

FOOTPRINTS OF A GIANT



A FESTSCHRIFT IN HONOUR OF
PROFESSOR
M.M. AKANBI SAN

Professor Abdulwahab Olanrewaju Issa
(Editor-in-Chief)

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A Festschrift in Honour of
PROFESSOR MUHAMMAD MUSTAPHA AKANBI SAN

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Kwara State University, Malete, Nigeria

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Preface



This Festschrift, titled *Footprints of a Giant: A Festschrift in Honour of Professor M.M. Akanbi SAN*, is a collection of writings published in honour of the late Vice-Chancellor of Kwara State University, Malete, Professor Muhammed Mustapha Akanbi SAN, who passed away on 20th November, 2022, after a protracted illness.

As part of a wide-ranging activities to immortalise the late Vice-Chancellor, the Acting Vice-Chancellor, Professor Shaykh-Luqman Alade Jimoh, in January, 2023, inaugurated a 5-person committee to put together a festschrift. The committee was headed by Professor A. O. Issa, a visiting professor Library and Information Science, with membership including Professor K. I. Adam, Dr. Saeedat B. Aliyu, Dr. Oluwatomi O. Adeoti and Dr. Hauwah K. K. AbdulKareem, who served as Secretary. The committee's assignment began in January 2023, and it took about a year for articles to be harvested, with two separate calls for papers at wide intervals, and several extensions.

At the end of the rather long process, a total of 19 articles, each making a chapter, three other chapters, one each for Tributes, Condolences, and Tribute Poems, respectively, were compiled and edited. Thus, the 260-page book has a total of 22 chapters in all, the first of which presents the background and sets the tone by providing background information on Professor Akanbi's origin, life, education, and career. As a follow-up to this, Dr. Abdulwaheed Musa's chapter, *Remembering Prof. Akanbi: Personal Reflections on his Life and Work* is an exploration of the life, work and legacy of Prof. Akanbi, as the author presents personal reflections on his remarkable life and significant contributions to the fields of education and law.

The third chapter, written by Dr. Olayiwola G. Olorisade on *Institutional Administration and the Rule of Law* focuses essentially on KWASU under Prof. M. M. Akanbi, enumerating the components of effective institutional administration while discussing the rule of law in institutions, generally. Good enough, its contents complement those of the preceding two chapters, all of which focus on Prof. M.M. Akanbi's personality.

The fourth chapter, which is on the *Prospect for Reconciliation in Electoral Dispute in Nigeria*, was authored by the late Vice-Chancellor's wife, Mrs. Shakirat F. Akanbi. The article is a qualitative analysis on the prospect, using the 2023 Presidential Election as a case study, with particular attention on the three leading political parties, namely: APC, PDP and LP. The article provides useful insights into the resolution of electoral disputes by candidates of the political parties, thus providing rich discourse on the subject from empirical evidence—a commendable effort indeed!

The fifth chapter, contributed by Dr. Sulaiman Sheu Adua titled *The Rise of Islamophobia in Europe and India: A Comparative Analysis* of the two named countries investigates the

underlying causes as well as the socio-political events that led to the creation of Islamophobia. Furthermore, Prof. Y.D.U. Hambali's chapter, which is the sixth, identifies where to seek help in combating the scourge of police brutality in Nigeria, emphasising how abuse of power and brazen disregard for the rule of law thrive at the expense of the victims. The article identifies some safeguards against police brutality in the various applicable municipal laws.

The seventh chapter was an overview of the attitude of Nigerian courts towards environmental crimes in the oil industry, contributed by Ayodeji Emmanuel Aimasiko. The article adopts a legal perspective to analyse critically, the judicial approach and responses of the courts to the environmental crimes perpetuated by the oil companies. The eighth chapter by Nnaemeka Nweze discusses the effects of arbitration agreement on jurisdiction of Nigerian courts. Its main thrust is that the authority of arbitral tribunal to determine the existence of arbitration agreement or its jurisdiction has the effects of ousting the jurisdiction of Nigerian courts.

Dr. Balkisu Aliyu contributed the ninth chapter, which examines the interplay between social learning and routine activity theory as interventions and prevention strategies in cyberbullying. This subject is treated in the chapter under the broad heading of ICT and Cyberbullying in Nigeria. Dr. Kudirat M.W. Owolabi contributed the tenth chapter, which examines the provisions of the statutes of Limitation Law in relation to the time limit within which to apply to the courts for the enforcement of arbitral awards. On his own part, Dr. Hanafi A. Hammed in the eleventh article, focuses on the role of civil society organisations (CSOs) and the legality of their actions towards establishing good governance in Nigeria. The paper explores the complementary role that these CSOs can play in delivering good governance in a country like Nigeria.

Drawing lessons from jurisdictions, Dr. Oyesola Animashaun and Prof. Abiodun Amuda-Kannike SAN, wrote on managing workplace conflicts through alternative dispute resolution (ADR) in Nigeria. This twelfth article underscores the essence of ADR mechanism in the quest for speedy and amicable resolution of conflicts, as a remedy to the shortcomings inherent in the customary arbitration and mediation, which were hitherto, the norm. The thirteenth chapter by Prof. Kayode I. Adam, Abdulrazaq A. Daibu and Hameerat B. Ojibara focuses on *Arbitrability of Intellectual Property Disputes: A Cue from Global Practice*. On their part, the duo of Suleiman Ikpechukwu Oji and Esther Inko Abili examine the illusory nature of the Single African Air Transport Market, likened to a legal mirage. Essentially, this fourteenth chapter provides an analysis on the history, relevance and legal framework for the liberalisation of Africa's air market.

