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ENFORCEMENT OF FOREIGN ARBITRAL AWARD IN NIGERIA

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DEDICATION

TO GOD THE CREATOR OF MANKIND - BLACK OR WHITE.

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ABSTRACT

Considering the importance of arbitration in the settlement of disputes, this work will focus on the effect of the reception accorded the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award [New York Convention] in Nigeria. A functional analysis of case law and legal regime of international commercial arbitration will be carried out. The aim is to indicate the progressive acceptability of arbitration as an alternative means to solving commercial disputes. It will be examined whether enforcing an arbitral award that is subject to a set-aside proceeding in the country of, or under the laws of arbitral proceedings of another country will be in conflict with the New York Convention. The issue of deference to international arbitral award and the attitude of the national courts to international commercial arbitration in Nigeria as a whole will be analyzed. Finally, some suggestions will be offered on making Nigeria the hub of conducting foreign arbitral proceeding as well as enforcement of such awards.

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INTRODUCTION

Historically, traditional means of settling disputes have been a common occurrence in Nigeria. Before the advent of colonial administration in the late 19th century, parties were represented by persons skilled in oratoral prowess, who could argue and who possessed the persuasive power of argument.[1] The most serious disputes were resolved by a council of elders that would take testimony and sometimes hear the arguments of agents advocating on behalf of the disputants.[2] It was the general believe then that no appeal could come out from those judgments partly because the people feared and believed in the elders and therefore their wisdom could not be questioned. Subsequently, resolution of disputes through court assisted instrumentality became the only option for the parties.[3]

Considering the need to enhance commercial activity in Nigeria vis-à-vis resolution of disputes through arbitration, one can understand the need for Nigeria to sign and ratify the New York Convention.[4] Nigeria is the home to many multi-national companies[5] engaged in oil and gas business or allied services.[6] Until now, resolution of transnational disputes remain a relatively unknown system in Nigeria, ultimately due to the near-pariah status Nigeria was plunged into as a result of the unsettled political climate and military incursion into politics. This work stresses

[1] Azadon S. Tiewul & Francis A. Tsegah, *Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice*, 24 The International and Comparative L. Q. 393,396 (1975).
[2] Liundi S., *Introduction: Status of Tanzania and Zanzibar and Applicable Laws, in* ARBITRATION IN AFRICA 78-79 (E. Cotran & A. Amissah eds. 1996).
[3] See Goodman-Everard, *Book Review – Arbitration in Africa*, 14 Arb. Int'l 457, 458 (1998). See also Raghavan L, *New Horizons for Alternative Dispute Resolution in India – The New Arbitration Law of 1996*, 13(4) J. of Int'l Arb. 5, 6 (1996). (In ancient India, "local village councils (*panchayats*) conducted informal arbitral proceedings and their decisions were considered binding).
[4] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award. United Nations, Treaty Series, vol 330, No. 4739. Done in New York on 10th June 1958.
[5] The major companies include: Shell Development Corporation of Nigeria, Chevron Nigeria Ltd, Mobil Producing Nigeria Unltd. Some of these companies have incorporated their subsidiary in Nigeria. This does not in any way derogate the classification of the company as a foreign company.
[6] Other services include pharmaceuticals, manufacturing, construction and dredging services.

that the seat of arbitration might be in Nigeria, basically for convenience sake, as most of the multi-national companies can easily have their awards enforced in Nigeria. This does not undermine the applicability of the New York Convention.[7] The need for resorting to arbitration is more compelling considering the lethargic attitude of Nigerian courts to the resolution of sophisticated business disputes.[8] This undoubtedly discourages foreign investments.

Due to disparities between the systems of thinking, national ideologies and methods of conducting business in the various regions of the world, a national of a particular jurisdiction will be more likely to present a more convincing case by the standards of the court of her jurisdiction than will a foreigner.[9] The negative perception of a judge's national predisposition may prevent parties with different national or cultural backgrounds from agreeing on a suitable court to hear their disputes.[10] However, given the interest shown in conducting business in Nigeria, these multinationals have no alternative than to submit to the jurisdiction of Nigerian courts and its laws.

Certain gaps were created by earlier writings on this area of research. This stems from the fact that efforts have not been made to simulate international conventions as they are applicable in

[7] Some scholars believe that this foreign parties attitudinal behavior could be as a result of lack of familiarity with the local judicial system; a suspicion of pro-national bias in the courts and a desire to eliminate the perceived formality of judicial proceedings of judicial proceedings. See Nicholas B Angell &, Gary Feulner, *Arbitration of Disputes in the United Arab Emirates,* 3 Arab Law Quarterly, 19-32 (1988).

[8] In *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation,* [2008], EWHC, 726 797 (Comm), the winning party had approached the English court to enforce an arbitral award given in Nigeria. The trial court deferred to the Nigerian court when it got wind that a set aside proceedings had been instituted in Nigeria. Surprisingly, the same court was taken aback when it learnt that the Nigerian court was still entertaining the same matter for almost three years and there was no hindsight that the case was nearing any completion.

[9] C. Lecuyer-Thieffry & P. Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts*, 45 BUSINESS LAWYER, 577(1990).

[10] Asouzu, A, International Commercial Arbitration and African States 34 (2001).

Nigeria particularly. While discussing broad issues in relation to a region, conscious efforts to delve into particular context would be lost.[11]

This thesis shall seek answers to the following hypothetical questions. Can any form of foreign arbitral award be enforced in Nigeria? What standard of review should national courts utilize in enforcing an arbitral award? Problems do occur where a foreign country has indigenized its subsidiary in Nigeria. Can such a company be said to be a foreign company in the light of the various legal regimes regulating international commercial arbitration? What if enforcement is being sought in Country A which has no connection with the parties before the arbitral tribunal, however the arbitral tribunal applied the laws of Country A in resolving the dispute, would such enforcement be made in Nigeria? Take for instance a contract between a Nigerian company and an American party who entered into an international commercial contract. The contract provided for an arbitration clause which stipulated Switzerland as the seat of arbitration under the UNCITRAL Arbitration Rules.[12] The Nigerian buyer wins and was initially granted a partial award, subsequently a final award was given. The Nigerian party makes move to enforce the award in the US since both parties have no asset in Switzerland and was refused enforcement. Can he still seek enforcement in Nigeria?

Chapter one will be devoted to the various legal regimes in Nigeria. Nigeria has ratified and acceded to virtually all the conventions relating to international commercial arbitration. The

[11] Emilia Onyema, *Enforcement of Arbitral Award in Sub-Saharan Africa*, 25 Arbitration International, 115 (2010), Asouzu, Amazu A., *The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards*, the J. Bus. L. 185 at 118-119 (1999). This work is therefore an effort at exploring areas of enforcement of foreign arbitral award with particular reference to Nigeria.

[12] Available online at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf. Last visited on 21st March, 2011

grundnorm of enforcement mechanism of foreign arbitral award is the New York Convention. Hence its applicability to Nigerian context remains of critical relevance in this work.

In chapter two, this work discusses the applicability of the different arbitral laws in Nigeria to an arbitration agreement. The agreement is the basis for the jurisdiction for any tribunal to sit and decide the dispute, where there is no arbitration agreement, there cannot be said to be arbitration, and where the agreement is inchoate, the jurisdiction of an arbitral tribunal is tainted with irregularity.

Chapter three focuses on the enforcement of an international arbitral award, although recognition and enforcement follow each other, it is the practice in Nigeria that by enforcing an arbitral award, the award is deemed recognized in the country where the award was given. Thus where recognition alone is sought by a party, it does not lead to any obligation on the part of the losing party. Some of the questions treated in this chapter include what happens where both parties who entered into an arbitration agreement are not foreigner's *stricto sensu* but the country where the award is made considers them foreigners.

The end result of this work is to portray the judicial activism and receptive regime of our national courts towards the enforcement of foreign arbitral award. Nigeria is vast and potentially blessed to handle highly sophisticated disputes than can be decided in arbitral institutions in other parts of the developed world.

CHAPTER ONE

LEGAL REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION IN NIGERIA

Arbitration commands the machinery of world trade; therefore the local enactments have encompassed a highly-supportive legal regime for international commercial arbitrations.[13] It is therefore natural to conclude that enforcement of foreign arbitral awards enhances the free flow of commercial transactions by obliterating hiccups and uncertainties that hitherto were characteristics of the litigious era.

1.1 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award in Nigeria.[14]

The New York Convention succeeded the Geneva Protocol[15] and the Geneva Convention[16] which were the earliest attempts at regulating the administration of international commercial arbitration vis-a-vis enforcement of arbitration agreements and arbitral awards. The New York Convention was ratified and domesticated and thus became part of the national laws pursuant to Nigeria's constitution.[17]

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[13] See Veeder L, *The Lawyer's Duty to Arbitrate in Good Faith*, in L. Lévy & V.V. Veeder (eds.), Arbitration and Oral Evidence 115, 118 (2004) ["international arbitration is the oil which lubricates the machinery of world trade"].

[14] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award in Nigeria. United Nations, Treaty Series, vol 330, No. 4739. Done in New York on 10 June 1958. [New York Convention]. Available online at: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf. Last visited 22nd March, 2011. The standard reference works consulted in the course of this research are A. van den Berg, *The New York Arbitration Convention of 1958* (1981) and Gary Born, *International Commercial Arbitration* (Kluwer 2009)

[15] Geneva Protocol on Arbitration Clauses, 1923. Done on the 24th day of September, 1923. Available online at: http://interarb.com/vl/g_pr1923. last visited on 22nd march, 2011

[16] Geneva Convention on the Execution of Foreign Arbitral Awards, 1927. Done on 26th day of September, 1927. Available online at: http://interarb.com/vl/g_co1927. Last visited on 22nd march, 2011.

