Strengthening the legal regime for the recognition and enforcement of arbitral awards in Nigeria

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TOWARDS A MORE EFFECTIVE LEGAL REGIME FOR THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN NIGERIA

Abstract

In Nigeria, provisions for the recognition and enforcement of arbitral awards are made under local and international instruments. While these instruments facilitate the smooth enforcement of awards in certain respects, the enforcement process is hampered in other respects by defects in these laws. For example, the absence of statutory time limits for the enforcement of awards under the Arbitration and Conciliation Act (ACA) 1988, and the resulting reliance on Federal and State Limitation Laws, may sometimes mean that an award creditor is denied justice through no fault of theirs. Also, the enforcement process is impeded by the slowness in the disposal of cases by the Nigerian courts. In fact, proceedings for the enforcement of awards have been known to last for twelve years. These problems and a number of others to be discussed in this paper could affect investor-confidence and consequently, the current foreign investment drive by the Federal Government. The paper looks at the various instruments for the recognition and enforcement of domestic and foreign awards in Nigeria against the backdrop of their peculiarities, strengths and weaknesses. It also takes a brief look at the issue of slowness in the disposal of cases by the courts using IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation as a point of reference. Having considered these issues, the paper posits that the current regime for the recognition and enforcement of arbitral awards could be more effective. As Nigeria has continued to rank poorly on the World Bank Ease of Doing Business annual surveys, the paper stresses that one way of improving this rating is by entrenching a more effective framework for the enforcement of awards, particularly as arbitration has become the preferred dispute resolution mechanism in international commercial transactions. The effect of this is that

investors will be more willing to invest in Nigeria knowing that in the event of a dispute or a claim they will be able to fall back on our laws and justice system.

1.0. Introduction

The 21st Century has witnessed a considerable expansion in global trade and investments. Concomitant with this development is the increasing inclusion of arbitration agreements in commercial contracts, particularly international contracts. This is not unconnected with the fact that arbitration provides a viable alternative to litigation in the resolution of domestic and cross-border commercial disputes. Arbitration agreements, by their very nature, imply that parties to an arbitration will comply with the decision of the arbitral tribunal by performing the award without delay, no matter how unpalatable it may be.[1] However, arbitral awards are not always voluntarily complied with. Thus, where a party fails to perform their obligations under an award, the coercive powers of the State may be invoked, through the instrumentality of the courts, to recognise and enforce the award.

Leading international and regional arbitration conventions and most national systems of law provide for the recognition and enforcement of arbitral awards. In Nigeria, provisions are made for the recognition and enforcement of domestic and foreign arbitral awards under various local and international instruments. These include State arbitration legislation,[2] the

[1] The various international and institutional rules of arbitration enjoin parties to carry out an award without delay; See the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 1976, art 32(2); United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2010, art 34 (2);United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2013, art 34(2); See also the London Court of International Arbitration (LCIA) Rules 2014, art 26(8).

[2] Arbitration Ordinance, No 16 of 1914 and the Lagos Arbitration Law, No 10 of May 2009, hereinafter referred to as the "Lagos Law".

Arbitration and Conciliation Act (ACA) 1988,[3] the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958,[4] the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) 1965 as well as the relevant Reciprocal Enforcement Legislation.[5] An award may also be recognised and enforced by action at law under the common law. The apparent superfluity of enforcement systems notwithstanding, the award enforcement process in Nigeria is hindered in key aspects by defects and challenges within the legal and institutional framework for the enforcement of awards.

One of such defects is the absence of a statutory time limit for the enforcement of arbitral awards under the ACA and the resulting dependence on Limitation Laws which may sometimes mean that an award creditor is left with a hollow award. There is also the challenge presented by the slowness in the dispensation of justice by the Nigerian courts which means that an award creditor may have to wait for years to enforce the award. For example, more than thirteen years after a decision was made in the arbitration between IPCO (Nigeria) Limited and Nigerian National Petroleum Corporation (NNPC), IPCO has yet to

[3] Cap A18, Laws of the Federation of Nigeria, 2004, hereinafter referred to as the "ACA". The ACA was enacted as Decree No 11 of 1988. It is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985. It incorporates the UNCITRAL Arbitration Rules 1976 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 in the 1st and 2nd Schedules to the ACA, respectively.

