"Public Policy, Jurisdiction, and Arbitration of Tax Disputes in Nigeria"

I. Introduction

Nigerian tax statutes are now getting tested and interpreted by the Nigerian Superior Courts after staying dormant for a long period—a situation that has attracted the comments and attention of most tax stakeholders in Nigeria. The present President Muhammadu Buhari-led administration has stated its commitment to diversify the sources of government revenues by significantly increasing tax to Gross Domestic Product (GDP) ratio, among other things.[1] Further, the 2016 Nigeria National Tax Policy[2] has stated the challenges facing the Nigeria tax system as including the need to grow internally generated revenue which has led to the arbitrary exercise of taxing powers and the lack of clarity on taxation powers of each level of government and encroachment on the powers of one level of government by another.[3] The issue of clarity and certainty in the interpretation, administration and application of tax statutes in Nigeria is certainly very germane

Therefore, in this short paper, we posit that Section 251(1)(a)&(b) of the Constitution of the Federal Republic of Nigeria of 1999 (CFRN) and other applicable statutes should not extend to Arbitral Tribunals and/or Panels which are mot Courts of records *strictosensu*. Further, we contend that allowing arbitration on tax issues between private parties, even if such touch on the Federal Inland Revenue Service (FIRS)'s jurisdiction to administer the revenue of thefederation would provide certainty[4]in the Nigerian tax and arbitration jurisprudence, and

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[1]. Olumide K. Obayemi, "An Appraisal of the 2017 Joint LIRS and JTB's Public Notices Seeking to Curb Tax Avoidance Techniques Arising From Voluntary Pension Contributions" (2017) Lagos State University's Faculty of Law's Readings in Law.

[2]. Federal Ministry Finance, *Nigeria Tax Policy* (Federal Ministry Finance, Anuja, September 28, 2016). Released by Professor Abiola Sanni's Committee on Tax Policy Reform. Available at: http://pwcnigeria.typepad.com/files/revised-ntp-28-sep-2016.pdf. Last visited on October 3rd, 2017. (NTP 2016).

[3]. *Ibid.* per NTP 2016 at para 1.4, at page 2.

[4]. Adam Smith, *An Inquiry Into The Nature and Causes of Wealth of Nations*(W. Shahon and T. Cadell Publishers: London, 1776) Book V. Chapter II, held the view that a good tax

also compliment the voluntary waiver of the court's jurisdiction in arbitration. Finally, we contend herein that Nigeria must not be left behind, thus, as the nation continues to remove strictures, barriers, and impediments militating against the ease of doing business, Nigeria must continue to aspire to keep up with globalization and its demands by adopting the global trend which allows arbitration of private tax disputes, thereby moving beyond short-term solutions infavour of more solid alternatives.[5]

This Paper is divided into Eight (8) Parts. Part I is the introductory part. Part II discusses the background to the problems in Arbitration and tax in Nigeria. Part III looks at the gradual process of adoption of arbitration into the Nigerian legal system. Part IV reiterates the need for certainty of laws governing the Nigerian business terrain. Part V critiques the extant provisions of the Constitution of the Federal Republic of Nigeria (1999) applicable to the matters under consideration. Part VI looks at the regulatory powers over taxation matters in Nigeria and the separate decisions of the Court of Appeal on taxation matters contained in arbitration agreements. Part VII contains a discussion of all the issues raised in the Paper. Part VIII is the Conclusion.

II. **Background to the Problems Arising From the Interaction Between Arbitration and Tax in Nigeria**

The statutes and instruments governing the inter-related subjects of arbitration and taxation in Nigeria[6] are the 1999 Constitution; the Arbitration and Conciliation Act ("the Arbitration

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system must possess the qualities of equity, certainty, convenience and administrative efficiency. (Adam Smith). See, also, Ade Ipaye, *Nigerian Tax Law and Administration: A Critical Review* (ASCO Prime Publishers 2014) at 9. (Ipaye).

[5]. W.W. Park, "Arbitrability and Tax" in L. Mistelis& S. Brekoulajis (eds), *International and Comparative Perspectives* (Kluwer Law International, 2009) pp 179-205, at 200. (Park).

[6]. *Shell (Nig.) Exploration and Production Ltd & 3 others v. Federal Inland Revenue Service*, Unreported Appeal No. CA/A/208/2012; delivered by the Court of Appeal, Abuja on 31st August, 2016. (Shell Decision);*Esso Petroleum and Production Nigeria Ltd v. NNPC*,

Act");[7] the Petroleum Act;[8] the Petroleum Profits Tax Act (PPTA);[9] the Federal Inland Revenue Service (Establishment) Act (FIRSEA);[10] and the Nigerian Production Sharing Contract Model Agreement.[11] For instance, Paragraph 41 of the First Schedule to the Petroleum Act states thus:

> *If any question or dispute arises in connection with any license or lease to which this Schedule applies between the Minister and licensee or lessee (including a question or dispute as to the payment of any fee, rent or royalty) the question or dispute shall be settled by arbitration unless it relates to a matter expressly excluded from arbitration or expressed to be at the discretion of the Minister.*

On the contrary, Section 8(1)(a)&(b) of the FIRSEA provides that the FIRS shall have exclusive powers of assessing, collecting, and enforcing payment of tax due to the Government of Nigeria or any of its agencies from persons, including companies and enterprises chargeable with tax. Similarly, Section 25 of FIRSEA also confers upon the FIRS the power to administer all federal tax legislations, including the Petroleum Profit Tax Act, in Nigeria.

Relatedly, as a matter of fact, arbitration is becoming an attractive dispute resolution mechanism in Nigeria due to its unique features.[12] It is a specially designed tool established for the final and binding resolution of disputes.[13] 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 doctrine of party autonomy. To this extent, arbitration agreements

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Unreported Appeal No. CA/A/507/2012; handed down by the Court of Appeal, Abuja on 22nd July, 2016. (Esso Decision)

7. The Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria (LFN) 2004, at Sections 8, 34, and 35. ("The Arbitration Act").