[17] Section 12 of Nigeria's 1999 Constitution provides that: (1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly. (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty. Section 54 of the Arbitration

In giving a basis for the enforcement of a foreign arbitral award, Nigerian courts have sought reliance on the second arm of the definitional section of an arbitral award under the New York Convention.[18] That definition gives a basis for two interpretations. The first arm of the definition is logical. Any party can, after obtaining award in any other sovereign State, apply to Nigerian courts to have the award enforced, once the procedural requirements have been complied with. The second part could either refer to an arbitration conducted in another sovereign State or to an arbitration conducted in Nigeria but with foreign parties. In *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation*[19] the English House of Lords enforced a Nigerian arbitral award, thus deferring to the New York Convention.[20] The fact that this award is purely a Nigerian award is irrelevant under the Convention and of course under Part III of the English Arbitration Act, 1996. Undoubtedly, the pro-enforcement bias of Nigeria's Supreme Court is in line with the regime of the New York Convention. The qualification that anyone can sue without the necessity of proving the doctrine of reciprocity evidences the readiness of Nigerian courts to entertain the enforceability of arbitral award in Nigeria and make Nigeria a fertile ground for international commercial arbitration dispute resolution.[21]

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and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004 incorporates the New York Convention under the Second Schedule of the Act and has become applicable in our national courts ever since.

[18] The second arm of Article I (1) of the Convention provides that the Convention shall apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement is sought.

[19] [2008] EWHC 797 (Comm).

[20] Tomlinson J, held that "Being an award rendered in Nigeria by Nigerian arbitrators in a dispute governed by Nigerian law between two Nigerian entities, this is in every sense a Nigerian domestic award. However, since Nigeria is a state specified by Order in Council under [s.100 (3)], the award is also a [Convention] award. Accordingly it may be recognized and enforced in this jurisdiction pursuant to [s.101]." [2008] EWHC 797 at 799

[21] In *Toepher Inc. of New York v. Edokpolor (trading as John Edokpolor & Sons* [1965] All N.L.R. 307, the Nigerian Supreme Court held that a foreign arbitral award could be enforced in Nigeria by suing upon the award, even where there is no reciprocal treatment in the country where the award was obtained. To succeed in the action however, the plaintiff must prove the following: (1) the existence of the arbitration agreement, (2) the proper conduct of the arbitration in accordance with the agreement and (3) The validity of the award.

Article II (3) mandates courts to refer parties to arbitration unless the courts find that the said agreement is null and void; inoperative or incapable of being performed[22]. In Nigeria there is overwhelming deference to arbitrator's jurisdiction by the courts. In *Owena Bank Ltd v. Vit. Construction Ltd, Niger Consultants*[23], the issue that arose was whether during the pendency of an arbitral proceeding, a party could bring an action to enforce one of the issues partially agreed to by the other party, even though, the proceedings had not been concluded. The Court of Appeal held that the lower Court should not in the exercise of its jurisdiction subvert the submission of the parties to arbitration for the resolution of the dispute.[24]

The effect of Article III is to prohibit the imposition of substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic arbitral award. Thus the additional and more onerous conditions given in *Ebokam v. Ekwenibe & Sons Trading Company* should be discouraged and jettisoned so as to portray Nigeria as an arbitration friendly country.[25] Article IV provides for documents to submit for recognition and enforcement of arbitral awards.[26] Article VII ensures a more-favorable-right-provision under the second arm

[22] Article II (3) of the New York Convention.
[23] (2000) FWLR (Pt.24) 1439.
[24] In a similar decision by the Supreme Court in *Ras Pa Gazi Construction Company Ltd v. Federal Capital Development Authority* [2001] FWLR (Pt.58) 1013, the Supreme Court held that the High Court has no power under the Arbitration and Conciliation Act to convert an arbitral award into its own judgment as the High Court did in the instant case… the only jurisdiction conferred on the Court is to give leave to enforce the award as a judgment unless there is real ground for doubting the validity of the award; then it can refuse leave. An award is on a par with judgment of the Court. [2001] FWLR (Pt.58) 1013 at 1015. This decision is in tandem with Article II (3) of the Convention which imposes a legal imperative on a Court to stay a court action brought in violation of the arbitration agreement.
[25] The Court of Appeal listed the following additional requirements while seeking for enforcement of arbitral award: that the arbitrators were appointed in accordance with the clause which contains the submission and the amount awarded has not been paid.
[26] The documents include the duly authenticated original award and the original arbitration agreement, or a duly certified copy of those documents. The requirement of translation where the said award or agreement is not in

of the article. It provides for the party seeking enforcement of an arbitral award to rely on the provisions of a domestic law concerning enforcement of foreign arbitral awards or other treaties, instead of the New York Convention.[27] Nigeria has a separate statutory regime for the enforcement of foreign arbitral award which is discussed below.

1.2 Arbitration and Conciliation Act[28]

The earliest attempt at consolidating arbitration in Nigeria was in 1914 when the first statute was enacted- the Arbitration Ordinance of 1914,[29] which was understandably predicated on the English Arbitration Act, 1889.[30] Later that year the ordinance was replaced by an act and became Arbitration Ordinance Act, 1914. The 1954[31] Act relates to domestic arbitration.[32]

The extant law on arbitration in Nigeria is the Arbitration and Conciliation Act, 2004.[33] This Act was done to:

> "Provide a unified legal framework for the fair and efficient settlement of commercial[34] disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and

English language is necessary. This is however a procedural formality which Nigerian courts are eager to waive where there would be a subversion of justice such as where the judge before whom the enforcement proceedings are brought understands the foreign language well enough to have taken full cognizance of the contents of the documents.

[27] Article VII of the New York Convention.

[28] Arbitration and Conciliation Act, [ACA] Cap A18, Laws of the Federation of Nigeria, 2004. The Act codifies the New York Convention.

[29] Nigeria Ordinance, Orders and Regulations, 199 (1914). See Charles Mwalimu, The Nigerian legal system Peter Lang, 646,658 (2009).

[30] Akin Akinbote, 'Arbitration in Africa-The State of Arbitration in Nigeria'. Available online at http://www.ohada.com/fichiers/newsletters/315/the-state-of-arbitration-in-nigeria.pdf. last visited on 22nd March, 2011.

[31] This Act was later to be incorporated into the Laws of the Federation of Nigeria, 1958 as this was the year Nigeria had the first set of organized laws.

[32] There was no reference no International Commercial Arbitration in the 1954 Act. See Akin Akinbote, *supra* note 30.

[33] Cap A18, Laws of the Federation of Nigeria, 2004. The Act came into effect on 13th March, 1988.

[34] 'commercial' as defined under section 57 (1) of the ACA includes "all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road."

> Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration"[35]

While Part III of the Act[36] relates to the International Commercial Arbitration and Conciliation vis-à-vis recognition and enforcement of awards, Section 48 of the Act sets the grounds under which an arbitral award may be set aside.[37] Trial courts in Nigeria more often than not do provide extraneous procedural requirements.[38] Such attitude towards arbitration should be totally discouraged and abhorred. ACA encapsulates the reciprocity doctrine,[39] thus, a convention award will be enforced under the provisions of the New York Convention pursuant to ACA.[40]

1.3 UNCITRAL Model Law[41]

The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("UNCITRAL Model Law") is the single most important legislative instrument in the field of international commercial arbitration.[42] The Model Law, adopted in Nigeria in 1990 tremendously had impact in the formulation of Nigeria's ACA. Apparently

[35] See the recital to the act. Available online at http://www.nigeria-law.org/ArbitrationAndConciliationAct.htm. Last visited on 22nd March, 2011.
[36] Sections 43-55 of the Act.
[37] The grounds are *im pari materia* with Article V of the New York Convention.
[38] In *Imani & Sons Ltd. V. BIL Construction Co. Ltd* [1999] 12 NWLR [Pt. 630] 253 at pg 263, the Court of Appeal held that in addition to the Motion on Notice expected to be filed by the party seeking enforcement, the party also needs to adhere to the following simple requirements: (1) The Arbitration Agreement, (2) The Original Award, (3) The name and last place of business of the person against whom it is intended to be enforced, (4) Statement that the award has not been complied with, or complied with only in part. These additional requirements (items 3 and 4) are not in tandem with the provisions of the New York Convention, neither do they encourage domestic arbitration.
[39] See section 54(1) of the ACA.
[40] Emilia Onyema, *Enforcement of Arbitral Awards in Sub-Sahara Africa*, 26, Arbitration International, 1, 2010
[41] United Nations document A/40/17, annex I and A/61/17. Adopted on the 21st of June, 1985 and as amended by UNCITRAL on 7th day of July, 2006. Available online at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf. Last visited 22nd March, 2011. For commentary, *see* Asouzu, Amazu A., *The UN, the UNCITRAL Model Arbitration Law and the Lex Arbitri of Nigeria*, 17 Journal of International Arbitration 85-108 (2000).
[42] P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2d ed. 2005). See also Asouzu, Amazu A., *The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards*, the J. Bus. L. 185 at 118-119 (1999).

Nigeria saw a need to provide foreign investors with a law that is closely connected to the Model Law which is widely acceptable all over the world.[43]

1.4 UNCITRAL Arbitration Rules[44]

The UNCITRAL Arbitration Rules sets the model for Nigeria's arbitral process. The First Schedule to the ACA is based on the UNCITRAL Arbitration Rules.[45] The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators[46] and the conduct of arbitral proceedings[47] and establishing rules in relation to the form, effect and interpretation of the award.[48] The Rules empower the Secretary General of the Permanent Court of Arbitration to sui generis designate a suitable appointing authority where the parties have not agreed on an appointing authority.[49] To indicate the significant adoption of the UNCITRAL Rules in Nigeria, Section 53 of the ACA provides that:

> "Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act,

[43] See K. P. Berger, *The New German Arbitration Law in International Perspective*, 26 Forum Int'l 4 (2000) in Gary Born, *International Commercial Arbitration* 63 (Kluwer 2009) [http://www.kluwerarbitration.com/arbitration/DocumentContent.aspx?ipn=31354]. (In Germany, while following the provisions of the Model Law, the German Ministry of Justice noted that "if we want to reach the goal that Germany will be selected more frequently as the seat of international arbitrations in the future, we have to provide foreign parties with a law that, by its outer appearance and by its contents, is in line with the framework of the Model Law that is so familiar all over the world")

[44] United Nations General Assembly Resolution 31/98, made on 15th december, 1976. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html.

