countries.[33]

53. Unlike the judicial system where judges are drawn from similar background, educational or social class, systemic bias arises where the private driven method of selection of arbitrators tends to favour the appointment of arbitrators who share

[33] Stavros Brekoulakis, "Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making" [2013], Journal of International Dispute Settlement, Vol. 4, No. 3 (2013), available at https://www.cailaw.org/media/files/ITA/ConferenceMaterial/2015/workshop/5b-brekoulakis.pdf, accessed 15 November 2022.

the same legal prejudices or similar values on legal, economic and social constructs.[34] Institutional bias is seen in the general tendency of the arbitration system to find consistently in favour of a particular type of party over the other.[35] Institutional bias does not seek to interrogate whether the arbitrator has a personal or financial interest in the subject matter of the dispute rather, it focuses on the institutional system and whether it is designed to favour a certain legal ideologies or class of parties.[36]

54. Interestingly, one major question is whether this type of bias be challenged pre-proceedings, during the proceedings or post-proceedings. In my view, parties should be allowed to raise their challenge before being compelled to submit to the arbitration proceedings. Issues of institutional bias go to evident partiality and fundamental fairness which really are the bedrock on which the use of arbitration has been toted above traditional litigation as a dispute resolution mechanism[37]. These are also common themes in the principles of justice and the rule of law.

55. As such, parties must take extra caution in negotiating their arbitration agreements so as to avoid the adoption of any institution that has been perceived to express any sort of bias against specific types or class of party or parties, so that they are not unfairly disadvantaged. With respect to already existing arbitration agreements, the parties can challenge the impartiality of the institution or tribunal as early as possible, preferably before submitting to the proceedings.

The Way Forward – What Practical Mechanisms can be employed to tackle the challenges identified above

56. With respect to the increasing cost of arbitration, the present use of standard scale of fees of by some institutionalized arbitration such as the NCIArB and the ICC Court of International Arbitration is encouraging. However, there is a need to review the scale of fees downward and with requisite flexibility to make the fees more affordable.

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34 Ibid.

35 Roger J. Perlstad, "Timing of Institutional Bias Challenges to Arbitration", The University of Chicago Law Review, available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5150&context=uclrev, accessed 15 November 2022.

36 Ibid.

37 Ibid.

57. Regarding the delay tactics in arbitral proceedings, there should be trainings for judges where they are regularly exposed to the workings of arbitration and recent developments in the arbitration world. With this, the judges will be regularly aware and encouraged to give requisite support to arbitral proceedings rather than to meddle in arbitral proceedings. The apex Court should continue to send the right message to all Courts within jurisdiction by delivering more arbitration friendly judgments.

58. In relation to delay or frustration of the recognition and enforcement of Awards, the Nigerian Courts should do more in giving arbitration friendly judgments such as their foreign counterparts. The Paris Court of Appeal recently rejected an application for setting aside an award by a non-signatory parent company, holding that the non-signatory parent company has impliedly consented to the arbitration agreement and thus is not in a position to resist the enforcement against it.[38]

59. There is a need to limit the grounds for setting aside arbitral awards in Nigeria. Nigeria ecosystem seems to be on the right track with respect to this if the Arbitration and Mediation Bill 2022 is signed into law. The Bill has dispensed with the provisions of Section 30 and 31 of the ACA which allow the setting aside of awards and refusal of recognition and enforcement of awards on the basis of arbitrator's misconduct and improper procurement of award. We have seen that these provisions have been abused in practice as a result of lack of definition of what constitutes 'misconduct' or 'improper procurement of award' in the ACA.

60. There is need to consider the possibility of deposit or bond for damages if a party desires to challenge an arbitral award- this might significantly reduce the urge to challenge awards and truly introduce finality to arbitral awards.

61. Also, with regards to institutional bias, parties must take extra caution in negotiating their arbitration agreements so as to avoid the adoption of any institution that has been perceived to express any sort of bias against the that class of party or parties. Individual arbitrators are also enjoined to purge themselves of inherent prejudice and bias they have been inculcated and rather, base their decisions on objective metrics.

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38 Damietta International Port Company SAE & Kuwait Gulf Link Ports International v. Doosan Heavy Industries & Construction Co Ltd, 23 November 2021, NO. 18/22323.

Summary of Recommendations and Conclusion

62. In precis, we have established that the concept of justice and rule of law are intertwined and the goal of all dispute resolution mechanism inclusive of arbitration is to do justice between the disputing parties. We have also highlighted the various factors that may impede access to justice in arbitral proceedings such as the cost of arbitration, seat of the arbitration, the use of guerilla tactic in delaying in arbitral proceedings and the difficulty in enforcement of arbitral awards.

63. We have also proffered workable recommendations to address these issues such as legitimizing the adoption of third party-funding in arbitration, limiting the grounds for setting aside arbitral awards in Nigeria; ordering heavy cost against failed applications to set aside arbitral awards, giving proper advice to parties before entering into an arbitration agreement; and organizing trainings for judges where they are regularly exposed to the workings of arbitration and recent developments in the arbitration world.

64. In closing, I would like to adopt the view of the renowned arbitration practitioner Prof Gary Born to the effect that the most important challenge that the practice of arbitration faces in Nigeria, is **the need to train the judiciary on the benefits and functioning of arbitration,** so that it can more effectively support the arbitral process. There is no doubt that the most successful jurisdictions are those that not only do not obstruct or intervene in the arbitral process, but in fact actively support the arbitral process.[39]

65. As arbitration practitioners, I urge us to also learn do away with the urge to always invite the court to intervene in arbitration proceedings or stall the enforcement of arbitral awards by inundating the courts with applications and objections. We must remember that the ends of justice is met not only when our client wins.

66. I therefore urge the Nigerian judiciary and arbitration practitioners alike to continue to support the practice of arbitration in Nigeria so as to improve the current outlook on ease of enforcement of arbitral awards and recovery of award debts. This will significantly increase the desire for more Nigeria seated arbitration proceedings.

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[39] https://ciarglobal.com/gary-born-most-successful-jurisdictions-are-those-that-actively-support-the-arbitral-process/

67. Thank you for your time and consideration. I am happy to take your questions at this juncture.