8. The Petroleum Act Cap P10 LFN (2004). (Petroleum Act) at Paras 11, 41 and 42 of First Schedule.

9. The Petroleum Profits Tax Act Cap P13 LFN (2004). (PPTA).

10. The Federal Inland Revenue Service (Establishment) Act No 13 of 2007. (FIRSEA).

11. Clause 24(2) of the Nigerian Production Sharing Contract (PSC) Model Agreement executed between Nigeria National Petroleum Company (NNPC) and International Oil Companies (IOCs) provides for settlement of disputes by arbitration.

12. Vishnu Tandi, Arbitral Tribunal vs. Courts. 7thSeptember 2015.

13. J. Lew, et al, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law, 2003) p.1. (Lew I).

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, parties are in essence agreeing to be bound with finality by the award of the arbitral tribunal.[14]Generally, there are two (2) fundamental principles that underpin the field of arbitration known as (i) Kompetenz-Kompetenz[15] and (ii) parties' autonomy to solve disputes by means ofarbitration.[16] The autonomy of arbitration must be respected by all courts.[17] Thus, to Julian Lew, arbitration has reached its *effet utile* and has 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"*[18]

Further, Article 5 of the 1985 UNCITRAL Model Law states that "no court shall intervene except where so provided." The UNCTRAL Commission Report[19] 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*

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[14]. Arbitration Act (n 7) at Sections 1 & 2.

[15]. 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.

[16]. 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").

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

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

[19]. United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. The UNICTRAL Rules are now contained in the First Schedule to the 2004 Arbitration Act,

in the model law on international commercial arbitration all instances of court intervention."[20]

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

> *"Exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law."*[21]

Despite the increasing role of arbitration however, the Nigerian Supreme Court in ***Kano State Urban Development Board v. Fanz Construction Company Limited***,[22]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:

- an indictment for an offence of a public nature;
- disputes arising out of an illegal contract;
- disputes arising under agreements void as being by way of gaming or wagering;
- disputes leading to a change of status, such as divorce petitions;
- any agreement to give the arbitrator the right to give judgment in rem.[23]

Statutorily, whether or not a matter can be a subject for arbitration in Nigeria is determined by Sections 34-35 of the Arbitration Act. Similarly, in ***World Duty Free Company Limited v. The Republic of Kenya***,[24] 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."[25]In ***World Duty***, the defence of public interest was raised, and the Tribunal dismissed the Claimant's case because

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[20]. A/40/17: 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.
[21]. A/CN.9/264: 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.
[22]. (1990) 4 NWLR (Pt 172) 1.
[23]. 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 December 11th, 2017. (Biobaku).
[24] . 2006 ICSID Case No. ARB/00/7, Award (Oct. 4, 2006). Available at http://italaw.com/documents/ WDFv.KenyaAward.pdf
[25]. 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).

the contract at issue was unenforceable as it had been procured through corruption and thus against public policy.

Similar to the "Public Interest Defence," taxation has been ruled to be a matter of national interest and/or sovereignty of the nation which therefore cannot be ousted via an arbitration agreement. Thus, in Nigeria, the argument against arbitrability of tax matters continue to persist. In this regard, several tax practitioners[26] have commented on the subject of arbitration of tax disputes in Nigeria in the background of the three (3) judicial pronouncements by Nigerian courts: ***Esso Petroleum et al vs NNPC***,[27] ***Statoil vs FIRS***,[28] and ***Shell et al vs FIRS***.[29] An inevitable by-product of the globalization of economic activities has been the increased attention to international dispute resolution. International arbitration, mediation, conciliation as well as traditional cross-border litigation proceedings are now relatively common. In short, one subset of international disputes that has not received much attention, however, is the resolution of international tax disputes.Distinctions should therefore be drawn among three broad categories of fiscal arbitration: (i) tax controversies arising from business relationships; (ii) overlapping tax on the same transaction by two or more countries; and (iii) disputes implicating tax issues between a foreign investor and the host state with this last category of tax arbitration remaining the most controversial.[30]

III. The Adoption of ArbitrationInto The Nigerian Legal System

Although interchangeable for each other at times, arbitration is different from formal litigation. In fact, it is the arduous and costly legality and technicalities associated with formal litigation that led to the birth and emergence of Alternative Dispute Resolution (ADR)

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[26]. Park (n 5) at 200; Olumide K. Obayemi, "Tax Litigation in Nigeria and a Review of Recent Nigerian Court Decisions on Taxation," (2014) Vol. 5(24) *Research Journal of Finance and Accounting* Pages 162-171; Biobaku (n 23), at 1-4.
[27].***Esso*** Decision (n 6).
[28]. [2013] 14 NWLR (Pt 1373) 1.
[29]. ***Shell*** Decision (n 6).
[30]. Park (n) at 186.

of which arbitration is a major component.[31] Some of the reasons for the growing popularities of these alternative modes include, time efficiency, cost efficiency and specialized adjudicator for resolving disputes.[32] Arbitration, therefore, is a system of justice, born of merchants. In one form or another, it has been in existence for thousands of years.[33] In Halsbury's Laws of England, 4th edition(Reissue) by Lord Mackay of Clashfern,[34] the learned authorsof the authoritative work have written that:

> *"Arbitration is a process used by theagreement of the parties to resolve disputes.In arbitrations, disputes are resolved, withbinding effect, by a person or persons actingin a judicial manner in private, rather than bya national Court of law that would havejurisdiction but for the agreement of theparties to exclude it. The decision of the arbitral tribunal is usually called an award."*

Though the agreement to submit future disputes toarbitration usually forms part of the substantivecontract, but the arbitration clause is often treated as a separate contract.[35] 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 an Act of 1950 and adopted by arbitration statutes in most countries of the British Commonwealth.

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[31]. The Nigerian law also recognizes, arbitration, conciliation, judicial settlement including settlement under the various Rules of Court and mediation as the mechanism of settlement of disputes, besides litigation.

[32]. Tandi (n 12).

[33]. 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.

