Enforcement of Asymmetrical Arbitration Clauses in Nigeria: A Peep into Other Jurisdictions

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Abstract

Alternative Dispute Resolution (ADR) evolved as an alternate dispute settlement device to litigation. It is reputed for availing disputants' speedier resolution of dispute at a relatively cheap rate, less toxicity, confidentiality, flexibility, privacy and expertise. Arbitration has grown and attained the status of an independent dispute settlement mechanism complementing ADR and litigation. Thus, as a dispute resolution mechanism, it is anchored on the mutual agreement of the parties. The bedrock of arbitration is the mutual agreement of the disputants to refer their dispute to an arbitrator(s) chosen by them. However, it has become a practice for parties to agree that the option to arbitrate or appoint an arbitrator be exercised only by one party and not both. This type of arbitration agreement is known as asymmetrical arbitration agreement. It is a departure from the symmetrical nature of arbitration. This article through comparative research methodology, examines the enforcement possibility of asymmetrical arbitral agreement/clauses in Nigeria along its conservative public policy and the doctrine of *pacta sunt servanda*. It also examines its enforcement in other jurisdictions considered as arbitration hubs and found out that it is enforceable in the United Kingdom (UK), Singapore, United States of America (USA) while it is unenforceable in France, Russia and prohibited in China and its enforcement in India is unsettled. The paper proposes that while it is hoped that the Nigerian Courts will enforce asymmetric arbitral agreements, it would not do so sheepishly and slavishly because *pacta sunt servanda* should not be used as an engine of undue hardship.

Keywords: Asymmetrical Arbitration Agreement, Arbitration, Public Policy, Nigeria, United Kingdom.

1.0 Introduction

Over the years, arbitration has grown and developed into an independent amicable dispute resolution mechanism.[2] Today, when disputes resolution

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mechanisms are discussed, they are usually classified into the following: litigation, Alternative Dispute Resolution (ADR) and arbitration.[3] Arbitration like ADR is generally reputed as being less expensive, speedier, confidential, private, flexible and relationship fostering due to its intoxicity.[4] It has become the most favoured dispute resolution option for settling commercial disputes[5] whether local or international.[6] By its nature, commercial arbitration is contractual and therefore mutual. It is the mutuality of arbitration that distinguishes it from litigation and gives it validity.[7] This mutuality element makes arbitration conscionable and equitable. Thus, unless parties agree before or after the occurrence of a dispute to submit it either totally or partly to arbitration (however subject to court referred arbitration where the court is empowered to make such referral), parties cannot arbitrate.[8] Usually, a standard arbitration agreement/clause would permit either of the parties, upon the occurrence of a dispute, to submit same for settlement through arbitration.[9] Thus, where a party in disregard of this agreement, commences litigation, the other party, (subject to the requirement of not taking any steps in the proceedings),[10] can successfully apply to the court for an order staying the action and directing parties to proceed to arbitrate the dispute.[11] This is because a valid arbitration agreement suspends the jurisdiction of the court over the disputes to the extent contemplated under section 34 of the Arbitration and Conciliation Act 1988.[12]

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2 Ephraim Akpata, *The Nigerian Arbitration Law in Focus* (West African Book Publishers Ltd 1997) 11.

3 Aandrew I Chukwuemerie, 'An Overview of Arbitration and the Alternative Dispute Resolution Methods (ADRs)' (2010) 1 Journal of the Civil Litigation Committee of the Nigerian Bar Association 102.

4 John N. M. Mbadugha, *Principle and Practice of Commercial Arbitration* (Unilag Press 2015) 1.

5 Oluseun Abimbola, 'Prospects in Arbitration: An Overview' in A I Olatunbosun and L Laoye (eds), *Diverse Issues in Nigerian Law, Essays in Honour of Hon. Justice Okanola Akintunde Boade* (Zenith Publishers 2013) 27.

6 Enuma Moneke, 'Strengthening the Legal Framework for the Recognition and Enforcement of Arbitral Awards in Nigeria' (2018) 9(3) The Gravitas Review of Business and Property Law 18.

7 *Nigerian National Petroleum Corporation v Klifco Nigeria Ltd.* [2011] 10 NWLR (Pt. 1255) 209; *Owners of M V Lupex v Nigerian Overseas Chartering and Shipping Ltd.* [2003] 15 NWLR (Pt. 844) 469 at 487, para A-B.

8 Obosa Akpata, 'Arbitration Clause' (A presentation delivered at the Chief G.O. Sodipo Memorial Lecture held at the Regional Centre for Commercial Arbitration, No. 1 Alfred Rewane Road, Ikoyi, Lagos, 7 December 2015).

9 *Baker Marine (Nig.) Ltd. v Chevron (Nig.) Ltd.* [2000] 12 NWLR (Pt. 681) 393.

10 *Obembe v Wemabod Estates Ltd.* [1977] All NLR 130.

11 *Odunukwe v Ofomata* [2010] 18 NWLR (Pt. 1225) 404 at p 446, paras B-E. See also *U.T.C. Nigeria Ltd. v Pamotei* [1989] 2 NWLR (Pt. 103) 244; *Saude v Abdulullahi* [1989] 4 NWLR (Pt. 116) 387; *Ede v Omeke* [1992] 5 NWLR (Pt. 242) 428; *Dakur v Dapal* [1998] 6 NWLR (Pt. 660) 228.

12 Section 34 Arbitration and Conciliation Act, Cap. A18 LFN 2004.

However, parties have innovatively obliterated from the mutuality element of arbitration nevertheless, anchoring on the timeless doctrine of *pacta sunt servanda* to explore asymmetrical arbitral agreements. Thus, it has become common for parties, especially in financial transactions, to reserve the right to arbitrate to one party while the other can only litigate. The beneficiary of the option to arbitrate is also allowed to litigate. In some instances, aside the right to arbitrate, the right to appoint the arbitrator or tribunal is reserved to one of the parties and one of the parties may be made to litigate only in a particular jurisdiction while the other can litigate anywhere he/she chooses. In some jurisdictions which can be traditionally described as arbitration hubs, the Courts have held that asymmetrical arbitration agreements are enforcement and have not bothered to inquire into the equity of such agreements since the law is *pacta sunt servanda.* Such jurisdictions include the United Kingdom (UK), Luxemburg, and Singapore. The law in some other jurisdictions is unsettled as there is in existence contradictory decisions on the validity and enforceability of asymmetric arbitration agreement as exemplified by India and United States of America (USA). Yet, in some jurisdictions such as Russia and China, asymmetric arbitration agreements are unenforceable and prohibited.

Thus, while the Nigerian Courts have not had the opportunity to pronounce on the enforceability of this kind of arbitration clause/agreement as such has not become a subject of litigation, this paper prognosticates into the enforceability of asymmetric arbitration agreement/clause in Nigeria. The paper examines the position in other jurisdictions as noted above and argues that in order to enhance the developmental drive of arbitration in Nigeria towards positioning it as a modern arbitration hub; it is desirable for Nigerian Courts, as a general rule, enforce asymmetric arbitral clauses. However, in upholding their validity and enforceability, it is advisable for the Courts not to give a sheepish and slavish approval so that undesirable consequences could be forestalled. The paper argues that the position of the law in both the pro and anti-asymmetrical jurisdictions would be synergised by the Nigerian Court as a Nigerian template on the issue. The paper further contends that although, the belief that parties are bound by their agreement is a settled doctrine of law and of great antiquity; it should not be allowed to be used as an instrument for perpetuation of unreasonable hardship. This is so especially when its consequences are economically far reaching.

The paper is divided into five sections. Section one contains the introduction. Section two focuses on the nuances of arbitration, arbitration clause and asymmetric arbitration clause/agreement. Section three peeps into other jurisdictions on the enforcement of asymmetrical arbitral clauses

with the aim of drawing a Nigerian template. Section four examines the enforcement of asymmetrical arbitration agreement/clause in Nigeria by examining Nigeria's conservative public policy along the lines of *pacta sunt servanda.* Section five contains the conclusion and recommendations based on the findings.

