BEYOND THE ARBITRATION AND MEDIATION ACT 2023: STRUCTURAL AND SUBSTANTIVE IMPERATIVES FOR MAKING NIGERIA AN INTERNATIONAL ARBITRAL HUB

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Abstract

The 2023 Nigerian Arbitration and Mediation Act (AMA) is a notable piece of legislation. Though modelled upon modern arbitration laws, this article argues that the enactment is a superficial index of Nigeria's pro-arbitration stance. The true measure of a pro-arbitration jurisdiction depends on two critical factors: the institutional design of the supervisory jurisdiction of the national court and the substantive judicial elaboration of its laws, respectively. Through a comparative analysis of the successful regimes of the specialised commercial courts in Singapore, Dubai, Germany and the Netherlands, the article highlights a significant disparity in the Nigerian context. This is exemplified by the structural dysfunction of the Lagos State Commercial Court (LSCC)-a fast-track division that represents an isomorphic mimicry of the procedural flexibility and jurisdictional autonomy found in the successful international models. From a substantive perspective, the article reveals a finality paradox in the Nigerian version of Kompetenz-Kompetenz. It argues that the existing friction between Section 14(5) and Section 14(6) of the AMA leads to a race to the award, potentially prioritising efficiency over party consent and the legitimacy that consent fosters. To enhance Nigeria's global standing, the article recommends a national policy on Kompetenz-Kompetenz to maintain the finality of jurisdictional determination under Nigerian law. Learning from Section 1032(2) of the German Code of Civil Procedure (ZPO), it further recommends a model that permits early court review of arbitral jurisdiction before the constitution of the arbitral tribunal, while upholding the finality effect under Section 14 (5) after the procedure has begun.

Keywords: AMA 2023, Kompetenz-Kompetenz, Arbitration and Mediation Act (AMA) 2023, Specialised Commercial Courts, Supervisory Jurisdiction

1. Introduction

The New York Convention was established on 10 June 1958. It came into effect on 7 June 1959 to provide an international unifying standard for the recognition and enforcement of arbitration agreements (and arbitral awards). In 1985, the United Nations Commission on International Trade Law (UNCITRAL) established a Model Law to facilitate the implementation of the New York Convention. It aims to set a uniform standard on international commercial arbitration and to minimise, if not eliminate, any inconsistencies between the New York Convention and local *lex arbitri*.[1] The New York Convention most importantly recognises the special status or *sui generis* nature of the arbitration agreement by providing for its mandatory enforceability under Article II (3) except where such agreement is "null and void", "inoperable or incapable of being performed".

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[1] "The lex arbitri, also known as the 'seat,' refers to the procedural law of the place where the arbitration is held." George A Bermann, 'Domesticating' the New York Convention: The Impact of the Federal Arbitration Act' [2011] (2) (2) *Journal of International Dispute Settlement* 318, Janet A Rosen, 'Arbitration under Private International Law: The Doctrines of Separability and Competence de la Competence' [1993] (17) (3) *Fordham International Law* 613,614.

The above provisions of the New York Convention are binding on national courts that are state parties to the Convention.[2] National courts are the most strategic institutions that operate within the legal frameworks to ensure that arbitration agreements are respected and enforced following their obligations under the New York Convention. Consequently, those countries, including the developed and developing countries, may see the enactment of a contemporary legal framework, particularly an arbitration statute, as an opportunity to enhance the jurisdiction of the courts for settling international commercial disputes, by extension, international trade within the nation.[3] However, having a cutting-edge statute in arbitration and modern arbitration rules are mere preliminaries to enhancing the jurisdiction of courts for the recognition and enforcement of the arbitration agreement.[4] The measure of a country's commitment to the enforcement of agreements to arbitrate considerably depends on the institutional structure of the supervisory jurisdiction of the national court.[5] For example, the American Arbitration Act (FAA) is antiquated by contemporary standards, yet America is one of the most preferred destinations for arbitration due largely to a competent court system that almost always fills the gaps in the FAA and other legal frameworks that concern enforcement questions or regulation of international commercial arbitration.[6]

Therefore, the institutional design of a national court is a crucial factor that determines the quality of the supervisory and supportive jurisdiction of that court in the enforcement of an arbitration agreement.[7] This article aims to identify the factors that should complement the provisions of the new Nigerian Arbitration and Mediation Act (AMA) 2023 to make Nigeria a destination hub for international commercial arbitration. The enactment of the AMA merely represents a superficial indication of the state of arbitration in the Nigerian legal framework, which serves as a symbolic affirmation of compliance. Thus, the standard to use in assessing Nigeria's support for arbitration, just as the taste of the pudding lies in the eating, pertains to the judicial interpretation and enforcement of regulatory laws concerning arbitration. As the proverb suggests, the daily task of applying established law on arbitration to the realities of litigation is where practical implementation occurs. Over time, the Nigerian courts interpreted critical legal issues and practices of arbitration based on particular disputes, parties, and contracts.[8] Such scenarios are usually the vulnerable spots that reflect the Nigerian stance on arbitration. Statutory proclamations acquire substantive significance in judicial rulings. This article will analyse the foregoing issues from a structural and substantive point of view.