[34]. Vol.2(3) Halsbury's Laws of England, 4th edition (Reissue) (Lord Mackay of Clashfern (ed)), at para. 1, page 2.

[35]. *Bremer VulkanSchiffbau and Maschinenfabrik vs. South India Shipping Corporation* (1981) A.C. 909; (1981) 1 All E.R.289.

Nigeria has also adopted the New York Convention via Section 54(1) of the Arbitration and Conciliation Act of 1988, now contained in the 2004 compilation.[36] Yet, even before 1988, 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.[37] Further, Nigeria is a party to the Vienna Convention on the Law Treaties and acceded to it on 23rd May 1969 and ratified it on 31st July 1969.[38] 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 22 countries, which include but is not limited to Spain, France (1990), the United Kingdom (1990), the Netherlands (1992) and Brazil (2005).[39]

Apart from the New York Convention, the 2004 Arbitration Act is also based on the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. The UNCITRAL 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. Thus, *UNCITRAL Rules* were adopted by the UN Commission on April 28th, 1976 and were unanimously approved by the United Nations General Assembly on December 15th, 1976. [40] The

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[36]. Arbitration and Conciliation Act, of 1988 was first embodied as Cap 19, Laws of the Federation of Nigeria of 1990, and now finally contained in Cap A18, Laws of the Federation of Nigeria (2004). ("The Arbitration Act, (n 7)).

[37]. No. 31, Laws of the Federation of Nigeria (1960).

[38]. G. Etomi, et al., "NIGERIA: Arbitration" in Global Arbitration Review (eds): *Arbitration in 55 Jurisdictions Worldwide*, (London: Law Business Research, 2012), p. 328. ("Etomi, et al").

[39]. *Ibid*.

[40]. 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

UNICTRAL Rules are now contained in the First Schedule to the 2004 Arbitration Act, which are both for Domestic and International Arbitrations. They are by and large *ipsissimaverba* of the UNCITRAL Rules.[41] Presently, the primary domestic source of law relating to domestic and foreign arbitral proceedings is the 2004 ACA, which embodies the UNCITRAL Model Law, UNCITRAL Arbitration and Conciliation Rules, and the 1958 New York Convention.[42]

Whether or not a matter can be a subject for arbitration in Nigeria is determined by Sections 34-35 of the Arbitration Act which provide thus:

> *Section 34. Extent of Court intervention:*
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> *Acourt shall not intervene in any mattergoverned by this Act except where so providedin this Act.*
>
> *Section 35. Extent of application of this Actto arbitration:*
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> *This Act shall not affect anyother law by virtue of which certain disputes:*
> *(a) may not be submitted to arbitration; or*
> (b) *may be submitted to arbitration only inaccordance with the provisions of that oranother law."*

Thus, the 2004 Arbitration Act recognizes the fact that certainissues may not form part of an arbitrationagreement, e.g., if they will violate theConstitution or any other statutory enactment nor could they be submitted to ArbitrationTribunals, and so some issues may only be submitted toArbitral Tribunals only in accordance with theprovisions of the Constitution or other laws ofthe land where the agreement was enteredinto or governs the arbitral agreement.

IV. **The Need For Certainty of Laws Governing The Nigerian Taxation Terrain**

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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").

[41]. *Ibid*. per Akpata.

[42]. Etomi, et al, (38) at 328.

With the apparent bar against taxation maters from being submitted to arbitration in Nigeria, despite express provisions under Paragraph 41 of the First Schedule to the Petroleum Act, allowing for arbitration of issues of royalty tax and other taxes in the Oil & Gas regime, the question therefore is whether there is *certainty* in the taxation laws of Nigeria. As stated above, Adam Smith's ***An Inquiry Into The Nature and Causes of Wealth of Nations***, postulates that a good tax system must possess the qualities of equity, certainty, convenience and administrative efficiency.[43]Therefore, the requirement of certainty in a tax system makes it important that the income or property intended to be taxed, the occasion for tax payment, the rate of tax and the modalities for assessment and the general administration are clearly spelt out beforehand. All must be plain to the taxpayer and to every other person. The fear expressed by Adam Smith was that where there is no certainty. Every person subject to the tax is put more or less at the mercy of the tax collector who can unfairly increase or decrease the charge of any taxpayer.Certainty also means that tax administrators must not be allowed an unduly wide discretion. There must be no occasion for arbitrariness ad uncertainty which may foster injustice or iniquity in the system. Arbitrariness ad uncertainty, Adam Smith had argued:

> *"encourage the insolent and favour the corruption of an order of men (i.e., tax collectors) who are naturally unpopular, even when they are neither insolent nor corrupt"*[44]

The taxpayer should, as far as possible, be able not only to see clearly what is to be taxed, but also to understand the purpose which is intended to be served by choosing that particular form of taxation. A tax system is easier to administer when it is acceptable to the public and simplicity of the system is necessary for acceptability.Where time of payment, procedure to be followed or the amount to be paid is not clear to the taxpayer. The tax becomes a

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[43]. Adam Smith (n 4) at Book V and Chapter II.

[44]. See, May 19, 1809 Parliamentary Debate (Irish Tithes) in The Parliamentary Debates from the Year 1803 to the Present Time, Volume 14, By Great Britain. Parliament, at Pages 629-630.

burdensome and vexatious ordeal to him. In the first place, he sis quite unwilling to pay because he does not fully grasp the nature and purpose of the tax. If he attempts to pay without really knowing what is due, he is put more or less at the mercy of the tax collector who can use that opportunity to extort a bribe from ostensibly to effect a favourable adjustment of the tax liability. In practical terms, where, for lack of information, people get the impression that they are at the mercy of the tax collector because he determines whether they must pay a high or low rate, the tax collector, is thereby, encouraged to demand gratification as his recompense for charging a lower rate than he could have. Even the taxpayer under threat of an impending tax charge is encouraged to offer gratification in return for a reduction or waiver of the charge by the tax collector.[45]

V. Issues With the Provisions of the Constitution of the Federal Republic of Nigeria (1999)

In Nigeria with its written constitutional democracy fashioned after the American federalist system, the Constitution is the most supreme law. There are certain constitutional provisions applicable to the Nigeria tax and arbitration regime. Specifically, in Nigeria, the Constitution is supreme to any other law:

Section 1(3) (Supremacy of the Constitution)

1(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

Perhaps the most important statute with respect to the subject under consideration is Section 251(1) of Constitution of the Federal Republic ofNigeria 1999 which provides that:

> "… the Federal High Court shall have and exercise jurisdiction to the exclusion of anyother court in civil causes and matters –
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> (a) relating to the revenue of the Government of the Federation in which the saidGovernment or any organ thereof or a person suing or being sued on behalf of thesaid government is a party;
>
> (b) connected with or pertaining to the taxation of companies and other bodiesestablished or carrying on business in Nigeria and all other persons subject toFederal taxation…"

[45]. Ipaye (n 4) at 11-12.

