ARBITRABILITY IN NIGERIA AND SOME OTHER JURISDICTIONS*

Abstract

Arbitrability which refers to whether a dispute is suitable or not for Alternative Dispute Resolution (ADR) has not developed in chronological manner in Nigeria. Its development is largely marred by some confusion steaming chiefly from myopic understanding of public policy to arbitration. This understanding has greatly affected and imped ed the development of arbitration be it in criminal or civil justice system in Nigeria. As a result, existence or role of ADR is largely denied, disguised or shrouded in secrecy in criminal justice system and can easily be tampered with or frustrated in civil justice system, under the guise of possible offence to public policy. Unfortunately, this ugly trend has not engaged Arbitration scholars in Nigeria. This paper interrogates this status quo and advocates for a paradigm shift by giving a lucid historical account of the development of Arbitrability. In the absence of a clear statutory authority on the subject, a critical appraisal of the case law on Arbitrability was considered. Pointing out their limitations, the paper compares the development of Arbitrability in Nigeria with those of some other jurisdictions such as Ghana, England, India and Singapore and submits that since ADR finds its impetus in both indigenous and contemporary cultures, its indices should be subjected to that sole test governing all customary issues, namely, repugnancy test.

Keywords: Arbitrability, ADR, Nigeria, Some Other Jurisdictions

1. Introduction

The term Arbitrability simply refers to an enquiry to determine whether or not a particular dispute can be subjected to arbitration considering a wide range of issues such as: the parties involved in the matter (subjective arbitrability)[1] and nature of the dispute in question (objective arbitrability).[2] Broadly speaking, arbitrability aims to separate 'those issues that may be submitted to arbitration from those that may not.'[3] It seeks to determine 'the point at which the exercise of contractual freedom ends and the public mission of adjudication begins'.[4] For Redfern and Hunter, this determination, is nation specific; it behooves on each nation to draw its own line where it deems fit considering its economic and social policies.[5] For a nation such as Nigeria with poorly funded judiciary, courts with overwhelmed dockets, and generally weak institutions, economic considerations should be pivotal and permeate every public policy objective. These economic and social policies are given expressions in the national laws. They are simply prescribed by either legislative act or case law.[6] Since no law, especially Arbitration and Conciliation Act, 2004, has explained which disputes are arbitrable or not, this work interrogates judicial attempts at such clarifications. To this end, this work seeks to trace the historical development

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[1] This simply refers to the presence of contractual capacity in a given arbitration agreement or its lack. When there is special authorization of the parties who are willing to enter into arbitration agreement, it is called subjective arbitrability. According to Freimane, 'subjective arbitrability means that the party willing to be subject to arbitration agreement (for example, an individual, legal entity, state entity) must be allowed to enter into such agreement, i.e., must obtain a special authorization.' As he explains further, this implies that in subjective arbitrability, a person it refers to must be entitled either with individual rights to enter into such legal relationship or, in case of state entity, it must be endowed with legal capacity to enter into arbitration agreement.

[2] This simply refers to the category of dispute that may be refereed to arbitration. Objective arbitrability smacks of the fact that certain disputes may involve such sensitive public policy issues that it is felt that they should only be handled by the judicial authority of state courts. These kinds of disputes fall out of the realm of arbitration. Hence, arbitrators appointed to handle these matters will lack jurisdiction and the subsequent award may not be enforced.

[3] S C Obi-Okoye, 'The Effect of 'Arbitrability' on the Enforcement of Foreign Arbitral Awards in Nigeria' (2011) 8 *Unizik Law Journal*, 244.

[4] T E Carbonneau & F Janson, 'Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability', (1994) 2 *Tulaine Journal of International and Comparative Law* 193 Cited in N Freimane, *opcit*, p. 30.

[5] N Blackaby *et al, 'International Arbitration'*, (edn, New York: Oxford University Press, 2009) p. 124.

[6] N Freimane, *Ibid* p. 22.

of the subject while interrogating the *ratio decidendi* of case laws, to see how well they have fared in providing appropriate framework for arbitrability in Nigeria.

This study is done in three stages. The first part considers the provisions of the Arbitration and Conciliation Act. The second part considers the case law in Nigeria, while the third part makes references to other jurisdictions such as India, England, Zimbabwe, Ghana and Singapore to gauge Nigeria's performance and call for a paradigm shift.

2. The Arbitration and Conciliation Act 2004

Thirty-three years ago, during the Military era, the Arbitration and Conciliation Decree was made to conform to the UNCITRAL Model law on International Commercial Arbitration 1985. The Decree came into force on 14th day of March 1988 and later became known firstly as the Arbitration and Conciliation Act 1988 and later as Arbitration and Conciliation Act 2004 (ACA). Till date, it has neither been amended nor revised. Although a bill for its amendment that has been pending before the National Assembly in the last fifteen years, it only scaled through the Nigerian Senate in February 2018. From 2018 till date, the Nigerian successive legislatures which have passed similar bills in unprecedented manner in the past,[7] is yet to pass the ACA amendment bill into law. Perhaps if the ACA is amended, it would have bridged the huge gap in ACA with respects to arbitrability. In the ACA, there are three sections that give slight indication that every type of dispute may not be arbitrable. The first indication is found in section 5 where it is stated that a court may refuse to refer a matter to arbitration if it is satisfied that a sufficient reason exists for refraining from transferring the matter to arbitration. The section does not give any indication as to what could constitute sufficient reason for refusing to refer a matter. However, we can make a hard guess.