[45] *Id.*

[46] Arts. 5-13, see also Articles 6 to 8 of the First Schedule to the ACA.

[47] Arts. 14, 15-25, 27-29 of the UNCITRAL Arbitration Rules in comparison to Section III of the ACA. There is no significant difference.

[48] Arts. 31-32, 35-37 of the UNCITRAL Arbitration Rules in comparison to Section IV of the ACA. There is no significant difference.

[49] Article 7 of UNCITRAL Arbitration Rules. In Nigeria such authorities include, Chartered Institutie of Arbitrators, UK, Nigeria Branch, Regional Center for International Commercial Arbitration-Lagos.

or the **UNCITRAL Arbitration Rules** or any other international arbitration rule acceptable to the parties."[50] (Emphasis supplied)

1.5 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

As with other international arbitration instruments, the Convention sought to remove bottlenecks inherent in the settlement of investment disputes. The International Center for Settlement of Investment Disputes (ICSID) is an autonomous international institution established under the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States"(the Convention).[51] The Convention regulates the conciliation and arbitration of investment (legal) disputes between contracting States and nationals of other Contracting States in accordance with the provisions of the constitution.[52] Thus only such disputes which have been submitted to ICSID by the mutual consent of the parties will be settled under the Convention.[53] ICSID also regulates its arbitral proceedings through the ICSID Arbitration Rules.

Nigeria deposited its instruments of ratification on 23rd August, 1965 and the Convention entered into force in Nigeria on 14th October, 1966 through the process of domestication.[54] The Act provides that an ICSID award shall be enforced in Nigeria as if it were an award contained in

[50] Section 53 of ACA
[51] Convention on the Settlement of Investment Disputes between States and Nationals of Other States produced at Washington, D.C., 18 March 1965. 575 U.N.T.S. 159 (No. 8359) (1966). Available online: http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm. Last visited on 6th January, 2011.
[52] Article 1(2) of the Convention. *Id.*
[53] Art. 25(1) of the Convention.
[54] Section 12 of the 1999 Constitution of Nigeria. See also International Centre for Settlement of Investment Dispute (Enforcement of Awards) Act [Cap I20, Laws of the Federation of Nigeria, 2004].

a final judgment of the Supreme Court, once the party seeking enforcement presents a copy of such award, duly certified by the Secretary General of the Centre.[55]

Nigeria was before the ICSID in Washington in the case of *Guadalupe Gas Products Corporation v. Nigeria.*[56] In that case a dispute ensued over the Production and marketing of liquefied natural gas between the gas corporation and the Nigerian government. Before the matter was concluded however, a form of settlement was agreed upon and their Terms of Settlement was recorded at their request in the form of an award. Remarkably, awards rendered under ICSID Convention are directly enforceable in signatory states without any standard of review to be applied in national courts.[57] In Nigeria, the provisions of ACA shall not apply to proceedings pursuant to the Convention.[58]

Considering the secrecy that permeates resolution of disputes through this Convention, not many judicial activisms have been noted concerning awards rendered under the Convention. However, failure to comply with the terms of the award could have serious implications on the investment climate of Nigeria. Nigeria could also risk facing the International Court of Justice at The Hague, if a party seeking to enforce an ICSID award feels that the Nigerian government is uncooperative in obeying the award.

[55] Section 3 of the International Centre for Settlement of Investment Dispute (Enforcement of Awards) Act, 2004.
[56] ICSID Case No. ARB/78/1. Available online at http://icsid.worldbank.org/ICSID/FrontServlet. Last visited on 17th March, 2011.
[57] Arts. 53-54 of the ICSID Convention.
[58] Section 8 of the International Centre for Settlement of Investment Dispute (Enforcement of Awards) Act, 2004.

1.6 The Nigerian Investment Promotion Commission Act[59]

This is an Act which seeks to promote foreign investment in Nigeria. The Act contains a specific provision for the resolution of disputes arising between an investor (Nigerian or foreign) and any government of the federation of Nigeria.[60]

1.7 Foreign Judgment (Reciprocal Enforcement) Act, 2004.[61]

The effect of this Act is that it applies to registration of foreign judgments given by a competent court or an arbitral tribunal. Upon registration, the award becomes the judgment of the court. In *Alfred Toepper Inc. (New York) v. Edokpolor*[62], the plaintiff, a New York company brought an action for the enforcement of an award given in a foreign arbitration, which was governed by the law of New York, a State that had no reciprocal arrangement with Nigeria. The Supreme Court held that the lower court ought not to have struck out the suit for lack of reciprocity since the plaintiff could sue upon the foreign judgment under common law. However to do this, the plaintiff must prove the existence of the arbitration agreement, the proper conduct of the arbitration in accordance with the agreement, and the validity of the award. A judgment or award

[59] Cap N117 Laws of the Federation of Nigeria, 2004.

[60] Section 26 of the Act provides as follows:

2) Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration as follows:-
(a) In the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act or
(b) In the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or
(c) In accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.

3) Where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for the Settlement of Investment Dispute shall apply.

[61] Cap F35, Laws of the Federation of Nigeria, 2004

[62] (1965) 1 All NLR, 292.

obtained in a foreign country may be enforced in Nigeria within six years of the judgment or award.[63]

The purpose of this chapter is to indicate the legal regime of international commercial arbitration in Nigeria. Although, it cannot be confidently said that Nigeria has attained its height in the administration of international commercial arbitration, (unlike developed societies such as US, France and UK), it is hoped that with the free democratic society Nigeria has found itself, which has its attendant dividends of generating commerce and investment, there is an increasing chance that better days yet lie ahead in using Nigeria as the hub of international commercial arbitration in Africa.

[63] Section 4 of the Foreign Judgment (Reciprocal Enforcement)Act. 2004.

CHAPTER TWO

ENFORCEMENT OF THE ARBITRTION AGREEMENT.

It is only where the arbitration agreement is unquestionable, reflecting the will of the parties, can the national courts exercise preparedness to recognize and enforce such agreement. This chapter shall explore judicial activism in the areas of enforcement of arbitration agreements.

2.1 THE ARBITRATION AGREEMENT

Article II of the New York Convention sets the benchmark for the recognition and enforcement of international arbitration agreements including issues of arbitrability.[64] The consideration given to arbitration is more precarious when the international status of that agreement is brought before the court vis-à-vis a domestic award.[65]

The kernel of every international commercial arbitration and indeed the authority of arbitral tribunal rest on the validity of an arbitration agreement between the parties. "Obviously, no arbitration is possible without its very basis, the arbitration agreement."[66] The New York

[64] Article II (2) provides that that the term 'agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.' See also section 1(2) of ACA.

[65] Under section 57(2) of ACA, an arbitration agreement is international if any one of the following criteria is found:

(a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different countries; or
(b) one of the following places is situated outside the country in which the parties have their places of business-
(c) the place of arbitration if such place is determined in, or pursuant to the arbitration agreement,
(d) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is mist closely connected; or
(e) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; or
(f) The parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.

[66] A. van den Berg, *The New York Arbitration Convention of 1958: An Overview*144-45 (1981).

Convention, the UNCITRAL Model Law,[67] and the ACA provide a suitable mechanism for referring parties to arbitration where a valid arbitration agreement has been concluded.[68] It is apparent from the provision of Article II (3) of the New York Convention that where one is not a party to the arbitration agreement, seeking for a challenge or nullity of the arbitral agreement will be futile. In *African Development Ins. Coy. Ltd. vs. Nigeria LNG Ltd*[69], the contract between the parties contained an arbitration clause: "Any dispute whether in contract or at law, arising out of or in connection with the contract or the work performed there under shall be finally and exclusively settled by arbitration in Lagos, Nigeria under the Nigerian Arbitration and Conciliation Decree of 1988 by three arbitrators appointed in accordance with the Decree."[70] At the Supreme Court, the respondent contended that the appellant was in the position of guarantor whose liability is dependent on the default of another. He thus qualifies as a party to the contract. The Supreme Court held that from the provisions of the then Section 5(1) of the Arbitration and Conciliation Decree 1988, a party who brings an application for a stay of proceeding must be a party to the arbitration agreement and that the subject matter of the action must be with respect to any matter which is the subject of an arbitration agreement. Hence, nothing in the arbitration agreement between the plaintiff and the contractor can be interpreted as making the appellant a party to that agreement.[71]

[67] Article 7(1) of the Model Law provides that an "arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.

[68] See Varady T, Barceló III, J.T, Arthur T. von Mehren (eds), International Commercial Arbitration, A Transnational Perspective, 97 (4th edition, Thomas West, 2009).

[69] [2000] FWLR (Pt. 3) 431.

[70] *Id.,*

[71] *Id.* In *Nigerian National Petroleum Corp. v. Lutin Investments Ltd and anr* [2000] ALL FWLR (Pt. 301), 1760. In the course of the arbitral proceedings appellant objected to the continuation of the proceedings on the grounds that the original agreement entered into between the parties were with Lutin Investment Ltd, Geneva Switzerland but the party that initiated the arbitral proceedings is Lutin Investment of British Virgin Islands, a complete stranger to the agreement. In addition, the said agreement provided for arbitration under Nigerian laws, however arbitration was moved to London. The Supreme Court held that where there is no agreement by the parties as to the place of the

2.2 LEGAL IMPERATIVES FOR THE FORMAL VALIDITY OF ARBITRATION AGREEMENTS.

Article II (1) of the New York Convention provides that: "Each Contracting State shall recognize an ***agreement in writing*** under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a ***subject matter capable of settlement by arbitration.***"[72](emphasis provided).

Despite the technological innovations apparent today, writing still remains a basis for the validity of agreements. Writing is essential for the records, not only as a verifiable source of evidence[73] but to establish the truthfulness and genuineness of any agreement that may have been reached by the parties. While this may not be said about the formal validity of contracts in developed societies, the same cannot be said in a country like Nigeria. This is due to the fact that having survived years of repressive governments and political instability, elements of trust and good faith are still lacking. Foreign parties are reluctant to enter into contract with the Nigerian parties. Consequently, in Nigeria, electronically transmitted documents cannot satisfy an arbitration agreement in writing definition.[74] A solution to the foregoing anomaly may not be farfetched;

arbitral proceedings the sole arbitrator had full and unfettered power to determine or decide where the proceedings should take place or continue pursuant to the provisions of Section 16 of the Act. Besides, the appellant failed to prove that Lutin Investment Limited of Geneva, Switzerland and Lutin Investment of British Virgin Islands are two distinct and different companies with identical names.