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[2] Nigeria acceded to the New York Convention on 17 March 1970.

[3] Gonzalo Vial, 'Influence of the Arbitral Seat in the Outcome of an International Commercial Arbitration' [2017] (50) 2 *International Lawyer* 331. This is to ensure that commercial disputes that may originate within that country are not settled outside the jurisdiction, but within a viable framework already established for the settlement of international commercial disputes in that country.

[4] Thomas E Carbonneau, 'Judicial Approbation in Building the Civilization of Arbitration Judicial Approbation in Building the Civilization of Arbitration' [2009] (113) *Penn St L Rev* 1345.

[5] Ibid 1346.

[6] Jack M Graves, 'Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules' [2011] 2:225 *William & Mary Business Law Review* 263.

[7] Gary B. Born, International Commercial Arbitration (3rd edn, Kluwer Law International 2021) 1602 (noting that the effectiveness of an arbitration agreement often depends on the supportive and supervisory functions of the enforcement courts); see also Redfern and Hunter on International Arbitration (7th edn, Oxford University Press 2022) para 2.91.

[8] *Kano State Urban Development Board v Fanz Construction Ltd* [1990] 4 NWLR (Pt 142) 1 (SC) (discussing the effect of finality of arbitral awards); *Stabilini Visinoni Ltd v Mallinson & Partners Ltd* [2014] 12 NWLR (Pt 1420) 134 (CA) (addressing the concept of default of appearance in the proceedings seeking the enforcement of arbitration agreements).

Following the introduction, part two analyses the degree of robustness of the jurisdiction of the Nigerian courts in the arbitral process. It identifies the extent to which the dysfunctional structural court system in Nigeria does not maximise the considerable legal and institutional frameworks on arbitration in Nigeria. These frameworks should be inextricably tied to a special commercial court system that is staffed with specialist judges and one that generally ought to mirror arbitration's most valued characteristics concerning procedural flexibility. It concludes by noting that even though Lagos State blazed the trail by creating specialized courts (Lagos State Commercial Court (LSCC) following the recommendation by the Presidential Enabling Business Environment Council (PEBEC), the institutional design and structure of the LSCC is an isomorphic mimicry of the successful regimes of the specialized courts in other jurisdictions such as Dubai International Financial Centre (DIFC) Courts, the Singapore International Commercial Court (SICC), the German Chambers for International Commercial Disputes, and the Netherlands Commercial Court. Though there are laws of unintended consequences, such as Section 20 of the Nigerian Admiralty and Jurisdiction Act (AJA)[9] that require judicial elaboration to align with the modern-day commercial realities, part three shall focus on the Nigerian version of *Kompetenz-Kompetenz*[10] as a law of unintended consequences that creates a finality paradox in determining the arbitral authority. Consequently, it argues for a national policy on the Nigerian style of *Kompetenz-Kompetenz* under Section 14 of the AMA, or an amendment of Sections 14 and 5 to mirror the German standard that balances the efficiency and legitimacy concerns under Section 1032 (2) of the German Code of Civil Procedure (ZPO).[11] Part four concludes the paper.

2. The Courts

It is not in doubt that the role of domestic courts in the practice of international commercial arbitration has changed considerably over the past four centuries.[12] This fundamental shift in judicial thought has been facilitated in the Nigerian context by specific legislative and international treaty interventions, such as the New York Convention, which affirms the right of businessmen and businesswomen to enter into an arbitration agreement. The previous Arbitration and Conciliation Act (ACA) contained numerous pro-arbitration provisions, such as empowering courts to stay proceedings initiated in violation of an arbitration agreement, preventing the revocation of the arbitration agreement, and ensuring the enforcement of arbitral awards.[13] These

[9] Section 20 of AJA creates a protectionist paradox that, in reality, does not even protect the interest of the Nigerian litigant who, for procedural and other reasons, may prefer an arbitral tribunal seated abroad or a foreign court for settlement of commercial disputes.

[10] The German phrase *Kompetenz-Kompetenz* literally means "competence-competence" or "the power to decide one's own power." In the context of international arbitration, it refers to the legal theory that gives an arbitral tribunal the authority to decide cases pertaining to its own jurisdiction, including challenges to the existence or validity of the arbitration agreement.