2.0 Legal Periscope of Arbitration and Symmetrical Arbitration Agreement/Clause

This section of the paper critically discusses the meaning, nature, advantages of arbitration and its preference by litigants in settling commercial disputes. It also examines the meaning, content of an arbitration agreement/clause and precautions to be taken when drafting an arbitral clause. The section also dwells on the nuances of asymmetrical arbitration agreement/clause as a *sui generis* arbitration agreement.

From the onset, we are not unmindful of the caution of Bagudu[13] that arbitration is one term that is frequently used in both legal and non-legal settings. Despite its ubiquitous use in both commercial and non-commercial transactions, there is a drought of precise and appropriate definition of the term.[14] Few of these definitions would suffice. Anjorin[15] posits that the concept of arbitration in recent times has become quite impressive assuming a different character from what it was traditionally perceived to be. It has been described as the process of resolving a dispute between at least two parties, who through an agreement, submit their dispute to arbitration, appointing a third party who shall decide on their dispute and agree that such decision shall be final and binding on them.[16] Oweazim[17] opined that arbitration is one of the dispute resolution processes available to individuals, group of persons, corporations and entities; other than litigation. It is a method of where two or more people agree to settle their civil dispute (s) privately, by referring such dispute (s) to a person or persons who would hear the parties and resolve the dispute in a judicial manner, by entering into a decision known as an arbitral

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13 Robert O. Bagudu, 'The Concept and Elements of Arbitration' (2014) 1 International Journal of Business Law 100-112.

14 Abdulrazaq A. Daibu, 'The Lagos State Arbitration Law and the Doctrine of Covering the Field: a Review' (2015) 6(1) The Gravitas Review of Business and Property Law 45.

15 Abdul-Ghaniy Anjorin, 'An Evaluation of Customary Arbitration in Nigeria' (2018) 9(3) The Gravitas Review of Business and Property Law 43.

16 Adesina Temityo Bello, 'Customary and Modern Arbitration in Nigeria: A Recycled of Old Frontiers' (2014) 2(1) Journal of Research and Development 50.

17 Stephen O. Oweazim, 'The Status and Impact of a Functus Officio Arbitrator in Settlement of Disputes' (2017) 4(1) Nasarawa Journal of Public and International Law 171.

award, which shall be binding on the parties.[18] Idornigie and Adewopo[19] state that 'arbitration is a procedure for settlement of disputes under which the parties agree to be bound by the decision of an arbitrator whose decision is in general final and legally binding on both parties'. The process derives its force principally from the agreement of the parties and in addition from the state as supervisor and enforcer of the legal process.[20] Then irresistible conclusion from the above definitions of arbitration (commercial) is that it is contractual, voluntary and mutual. Its voluntariness and mutuality is traceable and discoverable from the arbitration agreement between the parties.

Thus, the arbitration clause/agreement is the foundation upon which arbitration is built. The Supreme Court of Nigeria[21] defined arbitration agreement/clause as 'a written submission agreed by the parties to the contract and, like other written submissions, it must be construed according to its language and in the light of the circumstances in which it is made'.[22] From the above, it is abundantly clear that an arbitration clause/agreement would traditionally avail the parties the right and option to have recourse to arbitration to settle any dispute arising from their transaction as a first option. This is akin to the principle of mutuality which is conscionable and equitable. The arbitration agreement gives the parties the opportunity to explicate their autonomy. Through it, the parties provide for the number of arbitrators, their qualifications, the seat of the arbitration, the *lex arbitri*, the language the arbitral proceedings is to be conducted in, the time and venue of the proceedings, its likely duration and

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18 See section 63 of Lagos State Arbitration Law 2009.

19 Paul O. Idornigie and Arthur Adewopo, 'Arbitrating Intellectual Property Disputes: Issues and Perspectives' (2016) 7(1) The Gravitas Review of Business and Property Law Journal 1. *See also* Olufemi Abifarin, 'Resolving Domestic Violence in Nigeria through Alternative Dispute Resolution' (2010) 6 University of Ilorin Law Journal 164; Olakunle J. Orojo and Ayo M Agomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates (Nigeria) Limited 1999) 36 – 38; Gauis Ezejiofor, *The Law of Arbitration in Nigeria* (Longman 2005) 3.

20 John Tackaberry, and A. Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, vol 1 (Sweet & Maxwell 2003) 15.

21 *M. V. Lupex v N .O. C. & S Ltd* (2003) 15 NWLR (Pt. 844) 469 at 487, paras.A-B. *See also* Abdulrazaq A. Daibu, and Lukman A. Abdulrauf, 'Challenges of Section 20 of the Admiralty Jurisdiction Act to International Arbitration Agreements' (2015) 6(4) The Gravitas Review of Business and Property Law 17; Segun I. Aderibigbe, 'An Inquiry into the Formal Validity Requirement of Arbitration Agreements' (2014) 1(1) Afe Babalola University Law Journal 96; Lew D. M. Julian and others, *Comparative International Commercial Arbitration* (Hague Kluwer Law International 2003) 129.

22 David Ike, 'Arbitration Clauses in Nigerian Leases' (2016) 2(1) Abia State University Property and Comparative Law Journal 70–71; Lew D. M. Julian and others, *Comparative International Commercial Arbitration* (Hague Kluwer Law International 2003) 165. They posits thus 'an arbitration agreement/clause is where two or more persons agree that a dispute or potential dispute between them shall be resolved and decided in a legally binding way by one or more impartial persons in a judicial manner upon evidence put before him or them'.

any other matter the parties may deem necessary which can facilitate the arbitral process.

Deducible from the above, is the fact that arbitration is contractual in nature and contract, as a matter of law, so long as the law is not subverted or contains any legal or equitable vitiating elements, would be enforceable qua parties and their legal privies/assigns. This lay credence to the revered doctrine of freedom of contract which is sacrosanct and untrammelled. Anchored on the contractual nature of arbitration as well as freedom of contract, parties have exploited these sacrosanct positions of the law which have resulted in the creation of a *sui generis* arbitration agreement which places one party at an advantageous position over the other. This arbitration agreement is what is known differently as asymmetrical, unilateral, non-mutual, one-sided arbitration agreement. It is diametrically opposed to the traditional mutual/symmetrical arbitration agreement/clause which gives the parties equal right to resort to arbitration to settle potential dispute in the event a dispute arises from a contract the parties had agreed that same shall be submitted to arbitration and either of them either serves a notice on the other or where one of them, in disregard of their prior agreement, commences litigation, the other, subject to taking steps indicative of waiver, can apply to the court for stay of proceedings to enable them arbitrate as a first port of call for settlement. It has been contended that where an asymmetrical arbitration agreement is held to be valid and enforceable, it does not disadvantage either of the parties *per se*.[23] This contention is not to be taken slavishly as would be seen that Courts in some jurisdictions have held to the contrary.[24] Pierce and Petter[25] on the meaning of asymmetric arbitration clause, have opined that:

> An asymmetric jurisdiction clause is one where the parties submit to the jurisdiction of one or more designated courts, but this submission is exclusive for some parties and non-exclusive for others. In an English law facility agreement containing an asymmetric jurisdiction clause, the designated courts are usually the English courts and the submission to their jurisdiction is exclusive for the 'Obligors' and non-exclusive for the 'Finance Parties'. The Finance Parties therefore have the option of

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23 Christopher. R. Drahozal, 'Non-Mutual Agreements to Arbitrate' (2002) 27 Journal of Corporation Law 537.

24 Robert M. Horkovich, 'Overcoming One-Sided Insurance Policy Arbitration Agreements' <www.rmmagazine.com/2014/11/01/overcoming-one-sided-insurance-policy-arbitration-agreements/> accessed 12 November 2019; See also *CJSC Russian Telephone Co. v Sony Ericsson Mobile Telecommunications Russia LLC.* Case No. 1831/12 (19 June 2012).