[72] See also Article 11(2), Second Schedule of the ACA.

[73] *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules*, UNCITRAL, *Ninth Session*, UN Doc. A/CN.9/112/Add. 1, VII UNCITRAL Y.B. 166, 167 (1976)

[74] Section 1 of ACA provides that every arbitration agreement shall be in writing contained, in a document signed by the parties; or in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement; or in an exchange of points of claim an of defense in which the existence of an arbitration agreement is alleged by one party and denied by another. Subsection 2 goes on to state that any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contact is in writing and the reference is such as to make that clause part of the contract.

Nigeria can take a cue from the English Act which as far back as 1996 had made provisions for electronic form of arbitration agreement.[75] Another option for Nigeria could be changing the ACA to reflect the latest amendment to the UNCITRAL Model Law.[76] Such a drab definition as given to "agreement in writing" under article 11(2) of the ACA should be discouraged and attempts made to correct this anomaly in the seeming dynamics and innovations in present day world commerce. Furthermore, article II(1) of the New York Convention indicates that only such matters that are capable of settlement by arbitration are capable of qualifying under a valid arbitration agreement. Issues of arbitrability in international claims for instance tend more towards public policy of the enforcing country. Determining issues of public policy under a domestic legislation could be quite simple, however where the issue boils down to an international content, what is a public policy and by extension an arbitrable claim in one society may not be arbitrable in another society. For instance, while Maritime claims are arbitrable in London, the law is not yet settled on this in Nigeria.

2.3 INDEPENDENCE OF THE ARBITRATION CLAUSE

Nigerian courts have long accepted the separability doctrine. This is borne out of the fact that parties while entering into a contract would intend that the resolution of the disputes that may emanate from their commercial relationship would be quickly resolved in an amicable manner. The clause which puts both parties to arbitration in case of any dispute is a very vital key in the validity of and enforcement of an arbitration agreement. Many a times, parties after entering into a contract with a seemingly valid arbitration clause now recourse to courts when disputes arise

[75] Section 5(6) of the Act defines "writing" to mean "recorded by any means" which includes paper, electronic media and other forms of record-keeping.

[76] Article 7(1) of the amended 2006 UNCITRAL Model Law gives room for electronic form of an arbitral agreement.

on the pretext that the underlying contract is bad *ab initio* and therefore since the contract is invalid, the arbitration clause contained therein must also fail. The importance of an arbitration clause cannot be over emphasized.[77]

Even the economic analysis of contractual obligations cannot waive the enforceability of arbitral clause. In *Nissan (Nig.) Ltd v. Mr. S. Yoganathan and Sun Motors Ltd*, [78] where Mr. Yoganathan, a Chinese, breached the terms of his contract of employment,[79] the Court of Appeal held that the Court would grant a stay of proceeding and refer the parties to arbitration if the applicant complies with the provision of Section 5(2) of ACA.[80] The judgment by the Court further buttresses the unassailable nature of the arbitration clause. Indeed, arbitration agreement requires the consent of the parties and only that which is subject to arbitration by the parties will be adjudicated upon[81]. Under this circumstance, arbitration agreements must be enforced and when this has been done by the arbitrators can the assistance of judicial enforcement be resorted to.

[77] See M.V. Lupex v. N.O.C. & S. Ltd [2003]15 NWLR,Pt. 844,487, [per Ogundare, JSC: an arbitration clause has been defined as "a written submission agreed to by the parties to the contract and, like other written submissions, it must be construed according to its language and in the light of the circumstances in which it is made].

[78] [2010] 4 NWLR (Pt. 1183) 135.

[79] Article 5 of the service agreement stipulated that while in the employment of the appellant, and within one year after resigning, the 1st respondent shall not directly or indirectly engage in a trade similar to or in competition with that of the appellant.

[80] Section 5 (2) of ACA provides that: A court to which an application is made under subsection (1) of this section may, if it is satisfied- (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and (b) that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

[81] Guzman, A, Arbitrator Liability: *Reconciling Arbitration and Mandatory Rules*, 49 Duke Law Journal, 1284 (2000) ["the need for consent implies that when the parties to a transaction are the only ones affected by the transaction-that is, when there are no externalities-any form of dispute resolution upon which the parties agree should be permitted"].

Undeniably, this doctrine bears its originality from the age-long accepted rule of *Kompetence-Kompetence*[82]. Thus, in deciding the validity or otherwise of an arbitral clause, Nigerian courts generally look beyond the validity of the contract as a whole. Rather, where there is a vitiating element nullifying a contract, the same factors shall not affect the arbitral clause contained in it. Section 12 (2) of the ACA lends credence to the foregoing assertion.[83]

The justification for the doctrine of separability has been surmised by Onyema[84] as follows:

1. Respecting or upholding the autonomy of the parties who, having agreed on arbitration, do not wish to have part of their claim decided by arbitration and part by national courts,
2. This doctrine prevents or checks the excesses of parties wishing to frustrate or delay the arbitral reference by pursuing claims before national courts that the underlying contract was void by one factor or the other. [85]

The autonomy of the arbitral clause tends to create more problems than expected as there is the penchant by the courts to apply different *lex arbitri* to a particular contract. In the same vein, where the arbitral clause has been considered to be extant by virtue of the imposition of a different legal rule to the clause, another national law may find the underlying contract null and void. Thus, while the arbitral clause stands the underlying contract is declared invalid. The consequences of this is whether something can be put on nothing and still stand?[86] On what basis is the arbitration agreement standing? Apparently without a contractual agreement between two parties, dispute cannot be said to occur.

[82] See articel 16(1) of the UNCITRAL Model Law. The competence of the arbitrators to decide on their own jurisdiction to decide a matter brought before them,i.e., the merits of the dispute. , although the decision by the arbitrators can be reviewed by the courts at the enforcement stage, the initial activation of the decision on jurisdiction is given to the arbitrators themselves.

[83] section 12(2) of ACA provides that "For purposes of subsection (1) of this section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the validity of the arbitration clause.

[84] Onyema, Emilia, *The Doctrine of Separability under Nigerian Law*, 1 AJBPCL, 70 (2009).

[85] *Id*., 75.

[86] MacFoy v. United African Company (1961) 3 All ER 1169 at 1172, per Lord Denning.

To conclude, where the validity of an arbitral agreement is called to question, the courts need not go into the merits of the dispute as that is the striking difference between arbitration and litigation.

2.4 ENFORCEMENT OF THE ARBITRAL CLAUSE

In *The Owners of the M.V. Lupex v. Nigerian Overseas Chartering and Shipping Limited*,[87] the Charter-Party agreement provided for arbitration in London under English Law in the event of any dispute.[88] The respondent instituted an action at the Federal High Court, Lagos claiming damages for breach of the contract for the charter of appellants ship "LUPEX." In the interim, an order was granted for the arrest of the ship. The appellant subsequently applied to the court to set aside the *ex parte* order and a stay of proceedings in the suit *sine die*. He informed the court that as at the time the order was made, an arbitration proceedings had commenced in London, the respondent had even made a counter claim against the appellant. The Nigerian Supreme Court considered the duty of the court to ensure observance of arbitral clause in an agreement and opined that 'the mere fact that a dispute is of a nature eminently suitable for trial in a court is not sufficient ground for refusing to give effect to what the parties have, by contract, expressly agreed to. So long as an arbitration clause is retained in a contract that is valid and the dispute is within the contemplation of the clause, the court ought to give due regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed to by them.'[89] In reaching this decision, the Supreme Court considered sections 4(2) and 5 of the ACA[90] and came to the

[87] [2003] 15 NWLR, {Pt. 844} 469 [MV Lupex].
[88] Clause 7 of the Charter-Party Agreement.
[89] *Supra* note 87, at 491, paras. G-H.
[90] The provisions of ACA is as contained below:

> 4(2) where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.

conclusion that where, however, parties have agreed to refer their dispute to arbitration in a contract, it behooves the court to lean towards ordering a stay or proceedings for two reasons; namely:

(a) The provision of section 4(2) of the ACA may make the court's refusal to order a stay ineffective as the arbitral proceedings may nevertheless be commenced or continued and an award made by the arbitral tribunal may be binding on the party that has commenced an action in court;
(b) The court should not be seen to encourage the breach of a valid arbitration agreement particularly if it has international flavor.[91]

The enforcement of foreign arbitral clause in Nigeria is born out of the fact that arbitration is a means by which parties have sought that disputes be settled between them without recourse to the courts, a party cannot therefore be allowed to approbate and reprobate at the same time. A party to an arbitration agreement will be reprobating the agreement if he commences proceedings in court in respect of any dispute within the purview of the agreement to submit to arbitration.

Granted that enforcement of arbitral clause can be brought before the Nigerian courts at any stage in the proceedings, the standard of review usually undertaken by Nigerian courts has been deference to the arbitral tribunal, unless where the courts discover that the arbitration agreement is *"null and void, inoperative or incapable of being performed."*[92] Where the court is seized of the proceeding, the arbitral tribunal should by no means be hampered from arbitrating the dispute. This is the essence of the New York Convention to which Nigeria is a signatory. The

5(1) If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings. See section 5(2) at note 80 *supra.*

[91] Per Iguh, J.S.C. *Supra* note 87, at 490-491. See also *Niger Progress Ltd v. North East Line Corporation* [1989] 3 NWLR (Pt.107) 68.

[92] Article 11(3), Second Schedule, ACA

pro-enforcement nature of the ACA vis-à-vis the New York Convention is strikingly responsible for the commendable judicial activism in the enforcement of international arbitration awards.