[11] It permits a court to answer jurisdictional questions before the establishment of the arbitral tribunal, and when that is not done, the arbitral tribunal, after its constitution, exclusively determines its jurisdiction, but any jurisdictional decision it makes may be challenged in court. George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' [2012] (37) (1) *Yale Journal of International Law* 20.

[12] See Justice Winston Anderson, 'Role of the Domestic Courts in the International Commercial Arbitral Process' (Remarks at the Fourth High Level Meeting on the Role of the Judiciary in International Arbitration, 23 October 2014) 1-2 (noting the evolution from 17th-century judicial hostility to the modern era of treaty-led support); see also Born (n 7) ch 1 (discussing the historical transition to pro-arbitration legal frameworks globally).

[13] Arbitration and Conciliation Act 1988/2004 (ACA), ss 4 and 5 (stay of proceedings), s 2 (irrevocability of arbitration agreements), and s 52 (enforcement of awards). These foundations are further refined in the Arbitration and Mediation Act 2023 (AMA), s 5 (mandatory stay of proceedings), s 3 (irrevocability), and ss 57-58 (enforcement of awards).

provisions, which established the foundation for a contemporary law in Nigeria, were further refined and enhanced in the new AMA.

A fundamental principle of the AMA, which mirrors the New York Convention, is to circumscribe the role of the Nigerian courts in the arbitral process by identifying and thereby restricting the instances in which the courts may interfere. The objective is to promote party autonomy.[14] This strongly suggests that party autonomy and judicial intervention in the arbitral process are compatible. Parties to an arbitration agreement seek a swift, cost-effective, and conclusive resolution of disputes. At the same time, the courts aim to ensure the arbitral process is fair and applicable to parties who genuinely consented to arbitrate the dispute. The courts have endeavoured to reconcile the conflicting interests of recognising the parties' agreement in selecting the arbitration method of dispute resolution, while simultaneously exercising adequate oversight to make arbitration a speedy process and to maintain the one-stop shop dispute resolution system that should be the hallmark of arbitration in deserving situations. To make arbitration a speedy procedure suggests that the need for a special court (in a supervisory capacity) is very important. The special courts should have jurisdiction to enforce the parties' agreements on jurisdiction. Also, the special court should have an appellate division similar to the successful procedural design of the commercial courts in advanced jurisdictions such as Singapore, Dubai, Germany and the Netherlands. These two areas are essential in determining to what extent the courts, as an institution, contribute to making arbitration the best alternative to litigation. This will be examined in turn.

2.1 Specialised Courts (Commercial Courts)

On 26 May 2023, Nigeria enacted the AMA to catch up with developments in global standards for the arbitration and mediation system. However, having a cutting-edge arbitration statute and modern arbitration rules is not enough to strengthen Nigeria's standing as a global hub for international business dispute settlement. For example, countries like Singapore, Dubai, Germany, and the Netherlands have innovative and modern arbitration laws. Still, they have hitherto witnessed a disturbing trend in which businessmen and businesswomen in an international context prefer to resolve disputes in a foreign court or an arbitration seated abroad. This changed with the establishment of specialised courts such as the Dubai International Financial Centre (DIFC) Courts, the Singapore International Commercial Court (SICC), the German Chambers for International Commercial Disputes, and the Netherlands Commercial Court (NCC). Barring other considerations, this strongly suggests that the institutional design and structure of the national court, in its supportive or supervisory function in the arbitral process, are pivotal to the development of a viable arbitration market in a country.

Nigeria may appear to have been inspired by the positive developments in some jurisdictions in Asia and Europe. In Nigeria, the court's overcrowded dockets usually do not facilitate a swift and prompt resolution of commercial disputes, including the supervisory oversight of the Nigerian courts. Consequently, in 2016, the Presidential Enabling Business Environment Council (PEBEC) was established to establish commercial courts and "Ease of Doing Business Councils" across all 36 states and the Federal Capital Territory of Nigeria. This effort sought to enhance the business environment and the supervisory role of the commercial court over the arbitration method of

[14] See s 64 of the Arbitration and Mediation Act 2023 (stipulating that "in matters governed by this Act, a court shall not intervene except where so provided in this Act"). This provision is the statutory expression of the principle of party autonomy, ensuring that the arbitral process remains primarily governed by the agreement of the parties rather than judicial interference.

dispute resolution nationwide.[15] Extant research reveals that Lagos is the only state in Nigeria that has blazed the trail in that regard. The Lagos State Commercial Court (LSCC) was established on 26 April 2004, long before the PEBEC initiative.