The fifteenth chapter is the second article in this book that is on abuse of power by the Nigeria Police. Written by Dr. Sunny Iboloku, it cites the incidence of death in the hands of the police as an affront on fundamental human right. Although the sixteenth chapter was a contribution by the trio of Kayode E. Obafemi, Taiye O. Obafemi, and Francis M. Yakubu and focuses on

child custody and visitation matters in the context of early childhood education settings, its relevance to this festschrift is in its exploration of the legal and ethical considerations surrounding child custody and visitation issues in early childhood education programmes.

The seventeenth chapter authored by Dr. Maryam Bayero-Jimoh is only tangentially relevant to the theme of this book, given its focus on the impact of climate change on agriculture and food security in Nigeria. The article highlights the changing climatic patterns, increased temperature, erratic rainfall and extreme weather condition as hindrance to traditional farming practices, leading to low yields. Similarly, Dr. Kikelomo W. Sallee, who authored the eighteenth chapter, wrote on optimising personnel and management strategies for effective university administration. The article explores the strategies for optimising university staff performance as well as the challenges and prospects of the university administration aligning with their staff's expectations.

The nineteenth chapter by Mrs. Khadijah W. Garba was on the perspective of university administration's means of achieving institutional objectives by deploying human relations skills. The article demonstrates how these skills could be deployed for the attainment of the university's objectives. The twentieth chapter contains 18 Tributes in memory of the departed Vice-Chancellor, the first of which is by the Acting Vice-Chancellor, Professor Shaykh-Luqman Alade Jimoh. The twenty-first chapter is dedicated to the Condolences, numbering 22 in all while the last chapter, the twenty-second, contains a total of nine Tribute Poems, also in memory of the late Vice-Chancellor.

Given the depth and breadth of the scholarly contributions in this 22-chapter festschrift, it is evident that the intellectual discourse on the subject matter has been raised to a higher level, as a mark of respect for the soul of the departed, thereby immortalising him.

Finally, while reiterating the fact that the thoughts and opinions espoused in these contributions are entirely those of the contributors, the coverage, quality and standard of the contributions are adjudged to be highly impressive, especially that most of the chapters were contributed by seasoned legal practitioners and other professionals of high ranking. Therefore, it goes without saying that this festschrift serves, in addition to immortalising our dear late Vice-Chancellor, as a useful reference source and a significant contribution to the growing literature in the fields of the discourse.

Professor Abdulwahab Olanrewaju Issa
(Editor-in-Chief)

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CHAPTER ONE



BACKGROUND

PROF. M. M. AKANBI SAN: ORIGIN, LIFE, EDUCATION AND CAREER

Muhammad Mustapha Akanbi was born on 24th January, 1970 in Kano, Nigeria to late Justice Mustapha Adebayo Ajao (Rtd.) and late Alhaja Munfa'at Aduke Akanbi. His early childhood days were those of fond memories as he reported that he moved around the country a lot, given his father's occupation- a Judge of the Federal High Court. Growing up in a family of six children- five boys and one girl, and lots of cousins and family friends living in the house with them also made his childhood days fun-filled. His growing-up days were thus lived in Kano, Port Harcourt, Ibadan, Jos and Lagos.

He started school in Kano, at Normal Nursery while his primary school was first at Bodija International School and later Sacred Heart Private School, Onireke, Ibadan. For secondary school, he initially attended Jerico High School also in Ibadan, before proceeding to the Federal Government College, Okigwe, Imo State, where he completed his secondary school education. Following the completion of his secondary school education, he was admitted into Obafemi Awolowo University, Ile-Ife, where he studied Law between 1989 and 1993. He attended the Nigerian Law School (Victoria Island, Lagos Campus) in 1994 and he was thereafter called to the Nigerian Bar in 1995. After his call to Bar, he served his nation, Nigeria during the compulsory National Youth Service Corps at the Legal Unit of the Central Bank of Nigeria, Lagos.

After his service year, he started practice with the law firm of Wole Bamgbala, at 37 Igboere, Lagos Island after which he moved to Olawoyin and Olawoyin. While he practiced, he decided to return to school to pursue his Master in Law degree. This he did at the University of Lagos between 1996 and 1997. In 1998, he joined the law firm of Ayodele Gafar and Co., which was based in Ilorin. Shortly after this, his sojourn into the world of academics began as he joined the University of Ilorin as a Lecturer II in the Faculty of Law. In 2004, he travelled abroad for his doctoral degree studies. He attended Kings College, University of London and obtained his doctorate degree in Law in 2006, a record time of two years. Following the completion of his doctoral studies, he returned home and continued with his services at the University of Ilorin. By 2008, he had risen to the Senior Lecturer rank and was appointed Acting Dean, Faculty of Law, University of Ilorin.