25 A. Pierce, and T. Petter, 'Asymmetric jurisdiction clauses in finance agreements – where are we now?' <www.dentons.com/en/insights/newsletters/2017/april/25/bank-notes/bank-notes-spring-edition/asymmetric-jurisdiction-clauses-in-finance-agreements-where-are-we-now> accessed 12 November 2019.

> starting proceedings in any competent court that will accept jurisdiction over a relevant dispute.[26]

Thus, an asymmetrical arbitral clause/agreement could take the form of reserving the option to arbitrate on one party as well as conferring an exclusive jurisdiction right on the same party while limiting the right of the other party to resort to litigation to the Courts of a particular jurisdiction. Seldom, the party in whose favour the asymmetrical clause is made would reserve an unrestricted jurisdictional right to Courts while the other party is restricted to the Courts of a particular jurisdiction.[27] These clauses seek to preserve the advantages of arbitration and litigation in the empowered party after the dispute has arisen, and thus, enables the party to select the forum that will best fit its needs in the present dispute.[28] Raman and Pizzey opined that:

> An asymmetric jurisdiction clause provides that, after a dispute has arisen, one party may elect between multiple jurisdictional forums in which to bring their claim while restricting the other party to commencing proceedings in only one jurisdiction. Clients in strong negotiating positions (such as lenders) often wish to include an asymmetric jurisdiction clause. As the lender is the party with the greater exposure, such a clause increases the prospect of debt recovery by enabling the lender to bring proceedings in the forum with the best prospects for

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[26] Asia-Pacific Legal News & Updates, 'Enforceability of One-Sided Optional Arbitration Clauses in Singapore' <www.conventuslaw.com/report/enforceability-of-one-sided-optional-arbitration/> accessed 12 November 2019. They opine that 'An arbitration agreement can comprise either a stand-alone agreement or an 'arbitration clause' in a wider commercial contract. Whatever their form, arbitration agreements typically provide that all disputes between parties to the agreement shall be resolved by arbitration, and then specify matters relevant to that referral (e.g. the number of arbitrators, and the seat and language of the arbitration). 'Optional' arbitration agreements are different. These types of agreements do not require parties to arbitrate. Instead, they either provide for court litigation but give the parties the option to 'opt-in' to resolving their dispute by arbitration, or provide for arbitration but allow parties to 'opt-out' and instead pursue court litigation. Optional arbitration agreements can also sometimes be 'one-sided' or 'asymmetrical', meaning the option to either arbitrate or litigate is only given to one party. One-sided optional arbitration agreements are common in finance transactions, where they are typically granted in favor of lending parties to give them maximum flexibility when enforcing any finance obligations or security interests. While the enforceability of such clauses has been upheld in some jurisdictions (e.g. England), it has also been questioned in others'.

[27] Zaakira Allana, 'Asymmetrical Jurisdiction Clauses in International Dispute Resolution' <www.fieldfisher.com/publications/2016/08/asymmetrical-jurisdiction-clauses-in-international-dispute-resolution> accessed 12 November 2019. He posited that 'An asymmetrical jurisdiction clause binds one party to commence proceedings in one particular jurisdiction, whilst allowing the other party to commence proceedings before any competent court. These clauses are typically (but not exclusively) used in financial contracts where a creditor wants the flexibility of suing the debtor in any jurisdiction where the debtor has assets. The risk of including such clauses in commercial contracts lies in how different jurisdictions approach them'.

[28] Wattieder.com, 'Unilateral Arbitration Clauses: What Are They and Can They Be Enforced?' <https://watttieder.com/resources/articles/unilateral-arbitration-clauses-what-are-they> accessed 12 November 2019.

> enforcement, while protecting the lender by ensuring that a borrower cannot forum shop.[29]

Thus, it is apposite to note that whether symmetrical or asymmetrical, an arbitration agreement could either stand as an independent agreement, distinct and removed from the main agreement pursuant to which it was made or be a part and parcel of the agreement but reduced into a clause thereof.[30] Nevertheless, whatever nature or form it takes, it is separate and distinct from the main contract to the extent that any defect in the main contract (even to the extent of it being null and void) does not affect the validity of the arbitration agreement/clause. This is based on the doctrine of separability or autonomy of the arbitration agreement/clause from the main contract.[31] This is one of the characteristics of an arbitration agreement/clause and it is sacrosanct though under certain circumstances, its justifications remain doubtful.[32] Clifford and Brown have pointed out the merits as well as the demerits of an asymmetrical arbitration agreement as follows:

> A unilateral option clause provides the flexibility to select the dispute resolution method most appropriate to the case at hand. As the suitability of a specific dispute resolution method depends on the particularities of an individual case (not least the location of the assets against which enforcement of an award might be required), a party to a contract with a stronger bargaining power may therefore seek the flexibility of a unilateral option clause. Pursuing flexibility however carries the risk of catastrophe. Unilateral rights might be considered invalid and unenforceable in certain jurisdictions because of lack of certainty, lack of

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29 Jumana Rahman and Hayley Pizzey, 'UK: Rebalancing the Law on Asymmetric Jurisdiction Clauses' <www.mondaq.com/uk/trials-appeals-compensation/587138/rebalancing-the-law-on-asymmetric-jurisdiction-clauses> accessed 12 November 2019.

30 Andrew I Chukwuemerie, 'An Overview of Arbitration and the Alternative Dispute Resolution Methods' (2010) (ADRs, A Journal of the Civil Litigation Committee of the Nigerian Bar Association) 102 – 103. He opined that 'the agreement can be a separate agreement indeed from the agreement or contract covering the main transaction from which the dispute has arisen or is contemplated. It could also be a clause in the main contract/agreement itself. Whichever way, it is in law a separate agreement or contract from the main contract. Even when the main contract fails for illegality or any other vitiating factor, the arbitration agreement/clause survives as an independent agreement and the parties can proceed to arbitration on the basis thereof. In yet another quintessential deference to commercial common sense, an arbitration agreement will be upheld even in situations where any other agreement similarly worded would fail for uncertainty. An arbitration agreement can be reached pre or post the dispute in question. However, pre-dispute agreements are more popular and more achievable. This is partly because when a dispute has set in it is more difficult for the parties to agree on anything, including an arbitration clause. Particularly if one of them is undecidedly recalcitrant or lacking in co-operation. The agreement can provide for an *ad hoc* or institutional arbitration. It can provide for a domestic or international arbitration'.

31 Sunday A. Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality' (2015) 6(1) Journal of Sustainable Development Law and Policy 224.

32 Some of such circumstances include where the contract is illegal, void or entered into under duress or undue influence.

> mutuality or the doctrine of unconscionability. If a party successfully challenges a unilateral option to arbitrate, the beneficiary of the option will have to resolve any dispute through the appropriate courts, whether or not a judgment from those courts could ever be enforced in the jurisdiction where relevant assets are located. If a court determines a unilateral option to arbitrate is invalid and unenforceable, when an award reaches the enforcement stage, the award might also be deemed invalid and unenforceable, rendering the whole arbitral proceedings a waste of time and resources (and potentially giving rise to limitation issues if a new claim needs to be started).[33]

Generally, while there is a growing acceptance of arbitration in settling disputes, parties resorting to it must be mindful of certain legal pitfalls which may cause the Court to refuse to relinquish their jurisdiction. This concern is imminent when it has to do with asymmetrical arbitration agreement/clause. The reason is not farfetched. Asymmetrical arbitration clause by its nature; obviously detracts from the doctrine of mutuality which is itself ingrained in arbitration.