In *The M.V. Lupex case*, there was no reservation of an option of the right to resort to litigation and at the same time commence arbitration or partake in an ongoing arbitration proceedings. Therefore, the respondents' attempt to institute court proceedings even when it had responded to arbitral proceedings in London by filing a counter-claim was more of putting his hand on the plough and looking back for any added incentives, a kind of forum shopping. The court should not be seen given parties a right they did not posses under the contract.

2.5 ARBITRAL CLAUSES AS OUSTER CLAUSES.

In *Sonnar (Nig.) Ltd v. Partenneederi MS Nordwind case*[93] the Supreme Court declined to grant a stay and held that the Nigerian court had jurisdiction in a case in which the parties had agreed that the German courts (being in the country of the carrier) shall have exclusive jurisdiction. That stipulation was struck down based on the closeness of the transaction to Nigeria, the inconvenience to the plaintiff, of suing in Germany, as well as the existence of a time bar under German law. *The Nordwind case* above can be easily distinguished from the *M. V. Lupex* case where the courts lent credence to the arbitration agreement. In that case, the respondent had voluntarily submitted to arbitration in London pursuant to the agreement between the parties, it however went on to file a suit against the appellant in respect of the dispute which is the subject-matter of the arbitration in London. The plausible explanation for the respondent's action could stem from the fact that having voluntarily submitted to arbitration as contracted by the parties, it

[93] [1987] 4 NWLR Pt. 66, 520. [The Nordwind Case].

was an abuse of court process for the respondent to institute a fresh suit in Nigeria unless there was a strong, compelling and justifiable reason for such an action.

Considering the striking difference between the aforementioned cases, it can be imagined the different rules that could be applied to the same set of easily identifiable cause of action. Indeed the clause which was at issue in *The Nordwind case* provided for settlement of disputes in Germany and by the time dispute arose, the cause of action had become statute barred in Germany. If one party had failed to bring an action within time as stipulated in the contract, should such party be made to benefit from his wrong? There exists a rule in law which posits that once a party has slept on his right, the doctrine of laches[94] and acquiescence[95] will catch up with such person. Statutory limits are a public policy issue and a condition precedent for courts' assumption of jurisdiction on any particular matter, let alone arbitrators. In *The Nordwind* case, parties contracted to have their arbitration conducted in Germany, nothing short of Germany should have been made, these are sacrifices that arbitration demands. These cases deals with admiralty matters and by its very nature are highly risky, technical and expensive. Foreign parties would not want to gamble with this kind of investment, more so the country's political stability is fledgling, hence the seat in different countries. The remarkable proactive pronouncement in aid of arbitration in *The M.V. Lupex case* is highly commendable. In *The MV Parnomos Bay v. OLAM Nigeria Plc*[96], where the bill of lading contained a clause providing that disputes between the parties shall be referred to arbitration in London. The Court of Appeal held

[94] The equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim, when that delay or negligence has prejudiced the party against whom relief is sought. Blacks Law Dictionary, 7th edition 879.
[95] Passivity and inaction on foreign claims that, according to customary international law, usually call for protest to assert, preserve, or safeguard rights. The result is that binding legal effect is given to silence and inaction. Blacks Law Dictionary 7th edition 23.
[96] [2004] 5 NWLR, {Pt. 865} 1.

that although initially the Admiralty and Jurisdiction Act[97] applied to all contracts having arbitration clause without any limitation whatsoever. However, section 20 of the AJA has only succeeded to limiting enforceable arbitration agreements to those having Nigeria as their forum.[98] With respect, this parochial view should be overridden by the Nigerian Supreme Court so that the future of international commercial arbitration in Nigeria will not be mortgaged. Needless to say *The M.V. Panormos* case was a decision by the Court of Appeal and until a final pronouncement on the matter by the Supreme Court, the law still remains that as decided in *The M.V. Lupex* case relating to matters of admiralty. The certainty of this judicial progressiveness is hinged on section 4 of the ACA which stipulates that the court before which a matter is brought "*shall*" order a stay. This is a legal imperative on the court and serves a useful tool in aid of international commercial arbitration.[99]

The provisions of ACA as it relates to the form and content of an arbitral award should be changed to be in conformity with the dynamics of world trade, the word is digitally changing and Nigerian national laws should follow suit. Besides, transactions arising from sale of shares, security holdings and sundry matters should be arbitrable in Nigeria.

[97] No 59 of 1991.

[98] Section 20 of the Act provides that 'any agreement by any person or party to any cause, matter or action which seeks to oust the jurisdiction of the Court shall be null and void, if it relates to any admiralty matter falling under this Act…' Commendably, the Nigerian Supreme Court did not lean towards this provision in giving effect to the arbitral clause in *The M.V. Lupex case*, even though this case had been decided earlier.

[99] Likewise in *Lignes Aeriennes Congolaises v. Air Atlantic Nigeria Ltd [*2006] 2 NWLR Pt. 963, 49, the Court of Appeal while construing the arbitration clause in an airport lease agreement went ahead to hold that the foreign arbitral clause was an attempt to oust the jurisdiction of the court contrary to section 20 of the Admiralty Jurisdiction Act. However, in the same case, another member of the judicial panel opined that "in any event, the arbitration clause did not seek to oust the jurisdiction of the court as all it did was to allow parties avenue and possibilities of settling disputes amicably out of court." Per Garba, JCA (as he then was). One could only wonder why the court eventually decided the way it did.

CHAPTER THREE

ENFORCEMENT OF THE ARBITRAL AWARD

The whole essence of an international arbitration and indeed all other dispute resolution mechanism is the rendering of an award. Knowing full well, that upon delivering an award, such arbitral tribunal becomes *functious officio,*[100] steps are taken by the tribunal to ensure the easy implementation of the award. Remarkably, there has been a progressive attitude of Nigerian judges on the enforcement of arbitral awards generally. This pro-enforcement attitude of our national courts can be attributed to the adoption and implementation of the New York Convention as well as the re-orientation of the judicial officers appointed.

3.1 BASIS FOR THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

'Arbitral awards have effects from the moment they are rendered'[101]. The recital to Nigeria's Arbitration Act[102] stipulates that the 'act is meant to provide for the fair and efficient settlement of commercial disputes by arbitration as well as making applicable the New York Convention to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.'[103] This presupposes that for a Nigerian or foreign party to seek enforcement of an award in Nigeria, such an award must have been given in Nigeria or in another contracting state. Thus, Nigerian courts are not obliged to enforce any award made in a non contracting state or

[100] Without further authority or legal competence because the duties and functions of the original commission have been fully accomplished. See Black's Law dictionary, 7th edition, 682.
[101] Varady T, Barceló J, Von Mehren, International Commercial Arbitration, A Transnational Perspective, (4th ed. 2006), 702.
[102] Cap A18, Laws of the Federation of Nigeria, 2004. [ACA].
[103] See the Long Title to the ACA. Available online at: http://www.nigeria-law.org/ArbitrationAndConciliationAct.htm. Last visited 22nd March, 2011.

from contracting states that do not have reciprocal arrangement with Nigeria.[104] However, Section 51 of the ACA provides a leeway for third party States or parties that are not signatory to the New York Convention to seek enforcement under this provision.[105] In *Alfred Toepper Inc. (New York) v. Edokpolor,*[106] the Supreme Court upheld the validity of a claim brought by an incorporated entity in the State of New York, even though no reciprocity arrangement had been concluded with the Nigerian State.

The applicability of the New York Convention shall only be with regards to differences arising out of legal relationship which is contractual.[107] In Nigeria, the concept of recognition and enforcement of 'international' awards, whether they are foreign or domestic, is usually governed by the same provisions, which are principally, the New York Convention and ACA. Procedurally, sections 51 and 54 of ACA require the same set of documents to be presented when a party is seeking for enforcement. Hence no distinction is given here between a contracting and non-contracting state. The basis for the enforcement of an arbitral award is

[104] Section 54(1) of ACA provides that where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the New York Convention shall apply to any award made in Nigeria or in any contracting state: (a) provided that such contracting state has reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention; (b) that the Convention shall apply only to differences arising out of legal relationship which is contractual. The theory of reciprocity posits that the courts of country X should recognize and enforce the judgment of country Y, if and only if, country Y is prepared to offer similar recognition and enforcement to the judgments of country X. See Godwin Omoaka, Nigeria: Legal Regime for the Enforcement of Foreign Judgments in Nigeria: An Overview, 02 December 2004. Available online at http://www.templars-law.com/media/publications/Enforcement%20of%20Foreign%20Judg-GOO.pdf. Last visited 18th March, 2011.

[105] According to section 51(1) of the ACA, an arbitral award shall, irrespective of the country in which it is made, be recognized as binding and subject to this section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.

[106] (1965) 1 All NLR, 292.

[107] See Section 57 (1) of ACA which defines commercial as all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail, or road.

therefore hinged on the necessity to make Nigeria attractive as a veritable resource country for enforcement of foreign arbitral award.

3.2 FOREIGN NATURE OF AN AWARD.

The New York Convention gives no express definition of an arbitral award, neither was there a direct definition of 'non-domestic' award.[108] Most foreing investors would agree to sit the arbitral tribunal in Nigeria taking into consideration the closeness of the transaction to the dispute. The question then is: does an award that emanates from such tribunal fit into a foreign award? Judicial decisons imply that such awards are foreign awards. Section 51 of ACA in relying on the New York Convention validates the enforcement of an arbitral award irrespective of the country in which such award is given, even if in Nigeria.[109] A more deferential attitude towards enforcement of arbitral award has been taken by Nigerian courts especially where the interest of foreign investors are concerned.[110] An enviable position is that taken by the International Center for the Settlement of Investment Disputes on the enforcement of arbitral award between foreign investors and States.[111] Nigerian courts owe it an obligation to frown at a parties' attempt to subvert the submission of dispute arising from a contract to arbitration.