Given his contribution to the community of learned fellows, in 2009, the Nigerian Bar Association (NBA) Ilorin branch unanimously elected him the Chairman of the branch for two years. In 2010, he completed his deanship tenure and was appointed as the Acting Head of Department of Business Law. He became a Professor of Law in the department in 2012 Acting. His leadership acumen and dedication to work made him a ready candidate for

positions of responsibility and in 2013, he was appointed as the Deputy Director, Centre for Research Development, an in-house training unit of the university. He oversaw the research component of the Unit and in 2016, he was appointed Director, School of Preliminary Studies in charge of the remedial programme and now the new programme called Joint Universities Preliminary Examinations Board (JUPEB).

Prof. Akanbi always had a desire to study Law, probably influenced remotely by his interaction with, and observation of his father, a lawyer and later a judge. Law was therefore his first choice of course in the university, *ab initio*. Even though his parents tried to enroll him in the Nigerian Military School, Zaria, his path as a lawyer seemed set and he ended up in a federal government college (for his secondary school education) rather than the military school, which could have changed his trajectory in life. His resolution to study law was because he wanted to be an advocate, toeing the line of great lawyers like his father, Gani Fawehimi and Rotimi Williams. However, during his bachelor's degree studies, he met lecturers like Prof. Popoola, who brought a shine to academics, and this spurred his interest in being an academic himself. So enthralled was he by the idea of getting into lecturing that by the time he was done with Law School, he was torn between going into law practice or into academics. He, however, went ahead to do his postgraduate studies, which enabled him to take up the opportunity for lecturing at the University of Ilorin. It was not an easy thing to give up his first love of law practice, so he combined both the practice and teaching at the university.

Given the challenges of practice, combining it with lecturing was not easy. So, even though he was running a law firm, he gave more to academics, and this probably, enhanced his quick rise in the academics. He enjoyed lecturing and impacting the students he taught. He therefore had no regrets about being in the academics. The satisfaction he got from seeing the students he trained over the 20 years plus of being an academic is gratifying and gives him a sense of fulfilment as some of these students have been nominated to the bar while some others have become professors and associate professors.

During his active years as a lecturer, Prof. Akanbi took on several positions of responsibility, from level advisership, to being an examination officer, a sub-dean, a coordinator, acting head of department, and acting dean of faculty. He gladly took up these administrative roles as he believed that the academia was not just a place for researching and publishing but an avenue to serve. These responsibilities, however, did not take away from his dedication to his teaching and research as he published numerous papers in reputable outlets, both in and outside of Nigeria. All these paved the way for his seeming swift ride to professorship.

CHAPTER THIRTEEN



ARBITRABILITY OF INTELLECTUAL PROPERTY DISPUTES: A CUE FROM GLOBAL LEGAL APPROACHES

By

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ABSTRACT

The paper is an attempt to undertake a mapping of the literature and legal provisions concerning the approaches adopted towards settlement of intellectual property disputes by means of arbitration. The main point of departure is that intellectual property as an embodiment of legal devices for incentivising creativity and innovations is endowed with vast opportunities to generate businesses and investments, the same as it is greatly amenable to threats of disputes arising from such IP transactions as licensing and transfer agreements, cases of infringements, challenge of ownership and even validity of the IPR itself. Considering the growing interests in the use of arbitration for settlement of disputes, and the possibility of IP disputes as a candidate for such purpose, there is apparent prospect for a friendly interface. However, the reality of their individual characteristics raises a question about the imminent tension that would manifest in the relationship between arbitration, which is a private means of settlement and intellectual property, which is essentially created by public authority to promote creativity and public welfare. Anecdotal evidence has revealed that legislation presents good opportunities which can be harnessed to resolve the challenges.

Keywords: Arbitration, Arbitrability, Disputes, Intellectual Property, Private Mode; Public Policy

Introduction

Both arbitration as a means of dispute resolution and intellectual property protection are matters ordinarily governed by legislation. As common IP devices are created by corresponding enactments, legislation has established modes of settlement for disputes that might arise in connection to the subject. No doubt, the different aspects of intellectual property hold great potential for disputation, there are also many modes of settling disputes recognised by law. The traditional mode being litigation, other recognised modes include arbitration.

IP is the broad term used to describe the group of legal devices created for the protection of intangible and creative products. The specific legal devices covered by the term include copyright, patent, trademark and industrial designs. As a truism, no form of intellectual property exists without having been created by legislation. This characteristic differentiates the various forms of intellectual property from other forms of property such as real property and chattels. Hence, the enactment of such statutes as the Copyright Act,³⁹⁹ Patent and Design Act,⁴⁰⁰ and Trademark Act.⁴⁰¹

Besides establishing the devices, the legislation defines the conditions for their validity⁴⁰² and confers rights on creators of intangible products⁴⁰³ with opportunities for economic exploitation of the rights through licensing and assignments.⁴⁰⁴ Further protection, in the form of moral right is also vested in the IP holders, particularly to uphold authorial dignity and sensitivity in copyright works.⁴⁰⁵

On the flipside of the protection and related opportunities lies a huge potential for disputes. For instance, claims to invention, copyright or trademark may be disputed by rival creators, as even the validity of protected items may be challenged. Similarly, disputes can be sparked by breach of licensing agreements, transfers or assignment of rights and infringement of property rights.