The LSCC is a Commercial (Fast Track) Division within the High Court, specifically created to manage commercial matters efficiently. This specialised court seeks to accelerate the resolution of commercial litigation. The establishment of the LSCC is a response to the high-value, complex commercial disputes that are increasingly being resolved by courts abroad, such as the London Commercial Court, or by arbitration with London as the seat. Due to the outflow of cases to the United Kingdom's court or arbitration abroad, Lagos courts, the jurisdiction where those cases originated, play no significant role in disputes with an international element, thereby adversely affecting the national judges' knowledge and their capacity to develop and refine the law.[16] By creating the LSCC, a special court appealing to entities engaged in international business, Lagos State clearly articulated its objective of modernising its public court system. The objective is to attract (arbitration and litigation) disputes often escaping the shores of Lagos, the commercial capital of Nigeria, and ultimately revitalising the case law jurisprudence of the state.

A similar objective was successfully achieved with the establishment of specialised courts in the majority of Countries, such as Dubai and Singapore in Asia, and Germany and the Netherlands in Europe. What is noteworthy is that specialist judges man those courts[17] and were also substantially, or to some degree, modelled on the procedural flexibility of international arbitration and the default rules that distinguish it from the formality of litigation. Compared to its European and Asian counterparts, the Lagos Special Commercial Court (LSCC) lacks several important characteristics. These international courts include procedural benefits such as party-led jurisdictional agreements and flexible appellate procedures, such as the ability to waive or restrict the right of appeal, in addition to the use of specialised judges.

2.1.1 Agreement on Jurisdiction

The High Court of Lagos State Civil Procedure Rules, which also regulates the proceedings of the commercial courts division, has no express provision on the agreement of the parties on jurisdiction compared with the practice in the majority of international commercial courts in jurisdictions such as Singapore,[18] China,[19] and the Netherlands.[20] Further, these international commercial courts, unlike the Lagos State Commercial Court, allow the parties to determine the court's subject-matter jurisdiction, which invariably lacks mandatory jurisdiction. In Singapore, in particular, a dispute is deemed commercial if the parties so designate it.[21] In Nigeria, even though

[15] The major purpose for the establishment of the commercial court is to engender a business-friendly atmosphere that would create economic or business opportunity for domestic lawyers and other service providers. The increasing use of arbitration was a key factor in the establishment of the commercial courts because of the excessive legal fees that counsel charge clients in complicated and high-value disputes. The implication is the resort to litigation, as it is evident in the case load of the court.

[16] As to whether the Nigerian lawyers who desire to represent clients in those cases in a foreign country are eventually hired is a story for another day.

[17] At the very least, in the majority of countries, the legislators are usually recuperating both mentally and financially from the rigours of the campaign, thus making them unable to conceive and follow matters of national interest. These challenges or gaps in the lawmaking process are often filled by the specialist judges who work hard towards the development of a law of arbitration that is liberal, pragmatic, and adaptable, considering the laissez-faire attitude of the legislators or their lack of knowledge in the refinement of statutory provisions. Carbonneau (n 4).

[18] SICC Rules 2021, Order 2, rule 1(1)(b)

[19] China International Commercial Court provision (CICC), art 2(1)

[20] Dutch Code of Civil Procedure [DCCP]; art 1.3.1.(d).

[21] SICC Rules, Order 2, rule 1(3)(a)(ii).

the courts enforce parties' choice-of-court agreements, no court rules allow parties to allocate subject-matter jurisdiction to the courts. The subject matter jurisdiction of the courts in Nigeria is determined by statute.

In addition, the LSCC rules do not give parties the authority to agree on the applicable rules of evidence or the design of the proceedings generally. Unless the parties have chosen a foreign law to govern their contract, neither the court nor the parties can rely on rules of evidence under any foreign law to determine the dispute. Further, parties do not have the freedom to agree on what rules of evidence under the Nigerian law should or should not apply by way of submitting such an application to the court. Again, there is no express provision under Order 38 of the rules of the High Court of Lagos State that allows the parties to agree on the applicability of soft law, such as the International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules), to govern evidence proceedings. Even though it has been argued that the IBA Rules on evidence apply in court proceedings in Nigeria,[22] it may be safe to say that the IBA Rules on evidence, even with the parties' agreement, are not binding on the Nigerian Court but may influence the court in deciding evidentiary matters.