A careful reading of the above section 251(1)(a)&(b) of the Constitution reveals a dilemma as to whether the section only ousts "courts" from deciding cases involving the revenue of the federation or whether Arbitral Tribunals do ***not*** form part of the "courts" so excluded.The Federal Revenue Court (as Federal High Court was then called) was established by the Federal Revenue Act 1973.[46] The Court was renamed the "Federal High Court" by Section 228 (1) and 230 (2) of the defunct Constitution of the Federal Republic of Nigeria of 1979. [47] Although the need was noted during the constitutional Conference leading to Independence, to establish a High Court for the determination of causes and matters within the Exclusive Legislative list of the Constitution, as is the customary in countries with the Federal System of Government, no step was however taken in that regard until the promulgation of the Federal Revenue Court Decree in 1973.Therefore, the Federal High Court as Federal Revenue Court (began with a President as the head of the court was then called) and four judges.

From its inception, controversies over its jurisdiction dogged every step of the Court. However, such controversies were finally settled with the enactment of Section 230(1) of the Constitution of the Federal Republic of Nigeria 1979.Section 231 of the 1979 Constitution was replicated in the Federal High Court Decree (Amendment) of 1991[48] which amended Section 7 of the Federal High Court Act (1973); and conferred *exclusive jurisdiction* on the Federal High Court in relation to the subject matters covered by section 7 of the Federal High Court Act (1973), as amended.

Further, Section 7 of the Federal High Court (Amendment) Act of 1991 has now being re-enacted as Civil Causes and Matters under section 251(1) (a)--(s) and of the

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[46]. Federal Revenue Court Act No.13 of 1973.
[47]. The Constitution of the Federal Republic of Nigeria of 1979 now superseded by the 1999 Constitution.
[48]. Federal High Court Decree (Amendment) No. 60 of 1991.

Constitution of the Federal Republic of Nigeria 1999 (as amended), while the Federal High Court's jurisdiction in criminal matters are as provided in Section 251(2)&(3) of the 1999 Constitution and in such criminal matters as the National Assembly may by Act, confers jurisdiction on it. The Federal High Court has concurrent jurisdiction with the High Court of the Federal Capital Territory and State High Court in respect of fundamental Rights matters by virtue of Section 46(1) of the 1999 Constitution.

In view of the above, we argue that the jurisdictional exclusion under Section 251(1)(a)&(b) would not exclude the jurisdiction of the Tax Appeal Tribunals set up under Paragraphs 1(1), 11, 13(1), &20(3) of the Fifth Schedule to the FIRSEA, especially in view of ***CNOOC Exploration and Production Nigeria Ltd vs NNPC.***[49]

In ***CNOOC***, CNOOC and NNPC were parties to a Production Sharing Contract (PSC) concerning an Oil Mining Lease (OML) 130 over a Contract Area (the Contract Area) in which another company, Total Upstream Nigeria Limited was the Operator of the Contract Area. In accordance with the PSC, Total Upstream Nigeria Limited prepared the Petroleum Profits Tax (PPT) returns for the 2010 accounting year in respect of the Contract Area and sent same to NNPC for filing with the FIRS. However, NNPC failed to file the returns and instead unilaterally prepared and filed another returns with the FIRS. Relying on the returns filed byNNPC, the FIRS assessed the Contract Area for the purpose of Tertiary Education Tax and served the Notice of Assessment on CNOOC in October, 2011. CNOOC filed a Notice of Objection challenging the Notice of Assessment on the ground that it believed that it was incorrectly prepared. After receiving the Notice,FIRS replied by sending a letter to CNOOC stating that the objection had been "noted for memorandum purposes only". CNOOC, being dissatisfied with the response, filed an appeal to the Tax Appeal Tribunal (TAT) on the ground that the assessment was wrong. After being served, FIRS challenged the

[49]. (2017) NCLR 13.

appeal on several grounds one of which was that CNOOClacked the locus to appeal to the TAT since the returns were not filed by CNOOCbut by NNPC and that non-joinder of NNPC rendered the appeal incompetent. The TAT in its ruling delivered in June, 2012 dismissed the objection of FIRS and went ahead to join NNPC in the matter.

After being served with the joinder, NNPC filed a Notice of Preliminary Objection challenging the jurisdiction of the TAT to hear and determine the appeal on grounds which bordered mainly on the allegation that the claims before the TAT were connected with taxation of companies carrying on business in the Federal Republic of Nigeria, and as such only the Federal High Court has the jurisdiction to the exclusion of any other court to entertain the matter. In its ruling of February 2013, the TAT held that it has the requisite jurisdiction to entertain the appeal while striking out NNPC. NNPC was dissatisfied with the ruling and consequently filed a Notice of Appeal at the Federal High Court, Lagos Division urging it to overrule the TAT.After hearing the parties, the Federal High Court Judge gave his ruling on the 22nd of May 2015 in which it held that CNOOChad no *locus standi* to initiate the appeal and that the TAT lacked jurisdiction to entertain the appeal as the subject matter is connected with the taxation of a Nigerian company which is an exclusive duty of the Federal High Court. The Federal High Court also held that the non-joinder of NNPC was fatal as it strips the TAT of jurisdiction to hear the appeal. CNOOCbecame aggrieved and filed a Notice of Appeal at the Court of Appeal, Lagos Division. One of the issues raised for determination was whether the jurisdiction of the TAT to entertain CNOOC's appeal infringed on the exclusive jurisdiction of the Federal High Court to hear tax disputes as stipulated under section 251 of the Constitution.Arguing the issue, CNOOCsubmitted that the TAT has the jurisdiction to entertain the tax appeal because the FIRSEA, which established the TAT does not encroach on the exclusive jurisdiction of the Federal High Court. CNOOCfurther argued that the TAT is an administrative body and that its proceedings is a

