"D'Ordre Public" Laws and Public Policy as Defenses to Arbitral Awards: Conflict Between the Public Procurement Act and Arbitration and Mediation Act

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ABSTRACT

In combating corruption and lack of accountability in procurement, contract awards, public finance and administration, Nigeria had, hitherto, adopted an ineffective 'Tender Board' approach characterised by detection, apprehension, prosecution and punishment of offenders. However, since 2007, Nigeria has adopted reformative rules that are founded on 'step-by-step vetting and tendering, quotations, proposals, dialogues, negotiations, procurement and agreement, aimed at preventing corruption and lack of accountability. On 4th June 2007, Nigeria enacted a new legislation on public procurement and contract award procedures—the Public Procurement Act of 2007 (PPA 2007). Similarly, arbitration has gradually been accepted as an alternative mode of settling business and commercial disputes in Nigeria, and it is instructive that the PPA requires that all procurement contracts shall contain provisions for arbitral proceedings as the primary forms of dispute resolution. However, the application of the Arbitration and Mediation Act of 2023 (Arbitration Act 2023) to disputes involving an arbitral award to enforce a procurement or contract award which violates the Nigerian public procumbent laws is the main focus of this Paper. The Paper examines the application of *"D'ordre Public"* laws and public policy rules as defenses against enforcing arbitral awards which violate PPA 2007, by reviewing the conflict between the provisions of PPA 2007 *viz-a-viz* those under the Arbitration Act (2023) in Nigeria. Also, the Paper carries out a comparative review of the 2021 Judgment of the Judicial Committee of the Privy Council in Mauritius—*Betamax v. STC,* [2021] UKPC 14. Therefore, using all applicable statutes and decisions of the Nigeria superior courts, this Paper examines the history, philosophy and global perspectives regarding arbitration and public procurement laws on disputes. The Paper submits that while arbitration and mediation, as alternative methods of dispute resolution, should be sustained towards eradicating elongated and expensive litigation, the underlying public interest and policy aimed at combating corruption, maladministration and lack of accountability must be entrenched over and above arbitral awards. The Paper also recommends that it accords with the spirit of law, business and justice to allow mediation and/or arbitration clauses involving the PPA 2007.

1. Introduction

The research method adopted in this Paper is to review all applicable statutes and judicial decisions superior courts on *"D'ordre Public"* laws and public policy defenses in the conflicts between the provisions of Public Procurement Act of 2007 (PPA 2007)[1] and the Arbitration

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[1]. Public Procurement Act, No. 14 A205 - 249 2007 Vol. 94, Government Notice No. 44 of 2007. (PPA 2007).

and Mediation Act of 2023 (Arbitration Act 2023)[2] in Nigeria. The PPA 2007 was enacted in order to address the issue of corruption and excesses of government and business activities in the process of procurement and contract awards. The issue of corruption and irregularities, have been the major challenge in the procurement sector.[3] Correspondingly, the field of arbitration and mediation has witnessed significant developments over the years, with legislative changes often reflecting evolving global practices. Nigeria, in an attempt to get up to speed with the evolution of the global best practices in the arbitration and mediation ecosystem, enacted the Arbitration Act 2023 on 26th May 2023.[4] The repeal of the erstwhile 35-year-old ACA 1988 by the new Arbitration Act 2023 is a significant legal transition.[5] However, this transition goes beyond mere repeal, as the 2023 Act addresses and improves upon the weaknesses and inadequacies present in the defunct ACA 1988, the Arbitration Act 2023 achieving this by incorporating numerous provisions from the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration of 1985, amended in 2006 (UNCITRAL2006) [6] and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Mediation of o1985, amended in 2018 (UNCITRAL 2018),[7] aligning Nigeria's arbitration and mediation framework with international standards, and, by reinforcing Nigeria's status as a prominent commercial hub while also demonstrating the nation's unwavering commitment to creating a conducive environment for alternative dispute resolution in accordance with contemporary global norms.[8]

The Paper finds that Nigerian superior courts may set aside arbitration awards on grounds that the enforcement of the underlying public procurement contract was in violation, flagrant and concrete breach of the PPA 2007, and, therefore, the arbitration award was a

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[2]. Arbitration and Mediation Act of 2023 (Arbitration Act 2023). This extant Arbitration Act 2003 has repealed and replaced the Arbitration and Conciliation Act, Cap A18 Laws of the Federation of Nigeria of 1988 (LFN) 2004 (ACA 1988) which was in force before the UNCITRAL Model Law on International Commercial Arbitration of 1985, amended in 2006, United Nations Document No. A/40/17, annex I). (UNCITRAL2006), the UNCITRAL Model Law on International Commercial Conciliation and Mediation of 1985, amended in 2018, United Nations Document No. A/40/17, annex I). (UNCITRAL 2018) etc. Thus, the New Act merely adopted these Model laws thereby adopting international best practices.

[3]. Hassan Bala, "Public Procurement Act and Its Application for Practice," (2021) Vol. 6 No. 1 *University of Maiduguri Journal of Private and Property (UJPPL)* 71. (Bala).

[4]. Tiwalade Aderoju, "The Nigerian Arbitration and Mediation Act 2023: A comparison with the Arbitration and Conciliation Act 2004 and global practices," *Olympus Solicitors and Advocates Newsletter, Lagos*. Wednesday 20 December 2023. Available at: https://www.ibanet.org/the-nigerian-arbitration-and-mediation-act-2023. Accessed on 17th August 2024. (Adepoju).

[5]. Bala (n3).

[6]. UNCITRAL2006 (n2).

[7]. UNCITRAL2018 (n2).

[8]. Bala (n3).

violation of the Nigerian public policy and interest.[9] The Paper further finds that the provisions of PPA 2007 are very wide and that they take into consideration various modern international Alternative Dispute Resolution (ADR)[10] and public procurement conventions and protocols providing for updated global contemporary rules. The Paper concludes that while accountability may still be lacking in Nigeria, due to a pervading culture of corruption, the courts must adhere to the general principle of the law that an illegal contract will not be upheld or enforced by courts as founded on the public policy embodied in the legal maxims—*in pari delicto, potior est conditio defendentis* and *ex-trupi causa non oritur actio*, that is, a party who is himself guilty of a wrongful action or omission, does not have a right to enforce performance of the same agreement that is founded on a consideration that is contrary to public interest or policy." Therefore, an award arising from an illegal procurement contract may be set aside on the grounds of public policy.[11] This position is similar to the provisions of Section 55(1), (2) and (3)(a)&(b) of the Arbitration Act 2023 as well as to Section 48(b)(ii) of the repealed ACA 1988[12] and Article 34(2)(b)(2) of UNCITRAL 2006. The Paper recommends that Nigerian courts, while applying Section 55(3)(ii) of Arbitration Act 2023, must adopt positions that accord with international best practices, i.e., from Nigerian case law on public policy as laid down by the Nigerian Supreme Court in *Kano State Urban Development Board v. Fanz Construction Company Limited*,[13] i.e., that Nigerian courts must adopt a restrictive approach in applying the public policy ground for setting aside or refusing the enforcement of an arbitral award, since illegal contracts are contrary to public policy, and that a contract is illegal where it violates mandatory provisions of statute.[14]

the mandatory nature of PPA 2007, which was enacted to protect public interest in the procurement of goods and services and which sanctions the contravention of its provisions, Nigerian courts must consider a contract executed in breach of PPA 2007 in a similar manner as the Mauritius Supreme Court did in *Betamax Ltd. v. State Trading Corporation, (Betamax*

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[9]. Chizaram Uzodinma, "Breach of the Public Procurement Act as a Public Policy Defence to the Enforcement of an Arbitral Award in Nigeria," 26 Aug 2019. Available at: https://afaa.ngo/page-18097/7849102. Accessed 24th August 2024. (Uzodinma); See, also, N.B. Paray, S. Dabee, and S.P. Maxime, "The Supreme Court of Mauritius Sets Aside Award on Grounds of Breach of Domestic Public Policy," in *Lexology*, 6 June 2019. Available at: https://www.lexology.com/library/detail.aspx?g=dbac875b-12f7-44d9-b921-f2fd0e8fe677. Accede 13th August 2024). (Paray, et.al.).

[10]. UNCITRAL 2006 (n2) at Article 34(2)(b)(2).

[11]. *Oguntuwase v. Jegede*, (2015) LCN/7923 (CA).

[12]. ACA 1988 (n2).

[13]. (1990) 4 NWLR (Pt 172) 1. (*Kano v. Fanz*).

[14]. Paray, et.al. (n9).

v. STC),[15] and set aside or refuse the enforcement of an award arising from such a contract on the public policy ground. Parties cannot agree to refer to arbitration disputes which involve matters that are *"d'ordre public."* The Nigerian PPA 2007 is a public procurement law, and, if the underlying arbitration agreement between the parties was in breach of PPA 2007, which is a law *"d'ordre public,"* both the contract and the arbitral award are unenforceable.

PPA 2007 embodies the public policy of Nigeria with regard to the principles and procedures applicable to public procurement, with PPA 2007 explicitly prohibiting the conclusion of major contracts by and with public bodies without the approval of the Bureau of Public Procurement (BPP) and the National Council on Public Procurement (NCPP),[16] the subject matter of the dispute raises matters relating to procurement process and alleged breaches of PPA 2007, which would be *"d'ordre public"* and would not therefore be capable of settlement by arbitration under Nigerian law.