As a general rule, whether symmetrical or asymmetrical arbitration agreement/clause, it has to be clear and unambiguous for the Courts to relinquish jurisdiction so that parties can proceed to arbitrate. Thus, the desire of the disputants to arbitrate their dispute by vesting the option in one of them must be precisely stated beyond any equivocation. The necessity for certainty cut across all jurisdictions even those regarded as arbitration friendly. The English court held in *NB Three Shipping Ltd v Harebell Shipping Ltd*[34] that the beneficiary of a unilateral option clause must elect a particular dispute resolution mechanism at an early stage of the process. Thus, the clause/agreement must not be open ended. Hence, aside being declared unenforceable, in order to prevent avoidable delay and expense, the unilateral arbitration agreement should clearly and precisely spell out when and how the option may be exercised and the consequences of exercising the option.

The English court held in *Deutsche Bank AG v Tongkah Harbour Public Co. Ltd. & Anor.*[35] that 'whilst a jurisdiction clause… that gives one party only the option to arbitrate is perfectly valid, once the option has been exercised in favour of arbitration, litigation of the same matter is subject to the statutory stay'. To overcome the challenge of ambiguity, it is advisable that the arbitration and litigation aspect of the agreement as it were, should

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33 Philip Clifford and Oliver Browne, 'Avoiding Pitfalls in Drafting and Using Unilateral Option Clauses' *International Arbitration News in Brief* (2013) 1. <www.lw.com/thoughtLeadership/IA-News-in-Brief-Unilateral-Option-Clauses> accessed 13 November 2019.

34 [2004] EWHC 2001 (Comm.) para 11.

35 [2011] EWHC 2251 (QB), para 25.

be drafted separately. In so doing, it should be ensured that both can subsist independently in case they need to be severed. It is advisable that the beneficiary of the option to arbitrate should avoid taking major steps in court proceedings before exercising the option in order to avoid the peril of the agreement becoming unenforceable. Likewise, the beneficiary of the litigation option should avoid taking any substantive step in arbitration before exercising his/her option to litigate to avoid similar outcome.

It is trite law that where parties have settled to arbitrate but one of them in neglect of the arrangement, recourses to litigation, the other party, subject to certain conditions,[36] can apply for stay of proceedings for them to arbitrate. Thus, where the only option available to a party is litigation while the other can either arbitrate or litigate, where the party with the litigation option opts for same, would it be justified for the party with option of arbitration to stay the proceedings? Would this not amount to sequestrating the party of his legitimate option? Also, where a party has both options of arbitration and litigation, can he/she exercise them consecutively or the exploitation of one, extinguishes the other? It would be safe to ensure that in drafting an asymmetrical clause, these concerns are clearly considered and adequately captured to avoid unnecessary delays and possible annulment on grounds of unconscienability or lack of mutuality. In fact, where there is inelegant drafting of an asymmetric arbitration agreement which is indicative of overt or covert oppression, the court should respond by taking a decision that would place the parties at an equilibrium and mutually beneficial even if that was not intended by them, this is not only logical but equitable.

Thus, one could ask, why is there preference of arbitration in settling disputes especially those of a commercial nature whether domestic or international? The answer to this inquiry is not farfetched. The

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[36] *Fawehinmi v O.A.U.* [1998] 6 NWLR (Pt. 553) 1 at 183, paras E-F; Nissan *Nigeria Ltd. v Yoganathan & Anor* [2012] 4 NWLR (Pt. 1183) 135, 1; *MV Panormos Bay v Olam (Nig.) Plc.* [2004] 5 NWLR (Pt. 865); *Confidence Insurance Ltd. v Trustees of O.S.C.E* [1999] 2 NWLR (591) 373, the Court of Appeal held at p 388, paras A-D on what constitute steps in the proceedings thus, 'Section 5 (1) of the Arbitration and Conciliation Act makes it clear that the right to evoke the arbitration provision must be asserted before a party takes any step in the proceedings. While certain acts done by a party may or may not constitute steps in the proceedings, nevertheless some acts will surely be construed to mean taking steps in the proceedings. For example, the following cannot ordinarily amount to taking of other steps in the proceedings as to defeat a party's right to rely on the arbitration provision, viz: (a) exchange of correspondence between parties or their counsel after entering appearance; or (b) effort made out of court to settle the matter in controversy between the parties; or (c) moving the court to seek a party's desire that the matter be placed before the arbitration panel. But where… the appellant delivered his pleadings and in it, raised the need to utilise and exhaust the arbitration in the trust deed without specifically applying to the court to stay the proceedings, that would amount to taking step in the proceedings, after entering of appearance sufficient to defeat the appellant's right to rely on the arbitration provision'.

peculiarities of arbitration give it an edge over and above the other mechanisms.[37] World over, arbitration has been accepted as a suitable method of commercial disputes settlement as almost every nation and some international organizations have laws and rules[38] regulating its practice. This feature of having a universal legal framework makes arbitration more attractive to disputants than other methods of dispute resolution. Arbitral award, unlike the decision of a mediator or a negotiated agreement, is final and binding once rendered. It can only be set aside by an order of the court on grounds laid down in the ACA.[39]

3.0 Enforcement of Asymmetrical Arbitration Agreement: A Peep into Other Jurisdictions

This section of the paper critically surveys other jurisdictions with regard to the enforceability of asymmetrical arbitration agreement with the aim of proposing a template for Nigeria. The jurisdictions examined are those that can be safely described as arbitration hub which includes the United Kingdom (UK), Singapore, United States of America (USA), Russia, India, and France.

(a) Singapore: The Singapore High Court has had the opportunity to pronounce on the enforceability of asymmetrical arbitration agreement.[40] The Court held that asymmetrical arbitration agreement are legal and enforceable, this was its decision in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd.*[41] Here, parties entered into a contract with an asymmetric arbitration clause wherein they were allowed to litigate in settling any dispute. However, the Plaintiff alone could resort to arbitration in addition to litigation. A dispute arose and the plaintiff resorted to litigation instead of arbitration. The Defendant joined issue and sought an order of the Court to stay proceedings and direct the parties to arbitrate in accordance with section 6 of the Singapore International Arbitration Act (SIAA). Section 6 of the SIAA obliges the Singapore Court to stay litigation between parties to an 'arbitration agreement' brought in breach of that agreement. This is

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37 Ouseun Abimbola, 'Prospects in Arbitration: An Overview' in Adeniyi I. Olatunbosun and Luqman Laoye (eds), *Diverse Issues in Nigerian Law, Essays in Honour of Hon. Justice Okanola Akintunde Boade* (Zenith Publishers 2013) 26 - 27.

38 For example in Nigeria at the federal level, the Arbitration and Conciliation Act 1988, Cap. A18 LFN, 2010 as well as the various Arbitration Laws of the various States regulates Arbitration in Nigeria.

39 *Okechukwu v Etukokwu* [1998] 8 NWLR (Pt. 562) 513 at 529-530.

40 Baker Mckenzie, 'Enforceability of One-Sided Optional Arbitration Clauses in Singapore' <www.bakermckenzie.com/en/insight/publications/2016/12/enforceability-of-one-sided-optional> accessed 4 November 2019.

41 [2016] SGHC 238.

to be unless where the court is satisfied that the arbitration agreement is 'null and void, inoperative or incapable of being performed'. Thus, the only conditions pursuant to which the Court can refuse granting an order stay, is if the arbitration agreement is null and void, inoperative or incapable of being performed. The application was heard by Justice Vinodh Coomaraswamy in the High Court. The Court held that the asymmetrical arbitration agreement constituted a valid arbitration agreement under Section 6 of the SIAA. However, the Plaintiff having elected to litigate than arbitrate, the arbitration agreement though operative, is incapable of being performed in the circumstance. The rationale is that only the Plaintiff could activate the arbitration agreement by exercising the option to arbitrate and not the Defendant. This is because he has no such right/power by virtue of the fact that he had voluntarily sequestrated himself of the same.[42] Thus, asymmetrical arbitration agreement is valid and can be enforced in Singapore.