condition precedent to the assumption of jurisdiction by the Federal High Court. CNOOCrelied on section 251(1)(a)&(b) of the 1999 Constitution; FIRSEA; ***Eguamwense v. Amaghizemwen***,[50]and further contended that the TAT was not created to be a court but to be deemed as functioning like a civil court, and Paragraphs 1(1)&20(3) of the Fifth Schedule to the FIRSEA; ***Orji v. Dorji Textile Mills***.[51] Reliance was also placed on the decision in ***Nigerian National Petroleum Corporation v. Tax Appeal Tribunal and 3 Ors***[52] to submit that the TAT is not a court. CNOOCurged the court to resolve the issue in favour of itself.

Responding to the argument of CNOOC, NNPC & FIRS submitted that the TAT does not have the jurisdiction to hear and determine tax appeals and that once a court is clothed with exclusive jurisdiction, other courts are precluded from exercising original jurisdiction over the matter. NNPC & FIRScited section 251(1) of the 1999 Constitution and the cases of ***Buhari v. INEC***[53] and ***Oyeniran v. Egbetola***,[54]and further submitted that the TAT was deemed to be a Civil Court by the National Assembly and that it was placed in the same category with courts mentioned in section 6(5)(j) of the 1999 Constitution. NNPC & FIRSalso argued that by the clear wording of Paragraph 20(3) of the Fifth Schedule to the FIRSEA, the TAT is to be treated as a civil court for the purposes of exercising jurisdiction in respect of disputes arising out of tax laws, which pertain to taxation of companies in Nigeria, tax payable to FIRS, an agent of the Federal Government. NNPC & FIRSalso relied on ***Nospecto Oil and Gas Ltd v. Olorunnimbe***[55] to argue that the provisions of the FIRSEA no matter how laudable and practicable, cannot override the provisions of the Constitution donating exclusive jurisdiction to the Federal High Court in respect of revenue of the Federal Government, taxation of companies and issues involving Federal Government agencies.

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[50]. (1993) 9 NWLR Pt 315) 1.
[51]. (2009) 18 NWLR (pt 1173) 467
[52]. (2014) 13 TLRN 39.
[53]. (2004) 4 NWLR (Pt.1078) 546
[54]. (1997) 5 NWLR (Pt. 504) 122.
[55]. (2012) 10 NWLR (Pt 1306) 46.

NNPC & FIRS urged the court to discountenance the CNOOC's argument and resolve the issue in favour of NNPC & FIRS.

In resolving the issue, the Court of Appeal held thus:In ***Shell Nig. Exploration and Production &Ors v. FIRS & Anor***,[56] the Court of Appeal at page 38 had ruled that:

> "The procedure for resolving claims and objections such as in the instant matter, are spelt out. When an assessment is made and the party is not satisfied, it can serve a Notice of Objection with the FIRS. It can also file a notice of refusal to amend the assessment as desired where it disagrees with FIRS. The party may also then appeal against the assessment to the Tax Appeal Tribunal. If the party is still dissatisfied with the decision of the Tax Appeal Tribunal, then it can approach the Federal High Court, the Court of Appeal and the Supreme Court."[57]

The above recognition of the TAT by the Court of Appeal as a vital step towards the resolution of tax related disputes shows that the TAT has jurisdiction over such matters.The facts of the case of ***Esso v. NNPC***[58] contained in the certified true copy presented to the Court of Appeal by CNOOC, are also relevant to this instant appeal, as the facts in issue there also revolved around Petroleum Profit Tax and Education Development Tax arising from a production sharing contract. In ***Esso***, the Court of Appeal at page 11 of the CTC of the judgment, wholly approved the procedure prescribed by the Petroleum Profit Tax Act, which includes an appeal to the TAT. The Court of Appeal in ***Esso*** then went on to hold at page 12 thus.

> "It must also be stated that Section 251(1)(b) of the Constitution of Nigeria 1999 as amended gives exclusive jurisdiction to the Federal High Court in civil causes and matters connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation. It may be added that in respect of the petroleum profit tax, it is after the exhaustion of remedies or the process set out in (i) (ii) and (iii) above that a person may approach the Federal High Court".[59]

Part of the process referred to by the Court of Appeal in ***Esso***Decision, is an appeal to the TAT. In essence, the combined effect of the aforementioned in ***Esso*** and ***Shell*** decisions is

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[56].***Shell*** Decision (n 6).
[57]. *Ibid* at *38.*
[58]. ***Esso***Decision (n 6).
[59]. *Ibid* at page 12.

that the TAT has jurisdiction to entertain tax matters such as in the instant case. The issue was therefore resolved in favour of CNOOC.

Based on the above, for the purpose of this Paper, it is the opinion of the present writersthat the history of the Federal High Court and the phrase "courts" as used in Section 251(1)(a)&(b) of the 1999 Constitution would ***not*** extend to Arbitral Tribunals. Therefore, the jurisdictional exclusion under Section 251(1)(a)&(b) would only extend to formal courts of law and ***not***to Arbitral Tribunals established by private arbitration agreements.

Further, we also argue that the jurisdictional exclusion under Section 251(1)(a)&(b) would ***not*** apply to taxation matters submitted private arbitration agreements submitted for adjudication to the TAT under the authority of the ***CNOOC*** case. And, since most tax issues are mandated by the FIRSEA to be filed with the TAT, tax issues in private arbitration agreements may continue to go to TAT.