Most businessmen are not saints, and would usually engage in corrupt practices in the pursuit of lucre and wealth from businesses and contracts obtained from public and governmental agencies. These contracts are usually compromised where no monitoring or supervisory oversight are present to ensure independence, integrity, and accountability in the award, performance, and payment for the contracts. Thus, in combating corruption and lack of accountability in public finance and administration, Nigeria had, hitherto, adopted an ineffective approach that was based on detection, apprehension, prosecution and punishment of the offenders. This old approach was laborious, lengthy, toothless, costly, time consuming, and highly unproductive. Even where the public funds were later recovered, galloping inflation and persistent degradation in value of the Nigerian local currency would make the entire efforts futile. However, since 2007, Nigeria has adopted reformative rules under the PPA 2007 which are founded on 'step-by-step vetting and tendering, quotations, proposals, dialogues, negotiations, procurement and agreement, aimed at prevention' of corruption and lack of accountability. The new legislation on public procurement and contract award procedures—the PPA 2007. Also, arbitration has gradually been accepted as an alternative mode of settling disputes among litigants in Nigeria.[17] Similarly, as part of the post-1999 democratic government's drive to entrench accountability, efficiency and transparency in the public procurement and contract award procedures, Nigeria has enacted the PPA 2007 as

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[15]. SIAC Case No. ARB084/15/KJ. Reversed by the Judgment of the Judicial Committee of the Privy Council [2021] UKPC 14 *(Betamax v. STC).*

[16]. PPA 2007 (n1) at Section 58.

[17]. See, generally, Olumide Obayemi, "Jurisdiction and Arbitration of Tax Disputes in Nigeria," (March 2018), Vol. 9(1) *The Gravitas Review of Business & Property Law* 120-135.

guidelines for the procurement and award of contracts.[18] And it is instructive that the PPA requires that all procurement contracts shall contain provisions for arbitral proceedings as the primary forms of dispute resolution.[19] However, the application of the Arbitration Act 2023 to dispute resolution mechanisms concerning public procurement in Nigeria has become a matter of perennial discuss.

Current President Bola Ahmed Tinubu-led administration has stated its commitment to diversify the sources of government revenues by significantly increasing Gross Domestic Product (GDP) and by making Nigeria more globally competitive, among others.[20] As noted by Abiola Sanni,[21] during Tinubu's inauguration on 29th May 2023, Tinubu pledged to address unfriendly business and fiscal policy measures and the multiplicity of taxes in Nigeria. According to Tinubu, "I have a message for our investors, local and foreign. Our government shall review all their complaints about multiple taxation and various anti-investment inhibitions."[22] Further, on 31st July 2023, Tinubu signed four (4) Executive Orders deferring and suspending the commencement of certain anti-investment laws on the basis that they were anti-business—a move that sent a positive signal that Tinubu has a better understanding of the business terrain.[23] Tinubu in his above inaugural address also stated his commitment to ensuring that the government's quest for improved revenue shall be based on best practices: "We shall not tax capital and investments. We shall tax the fruits, not the trees."[24] It follows, necessarily, that the innovations in investment laws in Nigeria, must spread and cover the mechanisms for resolving public procurement disputes, as well. As Nigeria continues to remove strictures, barriers, and impediments militating against the ease of doing business, Nigeria must keep up with globalisation and its demands by adopting the global trend which allows arbitration and mediation of public procurement disputes, thereby moving beyond short-term solutions in favour of more solid alternatives.[25]

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[18]. George Etomi, "Nigeria: New Guidelines on Procurement and Award of Contracts," (Etomi I).
[19] See S.16 (27) PPA
[20]. Aliyu Abdullahi, "Lead Debate on Nigeria Tax Academy (Establishment) Bill 2016 (SB 330)," Available at: http://placng.org/wp/wp-content/uploads/2017/11/Lead-Debate-on-Nigerian-Tax-Academy-Establishment-Bill-2016.pdf. Accessed 29th March, 2024; See, also, Olumide Obayemi, "Curbing Tax Avoidance Techniques Arising From Voluntary Pension Contributions" (December 2018), Vol. 9(4) *The Gravitas Review of Business & Property Law* 1-32.
[21]. Abiola Sanni, "Ten Reasons Why The Federal Government Should Reconsider The Expatriate Employment Levy," ASCO Newsletter, March 2024, at 2. (Sanni).
[22]. *Ibid.*
[23]. *Ibid.*
[24]. *Ibid.*
[25]. W.W. Park, "Arbitrability and Tax" in L. Mistelis & S. Brekoulajis (eds), *International and Comparative Perspectives* (Kluwer Law International, 2009) 179-205, at 200. (Park).

2. Historical Background, Context and Provisions of the Nigerian Public Procurement Act of 2007 and the Underlying Public Policy.

2.1. A Review of the Public Procurement Act of 2007

Generally, when the *grundnorm*[26] of a nation prescribes that its provisions are not "effective," then every government, whether weak or strong, that shares a common factor of impunity, must set pedestals that are notches above existing laws, and this would require a critical examination of the policy behind the laws.[27] Thus, a critical analysis of Nigeria's public procurement law and policy must dissect the law and also propose a synergy between law and policy, while attempting to explain how these would ensure the economic transformation in Nigeria, as both law and policy of procurement share the same objective, i.e., transforming the quality of life of the citizenry, even if the method of achieving this objective differ.[28]

'Public procurement' is defined as "the practice by which governments and their agencies acquire goods, works and services from contractors, as well as, from service providers."[29] The processes are mostly structured and guided by the domestic laws and regulations of each country, as well as, by other relevant international conventions, protocols, policies, treaties and bilateral or multilateral agreements.[30] For purposes of public procurement, these laws and regulations prescribe the types of procurement methods and the conditions under which they can be administered.[31] The purpose of public procurement has progressively moved from merely serving as primary means of ensuring due process in government's acquisition of public works, goods and service, as contemporary public procurement rules now serve as a critical means towards developing the socio-political

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[26]. A *grundnorm* is the fundamental principle or idea which serves as the driving force or guidng light behind a law, rule, or Constitution of a State, See, Hans Kelsen, *The Law of the United Nations—A Critical Analysis and its Fundamental Problems* 791 (1951); See also, Robert W. Tucker, *Hans Kelsen: Principles of International Law*, revised ed., (New York: Holt, Rinehart and Winston, Inc., 1967) at 323, 366-367; *The Corfu Channel Case (Merits) (UK versus. Alb.)*, 1949 ICJ 4 (Judgment of April 9); M. F. Higginbotham, "International Law, the Use of Force in Self-Defense, and the Southern African Conflict*,"* (1987) 25 *Columbian Journal of International Law*, 529, at 552.

[27]. Odunayo Bamodu, "Public Procurement Law and Policy in Nigeria," Being a paper presented at the National Conference on Law and Economic Transformation in Nigeria, July 11 – 13, 2012 held to celebrate the 50th year of the establishment of the Law Faculty of the Obafemi Awolowo University, Ile-Ife, Osun State, Nigeria, at 1. (Bamodu I).

[28]. *Ibid*.

[29]. Odunayo Bamodu, "Legal and Regulatory Aspects in Public Procurement," being a Paper presented at the Regional Course on Public Procurement Strategy and Contract Management, The Gambia, August 12 -16 2024; organised by the West African Institute for Financial and Economic Management., at 1. (Bamodu II).

[30]. *Ibid*.

[31]. Odunayo Bamodu, "Types of Procurement Methods," being a Paper presented at the Regional Course on Public Procurement Strategy and Contract Management, The Gambia, August 12 -16 2024; organised by the West African Institute for Financial and Economic Management., at 1. (Bamodu III).

structure of nations, such as building solid economic foundations and promoting international trade.[32] Thus, Nigerian jurist, Odunayo Bamodu, had noted that:

> While the words 'tendering' and 'bidding' may appear interchangeable, however, their concepts and purposes though interrelated, are different in substance. This underlies the need to explain their differences particularly in procurement where they seem clear, but even here the context of use might give them interchangeable meanings. There is no gainsaying however that both are essential tools for public procurement. The first, on the one hand specifying the needs and criteria required to satisfy a procuring entity's needs, and the other a response to a tender showing the capability and readiness of a supplier or contractor to be bound by a contract to fulfil same.[33]

As part of the World Bank's assessment of the viability of various developmental projects, the World Bank assists its member countries in analysing their present procurement policies, organisation and procedures.[34] Thus in 1999, the World Bank undertook a Country Procurement Assessment Report (CPAR)[35] that highlighted the gross inefficiencies in Nigeria's public procurement and financial management systems, as there were no laws on public expenditure or procurement, with the CPAR reporting that 60% of all money spent by Government was lost to malpractice and graft.[36] The CPAR also noted that:

> An average of ten billion US dollars ($10bn) was being lost annually due to fraudulent practices in the award and execution of public contracts through inflation of contract cost, lack of procurement plans, poor project prioritisation, poor budgeting processes, lack of competition and value for money and other kinds of manipulations of the procurement and contract award processes.[37]

Consequently, on 17th January 2001, with the establishment of a Public Procurement Commission (PPC), Nigeria embarked on concerted efforts to establish a framework for all government expenditure on projects, and later consolidated the process for tendering for government funded projects. These efforts immediately produced the Budget Monitoring and Price Intelligence Unit (BMPIU) otherwise known as 'the Due Process Unit,' which eventually culminated in the enactment of PPA 2007, signed into law by former President Musa Yar'Adua, on 4th June 2007.[38]

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[32]. Odunayo Bamodu, "Tendering and Bidding in Public Procurement," being a Paper presented at the Regional Course on Public Procurement Strategy and Contract Management, The Gambia, August 12 -16 2024; organised by the West African Institute for Financial and Economic Management., at 1. (Bamodu IV).
[33]. *Ibid.*
[34]. May Agbamuche-Mbu, "Putting the Searchlight on Public Procurement," in Legal Eagle THISDAY LAWYER, 19 January 2016. Available at: http://www.thisdaylive.com/articles/putting-the-searchlight-on-public-procurement/230754/. Accessed 16th August 2024. (Agbamuche-Mbu).
[35]. World Bank, Country Procurement Assessment Report (World Bank, Washington, DC 1999) (CPAR).
[36]. *Ibid.*
[37]. *Ibid.* at 3.
[38]. Agbamuche-Mbu (n33).