[4] Hereinafter referred to as the "New York Convention" or the "Convention". The Convention was made in New York in 1958. Nigeria acceded to it on 17th March 1970 and fully implemented it by incorporating it into the 2nd Schedule to the ACA in 1988.

[5] The Reciprocal Enforcement Legislations include the Reciprocal Enforcement of Foreign Judgments Ordinance 1922, Cap 175, Laws of the Federation of Nigeria and Lagos, 1958, hereinafter referred to as the "REFJ Ordinance" and the Foreign Judgments (Reciprocal Enforcement) Act 1961, Cap 152, Laws of the Federation of Nigeria, 1990, hereinafter referred to as the "FJRE Act".

enforce the award because of set aside proceedings initiated in 2004 by NNPC which remains pending at the Federal High Court, Lagos. [6] Also in *Commerce Assurance Ltd v. Alhaji Buraimoh Alli,* it took twelve years to enforce the award by which time the value of the award had reduced considerably.[7] There are a number of other challenges and defects which will be discussed in this paper. As Nigeria continually competes with other countries for foreign investment to drive economic development, it is imperative that the country is viewed as arbitration friendly. If investors know that the extant laws and the court system are fully supportive of arbitration and the enforcement process, they would be encouraged to invest in the country. Thus, the importance of an effective regime for enforcement of awards cannot be over emphasised.

The paper will commence with a brief discussion on the nature of arbitral awards. Next, it will distinguish 'recognition' from 'enforcement' while attempting to establish a connection between the terms. The paper will further examine the legal instruments available for the recognition and enforcement of domestic and foreign arbitral awards in Nigeria. Having investigated the peculiarities, commonalties as well as the problems associated with the systems of enforcement provided under these instruments, the paper will make proposals for a more effective regime for enforcement of awards, and conclude.

2.0. Nature of Arbitral Awards

[6] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Ltd* [2014] EWHC 576 (Comm); [2008] EWCA Civ 1157; [2008] EWHC 797 (Comm); [2005] EWHC 726 (Comm).

[7] (1992) 3 N.W.L.R. (Pt 232) 710; see also O. Goodluck, 'Setting Aside and Enforcement of Arbitral Awards' (NIALS Workshop on Alternative Dispute Resolution, Dispute Management and Negotiation Skills, Abuja, April 2015).

The arbitral process involves the resolution of a dispute by an arbitral tribunal which is agreed to by the disputing parties and whose decision is binding. [8] This decision is usually referred to as an *award*. In spite of the significance of the arbitral process and the important legal consequences of the decision of an arbitral tribunal,[9] the word "award" is not defined in mainstream international arbitration conventions. For instance, the New York Convention which focuses primarily on facilitating the recognition and enforcement of foreign awards barely defines the word.[10] Also, the word is neither defined in the ACA, which is the domestic arbitration legislation for Nigeria, nor the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985,[11] upon which the ACA is based. That notwithstanding, Turner defines an award as the decision of the arbitrator based upon the submission or submissions made to him in an arbitration.[12] Simply put, an arbitral award is the final decision by an arbitrator on matters submitted to him in a particular reference. However, in theoretical arbitral discourse, a distinction must be drawn between a decision that effectively disposes of all the issues submitted for determination and one that deals with only some of the issues in dispute, leaving others to be decided at a future date. A decision within the latter category is clearly not an award in the sense described above because it is not the "final decision" of the arbitral tribunal on all the matters in dispute, rather it is a "part decision". Such decision may be

[8] UNCITRAL Model Law, art 2(b).

[9] D.S. Sutton, J. Gill and M. Gearing, *Russell on Arbitration* (24th edn, Sweet & Maxwell, 2015) 290 para 6-002.

[10] In relation to arbitral awards, article I(2) of the New York Convention states that, *"…the term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted…".* It only specifies what awards shall qualify as arbitral awards under the Convention but does not define an "award".

[11] Hereinafter referred to as the "UNCITRAL Model Law 1985". The Model Law was revised in 2006. The ACA is based on the 1985 Model Law, so it does not incorporate the 2006 amendments.