Accordingly, the question arises whether such disputes must necessarily be referred to litigation, being the traditional mode of dispute resolution, or they are equally capable of reference to arbitration as the trendy and widely acceptable alternative. The question cannot be effectively answered without a clear understanding of the nature of arbitration and its limitations in so far as intellectual property rights is concerned. The chapter contribution is intended to undertake a mapping of the approaches to the settlement of intellectual property disputes by arbitration in the context of the literature and legal provisions. The study found that palpable uncertainty has pervaded the legal landscape on arbitrability of intellectual property dispute but there is an increasing drift towards a clear definition of pro-arbitration stance in some national legislation across the globe. Further, it notes that there lies a cue for ambivalent nations particularly Nigeria about the way to go for the purpose of providing an

³⁹⁹ Copyright Act, No.8 of 2022.

⁴⁰⁰ No. 60 of 1971, section 2, No. section 5.

⁴⁰¹ No. 29 of 1965.

⁴⁰² Ibid, section 9; Copyright Act, 2022, section 2 (2) (a & b); Patent and Design, Act, 1971, section 1.

⁴⁰³ Ibid, section 2.

⁴⁰⁴ Trade Mark, 1965, section 26; Copyright Act, 2022, section 9; Patent and Design Act, 1970, section 10.

⁴⁰⁵ Copyright Act, section 14.

enabling environment for commercial arbitration and in order to be able to effectively catch up with the rest of the world.

Nature of Arbitration

Arbitration has been globally recognised as a credible alternative to litigation in the settlement of disputes. It is a form of adjudication whereby parties by agreement submit their disputes to private individuals with powers to make final determination of the disputes including possibility of direct enforcement like an ordinary court.⁴⁰⁶ Its basic features include the concurrence of parties in submitting their dispute to arbitration, confidentiality of the process, requirement for impartiality of the arbitrators, and finality of awards barring any appeal except on grounds allowed to set aside the awards.⁴⁰⁷ It is reputed as conferring several great comparative advantages including paying total attention to substance (as opposed to technicalities), speedy resolution, private hearing, and resolution by experts. However, only matters within the lawful scope of arbitration are arbitrable. The question then is how to determine matters within the scope of arbitration, otherwise referred to as arbitrability. The approach for delineating matters within the scope of arbitration will be focused on in the next section.

Arbitrability

The concept of arbitrability relates to the determination of disputes capable or incapable of reference to arbitration.⁴⁰⁸ In other words, it has to do with what dispute can or cannot be lawfully submitted to arbitration for resolution. Scholars have suggested that there are two approaches to defining arbitrability, the narrow and loose conceptions. Whilst the narrow approach restricts the definition of arbitrability to only such "subjects as are legally capable of arbitration",⁴⁰⁹ the loose or broad approach extends the definition to submissions which do not have the consent of parties, including absence of contract to submit to arbitration.⁴¹⁰ The two approaches to the definition of arbitrability do not negate the requirement for compliance with objective or subjective arbitrability. By objective arbitrability, reference is made to the delineation of the scope of subject matters eligible for arbitration which is almost always by national legislation.⁴¹¹

⁴⁰⁶ Bernard G. Poznanski, "The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration," *Journal International Arbitration*, (1987) vol.4, page 71.

⁴⁰⁷ Patrik Lindfors, "Arbitration in Finland – Characteristic Features Currently under Discussion," *Nordic Journal of Commercial Law*, 2003, no1, available online at <https://doi.org/10.5278/ojs.njcl.v0i1.3077>, visited 11th December, 2023.

⁴⁰⁸ Julam D M Lew, Loukas A Mistelis and Stefan M Kroll, *Comparative International Commercial Arbitration*, Kluwer Law International, 32 (2003).

⁴⁰⁹ August Reinisch, "How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?" *Journal of International Dispute Settlement*, Volume 2, Issue 1, February 2011, Pages 115-174, <https://doi.org/10.1093/jnlids/ldq016>, accessed 2nd December, 2023.

⁴¹⁰ Arbitration and Mediation Act, 2023, section 2.

⁴¹¹ Krešimir Sajko, "On Arbitrability in Comparative Arbitration - An Outline," *zbornik PFZ*, 60, (5) 961-969 (2010) available online at 01 Sajko.indd (core.ac.uk), retrieved on 22nd November, 2023.

On the other hand, subjective arbitrability relates to capacity of subjects to conclude or enter into arbitration agreement or participate in arbitration,⁴¹² as for example where there is a legal prohibition or limitation against an entity submitting to arbitration.⁴¹³ Since this debate concerns the capacity of a subject matter but not of a party to submit to arbitration, compliance with objective arbitrability is therefore the point in issue. It is entirely within the law of each country to determine which subject matter falls within the realm of exclusive adjudication by the courts and which can be submitted to arbitration. It has been observed that the extent to which subject matters are classified as falling within the exclusive jurisdiction of the courts depends on "political, social and economic consideration," and the nation's general attitude to arbitration.⁴¹⁴

Others have viewed that arbitrability relates to public policy limitations upon arbitration as a method of settling disputes.⁴¹⁵ This derives from the power of each nation state, as a sovereign, to decide, in accordance with its own economic and social policy, which disputes should be resolved by the courts, or other state authorities or in fact, by private arbitration process. For international cases, arbitrability involves the balancing of competing policy considerations. In this connection, the arbitrability of disputes arising in certain areas of the law including intellectual property have continued to generate controversy. Accordingly, the next section will present the debate surrounding the arbitrability of intellectual property disputes in the context of the narrow and loose perception of arbitrability and particularly the objective arbitrability for its direct relevance to the debate.