[108] Article I (1) of the New York Convention stipulates that 'the Convention ...shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'.
[109] Section 51 of the ACA provides that "An arbitral award shall, irrespective of the country in which it is made, be recognised as binding…and shall upon application in writing to the court, be enforced by the court.
[110] In *Ras Pa Gazi construction Co Ltd v. Federal Capital Development Authority* [2001] FWLR (Pt. 58)1013, the Supreme Court held that 'the role of the trial court is merely to enforce an award when it is not challenged…An award is on a par with judgment of the Court.'
[111] Article 54 (1) of the ICSID Convention provides to the effect that each Contracting State shall recognize an award...as binding and enforce the pecuniary obligations imposed by that award within its territories... a Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

3.3 TYPES OF AWARD

The enforcement of an arbitral award is in part determinant on the type of the award placed before the courts. Problems do occur for the courts to determine whether an award to be enforced is a final award or not, this is pertinent when the court is trying to avoid a form of double enforcement. In *Fidelitas Shipping Co. Ltd v. V/O Exportchleb*,[112] the inimitable jurist, Lord Denning MR, stated the law as folows:

> "...the test was whether the arbitrator or umpire had in his award exhausted his duties so that there was nothing left for...him to do. If he had bid farewell to his office-so that the opinion of the court could decide all the issues one way or the other-then it is a final award. But if there was something left for himself so little as the asessment of damages, then it was...not a final award.[113]

The ACA makes provision for the different forms an arbitral award may take, however, no explanation of the awards were given.[114]

1. Final Awards

In clearing the confusion generated by the understanding of final award, Gary Born opines that all arbitral awards may be regarded as final in the sense that they finally resolve a particular claim or matter with preclusive effect.[115] Born's attempt to fuse all awards into final award may complicate matters in jurisdictions that are still developing their arbitral laws. The finality concept that he is trying to explore is different from the understanding in jurisdiction such as Nigeria. A final award disposes all claims in the matter; such matter thus becomes *res judicata.*[116] As a result, upon non-challenge of an award by any party to the proceedings, such an award is final and will be enforced against the losing party.

[112] (1965) 2 All ER, 4 at 7G-H.
[113] *Id.*, See Afe Babalola, Enforcement of Judgments, 322, (2003).
[114] Article 32(1) of the First Schedule to ACA provides that: "In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.
[115] Gary Born, International Commercial Arbitration 1665 (Kluwer 2009).
[116] An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been-but was not-raised in the

2. Partial Awards.

Partial award only concerns the determination of only part of the claims or issues brought before the arbitral tribunal.[117] Both partial and interim awards concern some issues in the arbitration proceedings while the other issues are still left for the tribunal to decide on.[118]

3. Interim Awards.

The essence of an interim award is to decide specific issues, leaving some other issues to be determined by the tribunal. In *Federal Ministry of Works and Housing and anr V. Monier Construction Company (Nigeria) Limited and anr*,[119] the question arose as to whether an interim decision of the arbitrator was an award capable of being enforced, set aside or refused recognition. The Federal High Court, Abuja held that such an interim decision of the arbitrator was an award on which the court can pronounce in accordance with the relevant provisions of ACA[120].

first suit. Blacks Law Dictionary, 7th edition, 1312. *Res judicata* is however not applicable in recognition and enforcement context, thus a party may engage in 'forum shopping' to get a suitable enforcement court.

[117] See section 47 of the English Arbitration Act, 1996.

[118] *Supra* note 113, at 323.

[119] (Unreported) Suit No. FHC/ABJ/CS/452/2001.

[120] In *Environmental Development Construction v. Umara Associates, [2000] 4 NWLR Pt. 652, 293* the Court of Appeal, per Salami JCA (as he then was) held that 'the interim decision of an arbitrator or umpire like his final decision, is known as an award.

3.4 STATUTORY LIMIT

The New York Convention sets no time limit for the enforcement of foreign arbitral award. A foreign party seeking to enforce its arbitral award should therefore be conscious of the limitation period for recognition and enforcement of arbitral award in Nigeria.[121]

Before the advent of ACA, foreign arbitral award could only be enforced by registration in Nigeria under the Foreign Judgments (Reciprocal Enforcement) Act[122]. With the enactment of ACA, the need for registration has been jettisoned. Section 51 of the Act makes the award binding and directly enforceable.[123] Section 7 of the Limitation Act, Nigeria makes reference to 'cause of action' in an action to enforce an arbitral award.[124] The uncertainty here bothers on what constitutes cause of action. In *Murmansk State Steamship Line v Kano Oil Millers Ltd*[125] where an action was brought for the enforcement of an arbitral award less than six years after the making of the award but more than six years after the breach of the charter party agreement, the Supreme Court held that the action was statute barred. 'The period of limitation runs after the date of award only when a party has by his own contract waived his right to sue as soon as the cause of action had accrued…'[126] The judicial standard as pre-condition for time limit does not seem plausible. In practice, no party will waive his right to sue as soon as the cause of action had

[121] Surprisingly, Nigeria is not a party to the Convention on the Limitation Period in the International Sale of Goods, New York. (1974) (A/CONF.63/17). Available online at: http://www.uncitral.org/pdf/english/texts/sales/limit/limit-conv.pdf. Last visited on 22nd March, 2011. The Convention provides a limitation period of four years.

[122] Cap F35, Laws of the Federation of Nigeria, 2004. Sections 2 and 4 of the Act provides that "a foreign award may be registered in the High Court at any time within six years after the date of the award if it has not been wholly satisfied and if at the date of the application for registration, it could be enforced by execution in the country of award.'

[123] See Section 51 of ACA. *Supra* note 109.

[124] Section 7 of the Limitation Act, Nigeria provides that "actions to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under an enactment other than the Arbitration and Conciliation, shall not be brought after the expiration of six years from the date on which the cause of action accrued."

[125] (1974) 12 SC 1.

[126] *Id*., at 8.

accrued, for that is the essence of a contract-an obligation to pay and the resultant obligation to perform.

In *Agromet Motoimport Ltd vs. Maulden Engineering Co. (Beds) Ltd*[127] the English court held that time begins to run from the date of the making of the award. This seems to be in accord with good business judgment. In Canada, the limitation period for most actions commenced after December 31, 2003 is two years.[128] In *City Engineering (Nig.) Limited vs. Federal Housing Authority,*[129] the contract was for the construction of housing units in Nigeria. Dispute arose from non performance of the contract and the matter went for arbitration according to the terms of the contract. The Arbitrator delivered his award in favor of City Engineering in November 1985. Enforcement proceedings were commenced in the High Court of Lagos in November 1988. The Supreme Court, relying on its earlier holding in the *Murmark's* case held that 'the limitation period ran from 12 December 1980 when the cause of action accrued and not November 1985, the date of the making of the arbitration award. Consequently, the action was statute-barred.'[130] There needs to be a clear demarcation between commencement of action when a dispute arises and cause of action when an arbitral award has been given.[131] Fusing these two differences into one provision as evident in the Nigerian limitation laws seems to be an indication to subvert the doctrine of separability under international commercial arbitration.

[127] [1985] 2 All ER 436.
[128] Antonin I. Pribetic, "*Winning is Only Half the Battle: Procedural Issues Relating to the Recognition and Enforcement of Foreign Arbitral Awards"*, in INTERNATIONAL COMMERCIAL ARBITRATION- CLAIMS AND COUNTERCLAIMS (V.V.L. Gayathri ed., Hyderabad, India: Amicus Books-ICFAI University Press, 2009). In the US, the FAA lays down a time-limit of three years for the confirmation and enforcement of awards made under the New York Convention.
[129] (1997) 9 NWLR (Part 520), 224.
[130] *Id.*, at 240.
[131] Such as an action for the recognition, enforcement, set aside or annulment of an arbitral award.

The New York Convention provides for a less expensive and less time consuming approach to enforcing foreign arbitral award. The implication of the *City Engineering case* is that both the arbitration proceedings and the enforcement of the award are a single cause of action which must be prosecuted and enforced within the statutory limitation period.

3.5 ENFORCEMENT OF FOREIGN ARBITRAL AWARD

Enforcement of an international award made in Nigeria is relatively easy, however, problems occur when the award sought to be enforced is made outside Nigeria. The matter is further complicated as a result of treaty obligations. The requirements under Section 51 of the ACA appear rather simple.[132] The demand for an arbitration agreement is only for the purpose of ensuring that indeed arbitration exists between parties. The agreement will be enforced by the court regardless of any reciprocity doctrine.[133] However, reasons may abound why the award should not be enforced.

[132] Supra note 109. The provision is *im pari materia* with article IV of the New York Convention.

[133] Under Order 20 Rule 17 of the **HIGH COURT OF THE FEDERAL CAPITAL TERRITORY, ABUJA, (CIVIL PROCEDURE) RULES, 2000,** an application to enforce an award on an arbitration agreement in the same manner as a judgment or order may be made *ex parte*, but the Court hearing the application may order it to be made on notice. (1) The supporting affidavit shall— (a) exhibit the arbitration agreement and the original award or in either case certified copies of each; (b) state the name, as usual or last known place or abode or business of the applicant and the person against whom it is sought to enforce the award; and (c) State as the case may require either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

3.5.1 GROUNDS FOR REFUSING TO RECOGNIZE AND ENFORCE FOREIGN ARBITRAL AWARD

Under the New York Convention, article V lists the grounds for refusal to enforce a foreign arbitral award.[134]

1. Article V(1)(a) - Validity of an arbitration agreement[135]

Under this provision, the Convention allows the enforcing State to exercise a de novo review of the arbitral award, to see whether any of the parties who consented to an arbitration agreement had the capacity to do so. In doing this, however, the Court must take cognizance of the law under which parties have chosen[136]. Where the parties have made no choice of law, then the law

[134] Section 52 (2): the court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse to recognize or enforce any award-

(a) if the party against whom it is invoked furnishes the court proof-
(i) that a party to the arbitration agreement was under some incapacity, or
(ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made, or
(iii) that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case, or
(iv) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or
(v) that the award contains decisions on matters which are beyond the scope of submission to arbitration, so however that if the decision on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on maters submitted to arbitration may be recognized and enforced, or
(vi) That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, or
(vii) Where there is no agreement within the parties under sub-paragraph, that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the law of the country where the arbitration took place, or
(viii) That the award has not yet become binding on the parties or has been set aside or suspended by a court in which, or under the law of which, the award was made; or
(b) If the court finds-
(i) That the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, or
(ii) That the recognition or enforcement of the award is against public policy of Nigeria.(section 52 of ACA)

[135] See Article 52 (2) (a) (i) (ii) of ACA, supra note 134.