To reiterate, the emergence of PPA 2007 followed the reform of the public procurement ecosystem which commenced in 1999, then to 17th January 2001, with the proposal for the establishment of the PPC.[39] Then, the latter enactment of PPA 2007 aimed to regulate the procedure and practice of procurement of all government contracts. The PPA 2007 established the Bureau of Public Procurement (BPP)[40] and the National Council on Public Procurement (NCPP).[41] The NCPP, which is headed by the Minister of Finance, supervises the BPP in order to ensure adequate implementation of the procedures provided in PPA 2007. The NCPP's functions include approving the following:

a) the appointment of the Directors of the Bureau;
b) the audited accounts of the Bureau; and
c) policies on public procurement.[42]

The NCPP is the administrative body responsible for regulating the leadership and management of the BPP.[43] The NCPP membership shall include:

a) the Minister of Finance as Chairman,
b) the Attorney General and Minister of Justice of the Federation,
c) the Secretary to the Government of the Federation,
d) the Head of Service of the Federation
e) the Economic Adviser to the President
f) Six part-time members to represent;
    i) Nigerian Institute of Purchasing and Supply Management;
    ii) Nigerian Bar Association;
    iii) Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture;
    iv) Nigerian Society of Engineers;
    v) Civil Society;
    vi The Media and
g) The Director General of the BPP who shall be the Secretary of the NCPP.[44]

Section 5 of PPA 2007, in particular provides for the BPP's powers which are centred around its responsibility for enforcing the framework for public procurement and certifying suppliers and contractors as compliant and eligible to compete for government projects.[45] The BPP has the power to enforce the monetary and prior review thresholds set by the NCPP for the application of the PPA 2007 by the procuring entities.[46] The BPP is directly involved in enforcing the provisions of the PPA 2007, and its functions include, formulating general

[39]. *Ibid.*
[40]. PPA 2007 (n1) at Section 3(1).
[41]. *Ibid.* at Section 1(1).
[42]. *Ibid.* at Section 2.
[43]. *Ibid.* at Section 2.
[44]. *Ibid.* at Section 1(2).
[45]. *Ibid.* at Section 5.
[46]. *Ibid.* at Section 6.

policies and guidelines relating to public sector procurement and supervising the implementation of established procurement policies. The BPP exists as an autonomous department of the Nigerian federal government with oversight responsibilities that apply across all Ministries, Departments and Agencies (MDAs) of the federal government with regard to all procurement of goods, works and services carried out by or funded (a minimum of 35% project cost) by the federal government (the Consolidated Revenue Fund-(CRF)),[47] applying to the procurement of goods, works and services carried out by:

> a) the Federal Government of Nigeria and all procurement entities; and
> b) all entities outside the foregoing description which derive at least 35% of the funds appropriated or proposed to be appropriated for any type of procurement described in the Act from the Federation share of Consolidated Revenue Fund.[48]

PPA 2007 covers any private sector entity that derives at least 35% of funds appropriated or proposed to be appropriated for the procurement of goods, services or works from the federation share of the CRF. The CRF which was established by the Constitution of the Federal Republic of Nigeria, 1999 (1999 Constitution)[49] holds all revenues and other monies raised or received by the federation for the purposes prescribed by the National Assembly. Where a private entity is in doubt as to whether or not it is covered by PPA 2007, a ruling may be obtained on the issue by way of originating summons, requesting the court to interpret the provisions of PPA 2007 to determine whether or not the private entity is covered by PPA 2007.[50] As stated above, there are rules on awarding contracts, as the award of a procurement contract is usually granted to the lowest evaluated responsive bid.[51] The lowest evaluated responsive bid is defined in PPA 2007 as 'the lowest price bid amongst the bids that meet the technical requirements and standards as contained in the tender document.'[52] While PPA 2007 does not expressly provide for 'joint procurements,' in practice, however, joint procurement in relation to certain types of contracts is permitted. According to the Concession Regulatory Commission (Establishment, etc.) Act, 2005 (Concession Act),[53] where a joint procurement (i.e. consortium bid) is envisaged, the consortium must provide evidence that all its members have agreed to be bound jointly and severally in the event that

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[47]. *Ibid.* at Section 15.
[48]. *Ibid.* at Section 15.
[49]. Sections 80-81 Constitution of the Federal Republic of Nigeria, 1999 Cap C23 LFN (2004). (1999 Constitution).
[50]. Gbenga Oyebode & Olubunmi Fayokun, "Public Procurement 2009: Nigeria," Chapter 30, in *International Comparative Legal Guide to Public Procurement 2009: A practical insight to cross-border Public Procurement*, (Global Legal Group Ltd, London 2009) 175. Available at: www.iclg.uk. (Aluko & Oyebode).
[51]. PPA 2007 (n) at Section 16.
[52]. *Ibid.* at Section 60.
[53]. Infrastructure Concession Regulatory Commission (Establishment, etc.) Act, 2005 (Concession Act).

the consortium is awarded a contract; following the procurement process. Besides the PPA 2007, other laws and regulations are applicable to public procurement procedures in Nigeria, including the Infrastructure Concession Act, 2005[54] and the Federal Government of Nigeria Financial Regulations, 2000 (Finance Regulations).[55] However, the PPA 2007 has precedence over the aforementioned law/regulations on issues of public procurement.[56]

There are basic underlying principles of the PPA 2007 regime, including value for money, equal treatment, and transparency, and these are principles relevant to the interpretation of the PPA 2007. The basic underlying principles in the conduct of public procurement in Nigeria are fairness, transparency and competition.[57] These principles are expressly stipulated in the PPA 2007 to be fundamental principles for the conduct of public procurement proceedings and are the underlying factors that would be considered in the interpretation of the provisions of the PPA 2007.[58] It is important to note that the PPA 2007 relate very well to continental supra-national regimes including the Economic Community of West Africa States (ECOWAS) and/or Africa Union (AU) rules. The PPA 2007 reflects the principles embodied within the ECOWAS and the AU procurement directives in terms of transparency, competition and accountability in the conduct of public procurement.[59]

There are principal exclusions and exemptions which are to be determined by the accounting officer of the Procuring Entity.[60] The PPA 2007 expressly prohibits the involvement of a bidder in the preparation of a tender procedure. It specifically states that

> "a person who has been engaged in preparing for a procurement or part of the proceedings is prohibited from bidding for the procurement in question or any part thereof, either as a main contractor, sub-contractor or cooperating with bidders in the course of preparing their tender."[61]

A person who contravenes this provision would be liable to conviction for a term of not less than 5 (five) to 10 (ten) years and summary dismissal from government service.[62] The accounting officer of the Procuring Entity would be responsible for ensuring that this provision is complied with, subject to the regulations laid down by the BPP.[63]

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[54]. *Ibid.*.
[55]. Federal Government of Nigeria Financial Regulations, 2000 (Finance Regulations).
[56]. Aluko & Oyebode (n49), at 174.
[57]. PPA 2007 (n1) at Section 57.
[58]. *Ibid.* at Section 57(2)&(5).
[59]. Aluko & Oyebode (n49) at 174.
[60]. PPA 2007 (n) at Sections 6 and 15.
[61]. *Ibid.* at Section 16(24).
[62]. *Ibid.* at Sections 16 and 58.
[63]. *Ibid.*

There are different kinds of procurement procedures that must be followed.[64] According to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement, 2011 (2011 UNCITRAL Model Law on Public Procurement),[65] the methods are listed under Article 27 of as follows:

(a) Open Tendering;
(b) Restricted Tendering;
(c) Request for Quotations;
(d) Request for Proposals Without Negotiation,
(e) Two-stage tendering;
(f) Request for proposals with dialogue;
(g) Request for proposals with consecutive negotiations;
(h) Competitive negotiations;
(i) Electronic reverse auction;
(j) Single-source procurement; and
(k) Framework agreement.[66]

Under PPA 2007, the operations and free choice show that the PPA 2007 stipulates four (4) major procedures which may be followed in the conduct of public procurement, and these procedures can only be adopted in circumstances specifically provided in the PPA 2007:

(a). The Open Competitive Bidding Procedure.[67]
(b). The Two Stage Tendering Process.[68]
(c). The Restricted Tendering Process.[69]
(d). Direct Procurement.[70]

(a) **The Open Competitive Bidding Procedure**.[71]

The term 'open competitive bidding' is the process by which a Procuring Entity effects public procurements by offering to every interested bidder, equal simultaneous information and opportunity to offer the goods and works needed. To Bamodu, Open Tender is:

> a process by which a procuring entity, based on previously defined criteria, effects public procurement by offering to every interested bidder, equal, simultaneous information and opportunity to offer the goods, works and services needed. This form ensures a transparent, fair and competitive process.[72]

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[64]. Aluko & Oyebode (n49) at 174; See, also, Bamodu III (n) at 2.
[65] United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement, 2011, Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2011-model-law-on-public-procurement-e.pdf Accessed 22nd August 2024. (2011 UNCITRAL Model Law on Public Procurement).
[66]. *Ibid.* at Article 27.
[67]. PPA 2007 (n) at Section 24.
[68]. *Ibid.* at Section 39.
[69]. *Ibid.* at Section 40.
[70]. *Ibid.* at Section 41.
[71]. *Ibid.* at Section 24.
[72] *Ibid.* at Section 24(2); Odunayo Bamodu, *Understanding the Public Procurement Act 2007 – A Handbook for Procuring Entities* (Morgan4Morgan Publishing House, Lagos, 2010) 23. (Bamodu V).

According to PPA 2007, the procurements of goods and works by all Procuring Entities must be effected by this means except where the Act specifically excludes it.[73] This is a generally preferred, most effective, and default method that promotes the objectives of best international practices in public procurement, including efficiency, competition, fairness, transparency and integrity,[74] and the key features of open tendering include:

i. openness of process to all interested bidders (sometimes prequalified), including public advertisement of process;
ii. description and specification in the solicitation documents of what is to be procured to provide a common basis for contractors to prepare their tenders;
iii. prescription of an objective qualification and clear evaluation criteria;
iv. prohibition of negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders;
v. the public opening of tenders at the deadline for submission;
vi. award of contract to the lowest evaluated price responsive to the bidding specifications; and
vii. the disclosure of any formalities required for entry into force of the procurement contract.[75]

(b) The Two Stage Tendering Process[76]

Procuring Entities may engage in a two stage tendering process in certain situations. These include, where the Procuring Entity seeks to enter into a contract for research, experiment, study or development or where the tender was rejected by the Procuring Entity, under an open competitive bidding procedure. Here PPA 2007 (n) at Section, the process for open competitive bidding shall be conducted in two stages. The first stage would involve an invitation to suppliers or contractors to submit initial tenders containing their proposals, without a tender price and the second stage would involve an invitation to suppliers whose tenders have not been rejected, to submit final tenders with prices.[77]

(c) The Restricted Tendering Process[78]

The 'Restricted Tendering,' according to Bamodu, is a process where only selected pre-qualified bidders are invited to participate:

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[73]. PPA 2007 (n1) at Section
[74]. Bamodu III (n30) at 3.
[75]. *Ibid.* at 3; See also, Guide to Enactment of the 2011 UNCITRAL Model Law on Public Procurement (n), at Chapter III, paragraph 1. Available at : https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/guide-enactment-model-law-public-procurement-e.pdf. Accessed 22nd August 2024. Restricted Tendering: is a process where only selected pre-qualified bidders are invited to participate. This form is suitable when a procuring entity wants to limit the number of bidders based on prescribed certain criteria. It is suitable for circumstances where the item of procurement could be procured from a limited number of contractors. And, most often where the time and cost of an elaborate process would be adversely disproportionate to the value of the procurement.https://www.procurementclassroom.com/open-tendering/. Accessed 22nd August 2024.
[76]. PPA 2007 (n1) at Section 39.
[77]. *Ibid.* at Section.
[78]. *Ibid.* at Section 40.

> This form is suitable when a procuring entity wants to limit the number of bidders based on prescribed certain criteria. It is suitable for circumstances where the item of procurement could be procured from a limited number of contractors. And, most often where the time and cost of an elaborate process would be adversely disproportionate to the value of the procurement.[79]

This process involves inviting a limited number of suppliers to bid, and it may be used where the goods, works or services are available from a limited number of suppliers or contractors or the time and cost required to examine and evaluate a large number of tenders is disproportionate to the value of the goods, works or services to be procured. In this case, quotations are required to be obtained from at least 3 (three) unrelated contractors.[80]

(d) Direct Procurement[81]

This process is adopted in limited situations including where the goods, works or services are only available from a particular supplier or where a particular supplier has exclusive rights in respect of the goods, works or services and no reasonable alternative exists. In this case the Procuring Entity shall procure the goods, works or services by obtaining a quotation from a single supplier or contract. This 'Single Source Procurement' is used where a procuring entity chooses one supplier to provide all of its goods, works or services where no reasonable alternative exists, or where it does, is not practical for reasons of standardization or time considerations.[82]

There are rules excluding tenderers. The PPA 2007 stipulates varying circumstances which may result in a tenderer being excluded from procurement proceedings, such as:

> a) where there is verifiable evidence that a supplier, contractor or consultant has given or promised a gift of money or any tangible item, or has promised any other benefit or item that can be quantified in monetary terms to a current or former employee of a Procuring Entity or the Bureau, in an attempt to influence any action, or decision making in any procurement activity;[83]
> b) where a supplier, contractor or consultant during the last 3 (three) years prior to the commencement of the procurement proceedings in issue, failed to perform or to provide due care in the performance of a contract awarded by way of public procurement;[84]
> c) where the bidder is in receivership or is the subject of any type of insolvency proceedings or as a private company, is controlled by a person or persons who are subject to bankruptcy proceedings or who have been declared bankrupt or have made

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[79]. Bamodu II (n26) at 3.
[80]. Aluko & Oyebode (n49) at 175.
[81]. PPA 2007 (n1) at Section 41.
[82] Indeed Editorial Team,What Is Single Sourcing? (Plus Benefits and 7 Examples," 18th August 2024. Available at: https://www.indeed.com/career-advice/career-development/single-sourcing. Accessed 24th August 2024.
[83]. PPA 2007 (n1) at Section 16(8)(a).
[84]. *Ibid.* at Section 16(8)(b).

> compromises with their creditors within 2 (two) calendar years prior to the initiation of the procurement proceedings; d) where the bidder is in arrears regarding payment of due taxes, charges, pensions or social insurance contributions, unless such bidders have obtained a lawful permit with respect to allowance, deference of such outstanding payments or payment thereof in instalments; and
> e) where the bidder has in its management or is in any portion owned by any person that has been validly sentenced for a crime committed in connection with a procurement proceeding, or other crime committed to gain financial profit.[85]

In any of the foregoing cases, the Procuring Entity is required to inform the affected person and the BPP in writing, that the tender in question has been excluded and must provide the grounds for the exclusion.[86]

The PPA 2007 provides for remedies and enforcement, and the general outline, including *locus standi*. Under the PPA 2007, a bidder may seek administrative review for any omission or breach by a Procuring Entity.[87] A bidder involved in a procurement proceeding shall be considered to have standing to bring an action against the Procuring Entity involved in that particular proceeding. For an action to be justiciable, the bidder would be required to prove that an offence was committed as a result of an omission or breach by the Procuring Entity. Any person who contravenes the PPA 2007 while carrying out his duties as an officer of the BPP, or any Procuring Entity, is considered to have committed an offence and liable to conviction for a term of not less than 10 (ten) calendar years, summary dismissal from government service and a fine equivalent to 25% of the value of the procurement in issue.[88] Remedies and enforcement may also be sought in other types of proceedings or applications outside the PPA 2007. In addition to the PPA 2007, a complainant may have recourse to arbitral proceedings and to the appellate courts (i.e. the Court of Appeal and the Supreme Court. Remedies and enforcement may also be sought before certain body or bodies, as well. Under the provisions of PPA 2007, a bidder may apply for administrative review for any omission or breach by a Procuring Entity, before the following bodies: a) the accounting officer within the Procuring Entity; b) the BPP; and c) the Federal High Court (FHC). A complaint by a bidder against a Procuring Entity must first be submitted in writing to the accounting officer within the Procuring Entity. Where the complainant is dissatisfied with the decision of the accounting officer, the complainant may apply to the BPP. If still dissatisfied with the decision of the BPC, the complainant may appeal to the FHC.

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[85]. *Ibid.* at Section 16(8)(c).
[86]. *Ibid.* at Section 16(9).
[87]. *Ibid.* at Section 54.
[88]. *Ibid.* at Section 58.