Arbitrability of Intellectual Property Disputes

The basic cause of concern about the eligibility of intellectual property disputes as a candidate for resolution on the arbitration platform is the treatment of the point or lack of it in the relevant national legislation. In this regard, a study has classified the different approaches adopted by national laws into four, namely: (i) outright and whole denial of arbitrability to IP related disputes, (ii) conditional denial of arbitrability on ground of public policy, (iii) grant of full arbitrability to IP disputes, and (iv) uncertainty regarding the issue.⁴¹⁶

The fourth approach appears to represent the class of the Nigerian law. The Nigerian legislation neither contains express definition of arbitrability nor makes provision concerning the arbitrability of intellectual property. According to the relevant statute, all disputes relating to commercial matters are generally arbitrable in Nigeria.⁴¹⁷ It is established that commercial disputes can arise from all relationships of commercial nature, and

⁴¹² Ibid.

⁴¹³ Ibid.

⁴¹⁴ Rosenthal, David. IP and IT Arbitration in Switzerland. In: ARROYO, Manuel. Arbitration in Switzerland: The Practitioner's Guide. 2nd edition. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2018, p. 1134. 26.

⁴¹⁵ Akanbi, M. M., "Contending without being Contentious: Arbitration, Arbitrators, and Arbitrability," being text of the 152nd Inaugural Lecture Series of the University of Ilorin, presented on 13th November, 2014, 22.

⁴¹⁶ International Chamber of Commerce. Final Report on Intellectual Property Disputes and Arbitration, adopted by the Commission on International Arbitration at its meeting of 28 October 1997, page available ICC Digital Library (iccwbo.org), visited on 5th November, 2023.

⁴¹⁷ See Arbitration and Mediation Act, 2023, section 1(5).

intellectual property disputes being ordinarily of the stated category, particularly due to its global treatment as trade related,⁴¹⁸ ought not to be an exception. However, the reality of the debates concerning arbitrability of intellectual property does not seem to suggest that the matter is as simple and straight forward. Apart from ordinary commercial disputes which may arise from intellectual property trading transactions such as licensing, transfer, investments and exploitation agreements, the Nigerian legislation presents certain challenges.

For instance, Section 65 of the Act excludes certain disputes the submission to arbitration of which has been totally prevented, and such as has been restricted by some other laws.⁴¹⁹ In addition, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)⁴²⁰ which the Act makes applicable for enforcement of international arbitral awards in Nigeria, provides circumstances in which such enforcement may be refused. the first is where the subject matter of the difference is not capable of submission to arbitration under the domestic law, and second, where the recognition and enforcement of the award would be contrary to the public policy of that country.⁴²¹

As a result of the challenge presented by the foregoing provisions, four reasons have been adduced for in-arbitrability of intellectual property disputes. First, it is reasoned that arbitration of intellectual property disputes is contrary to public policy on ground of incompatibility of interparty effects of arbitration with the effect of IP rights which are available against the whole world. Although reference to public policy as a ground for removing a dispute from the scope of arbitrability rekindles the controversial thought about public policy being "an unruly horse, which once astride it, you will never know where it will carry you,"⁴²² it has otherwise been hailed as necessary to ensure that basic and fundamental value of a society are not subverted. The further problem is that it is not static, it varies from one nation to another, and time to time.⁴²³ For instance, the thrust of Nigeria public policy on intellectual property has been found to include protection of an individual's right to their creativity and for promoting innovation and creativity.⁴²⁴ This alone suggests that the Nigerian public policy on IP involves a delicate blend of private rights and public interest for prevention of IP infringement.

One of the most common justifications for the existence of IP law lies in the fact that it induces desirable activities and provides creators with the incentive to come up with new

⁴¹⁸ WTO TRIPs Agreement, available online at WTO | intellectual property (TRIPS) - agreement text - contents, visited 11th December, 2023.

⁴¹⁹ Arbitration and Mediation Act, 2023, note 10.

⁴²⁰ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

⁴²¹ United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Article V(1&2).