VI. Regulatory Powers Over Taxation Matters in Nigeria and the Separate Decisions of the Court of Appeal on Taxation Matters Contained in Arbitration Agreements.

With the above in mind, we now examine the regulatory powers over taxation matters in Nigeria in Nigeria. It is settled law that in the interpretation of statutes effect must be given to their ordinary meaning where the text is clear, as laid down in ***Attorney General of Ondo State vs. Attorney General of Ekiti State***,[60] thus:

> *"It is certainly a cardinal principle of interpretation that where in their ordinary meaning the provisions are clear and unambiguous, effect must be given to them without resorting to any aid internal or external. It is the duty of the court to interpret the words of the lawmaker as used. Those words may be ambiguous, but even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited (See for example And St. Mellon R.D.C. v. Newport Corporation (1951) 2 All NLR 839, London Transport Executive v. Betts (1959) AC 231, Attorney General of Bendel State v. Attorney – General of the Federation Ors (1981) 10 S.C 1, (1981) 12 N.S.C.C 314)."*[61]

[60]. (2001) 17 N.W.L.R (Pt. 743) 706.
[61]. Per Hon. LegboKutigi, JSC, (2001) 17 N.W.L.R (Pt. 743) 706, at 756.

Similarly, Hon. Uwais, CJN had held in ***SDPC (Nig.) Ltd vs FBIR***,[62] that:

> *For the principle of construction of statutes is that if the words of the statute are plain, precise, and unambiguous, they should be given their ordinary and natural meaning*.[63]

Thus, the guiding principle for the interpretation of a tax statute is well established. Tax statutes are interpreted strictly, as expressed by Rowlat, J. in ***Cape Brandy Syndicate v. IRC***,[64] thus:

> *In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One has to look fairly at the language used*.

This judicial attitude to the interpretation of tax statute promotes certainty which is one of the most important requisites of a good law. A taxpayer ought to be able to determine the tax consequences of his transaction beforehand and then decide whether or not to proceed with it. Therefore, we now examine the separate decisions of the Court of Appeal on taxation matters contained in Arbitration Agreements.

a. Statoil (Nig.) Petroleum vs. Nigeria National Petroleum Corporation[65] *(Statoil I)*

In ***Statoil vs. NNPC***, the court dealt with the applicability of Nigerian Arbitration and Conciliation Act ("ACA")[66] to the Nigerian tax jurisprudence and further expanded the frontiers of the Nigerian tax practice. In a case involving a Production Sharing Contract (PSC) between NNPC and Statoil who were parties to an Oil Prospecting Lease (OPL) that was later converted to an Oil Mining Lease (OML) under a PSC that expressly mandated arbitration of all disputes arising during the operation of the PSC. A dispute later arose, and Statoil served a Notice of Arbitration and a Statement of Claim on NNPC. NNPC objected to the arbitration and the jurisdiction of the arbitral panel by filing a Notice of Preliminary Objection, a

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62. (1996) 8 NWLR (Pt. 466) 256.
63. Per Hon. Uwais, CJN (1996) 8 NWLR (Pt. 466) 256, at 285.
64. [1921] K.B. 64.
65. (2014) 15 TLRN 1.
66. Arbitration Act (n 7).

Statement of Defence, and a Counter-claim. Curiously, NNPC, in paragraph 1.3 of its counterclaim stated that NNPC's counterclaim, arising under the same PSC, was arbitrable and that the arbitral panel has jurisdiction over NNPC's counterclaim. Subsequent to Statoil joining issues with NNPC, the Court of Appeal held that under Section 34 of the ACA, once parties have agreed to arbitrate their disputes, the court are compelled to enforce every arbitration agreement, even where the tax issues. By conceding that the counterclaim was arbitrable, NNPC has wholly waived its objection.

Subsequently, in the case of ***Statoil (Nigeria)Limited & Anor v. FIRS & Anor***, the Court ofAppeal held that the FIRS had standing tointerfere with arbitration proceedings when itconstituted an infringement of the Constitutionor other Nigerian laws or impede FIRS' statutoryfunctions or powers. The Court's reasoningseemed to be based on the fact that a party toan arbitration agreement may challenge thejurisdiction of the tribunal or claim that thearbitration agreement was void, and the taxauthority should be similarly entitled tochallenge an arbitration where it falls within itsstatutory remit.[67]

Arguably, the direction of the Court in ***Statoil*** isquestionable at best. For one, the ACA doesnot permit the intervention of a non-party to an arbitration agreement as this runs contrary tothe principle of party autonomy. Also, it seemsunclear how an agreement *inter partes* tosubmit to arbitration impedes the functions orpowers of FIRS. However, the decision remainsbinding but it is hoped that if this decision goeson appeal, the Supreme Court would quash itand uphold the arbitration.[68]

b. Statoil (Nigeria) Limited vs FIRS (Statoil II)[69]

[67]. Edem Andah, et al, "Tax Disputes in the Oil & Gas Sector: Are They Subject to Arbitration?," OALP Journal (3rd November 2017, a Newsletter of Olaniwun Ajayi & Co., at 3. (Andah)
[68]. *Ibid.*
[69]. (2014) LPELR-23144 (CA).

In this appeal, NNPC filed, with the FIRS, separate Petroleum Profits Tax Returns different from the ones submitted by the contractors (Statoil) and in violation of the Production Sharing Contract. Arbitration ensued under the Petroleum Act and the PSC. FIRS, an outsider filed an originating summons with the Federal High Court seeking to stop the arbitration. Thus, the main issues for determination in the Originating Summons was whether the breaches alleged by Statoil and the reliefs claimed,can form part of an arbitral agreement, andwhether an Arbitral Tribunal, but not the FederalHigh Court, should be the forum to entertain thedispute.