The ancient case of *Russell v Russell*[8] seems to provide a clue. In that case, the Court stated clearly that it could refuse Arbitration if there is an allegation of crime and the defendant is desirous of clearing his name in the open Court. This enables a defendant in a pending suit to oppose an application for stay of proceedings on the ground that he can only be assuaged by trial in the open court. Over time, plaintiffs and defendants see this as a justification for frustrating an arbitration agreement.[9] In fact, the Supreme Court have further said that 'the exercise of the power to stay proceedings in the Court pending the determination of arbitration proceedings can only be and must be exercised in accordance with the provisions of section 5 of the ACA otherwise, the exercise of discretion will be nullified.[10] Similar allusions to arbitrability were also made in sections 48 and 52 of ACA. Section 48 states that a Court can set aside an arbitral award if 'the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or the award is against public policy in Nigeria.'[11] Also section 52 states that a Court in Nigeria can also refuse to enforce an arbitral award based on such grounds.[12] Something is wrong with giving such a wide latitude to a Court to set aside an arbitral award or refuse to enforce one without stating clearly what subject matters are precluded from the purview of arbitration. To my knowledge, there is no legislation that prevents disputes from being arbitrable by national law. In fact, the only section of the criminal code popularly known as the offence of compounding felony[13] has been given a very liberal interpretation by virtue of the case of *PML (Nig) Ltd v. FRN*[14] where the Supreme Court made a distinction between compounding a crime and compounding an offence stating that while the former offends the law, the latter is 'very legit'.[15] Thus, if one compounds an offence already in Court, he is not the same as one who has taken some monetary compensation to refrain from reporting a crime or to shield one from prosecution. With this liberal

[7] AM Jimoh, 'Senate dumps own rules, passes 46 bills in 10 mins' *The Guardian*, June 4, 2015. Available online at: https://guardian.ng/lead-story/senate-dumps-own-rules-passes-46-bills-in-10-mins/ accessed on 6/7/2021.
[8] *Russell v Russell* (1880) 14 Ch. 47.
[9] See *Mekwunye v Lotus Capital Ltd* (2018) LPELR-45546(CA)
[10] *Kano State Urban Development Board v Fanz Construction Ltd* (1990) 4 NWLR (PT.142)1 at 32-33
[11] S. 48(b) of Arbitration and Conciliation Act, LFN 2004
[12] S.52(2) of Arbitration and Conciliation Act, LFN 2004

approach to criminal cases, will the law ever frown on submitting a civil matter with possible allegation of crime? Will public policy stand in the way of commercial agreements with arbitration clause simply because an allegation of crime is made? The next section is poised to gauge judicial attitude to the question of arbitration as a way of ascertaining the public policy stance on arbitration. It is to these judicial authorities that we now turn.

3. Development of Arbitrability through the Case Law

Kano State Urban Development Board v Fanz Construction Ltd[16]

One judicial authority that is most cited on arbitrability and on matters that are excluded from the purview of arbitration for reason of fraud or public policy is *Kano State Urban Development Board v Fanz Construction Ltd* [17] (hereinafter referred simply to as Fanz's case) . Is *Fanz's* case this *omnibus* authority on arbitrability? The case is simply on breach of contract. There was an arbitration clause in the contract between Fanz and Kano State Urban Development Board for building of dwelling houses. ..A dispute arose when Fanz presented certificates for completed work but was not paid. Fanz sued. The matter was eventually referred to arbitration and an award was delivered in favour of Fanz. The defendant, Kano State Government, refused to pay and Fanz applied to court. The defendant applied that the award be set aside. According to them, the arbitrator failed to call expert evidence before reaching an award. The High Court dismissed the application to set aside and granted leave to Fanz to enforce the award. The matter moved to appeal. At appeal the defendant predicated his appeal on 5 grounds and contended that the reference to Arbitration is bad in law as it violated provision of s5(1) of the ACA thus rendering any award obtained therefrom bad in law for that singular purpose. The Court of Appeal dismissed the appeal. As would be expected, the matter moved to the Supreme Court. At the Supreme Court, the Appellant (Kano State Government) raised 11 incompetent issues for determination. The Apex court so discountenanced those issues that they did not even bother to list them anywhere in their records or judgment. That, of course, would have been the end of the matter but the Court graciously adopted the 8 grounds of appeal formulated by the appellant and entertained arguments canvassed on them, using same to determine the appeal. It was issues distilled from these grounds that the Supreme Court resolved.[18] I have read Fanz's case several times as reported by different law reporters and found nowhere noin the judgment where the Apex Court lay down principle on arbitrability or raised any question pertaining to arbitrability. Maybe the reason for citing Fanz's case as the authority on arbitrability stemmed from reading case summary and/or commentary alone, which may not give a full picture of the judgment and readers are most likely to read principle out of context. However, a thorough reading of the entire judgment will give a reader clearer picture of what transpired in the judgment. Contrary to the assumption that Fanz is the authority on arbitrability, the Court quoted copiously from Halsbury's Laws of England (4th Edition), not finding anything from Nigerian literature or jurisprudence. To be sure, the Apex Court started this discourse in these words, 'For a proper appraisal of submissions made to us on the above issues, it is necessary for us to remind ourselves of the meanings, in the context of arbitration proceedings, of the following expression….' [19] When the Court was done, it began the resolution of ground 3 in these words, 'I can now go to the consideration of submissions of counsel on ground 3.'[20] Of course, the discussion on the meaning and context of arbitration as culled from Halsbury's Laws of England ultimately prepared the stage for a subsequent finding that the allegation that the arbitrator 'treated the claim of the plaintiff as having been admitted by the defendant and that the only issue before him was simply one relating to the failure of the defendant to pay what is due under the claim' is one without basis.