(b) France: Asymmetrical arbitration agreements are not valid and therefore cannot be enforced under French law where they fail to meet certain conditions. This position was laid down by the French Supreme Court in *Ms X v Banque Privée Edmond de Rothschild*.[43] The *Cour de Cassation* invalidated a unilateral jurisdictional clause under Council Regulation (EC) No. 44/2001 of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation). The one-sided arbitration agreement it allowed a party to bring an action in a particular prescribed court while the other party could bring an action before any other court of competent jurisdiction. The brief facts of the case are that Mrs. X, a French national residing in Spain had opened a bank account at the Luxembourg based private bank Edmon de Rothschild Europe 'Rothschild' through an intermediary finance company affiliated with Rothschild and based in Paris. Pursuant to an alleged underperformance of her investments, Mrs. X brought an action for damages against Rothschild and the intermediary before the Paris Courts. The Defendant (Rothschild) challenged the jurisdiction of the French Court in Paris pursuant to a jurisdiction clause in the agreement which reads 'potential disputes between the client and the Bank shall be subject to the exclusive jurisdiction of the Courts of Luxembourg. In the event that the Bank does not rely on such jurisdiction, the Bank reserves the right to bring an action before the Courts of the client's domicile or any other court of competent jurisdiction'. Rothschild contended that this clause was *in tandem* with Article 23 of the Brussels Regulation which provides that:

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42 B. Mckenzie (n 40) 2.

43 No. 127/14, 29 January 2014.

> If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

The court trial held the agreement to be valid and binding. The Plaintiff appealed to the Court of Appeal. The Paris Court of Appeal on the 18th day of October, 2011, rejected the decision above and held that the unilateral jurisdictional clause was null and void. While it held the validity of the Brussels Regulation, it was of the view that it does not give any party the right or discretion to select whatever jurisdiction he wishes as was contained in the agreement between the parties. Further appeal to the *Cour de Cassation* was upheld however on the grounds of 'potestative' rather than 'discretion to select whatever jurisdiction he wishes'. The *Cour de Cassation* reasoned that:

> By reserving the Bank's right to bring an action in Mrs. X's place of domicile or in any other court of competent jurisdiction, the clause only restricted Mrs. X, who was the only party obligated to commence proceedings in Luxemberg , accordingly, the Court of Appeal correctly determined that the clause was potestative in nature, for the sole benefit of the Bank, and therefore was contrary to the objectives and the finality of the prorogation of the jurisdiction provided in Article 23 of the Brussels Regulation.

The doctrine of potestative describes a situation in which performance of a contract is made subject to the occurrence of a condition precedent entirely within the power of only one of the contracting parties to cause to happen or prevent from happening. This judgment is diametrical opposed to the Court's judgments in *Societe Sicaly v Societe Grasso Stacon NV*[44] and *Societe Coignet v COMIT, Bull*.[45] In these cases, the *Cour de Cassation* had held that where it was the common intention of the parties to provide only one of them with the right to choose whether to litigate or arbitrate such a clause was not objectionable. Thus, the view taken by the *Cour de Cassation* is not only surprising but also suspicious and capable of unsettling the law particularly within the EU where the Brussels Regulation is applicable.

However, in 2015, the *Cour de Cassation* reconsidered its position above and held in *Apple Sales International v eBizcuss*[46] that asymmetrical

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44 1974 I No. 143 p. 122 Cass. Civ.

45 1990 I No. 273, p. 193, Cass. Div.

46 Cass. 1ere Civ., 7 October 2015, 14-16.898.

jurisdiction clauses are valid under French law, so long as each party can identify, in advance of starting legal proceedings, the jurisdiction which may be competent to hear a potential dispute. This is on the condition that once asymmetrical clauses comply with this feasibility test, they are enforceable. Thus, this decision has clarified the position in Rothschild as the choice of court was not left to the discretion of the party in whose favour the asymmetric clause was created as it was possible to determine in advance which court has jurisdiction over any potential dispute. Thus, the court moved from 'potestativeness' to 'predictability' which makes the choice not to be under the beneficiary's complete control. The Rothschild catalysed Regulation No. 1215/2012 (Recast Brussels Regulation) which came into force on 10th day of January 2015. This regulation, unlike its 2001 predecessor which did not address the issue of validity of jurisdiction clauses, provides that this issue must be addressed in accordance with the laws of the courts given jurisdiction by the asymmetrical clause.[47]

Given this tricky state of the law, any contract that has any connection with France, the parties, who intend to go asymmetrical, must take necessary precaution and count the cost. It will be wise to frame those options carefully and explicit.[48]

(c) United States of America (USA): The US is an arbitration friendly hub and its Federal Arbitration Act (FAA) has a friendly policy favouring arbitration agreements. This is so notwithstanding any State substantive or procedural policy to the contrary as was held in *Moses H. Cone Mem'l Hosp. v Mercury Construction Corp*.[49] It was enacted to give credence to arbitration and dissuades the longstanding judicial stance of not enforcing arbitration agreement by making them equal to other contracts as was held in *Volt Info. Sciences, Incorporation v Board of Trustees of Leland Stanford Junior University*.[50] The Federal Arbitration Act makes arbitration clause/agreement valid, irrevocable and enforceable except where there exist grounds either at law or equity making a contract incapable of being enforced by the Courts. This will include grounds such as fraud, duress, undue influence, illegality, unconscienability and not just defenses that are applicable to arbitration as was stated in *AT & T Mobility LLC v Concepcion*.[51]

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47 See Article 25, Recast Brussels Regulation 2015.

48 Clement Dupoirier and Vincent Bouvard, 'Scope and Validity of Asymmetric Jurisdiction Clauses in France' <https://hsfnotes.com/arbitration/2015/12/07/scope-and-validity-of-asymmetric-jurisdiction-clauses-in-france/> accessed 13 November 2019.

49 (1983) 460 U.S. 1, 24.

50 (1989) 498 U.S. 468, 478.

51 (2001) S. Ct. 1740, 1746.

Generally, the US as far as enforcement of asymmetrical arbitration agreement is concerned, is accommodative. Most States have refused to enforce this kind of arbitration agreement within the sphere of contract of employment or standard contracts, as they reasoned that they may be harsh, imposing and therefore unconscionable, most jurisdictions have held them valid and enforced same in commercial transactions. Courts in some State, have however refused to accede to their validity and therefore refused to enforce them nonetheless.[52]

Courts in Maryland have refused to enforce unilateral arbitration clause in commercial transaction. In *Cheek v United Healthcare of Mid-Atlantic, Inc.*,[53] Maryland Court of Appeal held that an arbitration clause in a contract is treated as a separate provision that must be supported by distinct consideration on its own accord. By this decision, the US Court of Appeal for the Fourth Circuit, held that a building contract with a one-sided arbitration clause cannot be enforced due to the fact that it lacked mutuality of consideration in *Noohi v Toll Bros. Inc*.[54] Thus, there must be mutuality of consideration for the asymmetrical arbitration agreement to be enforced in Maryland. In *U. S. Ex Rel. Birkhead Elec. Inc. v James W. Ancel Inc*.,[55] the Maryland Supreme Court held that an asymmetrical arbitration clause in a construction subcontract was unenforceable because it was not supported by mutual consideration, as it did not create an obligation for the contractor, only the subcontractor.

In *Global Client Solutions, LLC v Ossello*,[56] the Supreme Court of Montana stated that asymmetrical arbitration agreements do not fit into the purpose and intendment of the FAA. It therefore held that such a clause, is unenforceable because it is unconscionable. This unconscionability debacle is bore out of the asymmetrical nature of arbitration and the natural inclination to give to all equally and not differently. Conscience would expect that you treat everyone the same. Thus, where a person is placed in a better position under the same circumstance, it is view as unconscionable.

The Apex Court of Tennessee held that a one-sided arbitration agreement is valid and enforced same. In *Richard Berent v CMH Homes Inc*.,[57] it was

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52 Wattieder.com 'Unilateral Arbitration Clauses: What Are They and Can They Be Enforced?' <https://watttieder.com/resources/articles/unilateral-arbitration-clauses-what-are-they> accessed 12 November 2019.

53 (2003) 378 Md. 139.

54 (2013) 708 F.3d 599.