⁴²² 13 Richardson v Mellish (1824) 2 Bing 229

⁴²³ Bradon Kain & Douglas Yoshida, "The Doctrine of Public Policy in Canadian Contract Law," (2007) Annual Review of Civil Litigation 1, 2-5,

⁴²⁴ Federal Republic of Nigeria, National Intellectual Property Policy and Strategy, 2022 available online at <https://youngafricanpolicyresearch.org/final-draft-of-nigerias-national-intellectual-property-policy-and-strategy-2022>.

intangible goods, which are desirable for society. The protection granted is not only against competition by potential infringers, it also provides a service to the public. Using the example of patent, the society pays for the advantage provided by inventors by granting a limited monopoly over their invention. For this reason, the state removes the relevant subject matter from public domain and grants the control over such subject matter to individuals. The argument therefore goes that arbitration, being a private mode of settlement, is not suitable for resolving questions challenging the validity of IP, which arise from a dispute relating to contractual aspect of intellectual property transaction. It is argued that the question to be decided involves public policy which can only be properly disposed by a public authority.⁴²⁵

The second reason in support of argument against arbitrability of intellectual property dispute relates to the nature of some associated rights which are considered non-economical and not capable of being disposed for commercial purposes. These refer to moral rights of the author, as it affects their interests and dignity.⁴²⁶ The rights include the right of attribution, the right to object to false attribution, the right of integrity and other non-pecuniary rights of the author. The point emphasised is that arbitration is focused on commercial disputes, and moral right not being economic right is outside the scope of arbitration.⁴²⁷

The third reason advanced against arbitrability of IPR relates to the exclusive jurisdiction of state bodies in deciding upon the questions of validity of IPR. The argument holds that the grant of IPR is an act of sovereignty, and therefore any dispute touching on it ought to be resolved by sovereign authority. This may be illustrated by an infringement of IPR which constitutes a criminal offence. Similarly, opponents in Nigeria have associated the complications surrounding the arbitrability of intellectual property as having to do with certain legal framework or provisions. Example has been cited of the provision of Section 251(1)(f)⁴²⁸ whereby exclusive jurisdiction has been conferred on the Federal High Court to exercise jurisdiction over any federal enactment relating to copyright, patent, designs, trademark, and passing off, comes along with an interpretive challenge.

As a counter, the proponents of arbitrability maintain that the argument of public policy is not sufficient to warrant a derogation of the autonomy of parties. Further, they posit that public interest will be better served when the intellectual property rights holders are able to fairly and efficiently enforce their rights against infringements and obtain due reliefs. Secondly, it has been pointed out that approaches differ across jurisdictions regarding the economic and financial standing of moral right. For instance, moral right can be effectively waived in common law countries generally to further economic interests or commercial aspect of intellectual property. As regards exclusive jurisdiction of the Federal High Court, other scholars have expressed opinion that rather than remove intellectual property from the

⁴²⁵ Kojo Yelapaala, "Restraining the Unruly Horse: The Use of Public Policy in Arbitration," *Interstate and International to Transnational Law*, (1989), 379.

⁴²⁶ Note 7 above.

⁴²⁷ *Ibid.*

⁴²⁸ FRN, Constitution of the Federal Republic of Nigeria, 1999 (as Amended).

scope of arbitration, the provision merely delineates the jurisdiction of the Federal High Court from that of the State High Courts.⁴²⁹

Whatever is the value of the foregoing arguments and counter arguments, arbitration has provided the needed alternative to litigation for intellectual property holders as evident in intellectual property transaction agreements which predominantly have arbitration clause. In addition, there are indications that relevant legislation in other climes has tackled the issues of arbitrability of intellectual property headlong, as will be examined in the next section of this chapter.

Treatment of Arbitrability in Some Jurisdictions

While some jurisdictions are still stuck to their old-fashioned restrictive approaches to treatment of arbitrability concerning intellectual property, very many others have jettisoned that and adopted a positive and friendly consideration for the subject. A comprehensive report by the International Chamber of Commerce Commission on arbitrability of intellectual property made a scoping survey of legal approaches on the subject across selected nations of the world.⁴³⁰ Countries in the former category include Latin America, South Korea, South Africa and Israel. For instance, in the Republic of Korea, intellectual property rights are not always recognised as commercial matters, similarly, section 18(1) of the South African Patents Act, 1978 provides that "no tribunal other than the commissioner shall have jurisdiction in the first instance to hear and decide any proceeding ... relating to any matter under this Act".

South Africa has new arbitration legislation in process but that will not affect the arbitrability issue. Also, in Israel, the absence of specific legislation on intellectual property rights, as well as the absence of case law concerning this issue, has led scholars to conclude that the adjudication of intellectual property rights is not suitable for arbitration. However, disputes relating to the amounts due arising out of the use of intellectual property rights can be determined by arbitrators as this will not involve an examination of the validity of the right itself.

On the other hand, an approach more reflective of party autonomy has been taken in Belgium, England, Germany, France, Ireland, Italy, Japan, Spain, Switzerland, and United States as shown below:

Belgium

The controversy of arbitrability of disputes involving patents has been resolved by the Belgian Patent Act, 1984. Disputes concerning the ownership, validity and infringement of patents and/or patent licensing agreements (other than compulsory licensing agreements) can be validly submitted to arbitration. Similarly, disputes concerning trademarks, drawings and models are also arbitrable under the law. Although the legislation relevant to trademarks, and drawings and models refer in their relevant provisions only to courts, legal commentators agree that these provisions do not affect the arbitrability of any such disputes.

⁴²⁹ M.M. Akanbi, "Contending without being Contentious: Arbitration, Arbitrators and Arbitrability", 152nd Inaugural Lecture Series, University of Ilorin, 2014, page 21.