[16] *Kano State Urban Development Board v Fanz Construction Ltd* (1990) 4 NWLR (PT.142)1 at 32-33
[17] *Supra*
[18] The Apex Court confirmed this in the judgment where it said, 'So, I will consider the grounds of appeal argued by counsel for the appellant before us, having himself related them to the issues said in the appellant's brief to arise for determination in this appeal. Then as occasions arise, I will consider the additional issues said by counsel for the respondent to arise too for determination in this appeal'.
[19] *Kano State Urban Development Board v Fanz Construction Ltd* (Supra).
[20] *Ibid.*

From the forgoing, one can say without any equivocation that the discussions on meaning and context of arbitration as found in Fanz's case is at best an *obiter dictum*[21] and does not in any way relate to the *ratio decidendi*[22] of the case which, by doctrine of judicial precedence,[23] lays down rules on a particular subject matter. This distinction is important because it portrays at once, gross misunderstanding and misapplication of Fanz's case. Perhaps the knowledge that Fanz's case does not contain rule on arbitrability would have shaped the outcome of subsequent decisions and resolved the complications its frequent citation generates. Now, let us consider B J Export's case.

BJ Export & Chemical Company Limited v Kaduna Refining & Petro-Chemical Company Limited[24]

Between 2000 and 2002 the Court of Appeal faced a relatively novel issue touching on arbitrability. Unlike Fanz's case, the Court was invited in *BJ Export & Chemical Company Limited v Kaduna Refining & Petro-Chemical Company Limited* (hereinafter called 'BJ Export') to interpret sections 2, 12 and 27 of the Arbitration and Conciliation Act, Cap A19 of the Laws of the Federation 1990 (now Cap A18 Laws of the Federation, 2004). In that case, the parties submitted to arbitration to determine a claim of $85,016. BJ Export went to present a claim for $400,000 and that irked the Respondent and made them approach Kaduna State High Court alleging fraud. The application to grant the Respondent leave to revoke the arbitration agreement was accede to by the Court and there was an appeal. The Appeal turned essentially on whether the trial court was right to grant the leave sought by the Respondent and this was answered in the affirmative. Relying on Fanz's case, Muhamed, JCA (as he then was), said that for a dispute to be subject of arbitration, agreement must not cover matters that by law of the state are not allowed to be settled privately or by arbitration, as this is contrary to public policy.[25] The Court went ahead to state that Fanz 'clearly' excluded allegations of fraud from the purview of arbitration. The word 'Clearly', according to Cambridge dictionary means 'in a way that is easy to see, hear, read, or understand'. It means something obvious, plain and without doubt or obscurity. To say therefore that the Supreme Court stated something clearly must necessarily mean that the Supreme Court led down a principle of law in that case in a manner that is plainly understood or understandable. Usually, it is by resolution of issue for determination presented before the Court that a court of law states a principle of law. Succintly put, a statement made clearly in any cause is found in the resolution of the case, otherwise called the *ratio decidendi*. Since the exposition of the case of Fanz already undertaken and discharged above does not disclose this 'clearly stated' principle, it means that the Court of Appeal grossly erred in that case. Unfortunately, the decision in BJ Export was never challenged up to Supreme Court.

[21]Obiter is a Latin word for 'by the way' or 'in passing'. Usually, in the course of delivering a judgment, a judge makes passing comment on a few issues not part of the gravamen presented before it. Such comments do not by any way constitute a binding precedent. It is only the pronouncement on law in relation to the material facts before the judge that constitutes a precedent. Any other pronouncement on law made in the course of a judgment is an *obiter dictum* (a statement by the way) and it does not form part of the *ratio decidendi***.** A very useful way of distinguishing *obiter dictum* from *ratio decidendi* is to look at the issues for determination. It is indeed the resolution of the issues for determination, submitted by the parties or formulated by Court itself that is the ratio, without more. See *Ikyernum v Iorkumbur* (2002) FWLR (Part 110) 1908 at 1926

[22] Citing Halsbury's, The Laws of England, AL Goodhart summarized *ratio decidendi* thus, 'It may be laid down as a general rule that that part alone of a decision of a court of law is binding upon courts of coordinate jurisdiction and inferior courts which consists of the enunciation of the reason or principle upon which the question before the court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the *ratio decidendi*.' See AL Goodhart, 'Determining the Ratio Decidendi of a Case', (1930) 40 (2) *Yale Law Review*, 161-183. See also *Eperokun v University of Lagos* (1986) 4 NWLR (Part 34) 162 at 193 and *Global Transport Oceanico S. A.* v *Free Enterprises Nigeria Ltd* (2001) FWLR (Part 40) 1706 at 1722

[23] The Doctrine of Judicial Precedent is a principle of law that states that like cases should be treated in the same way so as to provide certainty in the law. Through this concept, decisions of superior courts have binding effect on the lower courts and departure of it is considered judicial rascality. See KM Danladi, *Introduction to Modern Nigerian Legal Method,* (2nd edn, Zaria: Enifab Print Media, 2018)136.

[24] *B J Export & Chemical Company Limited v Kaduna Refining & Petro-Chemical Company Limited* (2002) LPELR-12175(CA).

[25] *BJ Export & Chemical Company Limited v Kaduna Refining & Petro-Chemical Company Limited*, (Supra).

NNPC v Lutin (2000)[26]

Ogbuabor, Nwosu and Ezike cited this case as authority on arbitrability of fraud cases in their work 'Mainstreaming ADR in Nigeria's Criminal Justice System'[27]. The case was heavily relied upon to show that the view of the Court of Appeal in *B J Export* which came 3 years after *NNPC v Lutin* is not coherent with it. They deposited as follows: -

> In BJ Exports & Chemical Processing Co v Kaduna Refining and Petrochemical Ltd, (2003) FWLR (pt.165) 445 at 465; (2003) 24 WRN 74, it was held by the Court of Appeal that arbitration and other forms of ADR are so far restricted to civil matters. …The decision above (i.e. B J Export) may be contrasted with that in NNPC v Lutin ((2000) 50 WRN 81) where the Court of Appeal stated that there was no reason whatsoever why the allegation of fraud should stop the arbitration from continuing its work.[28]