[12] R. Turner, *Arbitration Awards: A Practical Approach* (Blackwell Publishing, 2005) 3 para 1.1.1.

delivered in the form of an interim award.[13] For the purposes of this paper, any reference to the term "award" shall be a reference to a final decision of an arbitral tribunal, that is, a final award. [14] A final award must decide all the issues involved in the dispute and only what has been submitted for determination. [15]

[13] As the name implies, an interim award is an award which though has not finally settled all the matters in dispute, may be a final decision with regards to specific questions or applications by the parties. For instance, where a plea has been raised with regards to the jurisdiction of an arbitral tribunal to determine a particular dispute, the arbitral tribunal may under section 12(1) and (4) of the ACA decide the issue and make an interim award before proceeding with the determination of the substance of the dispute. Section 16(4) of the ACA provides that an award made in such circumstances is final and binding. Also under section 13(a) of the ACA a tribunal may take interim measures of protection where it is necessary to preserve evidence or protect assets or generally maintain the *status quo* pending the determination of the issues in dispute. A measure taken in such circumstances qualifies as an interim award. Interim awards often get confused for partial awards. A partial award is a final decision on a non-preliminary issue. Although, it can also be a final decision on matters settled in the award, it is not the same as an interim award. In drawing a distinction between the two terms, an International Chamber of Commerce (ICC) Report has suggested that partial awards should only be used when the issue determined is one of, or part of, a party's substantive claims while interim awards should only be used to describe an award that determines an issue such as jurisdiction or applicable law. Therefore, where it is expedient to determine issues of liability separately from issues of quantum, a partial rather than an interim award, would be more appropriate. See generally the ICC Final Report on Interim and Partial Awards of a Working Party of the ICC's Commission on International Arbitration (1990) 1 ICC International Court of Arbitration Bulletin 26; UNCITRAL Arbitration Rules 1976, art 32(1); See also Gauis Ezejiofor, Law of Arbitration in Nigeria (Longman Nigeria Plc, 1997) 94.

[14] An arbitral award may include a variety of remedies such as, monetary compensation, specific performance and restitution, injunctions, damages, declaratory relief, interest, costs, amongst others. See; N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, 2015) 515 para 9.40 -9.99.

[15] *Kano State Urban Development Board (KSUDB) v. Fanz Construction Limited* [1990] 4NWLR (Pt. 142) 1 at 32.

As soon as an award is published, the arbitral tribunal becomes *functus officio*. An arbitral award is final and binding on the parties.[16] It is equal to a judgment of the court,[17] thus like a court judgement, it extinguishes any right of action of the parties to the dispute and operates as *res judicata* between the parties on the same subject matter.[18] The nature of an arbitration agreement suggests a reasonable expectation that once an arbitral award is published by the tribunal, it would be performed without further ado by the unsuccessful party even if it is unfavourable. But where the unsuccessful party refuses to comply with the award, recourse may be had to a court of competent jurisdiction because arbitral tribunals do not have coercive powers of enforcement. It must however be noted that the courts will not enforce an award unless it is valid and enforceable. The requirements of a valid and enforceable award will be discussed in the succeeding section. But before then it must be stated that in Nigeria, the courts designated to hear, in the first instance, applications for the recognition and enforcement of domestic and foreign awards under a commercial arbitration are the State High Courts, the High Court of the Federal Capital Territory and the Federal High Court.[19]

2.1. Prerequisites for Validity and Enforceability of an Arbitral Award

[16] *United Nigerian Insurance Co. v. STOCCO* (1973)1 ALL NLR (Pt.1) 178 per Edmund Davies LJ; UNCITRAL Arbitration Rules 2013, art 34(2).

[17] *Ras Pal Gazi Construction Company Ltd v. FCDA* (2001) 10 NWLR (Pt.722)559 per Katsina-Alu JSC; ACA, s 31(1) (3).

[18] See generally, Blackaby and Partasides (n 14) 559 para 9.173 – 9.185; see also Goodluck (n 7).