The inability of the parties to apply by agreement foreign rules of evidence or make a choice on which national rule of evidence applies, or even opt out of such national rule and opt in to foreign rules or soft law such as the IBA Rules, promotes the idiosyncratic tenet in civil procedure that requires that law of the forum governs the parties' proceedings, in other words, *lex fori regit processum* or in the arbitration context, "judicial lex forism" according to Petsche.[23] This practice does not reflect the standard in international commercial arbitration, where the parties' agreement governs and determines the arbitral tribunal's jurisdiction and the conduct of proceedings, including the applicable rules of evidence. This procedural inflexibility strongly indicates that the LSCC was not modelled after an arbitration procedure and, to that end, suggests that the LSCC would not enforce a non-commercial arbitration agreement of the parties and their agreement on the procedural conduct of the proceedings in LSCC.

2.1.2 Appeal

The prominence of foreign-seated international arbitration, which was a key factor in establishing the LSCC, for example, somewhat implied that these courts and the jurisdiction (Nigeria) in which they operate were not conducive to arbitration. Nigeria, as a federal entity and Lagos state, as a federating unit in Nigeria, did not have a modern arbitration law until the enactment of the New Arbitration and Mediation Act in 2023 and the Lagos State Arbitration Law in 2009, respectively. Though the Lagos State Arbitration Law regulates arbitration within the State, including those with international elements, unless the parties agree otherwise, the LSCC that supervises and support the arbitral process does not have an appellate division. Decisions from the High Court of Lagos State (Commercial Division) are appealable to the Lagos Division of the Court of Appeal of Nigeria. It may not be wide of the mark to argue that the absence of an appellate division of the court does not complement arbitration seated within the state, hence, comparatively does not position the State, which is the commercial capital of Nigeria, as a sophisticated arbitration hub.

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[22] https://punuka.com/wp-content/uploads/2019/09/GLI_International-Arbitration-2017_Nigeria.pdf p 254<accessed 14 January 2026.

[23] Markus A Petsche, 'International commercial arbitration and the transformation of the conflict of laws theory' [2010] (18) (3) *Michigan State Journal of International Law* 463 described "judicial lex forism" as the undue application of the domestic law of a forum in disregard of the applicable law chosen by the parties or conflict of law analysis.

In contrast, international commercial courts in other countries provide parties with the opportunity to appeal to the courts' appellate divisions. Specifically, parties may appeal judgments from the Singapore International Commercial Court (SICC), Dubai International Financial Centre (DIFC) Courts, Abu Dhabi Global Market (ADGM) Courts, Netherlands Commercial Court (NCC), the Paris International Chambers, and the German Chambers for International Commercial Disputes to the appellate division of those respective courts.[24] What is interesting about the appellate provisions of the international commercial courts cited above is that the right to appeal operates as a default rule. In other words, parties may, in writing, waive their right of appeal or limit it to specific grounds; otherwise, the right of appeal as provided under the rules shall apply in the absence of an express agreement by the parties. But it is safe to say that parties cannot, by agreement in writing, waive their right on issues of natural justice or questions of arbitral authority. Those are the most basic values that determine the validity of the agreement to arbitrate and therefore cannot be circumscribed by the parties' agreement.

3 The Nigerian Version of *Kompetenz-Kompetenz*: The Finality Paradox

The Nigerian courts play their supervisory function of determining the arbitral authority or the validity of the arbitration agreement under the doctrine of *kompetenz-kompetenz*. The different versions of *kompetenz-kompetenz* doctrine under national laws mirror specific policy objectives of efficiency and legitimacy, and the attempt in some instances to balance the efficiency[25] and legitimacy concerns in an arbitration seated in that country. For example, while the French (Gallic standard) and the American systems (albeit at common law)[26] are the "extreme opposites"[27] that place a greater premium on efficiency and legitimacy in arbitration, respectively, the German standard balances the efficiency and legitimacy concerns under section 1032(2) of the German Code of Civil Procedure (ZPO).[28]

The above examples and the divergence, 'often derives not from discord on policy goals, but because of the relative weight given to rival risks.'[29] Because the Nigerian arbitration law is the only legislation that gives finality effect to arbitral jurisdictional decisions, it is a confusing outlier that neither prioritises efficiency over legitimacy nor vice versa, nor is it a model that attempts to balance the efficiency and legitimacy concerns. This has a historical background. The previous

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[24] Georgia Antonopoulou, 'The 'Arbitralization' of Courts: The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts' [2023] (14) (3) *Journal of International Dispute Settlement* 338.

[25] The Gallic standard prohibits at the outset and in ongoing arbitration any form of judicial intervention except at the end of arbitration unless the arbitration agreement is manifestly void and also if arbitration has not commenced. French NCPC art 1458

[26] The American approach permits the court to intervene at any time if there is doubt about the existence of an arbitration agreement, except if there is clear evidence (either in the arbitration clause or a separate agreement) that the parties intend to submit such doubt or questions to arbitrators. *General Elec Co v Deutz AG*, 270 F.3d 144 (3d Cir. 2001). This case is discussed in William W Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' 6. Available at https://cdn.arbitration-icca.org/s3fs public/document/media_document/media012571271340940park_joining_non-signatories.pdf<accessed 18 December 2025.