There are legal and practical timing issues where a party wishes to make an application for remedies/enforcement. A bidder who wishes to make an application for administrative review must submit the application to the accounting officer within 15 (fifteen) working days from the date the bidder first became aware of the circumstances giving rise to the complaint. The accounting officer is then required to make a decision in writing within 15 (fifteen) working days of receiving the complaint. Where the accounting officer fails to reach a decision within the stipulated time, the bidder may make a complaint to the Bureau within 10 (ten) working days of receiving the accounting officer's decision. The BPP is then expected to reach a decision within 21 (twenty-one) working days of receiving a complaint.[89] There are other related bodies of law of relevance to procurement by public and other bodies. Other relevant laws include, the Public Enterprises (Privatisation and Commercialisation) Act 1999 (Public Enterprises Act)[90] and the Infrastructure Concession Act, 2005.[91] The Public Enterprises Act regulates the privatisation and commercialisation of public enterprises in Nigeria, while the Concession Act regulates the participation of the private sector in financing the construction, development, operation and maintenance of infrastructure or development projects of the Federal Government through concession or contractual arrangements. In 2004, the Lagos State Government promulgated the Lagos State Roads, Bridges and Highway Infrastructure (Private Sector Participation) Development Board Law.[92] The law provides a legal and regulatory framework for private sector participation in the development, rehabilitation, upgrading and construction of infrastructure within Lagos State. However, the PPA 2007 supersedes all other legislation in relation to public procurement.

2.2. Criticism and Assessment of the Efficacy of the Public Procurement Act of 2007

First, even though the NCPP is established under Section 1(1) of PPA 2007, it was never set up by any of the post-2007 governments—robbing the NCPP of legitimacy.

Second, the appointment of the BPP's Director-General (DG), as provided by Section 7 of PPA 2007, must be by the President, on the recommendation of the NCPP after competitive selection.[93] Thus, the absence of the NCPP derogated from the DG's legitimacy, as well. In Nigeria, as noted by Agbamuche-Mbu, 'laws have been promulgated without the apparent desire to implement the law to the letter or indeed to its full and true spirit.'[94]

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[89]. *Ibid.* at Section 54.
[90]. Public Enterprises (Privatisation and Commercialisation) Act 1999. (Public Enterprises Act).
[91]. Concession Act (n52).
[92]. Lagos State Roads, Bridges and Highway Infrastructure (Private Sector Participation) Development Board Law, 2004.
[93]. PPA 2007 (n1) at Section 7.
[94]. Agbamuche-Mbu (n33).

Third, the PPA 2007 and its application need to be reviewed as the inefficiencies in public procurement and financial mismanagement still persist, and corruption thrives even more so now than in the past when the defunct Tenders Boards existed within the various Ministries.[95] Yet, the aim of the PPA is to bring the procurement process in line with international best practice, i.e., transparency, fairness and value for money.

Fourth, in addition, as with so many such Acts in Nigeria, there are loopholes created to allow for manipulation of the process. For example Section 32(2) of PPA 2007 provides:

> 'the objective of bid evaluation shall be to determine and select the lowest evaluated responsive bid from bidders that have responded to the bid solicitation.'[96]

Section 32(2) is further re-affirmed by Section 33(1) PPA 2007 which states that:

> 'the successful bid shall be that submitted by the lowest cost bidder from the bidders responsive as to the bid solicitation.'[97]

However, Section 33(2) states that

> 'notwithstanding subsection (1) of this Section, the selected bidder need not be the lowest cost bidder provided the procuring entity can show good grounds derived from the provisions of this Act to that effect.'[98]

This, among a host of other anomalies in the PPA 2007, in effect, opens the floodgates for corrupt practices to thrive and the list of abandoned projects now set to escalate.[99]

Fifth, the link between abandoned projects and the public procurement framework is undeniable; as both are two ends of the same deteriorating spectrum.[100] Improperly planned procurements and capital development coupled with bidding processes beleaguered by impropriety and an absence of proper scrutiny allow for projects and development that are impractical and/or implausible to complete—a poorly planned projects become abandoned projects and the statistics speak for themselves.[101]

The above leads to the subject of this Paper—where there have been violations of the PPA 2007's provisions, with the underlying procurement contract containing an arbitration clause. May the party benefitting from the breach of the PPA 2007 (a legislation enforcing public policy for eradicating corruption and lack of accountability), be allowed to enforce the arbitral award in its favour?

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[95]. *Ibid.*
[96]. PPA 2007 (n1) at Section 32(2).
[97]. *Ibid.* at Section 33(1).
[98]. *Ibid.* at Section 33(2).
[99]. Agbamuche-Mbu (n33).
[100]. Agbamuche-Mbu (n).
[101]. *Ibid.*.

3. Background to the Problems Arising From the Interaction Between Arbitration, Mediation, and Public Procurement in Nigeria

3.1. Definitions.

First, 'Mediation'[102] has been variously described either as (1) a process by which 'the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs; or as (2) a structured negotiation by which a neutral third party, the mediator, uses a number of techniques to assist the parties to the dispute to frame their own agreement to resolve the dispute.[103] Court ordered mediation has been defined as a process by which disputants pursuant to an order of the court engage the assistance of a neutral accredited mediator to help them resolve their dispute by negotiated agreement without adjudication. The following are the advantages of mediation include:

(1) Speedy settlement of disputes with reduced costs;
(2) Flexibility in the shaping of a settlement that is not found in litigation;
(3) Elimination of the chance of an unacceptable and unpredictable result;
(4) Avoidance of public disclosure.

Also, 'Arbitration'[104] is different from formal litigation. Some of the reasons for the growing popularities of these alternative modes include, time efficiency, cost efficiency and specialized adjudicator for resolving disputes.[105]

3.2. Arbitration Procedure Under the Nigerian Legal System

Here, this paper looks at the arbitration procedure. Arbitration is different from formal litigation. It is the arduous and costly legality and technicalities associated with formal litigation, among other factors, that led to the birth and emergence of ADR process, of which arbitration is a major component. Some of the reasons for the growing popularity of these ADR modes include, time efficiency, cost efficiency and specialised adjudicator for resolving disputes. Arbitration, therefore, is a system of justice, born of merchants. In one form or another, it has been in existence for thousands of years.[106] In *Halsbury's Laws of England*,[107] the learned authors of the authoritative work opined that:

> Arbitration is a process used by the agreement of the parties to resolve disputes. In arbitrations, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national Court of law that would have

[102]. Arbitration Act 2023 (n2) at Part II, especially at Sections 67-87.
[103]. *Ibid.* at Sections 70-79.
[104]. *Ibid.* at Part I, especially at Sections 1-66.
[105]. *Ibid.* at Sections 1-5.
[106]. Derek Roebuck, "Sources for the History of Arbitration" (1998) 14 *Arb Intl*.; Derek Roebuck, "Cleopatra Compromised: Arbitration in Egypt in the First Century BC" (2008) 74 *Arbitration* 3 at 263.
[107]. Vol. 2(3) *Halsbury's Laws of England*, 4th edition (Reissue) (Lord Mackay of Clashfern (ed)), para. 1, at 2.

jurisdiction but for the agreement of the parties to exclude it. The decision of the arbitral tribunal is usually called an award.

Though the agreement to submit future disputes to arbitration usually forms part of the substantive contract, however, the 'arbitration clause' is often treated as a separate contract.[108] The earliest law dedicated to arbitration in England was in 1697. In 1883, *the Court of Common Council of the City of London* set up a committee to consider the establishment of a tribunal for the arbitration of trans-national commercial disputes arising within the ambit of the City. The first such statute was the English Arbitration Act of 1889, which was later consolidated into the Arbitration Act of 1950 and adopted by arbitration statutes in most countries of the British Commonwealth, including Nigeria.

Nigeria has also adopted the New York Convention Law on Arbitration[109] via Section 87(1) of the Arbitration Act 2023. Since 1960, a foreign arbitral award in an international commercial arbitration made outside Nigeria could be enforced in Nigeria by the combined effect of Sections 2(1) and 4(2) of the Foreign Judgment (Reciprocal Enforcement) Act of 1960.[110] Further, Nigeria is a party to the Vienna Convention on the Law Treaties and acceded to it on 23rd May 1969, while ratifying it on 31st July 1969.[111] Nigeria is also a party to bilateral investment treaties requiring arbitration and regulating the recognition and enforcement of arbitral awards. Nigeria has signed bilateral investment treaties with more than 30 countries, which include but is not limited to Spain, France (1990), the United Kingdom (1990), the Netherlands (1992), Brazil (2005), and China (2001).[112]

Apart from the New York Convention, the new Arbitration Act of 2023 is based on the 1985 United Nations Commission on International Trade Law (UNCITRAL 2006) Model Law[113] and the UNCITRAL Arbitration Rules, which was established by the Resolution of the United Nations General Assembly of December 17, 1966, for the purpose of harmonising and unifying the laws of international trade, which also included the promotion of the New York Convention.[114] Thus, *UNCITRAL Rules* were adopted by the UN Commission on 28th

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[108]. *Bremer Vulkan Schiffbau and Maschinenfabrik vs. South India Shipping Corporation* (1981) A.C. 909; (1981) 1 All E.R.289.
[109]. New York Convention Law on Arbitration
[110]. No. 31, Laws of the Federation of Nigeria (1960).
[111]. G. Etomi, et al., "NIGERIA: Arbitration" in Global Arbitration Review (eds): *Arbitration in 55 Jurisdictions Worldwide*, (London: Law Business Research, 2012) 328. (Etomi II).
[112]. *Ibid*.
[113]. United Nations, *The UNCITRAL Model Law on International Commercial Arbitration 1985* with the 2006 amendments, United Nations Document No. A/40/17, annex I)-- (UNCITRAL 2006 (n 2); See, also, Bukola Faturoti, "Complementary or Disparity? The UNCITRAL Model Law on International Commercial Arbitration 1985 and English Arbitration Act 1996 Revisited," (2012) 2 *University of Ibadan Law Journal* 1.
[114]. *Ibid.* per UNCITRAL 2006.