[19] It must however be noted that for ICSID awards, the Supreme Court of Nigeria is the court of first and only instance for enforcement of awards. Also, the National Industrial Court (NIC) can now entertain applications for enforcement of arbitral awards, but it appears that its jurisdiction on this issue would be limited to arbitral awards arising under arbitrations that are employment related. See ACA, s 57(1); International Centre for the Settlement of Investment Disputes (Enforcement of Awards) Act, Cap 120, Laws of the Federation 2004, section 1(1); Order 17 Rule 3(3) of the National Industrial Court (Civil Procedure) Rules 2017 made pursuant to the Third Alteration of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

Arbitral tribunals are duty-bound to render awards that are valid and enforceable. This duty is expressly provided for in institutional rules of arbitration. For instance, the International Chamber of Commerce (ICC) Rules 2012 enjoins tribunals to, 'make every effort' to ensure that the award is enforceable.[20] The importance of rendering valid and enforceable awards cannot be overemphasised because as earlier noted, the courts will not recognize or enforce an award that is not valid. Therefore, the award must comply with any requirements as to form and substance. The formal requirements refers to what an award should contain to be to be enforceable by the courts while the substantive requirements deal with the substance of the award. These are discussed in more details below.

2.1.1. Formal Requirements of an Award: Generally, an award is said to comply with the requirements as to form if it: is in writing; is signed by the arbitrators; contains reasons unless it is agreed otherwise or the award is an agreed award; states the seat of arbitration and; is dated.[21] The formal requirements of an award are generally dictated by the arbitration agreement and the law governing the arbitration. So, in drafting an award, the tribunal must check whether the arbitration agreement adopts any particular set of rules which prescribe the requirements the award must meet to be valid.[22] It must also ensure that any requirements stipulated by the governing law of the arbitration are complied with. In most jurisdictions, stipulations as to form and content are mandatory requirements. For instance, Nigeria, India and Malaysia, make these requirements compulsory.[23] However in the United Kingdom

[20] ICC Rules, art 41; See also LCIA Rules, art 32(2).

[21] See ACA, s 26.

[22] International arbitration institutions such as the United Nations Commission on International Trade Law (UNCITRAL), International Centre for Settlement of Investment Disputes (ICSID), London Court of International Arbitration (LCIA) and International Chamber Commerce (ICC) all have rules that parties may incorporate into the arbitration agreement.

[23] See Indian Arbitration and Conciliation Act 1996, s 31; ACA, s 26; Malaysian Arbitration Act 2005, s 33.

parties can contract out of the prescribed form.[24] Non-compliance with formal requirements can be remedied if the failure in itself is not so serious, for instance, where the award is not dated, it may be remitted to the tribunal to affix a date.[25]

2.1.2. Substantive Requirements of an Award: An award is said to fulfil the substantive requirements if it is cogent, certain, complete and final. To be cogent, the award must be compelling, persuasive and of consistent reasoning.[26] To be certain, the award must be clear as to the obligations imposed on the parties to the reference,[27] particularly with respect to what is expected to be done, by whom and when.[28] To meet the requirements for completeness and finality, the award must be a complete decision and must fully resolve all the issues submitted to the reference, except there are some matters which are reserved to a further or final award, in which case the tribunal should issue an interim award. The court will not enforce an award if it does not meet every one of these requirements.[29] For instance, where a monetary award fails to clearly specify the sum to be paid, the award would have failed the test for certainty as no court would enforce an award if it is not clear what amount should be paid.

In addition, the tribunal must ensure that the principles of natural justice are brought to bear at all stages of the arbitral process, including the award making stage.[30] Failure to observe these requirements and principles may render the award liable to challenge and unenforceable

[24] See English Arbitration Act (EAA) 1996, s 52.

[25] D. S. Sutton, J. Gill and M. Gearing, *Russell on Arbitration* (23rd edn, Sweet and Maxwell 2007) 290-291 paras 6-045 – 6-046.

[26] Turner (n 12) 11 para 1.3.2.1.

[27] J. O. Orojo and M. A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, (Mbeyi & Associates, 1999) 249.

[28] Sutton, Gill and Gearing (n 9) 326 para 6.088.

[29] See M. J. Mustill and S. C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths 1989) 384.

[30] Turner (n 12) 5 para 1.1.4.

under the applicable laws.[31] Thus, it is crucial that the tribunal employs caution in the conduct of the arbitration to ensure that the process culminates in an award that is valid, recognizable and enforceable.