In bid to understand why the Court of Appeal refused to follow *NNPC v Lutin* (hereinafter referred to as Lutin's case) in B J Export, I have tried but to no avail to read the original case law to see whether the case can be distinguished or otherwise. Unfortunately, it is not possible to find part 50 in 2000 edition of WRN even after reaching out the authors and the publishers of WRN. I was not able to find any useful link to where I could find that particular case apart from the various citations of another Lutin's case I was given.[29] For avoidance of doubt, Lutin's case could be said to be an authority for seat of arbitration, scope of authority of arbitrators and parties to an arbitration. It has nothing to do with arbitrability in any guise at all. In that case, NNPC, by way of Civil Summons, sought 3 reliefs: (a) a declaration that the arbitrator is 'no longer considered reasonable, fair, impartial, suitable and qualified to continue with the arbitration proceedings' [30] (b) a declaration that the arbitrator acted without jurisdiction and against public policy by moving the seat of arbitration to London (c) an order of court removing the arbitrator. The case had nothing to do with the subject matter of the arbitration nor does it have anything in relation to with what Redfern and Hunter call 'objective arbitrability'.[31] At the trial court, NNPC lost and they proceeded to appeal where they equally lost. NNPC moved once more to Supreme Court. In the course of chronicling the facts of the case at the Supreme Court, we were told that at the appeal, their appeal contained 6 grounds of appeal from which 6 issues for determination were distilled, which were all dismissed. NNPC finally lost at the Supreme Court and issues raised there got to do with moving the seat of arbitration to London. Again, citing this case as authority on arbitrability is inappropriate.

Statoil (Nigeria) Limited & Anor v Federal Inland Revenue Service & Anor [32]

If the question presented to the Court in BJ Export does not relate to arbitrability, the case of *Statoil (Nigeria) Limited & Anor v Federal Inland Revenue Services* & Anor surely does. This case is apposite as it specifically questions the jurisdiction of arbitration tribunal over a specific subject matter: Taxation. It interrogates the ambits of s.35 of the ACA. At the Appellant Court, the issue for determination was whether the Arbitral Tribunal had jurisdiction on issue of taxation conferred on the Federal High Court by s.251 of the 1999 Constitution (as amended). Unfortunately, this issue formed part of a preliminary objection that was struck out and there was no appeal on this particular issue. Again, the case of Statoil does not resolve issue of arbitrability.

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[26] (2000) 50 WRN 81

[27] C A Ogbuabor, et *al*, Mainstreaming ADR in Nigeria's Criminal Justice System (2014) 45 (1) *European Journal of Social Sciences* < http://www.europeanjournalofsocialsciences.com/> Accessed on 12 May 2018.

[28] *Ibid*, p. 35.

[29] *NNPC v Lutin* (2006) 2 NWLR (pt 985) 506; www.nigerian-law-org/*Nigerian Petroleum Corporation v Lutin Investment Ltd* & Anor.htm and *Nigerian National Petroleum Corporation v Lutin Investments Ltd.& Anor* (2006) LPELR-SC.57/2002

[30] *Nigerian National Petroleum Corporation v Lutin Investments Ltd & Anor* (2006) LPELR-SC.57/2002.

[31] N Blackaby et al, *International Arbitration* (New York: Oxford University Press, 2009) p. 123.

[32] *Statoil (Nigeria) Limited & Anor v Federal Inland Revenue Service & Anor* (2014) LPELR-23144(CA)

Mekwunye v Lotus Capital Ltd & Ors [33]

However, the case of *Mekwunye v Lotus Capital Ltd & Ors* (supra) (hereinafter referred to simply as 'Mekwunye') is the most important case on arbitrability in Nigeria. The reason is that, (1) it is the first and only case where the question of arbitrability was properly raised and determined by the Court of Appeal. It is *locus classicus* on the subject matter. (2) The cases of *Fanz* and *BJ Export* were well cited and received appraisal. (3) The Appeal Court was invited in Mekwunye to apply the facts in Fanz's case but declined. The Court stated that the facts as contained in the Fanz's case does not apply to Mekwunye, as Fanz's case does not contain any principle of law on Arbitrability. The court stated in unambiguous terms that issue of fraud in the context of arbitration has never been presented or resolved by the Supreme Court. Thus, the case of Mekwunye is a tacit revalidation of our stand that the cases of Fanz and BJ Export are indeed of no utilitarian value as far as discourse on arbitrability is concerned. (4) The *Mekwunye's case* explicitly questioned reference to Arbitration where and when the issue of fraud is raised in the course of arbitration. Considering that the court rightly pointed out that there is no Nigerian authority on this, the Court of Appeal relied on the case of *Ayyasamy v Aparamasivam & Ors*[34] (hereinafter referred to as Ayyasamy) decided by the Supreme Court of India. The Court list two conditions where disputes involving fraud are arbitrable, thus, (a) where serious fraud is raised and (b) where fraud relates to the agreement itself. Perhaps, the second condition held in *Mekwunye* is easier to understand than the first one. A case where issue of fraud relates to the agreement itself will surely be a case where the contract is by default tainted with fraud. Even the regular courts lack the jurisdiction to entertain or adjudicate on fraudulent contracts because they are *ipso facto*, illegal contracts and by that token offend public policy.

Another problem is what constitutes 'serious fraud'. While the justices of court of appeal deserve applause for stating that a mere allegation of fraud does not vitiate arbitration proceedings, they need to be reprimanded for trivializing the issue of fraud cases. Perhaps the Justices of the Court of Appeal in that panel are not aware that the issue of arbitrability of fraud has come up severally before various courts in India and has been met with conflicting decisions even at the Apex Court of India.[35] For example, the Court did not notice that the Apex Court of India merely distinguished between *N. Radhakrishnan v Maestro Engineers*[36] (hereinafter referred to as N. Radhakrishnan) and *Ayyasamy*. The controversy created by *N. Radhakrishnan* was simply needless such that armed with the Arbitration Act 1996 (as amended in 2016) which by s.8 restricted the scope of judicial intervention only to a determination of whether a valid arbitration agreement exists on the face of the agreement,[37] the court in Ayyasamy had no basis in law to make such distinction between fraud *simpliciter* and complicated fraud.