55 (2014) WL 2574529 (D. Md. June 5, 2014).

56 (2016) 382 Mont. 345.

57 (2010) Tenn. 158 S.W. 3d 338.

held that asymmetrical mandatory consumer arbitration agreement was enforceable. The arbitration agreement had permitted the party with the option to arbitrate, under limited circumstances, to seek judicial review. This decision clarified the Courts previous decision in *Taylor v Butler*[58] where mutuality of consideration was use to declare an asymmetrical arbitration agreement unenforceable. Founded on the stance of the Court's opinion in *Berent*, supplementary causes that define whether unilateral arbitration agreements are unconscionable (and thus unenforceable) under Tennessee law are, whether the arbitration agreement was inserted as part of a standard contract which are contract coughed in a manner depicting the accepting party is only left with an option to either take or reject the terms of the contract the way they are and is not given an opportunity, as it were, to bargain with a view to reaching mutually agreed terms. Another is whether the arbitration agreement was '*entirely* unilateral', or whether it opportunity to seek judicial review by one party is limited to certain circumstances; and whether there is 'a judicious business rationalisation for the carve-out' that allows only one party to the contract to access to the court.[59]

The Ohio Court of Appeal has held that an asymmetrical arbitration clause in a subcontract empowering the main contractor to choose between litigation and arbitration is enforceable. In *Ohio Plumbing Ltd. v Fiorilli Construction Inc*.,[60] the Court of Appeal for the Eighth Appellate District (Cuyahoga County) held that the parties had to arbitrate their dispute at the instance of the general contractor who has chosen to exercise his right to arbitrate. This decision overturned the position of the second District Court of Appeal to enforce a sole arbitration agreement in *PS Commercial Play, LLC v Harp Contractors, Inc*.,[61] wherein the Court declined to grant a stay of proceeding upon the main contractor decision to enforce his sole option to arbitrate. As it stands, the Ohio position on the validity and enforcement of asymmetrical arbitration clause is unsettled as the two decisions above are conflicting. Thus, until the Supreme Court decides, parties subscribing

58 (2004) Tenn. 142 S.W. 3d 277.

59 David A. Horwitz, 'Tennessee Supreme Court Approves One-Sided Arbitration Clauses that Require One Party to Arbitrate All Disputes while Allowing the other Party to Seek Judicial Review for Limited Purposes' <https://scotblog.org/2015/06/tennessee-supreme-court-approves-one-sided-arbitration-clauses-that-require-one-party-to-arbitrate-all-disputes-while-allowing-the-other-party-to-seek-judicial-review-for-limited-purposes/> accessed 12 November 2019.

60 (2018) Ohio 1748.

61 (2017) Ohio-4011 (2nd Dist. Montgomery County).

to sole arbitration agreement must be cautious to avoid being faced with inadvertent outcomes.[62]

It can be safely summed up that in US, some States have endorsed the validity and enforceability of asymmetrical arbitration clause while some have refused to do so. Thus, the position of the law is half way.

(d) India: Under the law of India, the validity and enforceability of asymmetric arbitral clause/agreement is imprecise due to inconsistent decisions by the Indian Courts. The likely reason for this is that Indian law favours mutuality in an arbitral agreement and is not favourably disposed to untrammelled application of *pacta sunt servanda.* Thus, the Delhi High Court have held that one-sided arbitration agreement is invalid (or even a symmetrical arbitration clause/agreement) until the point at which the party exercise its option to arbitrate, prior to that, there is lack of mutuality. This was the decision in *Union of India v Bharat Engineering Corporation*.[63]

However, the Calcutta High Court has held that a unilateral arbitration agreement is valid and therefore enforceable in *New India Assurance Co. Ltd. v Central Bank of India & Ors.*[64] In fact, the Calcutta High Court expressly rejected the decision of the Delhi High Court and held that a one-sided arbitral agreement creates a valid arbitration agreement *ab initio,* albeit, enforceable only by the party who has the option to explore arbitration. The likelihood of Indian court taking cognizance of the balance of convenience, the interests of justice and other accommodating circumstances when deciding if they have jurisdiction under a contractual choice of forum or court clause is high. This position is supported by the decision in *The Black Sea Steamship U.L. Lastochkina ODESSA USSR v Union of India*.[65] It can be safely asserted that going by recent decisions, particularly of the Indian Supreme Court which however are not directly on the validity and enforcement of asymmetric arbitral agreement; it could be argued that the Courts are favourably disposed to upholding the validity of certain unilateral arbitration agreements.

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62 Eric Travers, 'One-Sided Arbitration Clause: Contractor's Right to Unilaterally Choose Arbitration Upheld' <https://ohioconstructionlaw.keglerbrown.com/2018/06/one-sided-arbitration-clause-contractors-right-to-unilaterally-choose-arbitration-upheld/> accessed 12 November 2019.

63 ILR 1977 Delhi 57.

64 AIR 1985 CAL. 78.

65 AIR 1976 ANDH PRA 103.

The Indian Supreme Court in *TRF Ltd. v Energy Engineering Projects Ltd.* held that an arbitration agreement or clause, enabling only one party to choose an arbitrator without the input of the other was not invalid.

This notwithstanding, it is vehemently contended that unless and until the Supreme Court of India reconciles the seemingly contradictory position with regard to the validity and enforcement of asymmetric arbitration agreement in India, the state of the law is far from settled. Hence, it would be prudent for parties to tread with utmost caution along the paths of asymmetric clauses to avoid unwanted outcome.

(e) United Kingdom (UK): UK is reputed as a world arbitration hub and has flexible arbitration legal and institutional arbitration regimes. In the UK, asymmetrical or unilateral arbitration agreements are regarded as valid and are being enforced by its courts. This was the decision of the English Court in *Mauritius Commercial Bank Ltd. v Hestia Holding Ltd.*[66] After the Rothschild decision by the French *Cour de Cassation* on Article 23 of the Brussels Regulation of 2001 which led to Recast Brussels Regulation 2015, the English Court has maintained its pro-asymmetrical stance.

In *Commerzbank AG v Pauline Shipping and Liquimar Tankers*,[67] it was held that an asymmetrical arbitration agreement is valid under Article 25 of the Recast Brussels Regulation 2015 and the jurisdiction thereunder is exclusive. Just recently, the English court demonstrates that it would give effect to an arbitration agreement whether symmetric or asymmetrical, it is guided by the principle of *pacta sunt savanda* and would not bother to inquire into the equity of the agreement. The reasoning is deduced from the decision in *Barclays Bank Plc. v Ente Nazionale di Previdentialza Ed Assistenza dei Medicie Degli Odontoiatri*.[68] In *Mauritius Commercial Bank Ltd. v Hestia Holdings Ltd*.,[69] the English Court held that an asymmetrical clause said to be 'for the benefit of the lender only' in fact only released the lender from the effects of the clause in proceedings brought by the lender. It did not override the lender's agreement to submit to the jurisdiction of the English court in proceedings brought by the borrower.

However, the present unrepentant push by Britain to exit from the European Union (Brexit) is a looming concern with the continuous

66 (2013) 2 Lloyds Rep. 121.

67 (2017) EWHC 161.

68 [2015] EWHC 2857 (Comm.).