3.0. Recognition and Enforcement of Arbitral Awards

It is not unreasonable for the prevailing party in an arbitration to expect that the award will be voluntarily and promptly performed by the unsuccessful party.[32] This is because by electing to resolve disputes through arbitration the parties agree to be bound by the decision of the tribunal and thereby undertake to carry out the award without delay. To put the point beyond question, international and institutional rules of arbitration such as the UNCITRAL Arbitration Rules 2013 provide that, 'the parties shall carry out all awards without delay'.[33] For this reason, arbitral awards are generally described as self-executing. The issue of 'recognition and enforcement' of an arbitral award would not usually arise unless the unsuccessful party fails to comply with the award.[34] As earlier noted, arbitral tribunals do not have powers to coerce enforcement of awards so, an award, whether foreign or domestic, can only be enforced by a national court with competent jurisdiction on the application of the

[31] Non-compliance with the requirements may not only amount to misconduct, but may give justifiable grounds for setting aside or refusal of recognition or enforcement of the award by the relevant courts; see ACA, ss 29, 30 & 52. For instance, the courts may refuse to recognize and enforce an award under section 52(2)(a)(iii) of the ACA or article V(1)(b) of the New York Convention where a party proves that he was not given a fair opportunity to answer or present his case.

[32] Blackaby and Partasides (n 14) 605 para 11.01.

[33] UNCITRAL Arbitration Rules 2013, art 34(2).

[34] P. O. Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Lawlords Publications, 2015) 292.

prevailing party.[35] The courts may also recognize an award where a party seeks to litigate issues already settled by the award. In other words, it is the courts that give arbitral awards the element of sanction.[36] The recognition and enforcement of awards is one area where arbitration and the courts are closely connected.[37]

3.1. Distinguishing "Recognition" from "Enforcement" of Arbitral Awards

Relevant arbitration instruments often use the words "recognition" and "enforcement" in the conjunctive sense as if they are always inextricably linked. It must be stressed that this is not necessarily so because the terms provide entirely distinct reliefs that need not be collectively sought. For instance, the ACA and the MAA speak of 'recognition and enforcement' of awards, so also the New York Convention and the UNCITRAL Model Law 1985.[38] Recognition by itself is primarily a defensive process as it provides the prevailing party with a shield.[39] A party may seek recognition of an award (without enforcement) where the other party initiates court action in respect of issues that have been the subject of previous arbitral proceedings and which have been resolved by the award of a tribunal. In such a case, the court proceedings will be terminated as *res judicata* if in fact, the arbitral award disposes of all the issues raised in the court proceedings.[40] By so doing, the court upholds and recognises the award as valid and binding on the parties in relation to the issues it deals with. This resonates with section 34(2) of the UNCITRAL Arbitration Rules 2013 which provides that

[35] Under article 35(1) of the UNCITRAL Model Law 2006, an arbitral award is recognized as binding and upon application to a court of competent jurisdiction, such an award shall be enforced. See also ACA 1988, s 51; MAA 2005, s 38; New York Convention, art III.

[36] Goodluck (n 7).

[37] Idornigie (n 34) 292.

[38] ACA, ss 31 and 51; MAA, s 38; New York Convention, art V; UNICTRAL Model Law 2006, art 35.

[39] Blackaby and Partasides (n 14) 611 para 11.20.

[40] *Ibid;* see also Ezejiofor (n 13); E. Akpata, *The Nigerian Arbitration Law in Focus* (West African Book Publishers Limited, 1997) 91.

all arbitral awards shall be final and binding on the parties. But if the award leaves some of the issues submitted to the arbitration unresolved, the courts would still grant recognition but only to the extent that is necessary to ensure that resolved issues are not raised again in new court proceedings.[41] Essentially, recognition upholds the legal force and effect of an award without necessarily enforcing it. Enforcement, on the other hand, entails applying legal sanctions as are available to compel the party against whom it was made to carry it out. So, it acts as a sword in the sense that it not only recognises the legal force and effect of the award but ensures that it is performed.[42] If a court is prepared to enforce an award, it follows that it necessarily recognises the award as valid and binding upon the parties, so against this backdrop recognition is said to be a necessary part of enforcement as the award has to be recognised by the courts, to be enforced.[43]