[27] William Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' [2007] Boston Uni. Sch. of Law. P. L & Legal Theory Paper Series 43, 44.

[28] It permits a court to answer jurisdictional questions before the establishment of the arbitral tribunal and when that is not done, the arbitral tribunal after its constitution exclusively determines its jurisdiction but any jurisdictional decision it makes may be challenged in court. Bermann (n 7) 20.

[29] William W Park, 'Explaining Arbitration Law' in No. 15-42 Boston University School of Law, Public Law Research Paper 1: 24 [2015].

Arbitration and Conciliation Act (ACA), apart from giving a finality effect to arbitral jurisdictional decisions, did not provide clarity and coherence to the framework that ought to have determined when the court may entertain arbitral jurisdictional questions. Under the old ACA, once the arbitral tribunal was constituted, it had the exclusive authority to make jurisdictional rulings, which were final and binding on the parties. Even though the *Kompetenz-Kompetenz* doctrine under the ACA attempted to create a delocalized arbitration, the implication, however, is that a party in certain complex commercial contracts that do not easily reveal consent to arbitrate might be denied a right of access to the court over a dispute it never consented to arbitrate. Thus, the provision of section 12 (4) of the ACA created room for every agreement to arbitrate to be regarded as a fact, even when analytical judicial scrutiny might have revealed otherwise. The Nigerian version of *Kompetenz-Kompetenz*, especially under the old ACA, ousted the jurisdiction of the court in reviewing arbitral jurisdictional findings, thereby heightening the finality paradox.

The new AMA seeks to address the foregoing finality paradox, which the antecedent legislation did not address. For example, the AMA provides the time within which a party may seek a review of the arbitral jurisdictional decision. The purpose of section 14 (6) of the Act is that a party dissatisfied with arbitral jurisdictional findings can challenge such a decision on an interlocutory basis before the court. What is rather confusing is that while the court is yet to make a final determination of the matter, the arbitral tribunal can merge the jurisdictional ruling in the final award, which carries a res judicata effect.[30] The unintended consequence is that non-parties in complex commercial contracts may discover that they never agreed to arbitrate at the end of the arbitration. The provision of the interlocutory challenge of an arbitral jurisdictional decision under section 14 (6) of the AMA and the issue of the finality effect of such arbitral findings under section 14 (5) orchestrates a race to award to the regulation of *Kompetenz-Kompetenz* under Nigerian law.

Regrettably, the Nigerian legislature, when overhauling the ACA, probably did not debate the rationale for the policy that ought to have resolved the finality paradox and the race to award by early judicial scrutiny of the arbitral authority before the constitution of the arbitral tribunal. Consequently, this article recommends the imperative of a national policy on *Kompetenz-Kompetenz* for establishing the finality effect of jurisdictional determination under the Nigerian jurisprudence and the revision of AMA Section 14 to balance the finality effect with the legitimacy, ensuring that legitimacy is not sacrificed on the altar of speed.

3.1 The Imperative for a National Policy on *Kompetenz-Kompetenz*

Section 14 of the AMA (previously section 12 of the ACA) has not had the benefit of receiving a finality effect by a judicial imprimatur or interpretation by the Nigerian courts, especially the Supreme Court. The superior courts of records in Nigeria, though favourably disposed to matters of arbitration, have not integrated the finality effect of the Nigerian version of *Kompetenz-Kompetenz* into the decisional law addressing jurisdictional challenges. Under the previous ACA, once the respondent received a notice of arbitration, the ACA designated the arbitral tribunal as the only place for such a respondent to present jurisdictional objections in its statement of defence, upon which the tribunal would issue a decision either interim or in the final award.[31] Such a decision was meant to be binding on the parties as it was not challengeable on an interlocutory basis or during a post-award proceeding on the ground of lack of jurisdiction. The court's core function at such a point, either during the interlocutory appeal or in the post-award proceedings,

[30] AMA s 14 (5) & (7)

[31] Nnaemeka Nweze & Festus Okechukwu Ukwueze 'The Effect of Arbitral Jurisdictional Decision on National Courts' [2023] (16) (2) *Contemporary Asia Arbitration Journal* 196.

was to give a res judicata effect to the arbitral findings. This also applies under the AMA if the arbitral tribunal in the final award preempts the jurisdictional challenge pending before the court.