⁴³⁰ International Chamber of Commerce Commission, "Final Report on Intellectual Property Disputes and Arbitration," ICC International Court of Arbitration Bulletin vol.9/No.1.

since the Acts only aim to prevent administrative agencies from involving themselves in this area.

England

Until recently, there has never been a special provision for intellectual property disputes in England. The Patents Act 1977 provides for arbitration in certain circumstances. First, where an application for a compulsory patent licence, under sections 48 to 51 of the Act is opposed, the Comptroller General of Patents may order the proceedings, or any question or issue of fact arising in them, to be referred to an arbitrator under section 52(3) of the Act. Moreover, the right of appeal to the Patents Court may be excluded by agreement of the parties. Secondly, when a dispute arises under section 58 of the Act, the court may refer a part or the whole of the issue to arbitration. There is no rule of legal principle or provision under the English law curtailing an intellectual property dispute should not be referred to arbitration. For example, an English Court stayed court proceedings in favour of arbitration in a dispute arising out of a patent licence agreement. However, the arbitrators can only bind the parties before them.

Nonetheless, questions of title to, and infringement of, intellectual property may raise special considerations because an arbitration award is a decision in personam, only binding the parties actually involved in the arbitration, whereas intellectual property rights can bind the whole world. However, given that it is well settled in England that disputes relating to title to real property may be arbitrated, and that awards in such cases bind not only the parties but (by section 16 of the Arbitration Act 1950 and section 58(1) of the Arbitration Act 1996) those 'claiming under' a party to the arbitration (but not third parties), it seems likely that intellectual property arbitration awards would be accorded the same effect. There is no reason to suppose that a foreign award dealing with intellectual property would not be recognised or enforced in England under the New York Convention of 1958. Since the subject matter is capable of settlement by arbitration under English law, it is unlikely that recognition or enforcement of such an award would be contrary to the public policy of the UK.

France

France, Article 35 of the Trade Marks Act states that trade mark agreements can be the subject matter of arbitration in accordance with Articles 2059 and 2060 of the Civil Code. As for the subsequent Intellectual Property Code (in force as of 1 July 1992), it provides that its jurisdictional rules are no obstacle to the settlement of intellectual property disputes by arbitration. Thus, the general principle is that intellectual property disputes may be settled through arbitration, subject to the qualification that the validity of a patent cannot be submitted to arbitration. In the 1989 SDP v. DPF case, the Paris Court of Appeal ruled that 'the contractual and private nature of arbitration prevents the arbitral jurisdiction [from being available] in matters governed by mandatory provisions with a public policy dimension, this being a prerogative of the State Courts.'

Germany

According to the new Article 1030 German Code of Civil Procedure ('ZPO') any right to which a commercial or financial value is attached may be submitted to arbitration.

This includes of course any intellectual property right. However, a patent is a right which does not flow from party autonomy, but which is issued by a state authority. Once a patent is issued, it is valid against everybody. If the validity of a patent is disputed between the patent holder and a third party in arbitration, the arbitral tribunal may not itself annul the patent. However, it may decide that the patent holder has no right under the patent and has to consent to have the patent declared null and void by the competent patent authority. In enforcement proceedings the competent patent authority then has to declare the patent null and void, the arbitral award serving as the application of the patent holder.

Ireland

In Ireland, disputes which are within the competence of the parties are *prima facie* arbitrable. This would include disputes relating to the respective rights and obligations of parties under contracts and licences and would include claims in tort. Although the issue has not come before the courts in Ireland, it is generally accepted that certain subjects are not within the competence of an arbitral tribunal. This would include the validity of patents, the validity of trademark and service mark registrations and the validity of design registrations. There are a number of reasons for this view. These grants and registrations are acts of a third party, namely the government, which would not be a party to the reference. Secondly, these grants and registrations are not within the competence of the parties to resolve themselves without involving third parties including the public. Thirdly, it would most probably be contrary to public policy to have a private tribunal interfere with a decision of the sovereign power, particularly where this involved the entitlement to a monopoly right.

Italy

Article 806 of the Italian Civil Procedure Code states that all 'disputes which may not be the subject of a settlement' cannot be submitted to arbitration. In 1977, the Italian Supreme Court ruled that it followed from this principle of law that a controversy about the validity of an internationally registered trademark with effect in Italy had to be retained by the Italian courts and could not be subject to arbitration. There is a consensus, however, that arbitration of patent and/or trademark validity or forfeiture is admissible. Accordingly, disputes relating to termination and breach of a licence or assignment of a trademark or patent can be submitted to arbitration so long as it is not directly connected to the validity in the realm of intellectual property rights. All other disputes involving intellectual property can be referred to and settled by arbitration.

Japan

Under Japanese law, any dispute which can be disposed of by compromise between private parties can be referred to arbitration. Article 78 of the Japanese Code of Civil Procedure (Law No. 29 of 1890) provides that 'an agreement for submission of a controversy to one or more arbitrators shall be valid insofar as the parties are entitled to effect a compromise regarding the subject matter in dispute'. According to the AIPPI report, disputes concerning intellectual property rights are, however, rarely referred to arbitration. Disputes regarding the cancellation or alteration of a right dependent upon grant or registration by a public authority cannot be validly submitted to arbitration. Thus, an arbitrator's decision as to the validity of patents, utility models, design rights and trademarks cannot be enforced.