Myriads criticisms trailed *Ayyasamy*. Chawla[38] raised most of the concerns that would have made the Court of Appeal circumspect in adopting *Ayyasamy* without qualification. But beyond these, there is this concern about the place of public policy. If public policy concern is indeed local, it goes without saying that importation of what is considered as appropriate gauge for India to Nigeria is simply patronizing. The court in Mekwunye's case did not do better either in addressing the issue of arbitrability of fraud or clearing the confusion in the development of public policy on arbitration as stated earlier in this work.

[33] *Mekwunye v Lotus Capital Ltd & Ors* (2018) LPELR-45546(CA)

[34] Ayyasamy v Aparamasivam & Ors CA No 8245 – of 2016.

[35] P Chawla, 'Arbitrability: from fraud to serious fraud - the controversy continues...' (2017), 20(2), *International Arbitration Law Review,* pp. 35-41 for a detailed account of both the history and controversies surrounding the issue of Arbitrability of fraud in India.

[36] (2010) 1 S.C.C. 72 (Sup Ct (Ind).

[37] There has always been controversy about the role of Court in the face of arbitration agreement. While some scholars will argue that arbitration can never fetter access to justice or function to oust the jurisdiction of the court; there is this persuasive argument which was espoused by Lord Hoffman to the effect when parties choose arbitration they choose to have the entire dispute referred to arbitration and he goes on to observe as follows 'it would be inconceivable that parties would have intended that some, amongst their disputes should first be resolved by a court before they proceed to arbitration' See *Premium Nafta Products Ltd v Fily Shipping Co Ltd* [2007] UKHL 40.

[38] P Chawla, *art cit,* p. 38.

The Appeal Court rather than base its decision on an Indian authority would have taken responsibility for demarcating the province of public policy. Public policy is intrinsically context dependent and changes with time and needs of each individual nation state such that "what was viewed as sacrosanct and thus determinable only by national courts by the legal fraternity of a particular country two decades ago may not be the same today. The changing political, economic, social and religious views and needs of a state may shape its public policy".[39] This is so because it is the right of each state to do so, taking into consideration their cultural, economic and political inclinations, introduces divergences in the interpretation and content of arbitrability and a lack of uniformity in state practice.[40] Ball endorsed this view when he puts it succinctly thus,

> [t]he courts of different nations have different views, based on their own interpretations of national or international public policy, of whether particular classes of disputes are arbitrable. Under the influence of a strong Federal policy favouring arbitration, U.S. courts have found wide classes of disputes arbitrable, including disputes under the securities and antitrust laws, the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Age Discrimination in Employment Act (ADEA). Other nations take a less expansive view, or at any rate have a less well-developed jurisprudence on the subject of arbitrability.[41]

We saw earlier how some of the authorities relied upon in stating that some matters are not arbitrable have changed. For example, the Gambling Act of 2005 of England knocked off 'gaming and wagers' and it became not just arbitrable but by that same token became justiciable. It means that adopting a decision taken against the backdrop of the Gambling Act 2005 of England and applying same to the facts of a case in Hawaii and Louisiana (both states in the United States of America) would birth two opposing outcomes. While the judiciary in the state of Louisiana may be swayed by a precedent in a case approving gaming and casino imported from England, the state of Hawaii will find the same as not attractive due to national laws.[42] Most importantly while Ayyasama was good authority in 2018 when Mekwunye was decided, it is no longer good law in India, as development of the law in Arbitrability has overtaken it. We shall soon see more on the Indian case *Avitel Post Studioz Limited & Ors v HSBC PI Holdings (Mauritius) Limited*,[43] which states that neither fraud nor complicated fraud constitute a bar on arbitrability. Does it make sense to follow a case that is no longer good law?

Finally, rather than adopt the Indian case of Ayyasama the Court of Appeal would have signaled that with new trends in the doctrine of Arbitrability, the stage is now ripe for a prescription through legislation of those matters that are arbitrable or not. In the light of the myriads of recent legislations, such Act of the National Assembly will first harmonize the various provisions of our laws in ways that promote predictability and certainty. Such legislative prescription will drastically reduce the jurisdictional challenges to arbitrability which is unfortunately at the moment founded on subjective

[39] J Mante & I Ndekugri, 'Arbitrability in the context of Ghana's new Arbitration on Law'. (2012) 15(2), *International Arbitration Law Review,31-41.*

[40] E N Torgbor 'Comparative Study Of Law And Practice Of Arbitration In Kenya, Nigeria And Zimbabwe, With Particular Reference To Current Problems In Kenya'. Sun scholar Research Repository. <Url: Http://Hdl.Handle.Net/10019.1/80182>. Accessed on 21 July 2019.

[41] M Ball 'Just Do It – Drafting the Arbitration Clause in an International Agreement' (1993) 10 (4) *Journal of International Arbitration*, 29-36.

[42] It is only the two states of Hawaii and Utah which completely outlaw all forms of gambling in the United States of America. See 'Hawaii Online Gambling', < https://www.penny-slot-machines.com/usa-gambling/hawaii.html> accessed on 30 October 2019.

[43] *Avitel Post Studioz Limited & Ors v. HSBC PI Holdings (Mauritius) Limited* (Civil Appeal NO. 5158 OF 2016) reported online at https://indiankanoon.org/doc/92854857/. Accessed on 23/5/2021.

notions of what the law ought to be. Zimbabwe[44] and Ghana[45] have recently attempted this legislative prescription. Let us turn to attempts in some other jurisdictions.