April 1976 and were unanimously approved by the United Nations General Assembly on 15th December 1976.[115] The UNICTRAL Rules are now contained in the First Schedule to the Arbitration Act 2023 and are also applicable in Nigeria under Section 87 of the 2023 Act. The UNCITRAL Model Law 2006 and New York Convention are both for domestic and international arbitration matters. They are by and large *ipsissima verba* of the UNCITRAL Rules.[116] Presently, the primary domestic source of law relating to domestic and foreign arbitral proceedings is the Arbitration Act 2023, embodying the UNCITRAL Model Law, UNCITRAL Arbitration and Conciliation Rules, and the 1958 New York Convention.[117]

3.3. Relevant Provisions of the Arbitration Act 2023

First, whether or not a matter can be a subject for arbitration in Nigeria is determined by Sections 64-65 of the Arbitration Act 2023 which provide thus:

Section 64. Extent of Court intervention:

> A court shall not intervene in any matter governed by this Act except where so provided in this Act.

Section 65. Extent of application of this Act to arbitration:

> This Act shall not affect any other law by virtue of which certain disputes:
> (a) may not be submitted to arbitration; or
> (b) may be submitted to arbitration only in accordance with the provisions of that or another law."

However, for purposes of application of the *Betamax v. STC) ratio decidendi,* especially as to situations where the underlying arbitration agreement between the parties would be set aside in Nigeria, for being in breach of the PPA 2007, which is a law encapsulating the public policy embodied in the maxims—*in pari delicto, potior est conditio defendentis*, *ex-trupi causa non oritur actio*, and and where the contracts and awards violated Nigerian laws that are *"d'ordre public,"* Section 55 of the Arbitration Act 2023 is very important. Section of 55 of the Arbitration Act 2023 empowers the court to set aside an arbitral award based on certain enumerated grounds.

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[115]. See, Olasupo Shasore, "Arbitrating Commercial Disputes in African Seats and Arbitral Centres: A Nigerian Perspective, ICCA Congress Series," in International Council for Commercial Arbitration (ed.) *ICCA Congress Series* (International Council for Commercial Arbitration Papers, 2016). (Shasore I). Generally, arbitration pre-existed the advent of the Europeans. For instance, in the ancient Benin empire, where arbitration and mediation was the sole means of resolving disputes before the advent of the adversarial system. Odionwere who was the village head and heads of the different families who held titles as Okaegbe functioned as arbitrators or mediators in resolving disputes among people of the Benin Empire. In addition chiefs would be called upon by the Oba of Benin to mediate or reconcile differences between neighbouring villages' sequel to the request of the villagers. See, Ephraim Akpata, *The Nigerian Arbitration Law in Focus* (Lagos, West African Book Publishers Ltd., 1997) at 6. (Akpata).

[116]. *Ibid*. per Akpata.

[117]. See, Section 87 of the Arbitration Act 2023 (n2); See, also, Etomi II (n 110) at 328.

Section 55: application for setting aside an arbitral award

> 55. (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (3) and (4)
> (2) An application for setting aside an arbitral award shall not be made on the ground of an error on the face of the award, or any other ground except for those expressly stated in subsection (3)
> (3) The court may set aside an arbitral award, where-
>
> (a) the party making the application furnishes proof that-
>
> ….
>
> (ii) the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, under the laws of Nigeria,
>
> ……..or
>
> (b) the court finds that the-
>
> (i) subject-matter of the dispute is not capable of settlement by arbitration under laws of Nigeria; or
>
> (ii) award is against public policy of Nigeria.
>
> (4) An application to set aside shall not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Section 49 of this Act, from the date on which the request had been disposed of by the arbitral tribunal.
> (5) Where the Court is satisfier that one or more of the grounds set out in subsection (3) has been proved and that it has caused or will cause substantial injustice to the applicant, the Court may—
>
> (a) remit the award to the tribunal, in whole or in part, for reconsideration, or
>
> (b) set aside the award, in whole or in part.
>
> (6) The Court, when asked to set aside an award, may, when appropriate or so requested by a party, may suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take any other action which in the opinion of the arbitral tribunal will eliminate the ground for setting aside.

It is clear that Section 55 of the Arbitration Act 2023 now legislatively confers, on Nigerian courts, the judicial powers to set aside contracts and awards that are made against public policy Section 55 of the 2023 Act is very important. Section of 55 of the Arbitration Act 2023 empowers the court to set aside an arbitral award based on certain enumerated grounds.[118]

3.4. Conflict Between Arbitration, Mediation, and Public Procurement in Nigeria

Arbitration and mediation are becoming attractive dispute resolution mechanisms in Nigeria due to its unique features.[119] They are specially designed tool established for the final and binding resolution of disputes.[120] With the rapid growth of international trade, parties are free to determine the terms of their business relationship, and this is in accord with the contractual

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[118]. Arbitration Act 2023 (n2) at Section 55(1)(b)(ii).
[119]. Vishnu Tandi, *Arbitral Tribunal vs. Courts.* 7th September 2015. (Tandi).
[120]. J. Lew, et al, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law, 2003) 1. (Lew I).

doctrine of 'party autonomy.' To this extent, arbitration and mediation agreements are often inserted in international trade instruments and contracts as a method of dispute settlement rather than the traditional method of dispute resolution through the instrumentality of the courts. By referring their disputes to arbitration and mediation, parties are in essence agreeing to be bound with finality by the award of the arbitral and mediation tribunal.[121] Generally, there are two (2) fundamental principles that underpin the field of arbitration known as (i) *Kompetenz-Kompetenz*[122] and (ii) parties' autonomy to solve disputes by means of arbitration and mediation.[123] The autonomy of arbitration and mediation must be respected by all courts.[124] To Julian Lew, arbitration [and mediation] have reached their *effet utile* and been:

> "established and conducted according to internationally accepted practices, free from the controls of parochial national laws, and without the interference or review of national courts"[125]

Further, Article 5 of UNCITRAL 2006 Model Law[126] states that "no court shall intervene [in arbitration and mediation agreements] except where so provided." The UNCITRAL Commission Report and the Model Law Explanatory Notes' philosophy of reduced role for court supervision over international arbitration was:

> "To achieve a certainty as to the maximum extent of judicial intervention, including assistance, in international commercial arbitration, by compelling the drafters to list in the model law on international commercial arbitration all instances of court intervention.[127]

The Analytical Commentary describes the effect of Article 5 of UNCITRAL Model Law to:

> "Exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law."[128]

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[121]. Arbitration Act 2023 (n2) at Sections 2 & 3.

[122]. The "Kompetenz-Kompetenz" rule means that an arbitral tribunal is competent to rule on its own jurisdiction; Olumide K. Obayemi, "International Commercial Arbitrations and Issuance of Anti-Arbitration and/or Anti-Suit Injunctions by Nigerian Courts" in *Readings in Law & Policy (Current Issues & Trends):* (July 2017, Zubic Infinity Concept, Owerri, Imo State) Pages 278-305.

[123]. A. Ponomaryov, *State Courts' Use of Anti-Suit Injunctions in International Arbitration*, Being a Thesis Submitted in Support of the Award of the Degree of Master of Laws (LL.M.) Central European University, Budapest on March 31st, 2008, at 29 ("Ponomaryov"); A. Redfern, et al, *Redfern and Hunter on International Arbitration*, (London: Oxford University Press, 2009), pp 457-458 ("Redfern & Hunter").

[124]. *Ibid.* per Ponomaryov, at 2.

[125]. J. Lew, "Achieving the Dream: Autonomous Arbitration," *Arbitration International,* Vol. 22 No. 2, p. 179 (2006). ("Lew II").

[126]. *UNCITRAL* 2006 (n2) Bukola Faturoti (n112) at 1.

[127]. See, Report of the United Nations Commission on International Trade Law on the Work of its 18th Session (June 3-21, 1985), Official Records of the General Assembly, 40th Session, at Para. 63, in United Nations Document No. A/40/17.

[128]. See, Report of the Secretary-General: "Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration," March 25, 1985, at Art. 5, Para. 2, in United Nations Document No. A/CN.9/264.

Despite the increasing role of arbitration and mediation mechanisms, however, the Nigerian Supreme Court in *Kano State Urban Development Board v. Fanz Construction Company Limited*,[129] has stated clearly the boundaries against arbitrability of certain claims and so laid down the parametres for identifying the categories of matters that cannot be the subject of an arbitration agreement and which cannot be referred to arbitration to include:

i. an indictment for an offence of a public nature;
ii. disputes arising out of an illegal contract;
iii. disputes arising under agreements void as being by way of gaming or wagering;
iv. disputes leading to a change of status, such as divorce petitions; and
v. any agreement to give the arbitrator the right to give judgment in rem.[130]

Also, in *World Duty Free Company Limited v. The Republic of Kenya*,[131] it was held that in a dispute between a foreign investor and a host State, even where the defence of State Immunity is unavailable either to a State or a State controlled entity, it is still able to plead "Public Interest Defence."[132] In *World Duty*, the defence of public interest was raised, and the Tribunal dismissed the Claimant's case because the contract at issue was unenforceable as it had been procured through corruption and thus against public policy. Similar to the 'Public Interest Defence,' public procurement has been ruled to be a matter of national interest and/or policy of the nation which therefore cannot be ousted via an arbitration agreement. Thus, in Nigeria, the argument against arbitrability and/or mediation of violation of procurement law continues to persist. Statutorily, whether or not a matter can be a subject for arbitration in Nigeria, is determined by Sections 55, 64 and 65 of the Arbitration Act 2023.