An award may be classified as domestic or foreign. For the purposes of enforcement in the Nigerian courts, an award is classified as a domestic award if it is made in Nigeria pursuant to a domestic arbitration. A foreign award on the other hand, is an award made outside Nigeria pursuant to an international arbitration. However, an award made in an international arbitration in which Nigeria is the seat may also be enforced as a foreign award in the Nigerian courts. Thus, two Nigerians can agree that an arbitration to resolve a dispute arising in relation to a commercial transaction shall be treated as an international arbitration.[44]

4.0. The Domestic and International Instruments for the Recognition and Enforcement of Arbitral Awards in Nigeria

In Nigeria, an award may be recognized and enforced under five different systems. These systems of enforcement are provided for by local and international instruments. A domestic

[41] ibid.

[42] *ibid* 611 para 11.22.

[43] *ibid.*

[44] See ACA, ss 57(2)(c) and (d).

award may be enforced under common law or pursuant to the ACA which is the Federal Act governing the conduct of arbitration in Nigeria. It may also be enforced pursuant to State arbitration legislation such as the Arbitration Ordinance 1914 or the Lagos State Arbitration Law 2009. For foreign awards, the award creditor may again, proceed under the ACA and common law. A foreign award may also be enforced pursuant to the relevant reciprocal enforcement legislations (Reciprocal Enforcement of Foreign Judgments Ordinance 1922 and the Foreign Judgments (Reciprocal Enforcement) Act 1961); the New York Convention as well as the ICSID Convention, where the award is an ICSID award.

These laws require that the permission of the court be obtained through one procedure or the other for an award to be enforced. For instance, the applicable instrument may require that the award be first deposited or registered with the enforcing court before it can be enforced as a judgment of that court or it may simply state that obtaining the leave of court to enforce would suffice. In some cases, tendering a copy of the award as proof that a debt is owed would be enough for the courts to allow enforcement.[45] After any stipulated requirements are met and permission to enforce is granted, execution is levied against the assets of the award debtor. Execution in this context, refers to the actual act of enforcing the award,that is, giving effect to it according to the law.[46] This is usually done pursuant to the Sheriff and Civil Processes Act 1945[47] and the Sheriffs and Civil Process Laws of the various States of the Federation. Clearly, Nigeria has enough legislation and conventions for the enforcement of awards, however, its award enforcement process does not run as smoothly as it should

[45] Blackaby and Partasides (n 14) 609 para 11.14.

[46] F. Nwadialo, *Civil Procedure in Nigeria* (2nd edn, University of Lagos Press, 2000) 965. See also A. Babalola, *Enforcement of Judgments* (Afe Babalola, 2003) 11-13.

[47] Cap 407 Laws of the Federation of Nigeria 1990, Part II. See the Judgment Enforcement Rules made pursuant to section 94 of the Sheriff and Civil Processes Act; ACA, s 31 (3); see also *Ras Pal Gazi Construction Company Ltd v. FCDA* (n 17); *Commerce Assurance Limited v. Alhaji Buraimoh Alli* (n 7).

because of defects in some of these laws. The succeeding section will examine the various instruments for recognition and enforcement of awards keeping in view their individual strengths and weaknesses as well as their particularities and shared aims.

4.1. Enforcement by Common Law Action upon the Award

Under common law, a party to an arbitration can enforce the ensuing award by commencing action in court on the award. . This is based on the implied undertaking that by agreeing to submit their dispute to arbitration, the parties agree to comply with the decision of the arbitral tribunal, however unsatisfied they may be with it. So, where the unsuccessful party fails to carry out the award, this would constitute a breach of that undertaking which would entitle the prevailing party to initiate proceedings in court for the enforcement of the award.[48] The party who seeks enforcement under this system must plead and prove: that there is an arbitration agreement; that a dispute has arisen which falls within that arbitration agreement; the appointment of a tribunal in accordance with the arbitration agreement; the making of the award pursuant to the arbitration agreement and; that the unsuccessful party has failed to perform the award.[49] By way of defence, the award debtor may aver that there was no agreement to arbitrate or; that the arbitral tribunal exceeded its jurisdiction or; that the arbitral tribunal lacked authority at the time the award was rendered or; that the award has been performed. He may also aver that there is a fundamental breach of natural justice by the arbitral tribunal which must be proved, for instance, lack of fair hearing. [50] In any case, the court has a discretion to accept or reject any defence made against this type of action. [51] The

[48] Sutton, Gill and Gearing (n 9) 472 par 8-020; see also Ezejiofor (n 13) 115; see also Lord Hodhouse in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* (2003)1 WLR 1041.