4. Arbitrability in Some Other Jurisdictions

India

In India there is no statutory bar on Arbitrability. The development of law in this area is purely matter of case laws. First being *Abdul Kadir Shamsuddin Bubere v Madhav Prabhakar Oak* (Abdul Kadir)[46] decided in 1962, which relied on the old English case of *Russel v Russel* and held that when serious allegations of fraud were made against a party, the person charged with fraud has the right to insist that the matter should be tried in open court and that constitutes a sufficient cause for the court not to make a reference to arbitration. Although as observed by Chawla, '*Abdul Kadir*… became the authoritative precedent on arbitrability on fraud and the basis to deny reference to arbitration'. Unfortunately, this erroneous conclusion remained unchallenged from 1962 to 2009. In *N. Radhakrishnan v Maestro Engineers,*[47] the Supreme Court of India had a golden opportunity of correcting this anomaly but this did not happen as the Court, ostensibly following *Abdul Kadir,* in a volte face held that fraud was non-arbitrable. So much controversy and criticisms followed the judgment. According to Chawla the judgment was *per incuriam.*[48] The 246th Law Commission Report published in 2015 captured the attacks on *Maestro Engineers* and recommended an amendment of s. 16 that allows arbitral tribunal to make an award despite the dispute before it involves allegation of fraud.[49] This recommendation, if effected would have brought certainty to the law and cleared the web of confusion around the subject matter. Regrettably, it was not accepted and implemented. Between 2010 and 2015, Kamath rightly captured the state of the law on Arbitrability in India as follows, *'the basic principle that certain kind of fraud should not be arbitrated is not prima facie disagreeable. But the devil is in the details – what is contentious is to identify the kind of fraud that is the courts' exclusive domain'.*[50] Kamath is right because the rule on Arbitrability of disputes with a ting of crime in it in India is unequivocally oscillating.

In 2016 however, the Supreme Court distinguished between allegation of fraud, fraud *simplicter* and complicated fraud. The Court held in *A. Ayyasamy v A. Paramasivam*[51] that except for serious case or allegations of fraud are complicated, every other issue is arbitrable. At the behest of this decision, there was confusion as to where to draw the line between fraud simpliciter and serious fraud. Chawla wrote a masterpiece on this confusion and called for clarity in the law..*[52]*. As at August 2020, the authority on Arbitrability in India is *Avital.* The case introduced the concept of 'public flavour' in the mix as the new standard for arbitrability of disputes with a ting of crime or fraud in it. This represents judicial activism in ensuring Arbitration does not shy away simply because a dispute could have a criminal

[44]The Zimbabwe Arbitration Act 1996 duly gave effect to these recommendations and admirably avoid doubt and uncertainty on arbitrability by first setting out what may be arbitrated under section 4(1) what is not capable of determination by arbitration is set out under section 4(2) and these matters comprise the following:
(i) an agreement that is contrary to public policy; (ii) a dispute which, in terms of any law, may not be determined by arbitration; (iii) a criminal case; (iv) a matrimonial cause or a matter relating to status, 287 unless the High Court gives leave for it to be determined by arbitration; (v) a matter affecting the interests of a minor or an individual under a legal disability, unless the High Court gives leave for it to be determined by arbitration; and (vi) a matter concerning a consumer contract as defined in the Consumer Contracts Act unless the consumer has by separate agreement agreed thereto.

[45] Alternative Dispute Resolution Act 2010 (Act 798) s.135 which by S.1 stated the scope of the Act as follows: 'This Act applies to matters other than those that relate to (a) the national or public interest; (b) the environment; (c) the enforcement and interpretation of the Constitution; or (d) any other matter that by law cannot be settled by an alternative dispute resolution method'.

[46] *Abdul Kadir Shamsuddin Bubere v Madhav Prabhakar Oak* 1962 SCR Supl. (3) 702

[47] *N. Radhakrishnan v Maestro Engineers* (2010) 1 SCC 72

[48] Chawla, p. 3

[49] *Op.cit*

[50] K. Kamath, 'Arbitrability of Fraud and the 'Public Flavour' Standard' (2020) India Corp Law. Online. Available at: https://indiacorplaw.in/2020/09/arbitrability-of-fraud-and-the-public-flavour-standard.html accessed on 23/5/2021.

[51]*A. Ayyasamy v A. Paramasivam* (2016) SCC Online. Available at: https://indiankanoon.org/doc/180680303/ 1110. Accessed on 20/5/2019 at 4pm.

[52] See.*Avitel Post Studioz Limited & Ors v. HSBC PI Holdings (Mauritius) Limited* (Civil Appeal NO. 5158 OF 2016) reported online at https://indiankanoon.org/doc/92854857/. Accessed on 23/5/2021.

undertone. In the words of the law Lords, public flavour means 'that as long as the alleged fraud is a matter between parties under civil law that has no public ramifications, it is arbitrable; and that it is not a bar to arbitrability when the same circumstances justify a parallel criminal proceeding.'[53] Avital presents a clearer precedent on arbitrability in India. Now, once focus is in the civil aspect, a parallel criminal proceeding can take place. The case did not say however, the effect of settlement of the civil aspect on the criminal angle. If the parties resolve their differences in the civil aspect, does it mean that the criminal matter must continue to linger?