The foregoing suggests that judicial review of jurisdictional decisions is unexacting on the reviewing judge because of its res judicata effect under the Act. There is an apparent absence of judicial authority within the Nigerian jurisprudence, where courts have given a *res judicata* effect to the statutory text of Section 12, a trend that may persist under the AMA unless specialized judicial expertise is brought to bear on arbitral jurisdictional determinations. This could wreak havoc in the national policy on arbitration when the various states in Nigeria begin to enact laws that may vary from the AMA on the finality effect of the Nigerian version of *Kompetenz-Kompetenz*. This can be surmounted if the Supreme Court of Nigeria creates a uniform national law on arbitration with a settled guiding principle that subjects conflicting state arbitrations to national preemption. To that extent, the AMA applies in the federal and state courts and also restricts the legislative authority of state legislators over arbitration issues. State laws that conflict with the AMA, even if established to safeguard fundamental legal rights or fulfil public policy goals, would be considered illegal and unenforceable. A unique imperative will govern all decisions.

3.2 Amendment of Section 14 of AMA: The Search for Finality and Legitimacy

To reconcile finality and legitimacy concerns, a comprehensive model is hereby proposed, even though it places a high premium on the finality of jurisdictional determinations under AMA section 14 (5), without by so doing advantaging finality over legitimacy. To that extent, this article proposes a repeal of sections 14 (6) and (7). In other words, section 14 shall significantly resemble the old section 12 of the ACA, with an amendment of section 5 of the AMA, by the introduction of a new subsection (2) and re-numbering the present sections 5 (2) and (3) as sections 5 (3) and (4). To that effect, what has changed is a new subsection 2 to section 5, which shall allow a party served with a notice of arbitration to seek early judicial scrutiny of the existence and validity of the arbitration agreement before the constitution of the arbitral tribunal. An illustrative example is as follows:

> 5 (1) Notwithstanding the provision of any other law, a court before which an action which is the subject of an arbitration agreement is brought shall, if any party so request not later than when submitting his first statement on the substance of the dispute, order or stay of proceedings and refer the parties to arbitration unless it finds the agreement is void, inoperative or incapable of being performed.
>
> (2) Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible.
>
> (3) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.
>
> (4) Where a court makes an order for stay of proceedings under subsection (1), the court may, for the purpose of preserving the rights of the parties, make an interim or supplementary order as may be necessary.

This proposed new subsection is modelled after section 1032 (2) of the German Arbitration Act, and it is similar to a model the researcher had earlier proposed with respect to section 4 of the old ACA that complemented section 12 of that Act.[32] The proposed modification will initially assist

[32] Nweze and Ukwueze (n 31) 199-202.

in clarifying uncertainties regarding the existence and validity of the arbitration agreement or the matters the parties have consented to submit to arbitration, before the establishment of the arbitral tribunal. The new provision does not have the inherent risk of being employed as a mechanism for delaying tactics, ensuring that arbitration may continue without awaiting court confirmation of the arbitration agreement's legitimacy. This is because section 5 (3) of the AMA would serve as a procedural safeguard against fraudulent applications, allowing arbitration to continue towards an award even if the issue in question is concurrently pending in court.[33]

Under this reasoning, the period between the initiation of arbitration and the establishment of the arbitral tribunal would provide sufficient opportunity for the court to ascertain the validity and enforceability of the arbitration agreement. This can be accomplished through a specialised process, such as a summary judgment procedure.[34] It indicates that before transferring jurisdiction to the tribunal, the court should ascertain the validity and enforceability of the arbitration clause solely by examining the affidavits and documentary evidence, thereby issuing a judgment as a matter of fact. When the arbitral tribunal ultimately makes a finding on its jurisdiction, the final award under section 14 (5) shall be final and obligatory for the parties,[35] contingent upon the proceedings adhering to principles of procedural fairness.

The finality of arbitral authority aligns with the principles of separability and Kompetenz-Kompetenz, which traditionally imply that parties opting for arbitration expect the arbitral tribunal to conclusively assess the validity of the arbitration clause and the merits of the substantive contract.[36] The proposed model is unusual and aligns more closely with the aims of international commercial arbitration. This may, albeit presumptuously, function as a unifying theory for Kompetenz-Kompetenz, adaptable by various models under the Convention, as it offers efficiency, legitimacy in the arbitral system, and finality in jurisdictional rulings.[37]

A revised version of the AMA, as this article recommends, is imperative for the following reasons. First, the AMA on arbitral jurisdictional determinations may not be capable of addressing issues that involve complicated transactions, which are capable of raising doubts about the agreement to arbitrate.[38] This is because the provision of section 14 (7) that permits the arbitral tribunal to proceed to award while the jurisdictional issue is pending before the court may very likely defeat the purpose of section 14 (6). To that end, it denies the court the opportunity to ascertain complex issues of fact and law interconnected to businesses such as corporate guise and agency

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[33] Bermann (n 11) 18, 21 (makes a similar analysis on the combined effect of the new German ZPO s 1032 (2) and s 1032 (3)).