Statoil contended that the FIRS not being a party to the arbitration agreement had no locus standi to appear before the Arbitration Tribunal to challenge the agreement nor the jurisdiction of the Tribunal to hear and determine the issues in dispute. The Court held that since matters of taxation cannot be subjected to arbitration and since Section 251(1)(a)&(b) of the Constitution conferred exclusive jurisdiction over the revenue of the federation on the Federal High Court, only the Federal High Court may rule on the matters of taxation and not the arbitral tribunal.

c. The July 2016 Esso Decision[70]

In ***Esso vs FIRS***, Esso as the Contractors had filed a claim for arbitration against NNPC based on the fact that NNPC had acted contrary to the terms of a PSC between them when NNPC over-lifted available crude oil in respect of royalty oil and tax oil to the tune of US$1,584,500,000:00, and that the over-lifting was based on unauthorized Petroleum Profit Tax [PPT] returns which the NNPC had filed with the FIRS contrary to the terms of the PSC

After the arbitral tribunal made an award in favour of ESSO, on May 22nd, 2012, the Federal High Court Abu, in Suit No. FHC/ABJ/CS/923/2011, set aside the arbitral award on

[70]. ***Esso*** Decision (n 6).

the ground that byissuing an award in a dispute that was “a tax matter” the arbitrators had misconductedthemselves and acted without jurisdiction as the dispute was not arbitrable.

On appeal, the Court of Appeal agreed with the Federal High Court qnd held that the taxation matters are not subject to arbitration:

> “It must also be stated that Section 251(1)(b) of the Constitution of Nigeria 1999 as amended gives exclusive jurisdiction to the Federal High Court in civil causes and matters connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation. It may be added that in respect of the petroleum profit tax, it is after the exhaustion of remedies or the process set out in (i) (ii) and (iii) above that a person may approach the Federal High Court".[71]

As noted by Adekoya and Benibara, the Court of Appeal however declared that the aspect of the claim before the arbitral tribunalrelating to preparation of the PPT returns and calculation of lifting allocations can be severedfrom tax dispute. It consequently affirmed the decision of the High Court which held that taxdisputes are not arbitrable, but ordered a restoration of the final award of the arbitral tribunalin respect of preparation of PPT returns and calculation of lifting allocation, which wereinitially decided in favour of the Contractors by the arbitral tribunal but set aside by the HighCourt.[72] The instant authors agree with the submission that the Court of Appeal’s decision in ***Esso*** lucidly highlights the anomalous nature of Production Sharing Contracts inNigeria, as the contracts often contain fiscal regimes in clauses that either replicate aspects oftax legislation, reference tax legislation, or which directly impact upon tax assessment issues.If the decision is not set aside upon a further appeal, it then means that companies cannot validlysubmit contractual disputes to arbitration where the eventual outcome will impact upon taxobligations.[73]

d. The August 2016 Shell v FIRS Decision

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[71]. *Ibid* at page 12.
[72]. Funke Adekoya (SAN) and IbifubaraBerenibara, “Case Review: Esso Petroleum and Production Nigeria Limited & SNEPCO v. NNPC,” a Newsletter of AELEX Law Firm, at p. 3. (Adekoya&Berenibara).
[73]. *Ibid*. at 3.

Similarly, in ***Shell (Nig.) Exploration andProduction Ltdv. FIRS***, the dispute arose in the Nigerian Petroleum Industry.[74] There, the Court of Appeal held that the FIRS has*locus standi* to intervene in any dispute relating to the assessment, computing, and payment of taxesin accordance with the PPTA, and while referring to Section 251(1)(b) of theConstitution providing for the exclusivejurisdiction of the Federal High Court in mattersrelating to federal government revenue and thetaxation of companies in Nigeria, the appellate court further held that that on matters pertainingto taxation in Nigeria, only the Federal HighCourt has jurisdiction to adjudicate thereon, to theexclusion of arbitral tribunals.[75]

On the issue as to whether the FIRS may intervene in a purely private arbitration matter between the contractors and the NNPC where the FIRS had not been named as a party, the appellate court held that the FIRS must necessarily have an interest in any proceeding in which disputes relating to theassessment, computing, and payment of taxes in accordance with the PPTA is to bedetermined. Finally, the Court of Appeal held that under \section 251(1)(a)&(b) of the Constitution and Sections 8 and 25 of the FIRSEA, since the Contractors' claims before the arbitral tribunal were tax disputes arising fromthe application of the PPTA, and not contractual disputes.

The above exposition shows that in almost all the cases that have arisen before the Court of Appeal, the courts have almost always shielded under the Constitution to uphold the sovereignty of the tax authorities to administer all tax issues to the exclusion of the arbitral tribunals, irrespective of the private agreements between the parties to arbitrate.

VII. **Discussion**

[74]. Kolawole Mayomi, "Recent Developments in the Arbitrability of Tax Disputes in Nigeria" A Newsletter of SPA Ajibade& Co. Law Offices 21st December 2016 (Mayomi).
[75]. Andah (n 67) at 3.

Irrespective of the above appellate decisions, it must be borne in mind that Section 57(1) of theArbitration Act defines a "Court" to mean

> ***"the High Court of aState, the High Court of the Federal CapitalTerritory, Abuja or the Federal High Court."***

Similarly, Section 57(1) of the Arbitration Act defines a "party" to:

> "means a party to the arbitrationagreement or to conciliation or any personclaiming through or under him and "parties"shall be construed accordingly."

Section 57(1) of the Arbitration Act does not allow an intervener such as the FIRS. The principles enshrined indecided cases is that only an injured party inan agreement that has been breached maysue the other party for redress, etc: ***AeroConstruction Co. vs. University of Benin.***[76]

Also, it is difficult to see how all matters of taxation in private arbitration agreements can constitute ouster clauses. In the case of ***Lawan v Zenon Petroleum & Gas Ltd***,[77] the Court defined the revenue of the Government of the Federation as: "Revenue of the Government of the Federation" refers to the income which the Federal Government collects and receives into its treasury, and is appropriate for the payment of its expenses.What determines jurisdiction of Court to entertain acause or matter

> Generally, it is primarily the subject matter in any claim that determines whether or not a Court has jurisdiction to entertain a matter.