England

In England, the Arbitration Act of 1996 contains no express provision, foreclosing arbitrability of any kind of dispute. This may not spark much of a surprise in a system reputed for its common law traditions. Thus, arbitrability seems to be governed majorly by common law as found in case law. According to Oliveira, arbitrability of disputes is not a new topic and the subject matter under English law is confusing as it was not given a statutory character by the Arbitration Act 1996 (AA) and the case law is not helpful in defining same. [54] So, from case law, the following kinds of disputes are arbitrable: Disputes involving a state- or state-owned companies[55], Revolving around competition law[56], Arising from Gambling[57], Labour [58], Consumer. [59] It may appear that there is certainty in the law, as regards these disputes but the reverse is the case for Courts still prevaricates once an application is filed challenging the arbitrability of a labour dispute on the ground that it involves discrimination based on sex and pregnancy in the work place is not arbitrable.[60] There is nothing which precludes insolvency and corporate matters generally from arbitration, once there is an agreement to submit. Otherwise, conditional discretion of the trustee in bankruptcy or an application to Court challenging same can scuttle these matters. However, there seems to be a general understanding that crime, no matter how trivial are outside the ambits of arbitration. Oliveira, offers a defence for this position in these words, 'punishing someone for committing a crime belongs to the exclusive jurisdiction of a state court, thus it cannot be subject to the privatization of justice and is unable to be the subject to arbitration'.[61] How he forgets in a hurry, that the police have a discretion on who to prosecute or not; or that restorative justice and community policing thrive under English law, is beyond comprehension. Does Oliveira not realize that parties in a dispute, especially victims now have the kind of voice and control in their disputes with the adoption of restorative justice and community policing, more than ever before?[62]

Zimbabwe

The Final Report of the Zimbabwean Law Development Commission had recommended that the Arbitration Law to be adopted should cover every subject matter that could lawfully be arbitrated and not confined to commercial arbitration only. Section 4 of the Zimbabwe Arbitration Act clearly stipulates what disputes that are not arbitrable[63] . According to the Act, the following matters shall not be capable of determination by arbitration:

(a) an agreement that is contrary to public policy; or
(b) a dispute which, in terms of any law, may not be determined by arbitration; or
(c) a criminal case; or
(d) a matrimonial cause or a matter relating to status, unless the High Court gives leave for it to be determined by arbitration; or

[53] *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd* (supra)
[54] LVP De Oliveira 'The English Law Approach to Arbitrability of Disputes' (2016) *International Arbitration Law Review*, 1
[55] *Gatoil v NIOC* 1990 WL 10622722
[56] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*. 473 U.S. 614 (1985) and *Societe Labinal v Societies Mors et Westland Aerospace* (1993) 4 *Revue de L'Arbitrage* 645, Cour d'Appel de Paris, 19 May 1993.
[57] *O'Callaghan v Coral Racing Ltd* (1998) WL 1044030
[58] S.203(5) Equality Act
[59] Sections 89 to 91 of the Arbitration Act and Unfair Terms in Consumer Contract Regulations 1994
[60] The Equality Act 2010
[61] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 A.C. 763.
[62] *Ibid*
[63] Zimbabwe's Arbitration Act, 1996.

(e) a matter affecting the interests of a minor or an individual under a legal disability, unless the High Court gives leave for it to be determined by arbitration; or
(f) a matter concerning a consumer contract as defined in the Consumer Contracts Act, unless the consumer has by separate agreement agreed thereto.

Although the it does not o explain what public policy means the Act is applauded for bringing certainty in the law in this regard. The desirability or otherwise of ousting the jurisdiction of an Arbitral panel over a consumer contract or all classes of criminal cases is a matter that can be taken on by stakeholders or Law Reform Commissions. Save for a determination of matter that offends public policy, Zimbabwe has led a foundation upon which arbitrability in the country can thrive.

Ghana

Ghana like Zimbabwe is among the African countries that have attempted a prescriptive approach to the question of arbitrability. In Alternative Dispute Resolution Act,[64] section 1 states the scope of the matters which are outside the purview of arbitration as follows: 'This Act applies to matters other than those that relate to (a) the national or public interest; (b) the environment; (c) the enforcement and interpretation of the Constitution; or (d) any other matter that by law cannot be settled by an alternative dispute resolution method'.[65] Mante calls cases in this category matters relating to state and public interests[66] and further noted that matters in this category pose 'a greater challenge because it entails matters which are less specific in scope and have the greatest potential to influence commercial transactions'.[67] Furthermore, the Act does not explain what 'national or public interest' means in the Act. Therefore it goes without saying that the law is far from certain. Thankfully, the Constitution of Ghana defines 'public interest' as including 'any right or advantage which enures or is intended to enure to the benefit generally of the whole of the people of Ghana'.[68] Mante and Ndekugri rightly noted that the word 'includes' demonstrates the open-ended nature of the definition.[69] Moreover, there are other Acts which define public interest differently in Ghana and that will imply that at various times, parties may have recourse to that interpretation which favours their case. In Ghana criminal matters are not ipso facto non arbitrable. The Criminal Offences Act, although it specifically stated that murder and robbery which are first degree felonies cannot be settled, in s. 73, it provides that 'misdemeanors, offences which are not felonies and those not aggravated in degree are capable of amicable settlement by negotiation.[70] Hence a specific interpretation of public interest is required to ensure that the provision of this law does not conflict with the provisions of the Alternative Dispute Resolution Act. Finally, harmonization the various provisions of the laws with effect on arbitrability would have helped to promote predictability and certainty.