4. Breach of the Public Procurement Act 2007 as a '*D'ordre Public'* Law or a Public Policy Defence to the Enforcement of an Arbitral Award in Nigeria [133]

The 2021 Privy Council decision in the Mauritius case of *Betamax v. STC*,[134] is very important. In *Betamax*, on 27th November 2009, Betamax entered into a contract of affreightment (Betamax COA) with STC, a public company which operates as the trading arm of the Government of Mauritius responsible for the import of essential commodities. Under the COA, which was governed by the laws of the Republic of Mauritius, Betamax was

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[129]. *Kano v. Fanz* (n13).
[130]. Gbenga Biobaku, "Arbitrability of tax issues arising from production sharing contracts – FIRS v. NNPC," a Newsletter of Gbenga Biobaku & Co (July 2012), at 2. Available at: http://www.gbc-law.com/assets/publications/Arbitrability-of-tax-issues-arising-from-production-sharing-contracts.pdf. Last accessed on 31st March 2024. (Biobaku).
[131]. 2006 ICSID Case No. ARB/00/7, Award (Oct. 4, 2006). Available at http://italaw.com/documents/WDFv.KenyaAward.pdf
[132]. Osoro Nick Otieno, "The State or State Controlled Entity As A Party To An Arbitration Agreement—Issues To Consider," (Spring 2016) *Law Digest* 12-14, at 13-14. (Otieno).
[133]. Uzodinma (n9)
[134]. *Betamax* (n15).

to build and operate a tanker and make available for a period of 15 years the freight capacity of the vessel for the transport of STC's petroleum products from Mangalore in India to Port Louis in Mauritius. Betamax is a Mauritian company incorporated on 6th May 2009 as a joint venture vehicle between a Mauritian family and Executive Ship Management Pte Ltd, a Singaporean company, which had been formed for the purpose of financing the construction of the tanker and carrying out the COA. The offices of Executive Ship Management Pte in Singapore and India handled all technical and commercial aspects of the COA, including crewing and ship management. In 2006-8, the Government of Mauritius, evaluated the best means of providing for the shipping of petroleum to Mauritius and thereafter began negotiations with Betamax in 2008-9.

With effect from 17th January 2008, a procurement regime entered into force in Mauritius under the Mauritius Public Procurement Act 2006 (Mauritius PPA) and the Mauritius Public Procurement Regulations 2008 (Mauritius PPR)[135] made by the Minister under Section 61 of the Mauritius PPA. Both Mauritius PPA and PPR were amended in 2009. In the dispute that emerged between the parties, one of the principal issues was whether the Mauritius PPA and PPR as they were in force on 27th November 2009 applied to the COA: STC contended that they did; Betamax contended that the COA was exempted from the provisions. If the Mauritius PPA applied to the COA, it would have been a contract which required approval by the Mauritius Central Procurement Board (MCPB) established under the Mauritius PPA. No such approval was given by the MCPB and entering into the COA would have been unlawful under the Mauritius PPA. The vessel was constructed and delivered to Betamax which carried the first cargo under the COA in May 2011. On 30th January 2015, the Cabinet of a new Government in Mauritius which had come to power in December 2014 announced that it would terminate the COA in light of "the unlawful procedure and processes regarding the allocation of the contract". On 4th February 2015, STC gave notice that it was unable to use Betamax's services under the COA any longer. On 7th April 2015, Betamax terminated the COA under its default provisions.

The COA contained an arbitration clause which provided that if the dispute could not be resolved through the dispute resolution provisions of the COA:

> "… either Party may refer the Dispute by notice to the other to be finally and bindingly determined by an Arbitrator in accordance with the [Singapore International Arbitration Centre (SIAC)] Rules, as amended from time to time...

[135]. Mauritius Public Procurement Act 2006 (Mauritius PPA) and Mauritius Public Procurement Regulations 2008 (Mauritius PPR).

> The Parties will jointly appoint an Arbitrator within twenty (20) Business Days of the referral of the Dispute to arbitration. If an Arbitrator is not appointed within the time limits set forth in the preceding sentence, either Party may request the SIAC to appoint an Arbitrator as quickly as possible (and the SIAC Court shall be the appointing authority under the SIAC Rules).

The Arbitrator issued its award in favour of Betamax, i.e., that the Mauritius PPA and PPR did not apply to the COA. On appeal to the Mauritius Supreme Court, the Supreme Court reversed the award, and held that the Mauritius PPA and PPR were meant to advance and protect Mauritius public interest and policy. Thus, with the Betamax in violation of the both the Mauritius PPA and PPR, the arbitral award must be set aside. Betamax then appealed to the Judicial Committee of the Privy Council.

Back in 2008, Mauritius adopted UNCITRAL's Model Arbitration Law 1985 (as amended in 2006) (UNCITRAL Model Law 2006)[136] by enacting the Mauritius International Arbitration Act 2008 (Mauritius Arbitration Act).[137] In the Betamax award, an international arbitration, the Arbitrator decided that the Betamax COA did not contravene legislative provisions relating to procurement and was not illegal. The Supreme Court of Mauritius set aside the Award under Section 39(2)(b)(ii) of the Mauritius Arbitration Act (Article 34 of the UNCITRAL Model Law 2006) on the grounds that, in its view, the COA contravened the legislative provisions and the Award conflicted with the public policy of Mauritius. The appeal to the Judicial Committee of the Privy Council, primarily raised the issue as to the extent of the permissible intervention by a court in an international arbitration under Section 39(2)(b)(ii) of the Mauritius Arbitration Act and Article 34 of the UNCITRAL Model Law 2006. The Judicial Committee of the Privy Council reversed the Mauritius Supreme Court and reaffirmed the arbitral award.

Irrespective of the Privy Council's appellate decision, the issue is whether Nigerian courts may set aside an arbitration award on the ground that the enforcement of the underlying procurement contract was in flagrant and concrete breach of Nigerian PPA 2007, therefore, the award was a violation of Nigerian public policy.[138] Thus, Uzodimma had asked:

> … whether the Nigerian courts would hold a similar view as the Supreme Court in Mauritius, that a breach of the Nigerian Public Procurement Act should be held as so

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[136]. UNCITRAL Model Law 2006 (n2)

[137]. Mauritius International Arbitration Act 2008 (Mauritius Arbitration Act).

[138]. Paray N.B, Dabee, S and Maxime, S.P (2019). The Supreme Court of Mauritius sets aside award on grounds of breach of domestic public policy [online]. Lexology. Available from:https://www.lexology.com/library/detail.aspx?g=dbac875b-12f7-44d9-b921-f2fd0e8fe677 [accessed 6 June 2019].

> fundamental as to amount to a breach of the public policy of Nigeria warranting the refusal of the enforcement of an award arising from such a breach.[139]

On the concept of refusal to enforce an award on grounds of public policy under the PPA 2007, the theory of public policy is quite broad and does not have any statutory definition in Nigeria, yet, judicial decisions exist where attempts were made to define the term, 'public policy.'[140] In *Okonkwo v. Okagbue*,[141] the Supreme Court held the term 'public policy' as:

> the ideals 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.

Further, in *Total Nigeria Plc. v. Ajayi*,[142] the Court of Appeal also opined that

> "the principle of public policy is to protect public interest by which the courts would not sanction what is injurious to public welfare or against the public good. The phrase public policy, therefore, means that policy of the law of not sanctioning an act which is against the public interest in the sense that it is injurious to public welfare or public good."

However, the Supreme Court in *Sonnar Ltd. v. Nordwind*,[143] per Eso, J.S.C. had warned:

> "Surely, public policy is an unruly horse and judges are not such masters of equestrian ability to take on such experience".

In Nigeria, when courts are confronted with the issue of public policy as a defence against the enforcement of an arbitral award, the courts usually take a restrictive approach in their interpretation of the concept.[144] In *Agro-Allied Development Ent. Limited. v. United Shipping Trading Co. Inc.*,[145] the Court of Appeal upheld a High Court decision which made a recognition and enforcement of an award order despite the appellant's argument that the award was against the public policy of Nigeria, and held that there was no perversity in the judgment of the High Court and that the award is not contrary to any public policy in Nigeria. Also, in *NNPC v. Lutin Investment Limited*,[146] the appellant argued that the arbitrator be removed because he had acted against public policy by moving the seat of arbitration to London at the expense of the parties when the agreement was governed by Nigerian law. The Supreme Court unanimously dismissed the appeal and recognized the arbitrator's power or discretion to go abroad to hear evidence from witnesses. As noted by Uzodinma,

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[139]. Uzodinma (n9).
[140]. *Ibid.*
[141] (1994) 9 NWLR (Pt. 368)
[142]. (2003) LPELR-6174(CA)
[143]. (1987) 4 NWLR (Pt. 66) 520
[144]. Uzodinma (n9).
[145]. [2011] 9 NWLR (Pt. 1252) 258
[146]. (2006) CLR 1(a) SC.