The SupremeCourt in the case of ***Gafar v Government of Kwara State,***[78]had this to say:

> "I wish to stress by way of emphasis, that jurisdiction,implies the power or authority of a Court, to adjudicate over a particular subjectmatter. As I already stated in this judgment, the nature of the claim, determinesthe jurisdiction of the Court."

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[76]. (1985) 1 NWLR (Pt.2) 287 at 292; ***N.L.N.G. Ltd. vs. A.P.I.C. Ltd.*** (1995) 8 NWLR (Pt.416) 677; ***Ikpeazu vs. ACB Ltd***. (1965) NMLR 379; ***LSDPC vs. WL & S Food Ltd.*** (1992) 5 NWLR
(Pt.244) 653; ***Union Beverages Ltd. vs. Pepsi-Cola International Ltd.*** (1994) 2 SCNJ 157 and ***Hill vs. C.A. Parsons & Co. Ltd.*** (1971) 3 All E.R. 1345.

[77]. (2014) LPELR – 23206 (CA)

[78]. (2007) 4 NWLR (PT.1024) 375.

It is now standard practice and has been settledbeyond citing authorities that the jurisdiction of the Court can only bedetermined from the reliefs sought in the writ of summons and statement of claim.[79]"

In ***Federal Ministry of Commerce and Tourism vs Eze***,[80] the Court held thus:

> "...one of the principles developed on the point from the decided cases is that in their interpretation or application of Section 251 on the exclusive jurisdiction of the Federal High Court, the Courts construe the said provision strictly or even technically and they confine themselves in that sense only to the specific subjects or subject matters contained in the section. Thus, any other matter or subject not specifically mentioned under or in the provision of the section are regarded as excluded from the jurisdiction of the Federal High Court."

In essence, it is erroneous for the courts to always see taxation matters in all involving enforcement of clauses regarding apportionment under PSCs between contractors and the NNPC. It is hereby submitted that the interpretation or application of Section 251 on the exclusive jurisdiction of the Federal High Court, must be construed strictly and/or technically with the courts confining themselves in that sense only to the specific subjects or subject matters contained in the section. We submit further that arbitration of obligations in oil and gs regime is not within the exclusive jurisdiction of the Federal High Court.

VIII. **Conclusion**

Arbitral tribunal is an alternative to the national courts and a private dispute resolution mechanism organized and controlled by the parties. Its award is final and binding on the parties and is not subject to appeal to the regular courts save some recognized setting aside procedure. As compared with national courts, arbitration has the unique feature of being flexible, private and confidential. It is suitable for international transactions as it transcends the boundaries of national courts. National courts, as compared to arbitration are usually rigid and lack the expertise in some complex international transactions.

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79. ***Oloruntoba-Oju vs Abdul-Raheem*** (2009) 13 NWLR (PT. 1157) 83 S.C.
80. (2005) LPELR-5626 (CA)

According to the New Lexicon Webster's Dictionary, the phrase “Court” is “a place or hall where justice is administered; a place or hall where justice is administered,” while “Tribunal” means, "a group of persons empowered to decide a specific issue according to the law, arbitrate in a dispute, etc.; a bench or seat for judges, magistrates, etc." Therefore the phrase “court” as used in Section 251(1) of the 1999 Constitution can ***not*** by stretch be extended to cover an arbitral tribunal which is not a court of record.

For instance, in of India, in ***Harinagar Sugar Mills Ltd v. Shyam Sundar Jhunjhunwala***,[81] the Indian Supreme Court held that

> "By Courts is meant 'courts of civil judicature' and by 'tribunals' those bodies of men who are appointed to decide controversies arising under certain special laws."

Similarly, Section 3 of Indian Evidence Act provides that "Courts" that:

> "Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence."

Yet, Tribunals are also seats of Justice sharing some characteristics of the Courts. Thus, the Supreme Court of India in ***Durga Shankar Mehta v Thakur Raghuraj Singh***,[82]held as follows,

> "... The expression 'tribunal,' does not mean the same thing as 'court' but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State and are invested with judicial, as distinguished from purely administrative or executive, functions."*

Again, we reiterate that Section 251(1)’s ouster against courts will not extend to arbitral tribunals. In the final analysis, we posit that “exclusive jurisdiction”bar on federal revenue under Section 251(1)(a)&(b) of the 1999 Constitution and other applicable statutes would not extend to Arbitral Tribunals and/or Panels which are mot Courts of records *strictosensu*. From our discussion above, it is clear that allowing arbitration on tax issues between private parties, even if such touch on the FIRS’ jurisdiction to administer the revenue of the

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[81]. AIR 1961 SC 1669.
[82]. (1954) 2 MLJ 385, reported in AIR 1954 SC 520,

federation would provide certainty[83] in the Nigerian tax and arbitration jurisprudence, and also compliment the voluntary waiver of the court's jurisdiction in arbitration. Finally, Nigeria must not be left behind, as the nation continues to remove strictures, barriers, and impediments militating against the ease of doing business, Nigeria must continue to aspire to keep up with globalization and its demands by adopting the global trend which allows arbitration of private tax disputes, thereby moving beyond short-term solutions in favour of more solid alternatives.

For further information, please, contact:

- **Patrick A. Osu**
  Partner and Head,
  Tax Litigation and Advisory Group
  posu@ajumogobiaokeke.com
  Tel: +234 1 2719368-9
  Fax: +234 1 2719882 / +234 1 4622686

- **Olumide K. Obayemi**
  oobayemi@ajumogobiaokeke.com
  Tel: +234 1 2719368-9
  Fax: +234 1 2719882 / +234 1 4622686

- **Kingsley Amaefule**
  kamaefule@ajumogobiaokeke.com
  Tel: +234 1 2719368-9
  Fax: +234 1 2719882 / +234 1 4622686

- **Abodunde H. Are**
  aare@ajumogobiaokeke.com
  Tel: +234 1 2719368-9
  Fax: +234 1 2719882 / +234 1 4622686

[83]. Adam Smith (n 4) at Book V. Chapter II; See, also, Ipaye (n 4) at 9.