Singapore

Singapore is the most popular seat of Arbitration in Asia and the third most popular seat of Arbitration in the whole world.[71] Kluwer rightly observed that the state of national arbitration law rank high in influencing people's choice of seat of Arbitration.[72] In Singapore, not only is the law clear but there are very limited instances where the jurisdiction of the Arbitral panel is ousted by not just the national laws but by International Arbitration Act.[73] As such, All disputes are arbitrable unless this is contrary to

[64] Alternative Dispute Resolution Act 2010 (Act 798).
[65] Alternative Dispute Resolution Act 2010 (Act 798) s. 1
[66] J Mante, Arbitrability and Public Policy: An African Perspective. (2017) *Arbitration Internationl*.33(2) Online. Available from: https://openair.rgu.ac.uk. Accessed on 25/4/2021.
[67] J Mante, *ibid* p.16
[68] The Constitution of Ghana, 1992. Article 295(1).
[69] J Mante & I Ndekugri, Arbitrability in the context of Ghana's new Arbitration Law. (2012) *International Arbitration Law Review*. 15(2), 36
[70] Criminal Offences Act, 1960. S. 73
[71] *2018 Queen Mary University of London International Arbitration Survey*. Available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF accessed on 3/6/2021 at 5am.
[72] W Kulwer, *Arbitral Seats – An Empirical Overview*. Online Available at: http://arbitrationblog.kluwerarbitration.com/2018/05/17/tbc/ accessed on 3/6/2021 at 5am.
[73] International Arbitration (Amendment) Act, 2020.

public policy.[74] This implies that an arbitral panel shall have jurisdiction to deal with all sorts of matters, including when issue of fraud or illegality is raised.[75] But do not have jurisdiction to deal with matters pertaining to: Citizenship, Legitimacy of marriage, Grants of statutory licences, Winding-up of companies, Bankruptcy and Administration of Estates. [76] Of course, these are civil causes but it is easy to find the thread of liberal connection between the policy objective in the civil cases and the criminal cases. Perhaps, Singapore is the only jurisdiction with clear provisions on compounding of offences. The act of settlement of a charge without entering a conviction is popularly known as composition[77] in Singapore. One would have expected that compounding offences will result in high crime rates which is one of the strongest public policy arguments against arbitrability. Paradoxically, Singapore has the lowest crime rate, the world over. For Reynolds, this low crime rate is thanks to the large latitude given to prosecutors to have all the parties to an offence participate in the resolution of the dispute in the interest of the community.[78]

5. Conclusion

The transition from the traditional ambience of arbitrability to one that admits arbitration in criminal justice system is accountable to a certain change in the logic of ideas mediated by a constant struggle between globalization and primordial traditional justice system. If empiricism is attractive, it is because it has its foundation in only realities that exist and is verifiable.[79] Thus, discussions on arbitrability cannot take place outside the culture of the people it tends to serve. It has to be rooted in what works for the people. The crux of this work is finding the right balance such that while not giving an open cheque to arbitration in criminal matters, its field may not be arbitrarily cut in ways that offend root paradigms.[80]

In the first part of this study, we discussed the ACA which is the prime legislation on the matter. We saw its inadequacies and when it is appropriate for the court to stay proceedings or set aside an arbitral awards and its incapability of bringing certainty in the law. In the second part, we reviewed all the available judicial authorities on the subject and found that the development of arbitrability through the case laws and found that they are largely incoherent and have no idea regarding the effect of contemporary cultures on public policy. We considered the Mekwunye's case which made a fair attempt and how other cases which usually relied upon as authority on the subject matter scarcely pass the test of a *locus classicus*. There is therefore an urgent need to revisit the issues in Mekwunye especially in the light of developments in other jurisdictions which occupied this project in the last part. In sync with the findings and submissions in the foregoing, we strongly recommend that unnecessary stifling of the contemporary cultures is antithetical to national development. There is an urgent need, therefore, to allow arbitrability to evolve with globalization. This will mean shifting from the uncertain policy of allowing each Court to determine by its discretion whether the matter is arbitrable or not. This paper

[74] See s. 11 (a) of the International Arbitration (Amendment) Act, 2020.

[75]P Aston & S Meiklejoin, *Singapore: International Arbitration Laws and Regulations 2020.* Available Online: https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/singapore accessed on 3/6/2021.

[76] Larsen Oil and Gas Pte v Petroprod Ltd [2011] SGCA 21.

[77] Composition works this way: an accused person either in person or through his lawyer, with the consent of the prosecutor, approaches the victim and offers to make a monetary compensation and apology to the victim. In another instance, a public prosecutor, drawing from its powers to compound offences, can collect from an accused person sum of money, which shall not exceed one half of the amount of the maximum fine that is prescribed for the offence or 5000 dollars whichever is lower. Where this is accepted, it effectively terminates the legal proceeding against the offender and he *ipso facto*, becomes entitled to an order of acquittal. Remarkably, the Singapore Criminal Procedure Code (CPC) in its 4th schedule as well as sections 241 and 242 provides for compounding of offences. Also, see PML (Nigeria) Limited V. Federal Republic of Nigeria (2008) 7 NWLR (pt. 1619)485

[78] Z Reynolds, 'Intertwining Public Morality, Prosecutorial Discretion, and Punishment: Low Crime and Convictions in Singapore' (2017) *Chicago Unbound International Immersion Program Papers*. Available Online: https://chicagounbound-uchicago-edu.ezproxy.wlv.ac.uk/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1060&context=international_immersion_program_papers accessed on 3/6/2021 at 6am.

[79] MP Cosgrove, *The Essence of Human Nature* (Michigan: Zondervan Publications, 1977) p.18.

[80]Anthropologists coined 'root paradigms' to describe a set of assumptions about the fundamental nature of the universe, humankind, or the way in which people behave, which are so deeply held by the members of a society as to be essentially unquestioned by them. See H Montefiore (ed) *The Gospel and Contemporary Culture* (New York: Mowbray, 1992) p. 2.

finally submits that to achieve certainty in the law and attract the benefits a certain law brings in this era of globalization, Nigeria is faced with only two options which is to either make a prescription as England, Ghana and Zimbabwe did or liberalize the all matters as India and Singapore have done. In so doing, the contemporary cultures will subject all indices of indigenous justice system to that sole test, and none other, to which customary law is subject: repugnancy test. Anything more than this will in fact be contrary to public policy.