69 [2013] EWHC 1328 (Comm.).

applicability of the Recast Brussels Regulation of 2015. If Brexit sails through as Prime Minister Theresa May has vowed to accomplish,[70] the Recast Brussels Regulation will no longer apply to it automatically. It is unclear what, if any, reciprocal arrangements on jurisdiction and recognition of judgments will apply instead between the UK and the remaining EU member states. However, if no replacement agreement is reached upon the success of Brexit, Pierce and Petter proposed two possible leeways.[71] They opine that:

> The English courts may no longer be bound by decisions of the CJEU, removing the current (low) risk that asymmetric clauses might become ineffective in England on account of an unfavourable CJEU judgment in the future. The UK's simplest option for ensuring that English (and other UK) judgments continue to be recognised and enforced throughout the EU27 may be to accede to the Hague Convention on Choice of Court Agreements (the HCCCA). The UK will be able to accede in its own right to the HCCCA unilaterally, without needing the agreement of the EU27.[72]

(f) Russia: Asymmetrical arbitration agreement is invalid and therefore unenforceable under Russian law. The Presidium of the Supreme Arbitration Court of the Russian Federation establishes that an asymmetrical arbitration agreement or option to litigate was invalid and therefore cannot be enforced. The reason is that it puts either of the parties in an unfair advantageous position over the other. The agreement also encroaches upon the principle of equality between the parties which is intended to be present in all contracts arbitration agreement inclusive. This was the Court's decision in *CJSC Russian Telephone Co. v Sony Ericsson Mobile Telecommunications Russia LLC*.[73]

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[70] It is worthy to note that as at the time of written this manuscript, Theresa May was the Prime Minister but at present, Mr. Boris Johnson, is the Prime Minister of Britain and is aggressively pursuing the realisation of the Brexit agenda.

[71] Adam Pierce and Tracey Petter, 'Asymmetric jurisdiction clauses in finance agreements – where are we now?' <www.dentons.com/en/insights/newsletters/2017/april/25/bank-notes/bank-notes-spring-edition/asymmetric-jurisdiction-clauses-in-finance-agreements-where-are-we-now> accessed 12 November 2019.

[72] ibid. However, they raise their fears as follows:

> The EU, Singapore and Mexico have already ratified the HCCCA. However, the mutual recognition of judgments between HCCCA contracting states only applies to judgments made under an exclusive jurisdiction agreement (unless contracting states agree otherwise). The Explanatory Note to the HCCCA states that asymmetric clauses do not count as exclusive for this purpose (although interestingly, Mr. Justice Cranston commented in his Commerzbank judgment that there are 'good arguments' for the opposite view). Given the number of variables and unknowns, it is hard to say definitively whether Brexit increases or decreases the risk of using asymmetric jurisdiction clauses in transactions involving EU27 parties. However, as the UK has the HCCCA 'fall-back' option, it is difficult to see a plausible outcome in which an English court judgment made under a mutual exclusive jurisdiction agreement would not be recognised and enforced throughout the EU27 after Brexit. It is not quite possible to say that about English judgments made under asymmetric jurisdiction clauses.

[73] Case No. 1831/12 June 2012.

Thus, we have seen that arbitration enjoys a universal acceptance. The traditional asymmetrical arbitration agreement is enforceable in most jurisdictions. However, the asymmetrical agreement is enforced in some while others have refused its validity and enforcement on grounds such as lack of mutuality and unconscienability. Thus, before a party ventures into subscribing to an asymmetrical arbitration clause, it is prudent to confirm the position of the law in the intended jurisdiction in order to avoid unintended consequences.

4.0 Asymmetrical Arbitration Agreement and Nigeria's Public Policy

This section of the paper examines the nature of Nigeria's public policy with a view to ascertaining whether Nigerian Court would enforce asymmetrical arbitration clause or its public policy would be a stumbling block and the possible extent. The section also examines the impact of such mutuality and unconscienability vis-à-vis *pacta sunt servanda*. The Supreme Court in *Sonnar (Nig.) Ltd. v Partenreedri M.S. Nordwind (Owners of the M.V. Norwind)*[74] had held per Oputa JSC (As he then was but now of blessed memory) that where parties contract voluntarily, they are bound to perform their bargain unless there be exceptional circumstances requiring otherwise. In *AG of Nasarawa State v AG of Plateau State*[75] upheld that between States, the principle of *pacta sunt servanda* is an integral part of Nigeria law, thus, where States have entered into a contract, change of government should not abrogate same as parties are expected to observe their contracts. Daibu and Abdulrauf[76] opined that 'based on the principle of *pacta sunt servanda,* parties are generally free to enter into a contract and such a contract is enforceable by law provided such agreement is lawful and not contrary to public policy'.[77]

The doctrine of public policy, under the common law, is essentially a creation of the courts.[78] The public policy concept, according to Yakubu[79]

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74 [1987] 4NWLR (Pt. 66) 520.

75 (2012) LPELR-SC. 214/2007.

76 Abdulrazaq A. Daibu, and L. A. Abdulrauf, 'Challenges of Section 20 of the Admiralty Judgment Jurisdiction Act to International Arbitration Agreements' (2015) 6(4) The Gravitas Review of Business and Property Law 14.

77 *United Bank of Nigeria Ltd. v Ozigi* [1991] 2 NWLR (Pt. 176) 677; *Dragetanos Construction (Nig.) Ltd. v Fab Madis Ventures Ltd.* [2011] 16 NWLR (Pt. 1273) 308 at 353, Para. E; *Nika Fishing Co. Ltd. v Lavina Cooperation* [2008] 16 NWLR (Pt. 1114) 509 at 543.

78 Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2016) 94(3) Nebraska Law Review 698. The phrase 'public policy' is discussed in four contexts: (1) public policy in a modern sense, i.e., policies pursued and enacted by governments (especially the administrative aspects); (2) public policy as a mandatory rule that trumps the parties' contractual agreement; (3) public policy as it appears in conflict of laws, limiting the application of foreign rules; and (4)

has become 'an enigmatic monster which shows no desire of being analysed and which defies the concerted attack of professors, daring thesis writers and treaty makers[80] and to the judges is that unruly horse has looked like even less accommodating animals. Others have thought it to be like a tiger, and have thus refused to mount it at all, perhaps because they feared the fate of young lady of Riga, to some; it is like the Balaam's ass which would carry its rider nowhere but none. But none, at any rate at the present day, has looked upon it as a Pegasus that might soar beyond the momentary needs of the community'. Nevertheless, a few definitions would suffice in setting the discussion here on course. According to Odunnaiya:[81]

> The whole doctrine of public policy depends on a concept of public interest. It is a principle which holds that no subject or group of subjects can lawfully do that which has a tendency to be injurious to the public or against the public good. To understand public policy, it is necessary to go behind it and see whether it applies in a particular case in order to remove the mischief which the policy is intended to cure, that is, the dominant reasons for the policy. Public policy illustrates the varying degrees of definiteness which the law may assume. It is the very nature of public policy that it should constantly pass through new transformations.[82] The expositions of the learned authors above, only demonstrate the inelastic nature of the doctrine of public policy and the problems common associated with ascribing a meaning to it in a seemingly authoritative and definite terms. Its elasticity affords the court, the latitude to espouse and expand the circumference of the law on the subject and to accommodate

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public policy that bars the enforcement of foreign judgments or arbitral awards. <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2833&context=nlr> accessed 25 May 2019.

79 John A. Yakubu, *Limits to the Application of Foreign Laws* (Malthouse Press Ltd. 1999) 12.

80 For example Halsbury, L.C. in *Janson v Driefontein Mines Limited* (1902) A.C. 484. 491 cf. Parke B., in *Egerton v Brownlow* 4 HLC 1.

81 Vincent A. Odunnaiya, *Law and Practice of Industrial Relations in Nigeria* (Passfield Publishers Limited 2006) 8.

82 Kojo Yelpaala, 'Restraining the Unruly Horse: The Use of Public Policy in Arbitration. Interstate and International Conflict of Laws in California' (1989) 2 Pacific McGeorge Scholarly Commons, the Transnational Lawyer 387-388. He posited thus 'the meaning of public policy has always eluded even the most astute judicial minds in various common law systems. Judges, Jurists, and academicians continue to struggle with defining the contours of the concept and its implications in specific situations. One theme that seems to underscore the struggle with the concept of public policy is the view that public policy shares the distinction of vagueness and intractability with fraud and other legal concepts notorious for their elusiveness. The way public policy is viewed by the courts is best exemplified by the following statement by Justice Shenk of the California Supreme Court: The term 'public policy' is inherently not subject to precise definition… The question, what is public policy in a given case, is as broad as the question of what is fraud… Public policy is a vague expression, and few cases can arise in which its application may not be disputed… public policy means anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel is against public policy. <http://digitalcommons.mcgeorge.edu/cgi/viewcontent.cgi?article=1043&context=facultyarticles> accessed 20 May 2019.