> notwithstanding the nebulous nature of the term "public policy", courts have held that illegal contracts are against public policy.[147] In effect, where an arbitration agreement is classified by a court as an illegal contract, the court is likely to find that an award made on the basis of that arbitration agreement is unenforceable for being a product of an illegal contract. So, if the arbitration agreement is prohibited by statute, an award from it may not have favourable recognition from courts.[148]

In *Fasel Services Ltd v. NPA*,[149] the Supreme Court also held that

> "without getting unduly enmeshed in the controversy regarding the definition or classification of that term (illegal contract), it will be enough to say that contracts which are prohibited by statute or at common law, coupled with provisions for sanction (such as fine or imprisonment) in the event of its contravention are said to be illegal."

Further, in *Oguntuwase v. Jegede*,[150] the Court of Appeal held that

> "the general principle of the law that an illegal contract will not be upheld and enforced by the Court is founded on the public policy embodied in the maxim, *in pari delicto, potior est conditio defendentis* and *ex-trupi causa non oritur actio*, that is, a party who is himself guilty of an action, does not have a right to enforce performance of an agreement founded on a consideration that is contrary to public interest or policy."

Therefore, an award arising from an illegal contract may be set aside on the grounds of public policy.[151] It is now clear that a breach of the PPA 2007 based on public policy is a ground for refusal of enforcement of an arbitral award. First under Section 55(3)(a)&(b) of the Arbitration Act 2023, the court may set aside an arbitral award that violates public policy:

> Section 55……
> (3) The court may set aside an arbitral award, where-
> (a) the party making the application furnishes proof that-
> ……
> (ii) the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, under the laws of Nigeria,
> ……..
> (b) the court finds that the-
> (i) subject-matter of the dispute is not capable of settlement by arbitration under laws of Nigeria; or
> (ii) award is against public policy of Nigeria.

Further, where the underlying contract is an indictment for an offence of a public nature or a dispute arising out of an illegal contract, as the Supreme Court held in *Kano v. Fanz*,[152] such an arbitral award may also be set aside. The PPA 2007 was enacted to ensure a fair,

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147. Uzodinma (n9).
148. *Ibid.*
149. (2009) CLR 4(g) SC.
150. (2015) LCN/7923 (CA).
151. Uzodinma (n9).
152. *Kano v. Fanz* (n13).

competitive and transparent standard for the procurement and disposal of public assets, and it governs the manner in which public funds are used to purchase public goods and services. Clearly, the PPA 2007 impacts on public policy because a flagrant violation of the PPA 2007 could result in the award of a major procurement contract to an unqualified contractor or the purchase of substandard goods or services, which would be injurious to public welfare and interest.[153] However, arguably, not every violation of PPA 2007 should be treated as a breach of public policy, and some provisions should be treated as directory, as the Court of Appeal in *Revenue Mobilization, Allocation and Fiscal Commission v. Onwuekweikpe*,[154] has held:

> "it is not every non-compliance with the provisions of a statute that is fatal. A breach of mandatory enactment renders what has been done null and void. But if the statute is merely directory, it is immaterial, so far as it relates to the validity of the thing done, whether the provisions of the statute are accurately followed out or not."

It must be noted that Section 58 of PPA 2007 makes it a punishable offence for natural or legal persons to contravene "any provision of this Act"—connoting that the provisions of the PPA cannot be treated as merely directory. Thus, the effect of a contract which breached statutory provision is aptly stated by the Supreme Court in *Corporate Ideal Insurance Ltd v. Ajaokuta Steel Company Ltd*,[155] *albeit* in relation to the Insurance Act 2003, that

> "A contract which violently violates the provisions of a statute as in this case, with the sole aim of circumventing the intendment of the law maker is, to all intents and purpose, illegal, null and void and unenforceable. Such a contract or agreement is against public policy and makes nonsense of legislative efforts to streamline the ways and means of business relations."

The PPA 2007 which affects public interest is not just a directory statute, but a mandatory enactment which contravention will render a contract based thereon, illegal and against public policy, and in context of a challenge to the enforcement of an award on the public policy ground, the courts would have to consider the alleged breach in juxtaposition with the provisions of the PPA and determine whether there has indeed been a violation of the PPA. Where it determines that the PPA was violated in awarding the contract, the court may align with the position of the Mauritius Supreme Court by setting aside or refusing recognition of an arbitral award arising from the contract.[156]

5. Findings and Observation

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153. Uzodinma (n9).
154. (2008) LPELR-8398(CA)
155. (2014) LPELR-22255(SC)
156. Uzodinma (n9).

Despite PPA 2007, corruption and lack of accountability still pervade procurement and contract award in Nigeria. For instance, the Presidential Projects Assessment Committee (PPAC) in its May 2011 Main Report[157] had compiled an inventory of ongoing federal government projects across Nigeria which stood at 11,886 with a financial commitment totalling N7.8 trillion.[158] The PPAC Report noted that

> ….there was evidence of deficiency of vision and lack of direction in the way many capital projects are conceived with the attendant effect of avoidable cost overrun into the hundreds of billions of Naira.[159]

The PPAC 2011 Main Report further noted that most projects are procurement driven rather than being driven by the development needs of the nation.[160] Therefore, the PPAC recommended for the review of the procurement process include

> a) Price Intelligence-a detailed compilation and regular updating of prices of the component parts of contracts and the provision of such data to project design teams in a comprehensively usable format.
> b) Due Process and Government Establishments-strengthening the due process mechanisms in the individual establishments of government and ensure strict monitoring of these procedures.
> c) Project optioning, Project Formulation and Project Designing- the BPP has the distinction of being the only government organ that is mandated to get involved in the contracting process of every Ministry, Federal Parastatal and Agency. It should therefore be involved from project design to project commissioning. The Unit only gets involved in the contracting process. It is at the level of project optioning, project formulation and project designing that project costs are inflated and beefed up to accommodate the corrupt desires of contractors and unscrupulous officials. By getting actively involved in the processes at an early stage, the BPP can input safeguards and cost limits that eliminate or at least drastically reduce the cost overlays that make for corrupt practices.
> d) Size of Monitored Procurement and Projects-BPP is mandated to monitor and provide guidelines for all government procurement and contracts. However, some government ministries, departments, parastatals and agencies have expenditure approval limits that allow mischievous officials in these organisations to 'dodge' due process requirements by slicing procurements and contracts into smaller entities that will fall below the organisation's approval limit. Thus, MDAs use this 'administrative procedure' to avoid monitoring by BPP.
> e) Contractors' Registry- As part of the overall fight against corruption, BPP must institute comprehensive criteria for the development of a contractor's registry. The registry should cater for different categories and size of contractors. It should verify the statutory status of contractors and their conformity to all legal requirements of Nigeria. The registry will be the basis for vetting contractors for relevant projects of the federal government.[161]

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[157]. Presidential Projects Assessment Committee (PPAC)'s Main Report, of May 2011. (PPAC 2011 Main Report).
[158]. *Ibid.* at 1-5
[159]. Agbamuche-Mbu (n33).
[160]. PPAC 2011 Main Report (n156) at 20.
[161]. *Ibid.* at 41-42.

Lack of observance of PPA 2007 has led to government funds often going down the drain with nothing tangible to show for them, and so, curbing corruption at its roots and making fraudulent officials within the MDAs accountable will help in enhancing the procurement process.[162]

Nigerian courts must be proactive, as the Mauritius Supreme Court did in *Betamax*, by enthroning the spirit and intent of public procurement rules in all cases bordering on awards and procurement..

6. Conclusion

From the provisions of Nigerian case law on public policy, it is clear that Nigerian courts adopt a restrictive approach in applying the public policy ground under Section 55(3)(a)&(b) of the Arbitration Act 2023 for setting aside or refusing the enforcement of an arbitral award[163]. However, illegal contracts and contracts which violate PPA 2007 are contrary to public policy, and violate mandatory provisions of PPA 2007, and due to the mandatory nature of PPA 2007, enacted to protect public interest in the procurement of goods and services and which also sanctions the contravention of its provisions, Nigerian courts must consider a contract executed in breach of its provisions in a similar manner as the Mauritius Supreme Court in *Betamax* and set aside or refuse the enforcement or an award arising from such a contract on the public policy ground.[164]

However, it must be noted, also, that the new Arbitration Act 2023 is much more encompassing legislation allowing for both arbitration and mediation of most subject matters, including procurement, and read together with the above provisions of PPA 2007, would allow for arbitration and mediation of all procurement and contract award matters. Also, an arbitral tribunal is an alternative to the national courts and, as well, a private dispute resolution mechanism organised and controlled by the parties, its award is final and binding on the parties and such is not subject to appeal to the regular courts save for some or except in some situations, e.g., for setting aside procedure gaffes.

Thus, absent illegality and/or violation of public policy, all procurement and contract award matters should be arbitrable.

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[162]. Agbamuche-Mbu (n33).
[163]. Uzodinma (n9).
[164]. *Ibid.*