[136] In *Nigerian Paper Mill Ltd. v Pithawalla Engr. GMBH* [1989] 1 NWLR (Pt. 99) 622, the issue was whether the respondents had legal personality being a foreign company. The Court of Appeal held that the fact that the Claimant

of the state where the award was made governs.[137] Incapacity here could amount to instance where one of the parties such as a corporation had no capacity to enter into such an agreement.[138]

2. Article V(1)b – Due notice and Inability to present case[139]

This section incorporates the twin pillars of natural justice which are *audi alterem partem*[140] and *nemo debet esse judex in propria causa*.[141] These doctrines are enshrined in Nigeria's constitution.[142] Thus where a party raises a ground under this heading, serious constitutional breach has been occasioned. In *Lagos State Development and Property Corporation v. Adold/Stamm International (Nig.) Ltd*.,[143] the Supreme Court held that "arbitration may proceed with a reference in the absence of one of the parties if he does not choose to attend. However, the party ought to have notice that the arbitrator will proceed *ex parte* in the case he chose not to attend…"[144] Nigerian courts should not lean on mere technicalities in denying the winning party the enforcement of his award, especially where the issue boils down to procedural irregularity. After all, parties with intent to avoid the technicalities in litigation opt for the easy, fast, and

obtained exception from incorporation in Nigeria raises a presumption that the Claimant is a company incorporated outside Nigeria; as only incorporated foreign companies qualify for exemption. Thus the claimant was competent to institute the action as a juristic person.

[137] Elisabeth M. Senger-Weiss, Enforcing Foreign Awards, Handbook on International Arbitration and Alternative Dispute Resolution, (Thoman E. Carbonneau, Jeanette A. Jaeggi eds.,) Juris Net. LLC,829(2006).

[138] Section 54 of the Companies and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, provides that a foreign company having the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Act. Any foreign companies exempted under any treaty to which Nigeria is a party. For natural persons, the law of the domicile of that individual shall govern the choice of law to be used.

[139] See also Article 52(2) (a) (iii) of ACA, supra note 134.

[140] No one should be condemned unheard. See Blacks Law Dictionary, 7th edition, 1620.

[141] No one should be a judge in his own cause. See Blacks Law Dictionary, 7th edition, 1661.

[142] Section 36 (1) of the 1999 Constitution of Nigeria provides that '… a person shall be entitled to **a fair hearing** within a reasonable time by a court **or other tribunal established by law and constituted in such manner as to secure its independence and impartiality**.' (emphasis mine).

[143] [1994] 7 NWLR (Pt. 358) 545.

[144] Per Ogwuegbu, JSC, *id.*, at 564. Where the appellant was properly informed by the arbitrators that the proceedings will go on and he fails to attend, no denial of fair hearing has been occasioned.

simple procedural formalities of arbitration, they should not encounter the technicalities they are trying to avoid.

3. Article V (1)(c) – Scope of submission to Arbitration[145]

Here an award will not ordinarily be enforced wherein the scope of submission is exceeded. In *Baker Marine Nigeria Ltd v Chevron (Nig.) Ltd*.,[146] the arbitration agreement provided that judgment upon the arbitral award may be entered in any court having jurisdiction on the matter. By an originating summons dated 4th March 1996 brought before the Federal High Court, Lagos, the Appellant sought leave of the court to enforce the award. On the respondents' motion, the Federal High Court set aside the award. The court's conclusion was based on the premise that "the arbitrator had improperly awarded punitive damages, gone beyond the scope of submissions, incorrectly admitted parole evidence and made inconsistent awards, amongst other things."[147]

However, there is an exception under this provision. Where the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.[148] The 'separability' doctrine enshrined in this article was given judicial impetus in *IPCO v. NNPC*[149] where the English Court of Appeal partially enforced an arbitral award.

[145] Article 52(2)(a)(iv), (v) of ACA, supra note 134.
[146] 91 F.3d 194 (2d Cir. 1999). Quoted from Varady et all, International Commercial Arbitration: A Transnational Perspective 917 (4th ed., 2009).
[147] *Id.* Nowhere in the New York Convention, neither in the ACA is there a provision for nullifying an award based on admittance of evidence, the trial court seemed to have applied certain rules extraneous to the legal regime known in international commercial arbitration.
[148] Article V (1) (c) of New York Convention.
[149] [2008] EWCA, Civ. 1157.

4. Article V(1) (d) – Arbitral Procedure[150]

The determination of this ground is based on the parties' agreed choice of law or the *lex loci arbitri*. The provision covers the conduct of the arbitrator, composition of the tribunal, the issue of arbitrator's qualification and confidentiality, as well as time limits for the enforcement of the arbitral award. Thus in *Nigerian National Petroleum Corp. v. Lutin Investments Ltd and anr*,[151] the Court held that where there is no agreement by the parties as to the place of the arbitral proceedings the sole arbitrator had full and unfettered power to determine or decide where the proceedings should take place or continue pursuant to the provisions of Section 16 of the ACA.[152] Despite the foregoing, respect must be given to the arbitration agreement except where the law of the place of arbitration demands that some mandatory rules be applied; even then the parties' agreement ought to remain sacrosanct.

5. Article V (1) (e) – Non Binding nature of the award.[153]

This crucial provision stems from an attempt to subvert the pro enforcement regime of the New York Convention. This stipulation is to the effect that the awards should not be given binding effect in one country when the law under which it was made precludes its binding effect. This is a fertile ground under which the losing party could evade enforcement of an award. Once an award has been rendered, it should have an immediately binding effect, except there exists extraordinary reasons for not enforcing the award. In *Baker Marine's* case, the second circuit court confirmed that under the New York Convention and principles of comity, "it would not be proper to enforce a foreign arbitral award under the Convention when such award has been set

[150] Article 52(2) (a) (vii) of ACA, supra note 134.
[151] [2000] ALL FWLR (Pt. 301), 1760.
[152] *Id.*
[153] See also Article 52(2) (a) (vii) of ACA, supra note 134.

aside by the Nigerian courts."[154] Even in the extreme circumstance where the award has not yet become binding, article VII of the New York Convention implicates that the award-creditor 'shall not be deprived of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'[155] It needs be asserted that the seat of arbitration might be in Nigeria, for convenience sake as most of the multi-national oil companies can easily have their awards enforced in Nigeria. Besides arbitrators operate in an international forum detached from any particular national forum and guided solely by the agreement.[156]

6. Article V(2) (a) – Arbitrability of the Subject Matter[157]

The enforcing court is obliged to determine the arbitrability of a subject matter in accordance with its own laws. Indeed, 'if the grounds of a dispute cannot be settled by arbitration under domestic law, a court may refuse to enforce an award granted through a foreign arbitration panel.'[158] Such grounds could be criminal conspiracy or sale of drugs that are banned in Nigeria, illegal contracts, gaming and wagering, bankruptcy, and insolvency.[159]

7. Article V (2) b – Public Policy Issue[160]

Granted that public policy issues may differ from one jurisdiction to the other, this provision grants Nigerian courts the power to refuse enforcement based on public policy in Nigeria. However, determining public policy has been fraught with difficulties. In *Taylor Wordrow*

[154] Supra note 146 at 197. See also Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention. 329 (2010).
[155] Article VII of New York Convention.
[156] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention. 325 (2010).
[157] Section 52 (2) (b) (i) of ACA, supra note 134.
[158] Supra note 151.
[159] *KSUDB v. Franz Construction Ltd* [1990] 4 NWLR 172.
[160] Section 52(2)(b)(ii) of ACA, supra note 134.

(Nig.) Ltd. v. Suddentolahe Etna-Werlk GMBH,[161] the Supreme Court identified some acts as constituting an infringement of public policy in Nigeria.[162] What constitutes public policy is not codified in any of our national laws; hence reliance will be placed on judicial disposition and the facts of each case.[163] The mores and norms in Nigeria differ significantly from other developed society.

3.6 PARTIAL ENFORCEMENT OF FOREIGN ARBITRAL AWARD

The potency of the New York convention cannot be undermined in virtually all jurisdictions, Nigeria not an exception. The problem is more heightened when it is viewed from the perspective that a partial enforcement could ground legitimacy to those other parts of the award that might be subject of contention in a higher court or even non arbitrable.[164]

In *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation,*[165] IPCO is a Nigerian registered subsidiary of a Hong Kong company. NNPC[166] is a Nigerian State owned

[161] [1993] 4 NWLR 127.

[162] Some of the acts listed by the Supreme Court include where:

1. The arbitrator fails to comply with the terms, express or implied of the arbitrator agreement.
2. The arbitrator has been bribed or corrupted.
3. Technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement of reference. This, however, does not mean that every irregularity of procedure amounts to misconduct.
4. The arbitrator or umpire fails to decide all the matters which were referred to him. Where the arbitrator or umpire has breached the rules of natural justice.

[163] In *Termorio S.A v Electranta* 487 F. 3d 928 public policy was defined as a judgment that tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property is against public policy.

[164] In *Gulf Petro Trading Co., Inc v Nigerian National Petroleum Corp.* [512 F.3d at 793] the court held that in seeking confirmation of the partial award, Petreo was effectively requesting that the final award be set aside or modified, actions that the district court was precluded from taking by the New York Convention.