> possible unforeseeable but yet inevitable future situations without necessary legislative action especially in times of emergencies and public necessities.

The Supreme Court of Nigeria in *Okonkwo v Okagbue*[83] succinctly stated that:

> The phrase 'public policy' appears to mean the ideal which for the time being prevails in any community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is generally injurious to the public interest. It is the community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare and the like.

Public policy is an exclusionary doctrine through which the forum court refuses to give recognition to, and/or enforce, a foreign law, domestic or foreign right, capacity, obligation, privilege, power, disability or legal relation arising from the law of a foreign country, state (in the case of true federalism) or private agreements if the sought recognition and/or enforcement of such law, right, power, capacity, liability, disability or legal relationship will be harmful or obliterate from the forum's perceived and conceived moral standards, social cohesion, political ties with friendly sovereign nations, notion of justice, equality and fairness or economic stability in order to prevent undesirable consequences which are considered injurious to the forum.[84]

The importance of preserving Nigeria's public policy is prominent to the extent that the Constitution justifies obliteration from individuals constitutionally guaranteed rights for the purpose of protecting public policy.[85] Nigerian Courts have refused to give approval to unequally

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[83] [1994] 9 NWLR (Pt. 368) 301. See also J. B. Corr, 'Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes' College of William & Mary Law School (1985) l Scholarship Repository, Faculty Publications, London, 649. <http://scholarship.law.wm.edu/cgi?article=1852&context=facpubs> accessed on 25 November 2019. He stated thus 'For the purpose of choice of law, one may define public policy as that doctrine which permits a court to reject a cause of action based on the law of a different jurisdiction on the ground that the other jurisdiction's law is not only different from but also offensive to generally accepted values within the forum. The doctrine is an especially useful vehicle for evaluating the merits of modern and traditional learning, because it is one of the few features of the old learning to have survived the last generation's surge into modern choice of law thinking. Indeed, it appears that no matter which variation of modern learning a state may have adopted, public policy is retained as an instrument for adjudicating choice of law issues. Public policy, therefore, is a rare point of common ground upon which one may directly compare the actual operation of traditional and modern approaches'.

[84] David T. Eyongndi, 'Conflict of Laws Issues Arising from the Application of the Doctrine of Public Policy in the Enforcement and Recognition of Foreign Law' (2015) 5 University of Ibadan Journal of Jurisprudence and International Law 144.

[85] Section 45 of the 1999 Constitution of the Federal Republic of Nigeria Cap. C23 LFN 2004.

reached agreement even when they are patently mutual.[86] This is exemplified in the case of restraint of trade agreements in employment relationship where the employer who intends to effectuate them is made to come under an onerous burden of justifying them and the fact that they have been reached is of no moment.[87] In such instance, *pacta* will not *sunt servanda.* This position was upheld in *Anglo-African Supply Co. Ltd. v John Bonvie*[88] that the employer must justify the special circumstances necessitating the usage of a restraint of trade covenant before it can become enforceable. Like an asymmetrical arbitration clause which lacks mutuality, a restraint of trade covenant favours one party and should be scrutinized. The presumption of equality in bargains is more of a myth then reality especially in Nigeria. Conscienability demands that the weak be protected when dealing with those that are stronger and not be allowed to be bound under circumstances which ordinarily, they would not have agreed to be bound.

The gist here is not making a case against asymmetrical arbitration agreement. It is that the Courts should be on the watch to ensure that unscrupulous persons do not exploit one-sided arbitration clauses/agreement in an abusive manner against contracting parties. The possibility of such abuse, cannot be wished away particularly in Nigeria where profit making is cherished over everything in commercial sphere. That the parties agreed without more to an asymmetrical clause does not *ipso facto* cure the lack of mutuality. Nigeria has a conservative public policy, her sense of what is right is highly sensitive.[89] It would not ordinarily permit unequal agreements under the guise of, the parties have agreed. Agreement must be seen to be agreement to the extent that they are fair and reasonable and not merely agreement *per se.* the equity of an agreement is a necessary part of the agreement.

While freedom of contract is recognized under Nigerian law, mutuality should not be treated as a matter of agreement *per se.* The fact that parties have agreed should not be construed on the surface value. In commercial transaction, such as finance agreement, the financial institution at all times, has the upper hand, the other party is almost bargaining at a zero point where there is a business or financial exigency. Hence, he should not be made a scapegoat of business exigency. The circumstances surrounding the bargain are also important and the Courts should not shy away from examining same in deserving situation. Where it is discovered that if all

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86 *Andreas I. Koumoulis v Leventis Motors Ltd.* [1973] 1 All NLR (Pt. 2) 144.

87 *Union Trading Co. Ltd. v Hauri* (1940) 6 WACA 148.

88 (1937) N.L.R. 158.

89 *Total (Nig.) Plc v Ajayi* (2004) 3NWLR (Pt. 860) 270 at 293-294.

the circumstances were equally favourable, the agreement would not have been consummated in the way and manner it was, to the extent that it is prejudicial to the other party, such an asymmetrical clause, under such circumstance should not be enforced. The reason is; it would be giving impetus to parties to exploit their favourable position to gain undue advantage, which is unconscionable and morally reprehensible. However, this must be the exception and not the general rule.

5.0 Conclusion and Recommendations

Extrapolating from the above analysis, it is conclusive that arbitration by nature is contractual and has evolved as an alternative to litigation. Due to its several advantages, it is preferred for settling commercial disputes particularly of cross-border nature. The parties agreement is what gives commercial arbitration whether local or international validity. This mutuality makes arbitration symmetrical, however, parties exercising their freedom to contract, can vest the option to arbitrate as well as appointment of the arbitrator (s) in one of the parties while the other can only explore litigation in the event of any disputes. This kind of arbitral agreement/clause is what is known as asymmetrical arbitration agreement/clause. In most arbitration friendly jurisdictions like UK, US, Singapore, Luxembourg, etc, they are enforceable. In jurisdictions such as Russia and China, they are unenforceable and expressly prohibited as it is considered as obliteration from mutuality. Yet, in jurisdiction such as India and US, the law on its validity and enforcement is in a state of flux as there exist contradictory judgments.

Meanwhile, in Nigeria, the Courts are yet to make any pronouncement on the validity and enforcement or otherwise of asymmetrical arbitration agreement/clause. Even the Arbitration and Conciliation Act 1988 which is the main legal framework on arbitration in Nigeria is silent on the nature and validity of asymmetrical clauses. It has been argued that Nigeria's public policy as espoused by the court is conservative and usually, the Courts are not hesitant at inquiring into the equity of an agreement. The courts at various instances have held sacred the principle of *pacta sunt servanda.* Would the Nigerian Courts turn a blind eye where though parties have agreed voluntarily but the obviousness of inequality somewhat descriptive of an 'adhesive contract' is patent on a contract? This is one of the issues that intrigue the mind. Nevertheless, it is hope that the Nigerian Courts would adopt the attitude of the pro-asymmetrical arbitral clause enforcement jurisdiction Courts such as UK, Singapore and Turkey. However, it is also hoped that in upholding the validity and enforceability of asymmetrical arbitration clauses, the Courts would not do

so sheepishly and slavishly but would take a case-by-case approach to ensure that a person who is in an advantageous bargaining position, does not use same unduly to the avoidable exploitation of the other particularly where its outcome may trickle down to the society at large. While Arbitration is mainly commercial, the ACA 1988 which is the main legislation on arbitration should be amended. The amendment should make asymmetrical arbitration agreement/clauses enforceable in Nigeria however; conditions for its enforceability should be spelt out. In a case where it is obvious that there is a patent unequal bargaining power between the parties, such an agreement should be made unenforceable.

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