[34] Ibid 9. For provision on summary proceedings in Nigeria, see Lagos State High Court (Civil Procedure) Rules 2019 Or 13 r (5) (2). For jurisdictions that may seek to copy this proposed Model, their own expedited procedural method can always serve as a solution in that regard. Summary Judgment Procedure is applicable in many countries. See, for instance, United States Federal Rules of Civil Procedure Rule 56; French Code of Civil Procedure [NCPC] art 484. Summary judgment is not practised in Germany as a matter of statutory provision, but judges (based on *Urkundenprozess*- trial by documentary evidence) can dismiss a case as being inadmissible or frivolous while it enters judgment on the merits for the claimant.

[35] See *Harbour Assurance Co v Kansa General International Insurance Co* (*Harbour II*) [1993] QB 701 (CA) (underscoring that the commercial reason for the separability doctrine is to promote party autonomy and to have a "one stop adjudication"). See Julian DM Lew, 'Does National Court Involvement Undermine the International Arbitration Process' [2009] 24 (3) *AMERICAN UNIV.INT'L L R* 491,492,509. Phillip Landolt, 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz' [2013] (30) (5) *Journal of International Arbitration* 514, 517,525.

[36] Nweze and Ukwueze (n 31) 201.

[37] Ibid

[38] Park (n 27) 55.

relationships.[39] It would be unreasonable to assume that parties consented to submit a jurisdictional question to final and binding arbitration in all instances, especially where a judicial inquiry could potentially uncover different conclusions.

Secondly, in consideration of the aforementioned, a modified version of the AMA that offers litigants the chance to pursue early judicial examination before the establishment of the arbitral tribunal engages the court's judicial function in averting the erroneous inclusion of a defendant in the arbitration, thereby safeguarding the defendant's access to the court. If the court determines the alleged arbitration clause to be invalid or nonexistent, no party must expend resources and effort on arbitration.

Third, although no judicial authority in Nigeria has affirmed the arbitral tribunal's exclusive jurisdiction over jurisdictional questions, the proposed amendment to the AMA would nonetheless limit a judge's inclination to pre-emptively affirm or endorse the arbitral tribunal's exclusive jurisdiction, even in cases where the contract lacks clarity regarding the agreement to arbitrate the dispute.[40] This inclination to prioritise arbitral authority may serve as a pretext for judicial economy, which was one of the factors that influenced the modifications in German Arbitration Law before it implemented the Model Law in 1988.[41]

4. Conclusion

The Arbitration and Mediation Act (AMA) 2023's enactment is a major turning point in Nigeria's efforts to establish itself as the premier destination for resolving international business disputes, especially within the African sub-region. A cutting-edge legislation, however, is only as successful as the institutional and judicial frameworks that support it, as this article has shown. If the supervisory courts continue to be structurally dysfunctional or if the legislative provisions produce procedural paradoxes that compromise the basic validity of the arbitral procedure, then just adopting modern standards in arbitration does not automatically equate a pro-arbitration jurisdiction. While external factors such as security are often cited as deterrents, this article argues that the more substantive obstacles to Nigeria's arbitral aspirations are institutional. First, the organisational structure of the Lagos State Commercial Court's (LSCC) is an isomorphic mimicry of successful regimes in Singapore, Dubai, Germany and the Netherlands. The LSCC is unable to attract the high-value disputes that continue to be resolved in foreign courts or arbitration seated abroad because it is only a "fast-track" division rather than a fully independent specialised court with procedural flexibility. Second, Sections 14(5) and 14(6) open the door for a finality paradox, ensuing a race to the award that prioritises procedural efficiency over party consent, which is the foundation of arbitral legitimacy.

Nigeria needs to go beyond symbolic conformity to overcome these constraints. Nigeria, through the Supreme Court, needs to create a national policy on Kompetenz-Kompetenz to establish the finality effect of jurisdictional determination under the Nigerian jurisprudence. To reconcile the conflicting needs of efficiency anchored on the finality effect and the legitimacy of the process, a revision of the Kompetenz-Kompetenz framework modelled after Section 1032 (2) of the German ZPO is crucial to ensure that legitimacy is not substituted on the altar of race to the award.

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[39] Ibid 8. The national court, at some point, must take on a certain inquiry into the legitimacy of arbitral authority, which, as a matter of fact, is part of the steps in the enforcement of the award.

[40] Nweze and Ukwueze (n 31) 202.

[41] Ibid.