[49] Orojo and Ajomo (n 27) 303.

[50] See also G.C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria*, (Iyke Ventures Production, 2004) 117-118; Ezejiofor (n 13) 118.

[51] *ibid.*

procedure under this system of enforcement would not be available to awards issued under the ACA. This is because the ACA makes its own provisions for the enforcement of awards issued pursuant to arbitrations conducted under it. However, other types of awards, for instance, an award arising out of a customary arbitration may be enforced using this method. [52] In fact, such an award can only be enforced by an action at law.[53]

This system of enforcement may also be used for foreign awards in Nigeria. This is reinforced by the common law doctrine of obligation which dictates that where a foreign court of competent jurisdiction has determined that a specific sum of money is due from one party to another, the liability to pay that sum becomes a legal obligation that may be enforced by an action of debt.[54] To enforce a foreign award using this system, there need not be reciprocal treatment in the country where the award was obtained. An agreement for reciprocity in this context implies that an award rendered in one country would be enforced by the courts of the other country and vice versa. In *Topher Inc of New York v Edokpolor,*[55] the award creditor sought to enforce an award made in the United States. The award debtor applied to set aside the award on the grounds that the foreign award could not be recognised

[52] In *Igwego v Ezeugo*, (1992) 6 NWLR (PT 249) 561, it was held that the Supreme Court will enforce an award made in accordance with customary law and general usage.

[53] To enforce a customary arbitral award, the prevailing party must prove that the parties voluntarily submitted to arbitration; that the parties agreed that the decision of the arbitrator would be final and binding; that the arbitration was in line with the custom, business or trade of the parties; that the arbitrators reached a decision and published their award and; that the decision was accepted at the time it was made. See *Dikeocha v. Dike* (2006) All FWLR (Pt. 315) 185; *Eke v Okwaranyia* (2001) 4 SCNJ 300;*Obioha v. Akukwe* (2000) 5 NWLR PT 658) 699; *Ohiaeri v. Akabeze* (1992) 2 NWLR (Pt. 221)1; See also G.C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria*, (Iyke Ventures Production, 2004) 84-88; C.J. Amasike, The Fundamentals and Overview of Commercial Arbitration in Nigeria in C.J. Amasike (ed.), *Arbitration and Alternative Dispute Resolution in Africa* (Dr C.J. Amasike and Associates, 2005)47-49.

[54] Ezejiofor (n 13) 175.

[55] (1965) All NLR 307.

in Nigeria because there was no treaty guaranteeing reciprocal treatment. Dismissing the application, the Supreme Court held that a foreign award could be enforced in Nigeria by suing upon the award and for the Nigerian courts to entertain such a suit, there need not be a treaty guaranteeing reciprocal treatment in the country where it was made.

An action for the enforcement under this system is usually instituted in the High Court by the issuance of a writ of summons, the same way any action for debt is instituted. This system of enforcement presents a challenge for arbitration which is a relatively expeditious method of resolving disputes. This is because the processes involved allows room for the award debtor to re-open by way of defence, matters that have already been resolved by the arbitral tribunal.[56] Award creditors using this method of enforcement may sometimes be put to the task of proving afresh the substantive merits of a case they have already won, thereby undermining the sanctity of the doctrine of *res judicata* which is an integral feature of an arbitral award.[57] Also, contrary to the object of arbitration which is, '…to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense…', this method of enforcement unnecessarily prolongs the dispute resolution process. The procedures under the ACA and the New York Convention as will be discussed below, provide more effective and less cumbersome methods of enforcement of foreign and domestic awards in modern day commercial arbitration hence the common law system of enforcement is rarely used. However, the procedure remains available for the enforcement of non-statutory awards such as customary law awards.