[165] [2008], EWHC, 726 797 (Comm). See Hew R. Dundas, Partial Enforcement of Awards, Chartered Institute of Arbitration. Available online at http://www.davewaddell.co.uk/hrd/art/74-3-IPCO.pdf. Last visited 12th February, 2011. Tomlinson J. had restated this point when he declared that: "Being an award rendered in Nigeria by Nigerian arbitrators in a dispute governed by Nigerian law between two Nigerian entities, this is in every sense a Nigerian domestic award. However, since Nigeria is a state specified by Order in Council under [s.100 (3)], the award is also a [Convention] award. Accordingly it may be recognized and enforced in this jurisdiction pursuant to [s.101]. ([2005] 2 Lloyds Rep. at 328.

corporation regulating the activities of petroleum activities in Nigeria. Clause 65 of the contract between the two parties provided for arbitration in Lagos under the ACA and the substantive law of the contract was to be Nigerian law. IPCO obtained an award on the 28th October, 2004.[167] While NNPC's application to the Federal High Court, Lagos on 15 November, 2004, to set aside the award was still pending, IPCO approached the English High Court seeking for an order to enforce a part of the arbitral award that was not open to serious challenge. On November 29, 2004 the English Court enforced the 28th October, 2004 award. NNPC thence applied to the English court to set aside its order; and in the alternative to adjourn enforcement proceedings pursuant to the English Arbitration Act, 1996. The English court while deferring to the set-aside proceedings in Nigeria adjourned the proceedings in England on terms.[168] Gross LJ's key principles on partial enforcement are very instructive here.[169]

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[166] http://www.nnpcgroup.com/. Last visited 22nd March, 2011.

[167] The tribunal ordered NNPC to pay about US$ 152, 195, 971.55 and N5 million naira.

[168] The terms of which were that NNPC pay the agreed sum of US$13 million which was an amount due IPCO and which was undisputed between the two parties, and to provide appropriate security in London in an amount of US $50 million. NNPC complied with these terms.

[169] The principles are (1) Reflecting the Convention, s.103 embodied a pro-enforcement disposition; even when a ground for refusing enforcement has been established, the court retains discretion to enforce the award, (2) Section 103(2)(f) applied when there had been an order or decision by the court at the seat suspending the award and it was not triggered automatically merely by a challenge brought before that court…; (3) Public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution, since the reference thereto in s.103(3) was not intended to furnish an open-ended escape route for refusing enforcement…, (4) Section 103(5) achieved a compromise between two equally legitimate concerns: (i) enforcement should not be frustrated merely by the making of an application to the courts at the seat; (ii) pending proceedings in the courts at the seat should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction…, (5) The 1996 Act did not furnish any threshold test in respect of the grant of an adjournment and the power to order the provision of security was in the exercise of the court's discretion under s.103 (5) but it would be wrong to read a fetter into this understandably wide discretion (see Art.VI). Ordinarily, a number of considerations were likely to be relevant: (i) whether the application before the courts at the seat had been brought *bona fide* and not simply by way of delaying tactics; (ii) whether that application had at least a realistic prospect of success (the test in England for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice to the award creditor, (6) The Convention contained no nationality condition (unlike the Geneva Convention 1927) and was thus applicable, as here, when an award had been made abroad in arbitration between parties of the same nationality: it would be wrong to introduce a nationality condition into the Convention by the backdoor… see further Dundas, H.R. "Partial Enforcement of Arbitral Awards", (2008) 74 Arbitration 330-337.

In 2008, when the Nigerian decision was not forthcoming, IPCO approached the English courts again for the partial enforcement of his arbitral award. The court held that the 2005 order directing NNPC to pay an amount that was not disputed between the parties is tantamount to partial enforcement of the award.[170] NNPC's argument that the award should not be enforced in Nigeria because it had been suspended in Nigeria by virtue of the application before the Nigerian courts to set it aside was rejected. The implication of the foregoing is that Nigerian courts should take the issue of arbitration proceedings very seriously. Unnecessary delay and bureaucratic bottlenecks only divest Nigerian courts the jurisdiction of arbitration matters. However, this case further attests to the fact that under the Convention, partial enforcement of an arbitral awards is permitted.[171]

3.7 ENFORCEABILITY OF AN AWARD THAT IS SUBJECT TO SET-ASIDE PROCEEDINGS.

The important question raised in international arbitration is whether an award which is being challenged, that is, subject to setting aside proceedings can be enforced? An international dimension to enforcement of international arbitral award is curious, the position in Nigeria is to the effect that where an award has been annulled in the arbitral seat, such award is non-existent

[170] "… the enforcing courts role is not therefore entirely passive or mechanistic. The mere fact that a challenge has been made to the validity of an award in the home court does not prevent the enforcing court from enforcing the award if it considers the award to be manifestly valid… To do otherwise, would encourage unscrupulous parties to mount minor challenges to awards so as to frustrate their speedy and effective enforcement… Part of an award may be enforced provided that the part to be enforced can be ascertained from the face of the award, and judgment can be given in the same terms as those in the award…" Per Tuckey LJ (of the Court of Appeal).

[171] Martin King and Ian Meredith, *Partial Enforcement of International Arbitration Awards*, 26 Arbitration International 2010. See also the Austrian Supreme Court decision The Oberster Gerischtsof, No. 3Ob221/046 in (2005) Yearbook Commercial Arbitration 421 [partial enforcement of a Convention award has been permitted and directed].

and would not be enforced. In *Baker Marine Ltd v. Chevron Ltd,*[172] the U.S. appellate court concluded that Article V(1)(e) of the Convention permits non-recognition of annulled awards in the country of origin and that Article VII allows recognition of Convention awards under U.S. law. The US courts thus refused to enforce the award on the premise that the award has been set aside in Nigeria where the award was made. Perhaps if Baker Marine had exercised his right of appeal up to the Supreme Court, his judgment may have been enforced. The Federal High Court had refused enforcement because the tribunal concluded that Baker Marine did not admit sufficient evidence, a ground not supported by the New York Convention. Despite this however, the Court of Appeal concluded that Nigerian courts had no jurisdiction to set aside an award or any part thereof on the basis of reasons extraneous to the ACA. It refused enforcement on other grounds.[173] The intricacies surrounding set aside proceedings and desperate moves of loser-parties can be surmised in the US Circuit court's decision in *Gulf Petro Trading Co., Inc v. Nigerian National Petroleum Corporation.*[174] In that case, the US Court held that Gulf Petro's claim, though presented as an action under State and Federal law for fraud and conspiracy, was an attempt to set aside the final arbitral award, and that the New York Convention dictates that a United States court, sitting in secondary jurisdiction, lacks jurisdiction to consider such an action.[175]

[172] 191 F.3d 194, (2d Cir. 1999). Supra note 146.[Chevron (Nig) Ltd is a Nigerian registered company and a subsidiary of the American company].
[173] Baker Marine v Danos [2001] 78 N.W.L.R. (Pt 712) 337.
[174] 512 F.3d 742 (5th Circuit 2008. The dispute was rooted in a 1993 joint venture agreement between Petrec International Inc and NNPC(Petrec is a wholly owned subsidiary of Gulf Petro Trading Co., Inc, a Texas oil field services company). Petrec is to reclaim and clean the slop oil discarded by NNPC in the Niger Delta area in Nigeria).
[175] 512 F.3d at 753.

In the context of this chapter, it is evident that most decisions of the appellate courts, especially Nigeria's Supreme Court show the readiness to implement the principles underlined by the New York Convention geared towards enforcement of foreign arbitral award. This attitude deserves commendation. In a world of changing dynamics, we cannot afford to lag behind in totally overhauling our arbitration legal regime to make it attractive to international investors. Even, if our political and legal climate cannot be trusted by foreign investors for reasons best known to them, we should ensure that we eradicate all attitudes that will hamper the pro-enforcement regime of the New York Convention and publicize the inherent qualities in using Nigeria as the arbitration hub in Africa-be it domestic or foreign.

CONCLUSION

This thesis has set out to highlight the presence of international commercial arbitration vis-à-vis enforcement of foreign arbitral award in Nigeria. The essence of the New York Convention is to give speedy enforcement to arbitral award, irrespective of the country where the award was given. It is shown that Nigerian courts apply the New York Convention to circumstances where either one of the parties is a foreigner or the case is clothed with international facets. More so, article I (1) of the New York Convention allows Nigerian courts to consider an arbitral award as domestic. What follows are some recommendations.

Option I of article 7 to the 2006 revision of the UNCITRAL Model Law is intended to modernize the form requirement of an arbitration agreement to better conform to international contract practices, this is highly commendable. The provisions of ACA on the form of an arbitration agreement should be reviewed to create room for such contracts as Bills of Lading, certain Brokers Notes or even the conclusion of arbitration agreements via electronic mail or electronic data interchange (EDI) messaging. Until this is done, foreign parties will not be willing to contract with Nigerian parties under Nigerian arbitral laws.

The Nigerian legal regime on limitation of time should be more relaxed. Indeed, the arbitral tribunal becomes *functus officio* after rendering an award. Any action that may ensue would be matters relating to enforcement or set aside. Stipulating that time will start running from the period a breach of the 'container' contract occurred will be injurious to the idea behind the enforcement of foreign arbitral award.

It is evident that the arbitrators and judges must be abreast in the demands of the international commercial arbitration. Most Nigerian judges have been ingrained in litigation for so long that the demands of international arbitration are beyond their capacity. Perhaps the procedural rules of court could be adjusted to encourage filing of cases relating to enforcement of arbitral award. The judicial attitude towards arbitration must drastically change. The case of *IPCO v NNPC*[176] shows that the mill of justice can grind slowly in Nigeria. It is unimaginable how a set aside proceeding in an international commercial arbitration case can drag for up to three years. No rational message can be sent to foreign investors with this approach. The dictates of the New York Convention demands that arbitration must be conducted timeously and creditably. Like resolution of election disputes, international commercial arbitration should be given the weight and attention it deserves.

Undoubtedly, there exists some appointing authorities in Nigeria; very few of them are known internationally. These organizations owe it a duty to organize moot competitions, symposia and operate an effective and efficient information technology system. Sensitization of the general public on international commercial arbitration is a task that must be vigorously pursued. Enforcement mechanisms must be put in place as only a strong enforcement mechanism can ensure that arbitration is favorable to litigation.[177] Nigeria must begin to turn its potentials into reality. The level of international arbitration does not commensurate with the amount of investment in the country, the reason for this is not farfetched, even though arbitrators are devoid of any national laws of the forum, the seat of arbitration also plays a significant role in

176 [2008], EWHC, 726 797 (Comm).
177 Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention. 344(2010).

encouraging arbitration. Our political landscape must be refurbished. The environment must be conducive enough not only to do business but to resolve disputes.

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