Spain

In Spain, Article 1 of the Arbitration Act 1988 states that the parties may enter into an arbitration agreement, provided that the subject matter of the arbitration may lawfully be compromised by the parties. The Arbitration Act does not make explicit provision for intellectual property disputes, but arbitration does in principle appear to be available, subject to two qualifications. The validity of registry entries is within the exclusive jurisdiction of the courts. Thus, the validity of the patents, trademarks and the like (but not copyright) may not be the subject of arbitration; and the jurisdiction of the Culture Ministry's Arbitration Commission (established under the Intellectual Property Act 1987) in certain copyright cases may not be excluded.

Switzerland

In particular, according to Troller, 'the federal trademark and patent registrar will strike out a patent or trademark pursuant to an arbitration award. Thus, in 1976 the Federal Office for Industrial Property ruled that, 'since arbitral tribunals had the power to decide whether an industrial property right was validly registered, the Federal Office was going to execute their decision, upon the condition, however, that the arbitral award had been declared enforceable by the competent cantonal authority. Article 195 of the Swiss Private International Law Act lays down rules for determining enforceability.

United States

Under 35 USC, Congress has expressly provided for the voluntary, binding arbitration of patent validity, enforceability and infringement issues. Accordingly, virtually all issues concerning United States patents are properly subject to binding arbitration. However, while an arbitration clause may permit resolution of patent issues by way of binding arbitration in lieu of litigation in a United States Court, under some circumstances it may not do so in place of proceedings before a United States administrative agency. Regarding copyright issues, the U.S. Congress has not expressly authorised arbitration. Nevertheless, the courts have confirmed that copyright licence agreements may properly provide for binding arbitration.

Trademark issues are also arbitrable in principle. Their arbitrability in particular cases depends upon how generously the courts choose to interpret the arbitration agreement and related statutes. More generally, recent decisions concerning the arbitrability of issues under Federal antitrust and securities laws (such as *Mitsubishi Motors v. Soles Chrysler-Plymouth* and *Shearson/American Express Inc. v. McMahon*) are evidence of a trend in favour of the arbitrability of intellectual property issues. In view of this case law, it would appear unlikely that in the United States, decisions regarding intellectual property will hold public policy as sufficient justification to preclude arbitration of such disputes.

Hong Kong

The Hong Kong Arbitration Ordinance⁴¹¹ was amended in 2018 to provide that all IP disputes are arbitrable in Hong Kong. Intellectual property has received a very broad

definition under the Ordinance to include all registered and unregistered rights, and the scope of a dispute has been defined to include disputes that are incidental to the main dispute. The Ordinance at Section 103D (4) provides that an IPR dispute may be resolved by arbitration even if a specified entity in Hong Kong or elsewhere is given jurisdiction to deal with the dispute. Thus, a Hong Kong seated tribunal may decide a dispute over the validity of IP rights even if the law of another country provides that another body (such as a patent office) has exclusive jurisdiction to deal with validity. Equally important is the provision that it is not contrary to public policy to enforce arbitral awards involving intellectual property.

Singapore

The Intellectual Property (Dispute Resolution) Act was enacted in 2019 to clarify that IP disputes are capable of settlement by arbitration as between the parties to the IP disputes. The scope of such disputes has been defined to include a dispute over the enforceability, infringement, subsistence, validity, ownership, scope, duration or any other aspect of intellectual property right as defined under the Arbitration Act⁴³² and International Arbitration Act.⁴³³ The list also includes a dispute over a transaction in respect of an IPR, and a dispute over any compensation payable for an IPR. Meanwhile, a reference under the International Arbitration Act to IPR is a reference to the subject matter whether or not it is registered, or subsists, in Singapore.

Conclusion

The chapter examined the legal rules on the applicability of arbitration to settlement of intellectual property disputes. To put the matter in proper perspective, it takes into account the characteristics of both arbitration and intellectual property and analysed all in the context of relevant legal provisions and contribution of scholars. The applicable law to arbitration in Nigeria, like several of its counterpart in other jurisdictions, is focused on dispute in commercial matters. Whilst that enough qualify many IP disputes for arbitration, some were erroneously disallowed or mis-adjudged as ineligible. This derive from provisions of most legislation which were previously hostile towards arbitrability of intellectual property probably due to historic link between the latter and public policy.

Several of the arguments and reasons advanced against arbitrability of intellectual no longer appear tenable in the light of recent developments as adduced in the body of the work. In fact, the trend around the globe is that national legislation now makes clear provision on arbitrability of intellectual property to make their stance known on the point. In fact, it is surprising that the several developments that recently happened in connection with arbitrability of intellectual property, as shown by the legislation of Hong Kong, Singapore and even England, did not have an influence on the 2023 amendments to the Nigeria Arbitration and Mediation. There is therefore an urgent need to remove any such uncertainty remaining in the Nigerian statute books, in order to engender the transformation of her arbitration sector.

⁴³¹E.R.1 of 2018.

⁴³²Cap 10 ("AA").

⁴³³Cap 143A (IAA).