4.2. Enforcement under the Arbitration and Conciliation Act (ACA) 1988

The Arbitration and Conciliation Act 1988 governs the conduct of arbitration in Nigeria. The Act provides for the recognition and enforcement of arbitral awards in Nigeria. Section 31 of

[56]Ezejiofor (n 13) 175

[57] See *Nruamah v Ebuzoeme* (2013) 13 NWLR (Pt 1372) 474 at 503.

the Act deals with the recognition and enforcement of domestic awards while section 51 covers foreign awards. To enforce a domestic award, recourse must be had to section 31(1) of the ACA which provides that, 'an arbitral award shall be recognised as binding and….shall, upon application in writing to the court, be enforced by the court'. The leave of the court must be obtained to enforce an award under this section.[58] To obtain such leave, the application for enforcement must be made by motion on notice.[59] The application must be supported by affidavit as well as the original copies of the award and the arbitration agreement. Certified true copies of these documents would also suffice.[60] The court will normally grant leave to enforce an award except a request is made by the award debtor under section 32 to refuse recognition and enforcement of the award. However, it is not clear in what circumstances the courts will refuse to recognise and enforce a domestic award because the ACA does not specify grounds upon which such an application may be made.[61]

For the enforcement of foreign awards, section 51(1) states that, 'an arbitral award shall, *irrespective of the country in which it is made*, be recognized as binding and ... shall, upon application in writing to the court, be enforced by the court'.[62] The use of the phrase 'irrespective of the country in which it was made' is indicative of the fact that no reciprocity

[58] ACA, s 31(3).

[59] *Imani & Sons Ltd v Bill Construction Company Ltd* (1999) 12 NWLR (Pt. 630) 254.

[60] However in *Imani & Sons Ltd v Bill Construction Company Ltd* (n 59), the Court of Appeal held that in addition to the motion on notice, copies of the arbitration agreement and award, the party seeking enforcement needs to file the name and last place of business of the person against whom it is intended to be enforced and a statement to the effect that the award has not been complied with, or complied with only in part. See also *Ebokan v Ekwenibe and Sons Trading Company* (2001) 2NWLR (Pt.696) 32; ACA, s 31(2).

[61] It must however be stated that the courts will not grant leave for enforcement where there the award has been set aside under section 30 of the ACA or where there is a pending application for that purpose.

[62] Emphasis added.

of treatment is required in the enforcement of foreign awards under the ACA.[63] Therefore a foreign award, in whatever country it was made, can be enforced in the Nigeria under the ACA. This feature significantly distinguishes the ACA from the New York Convention which as we will see, requires reciprocity in the enforcement of foreign awards in certain cases. The requirements for enforcement of foreign awards under section 51(2) are the same as that for domestic awards save that an English translation of the award and the arbitration agreement have to be filed along with the copies of the award and arbitration agreement where they are not originally made in English.[64]

It is instructive that unlike section 32 which does not make provisions for grounds on which a court may refuse to recognize and enforce an award, ample provisions are made for this in relation to foreign awards. Section 52(2) of the ACA lists ten grounds upon which an application for refusal of recognition and enforcement may be based. Some of these grounds include: that the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or he was otherwise unable to present his case or;[65] that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made or; [66] that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties or the law of the country where the arbitration took place,[67] amongst other things.[68] These grounds are purely procedural which means that the ACA will not entertain

[63] See also UNCITRAL Model Law 2006, art. 36.

[64] ACA, s 51(2)(c).

[65] ACA, s 52(a) (iii); See also *Continental Sales Ltd v R. Shipping Inc.* (2013) 4NWLR (Pt. 1343) 67 CA at 88

[66] ACA, s 52(a) (viii).

[67] ACA, ss 52(a) (vi) & 52(a)(viii).

[68]The other grounds under section 52(2)(a),upon which a party may apply for a refusal include: that a party to the arbitration agreement was under some incapacity; 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

any applications for refusal based on the merits of the award. They are also exhaustive meaning that the courts will not permit a review based on any other grounds. Additionally, the courts may of its own volition refuse to enforce and award where it finds: that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria;[69] or that the recognition or enforcement of the award is against the public policy of Nigeria.[70] The grounds for refusal under 52(2), do not apply to applications made under section 32. However, it has been submitted that an application for refusal under section 32 can be based on any of the grounds upon which enforcement may be opposed in a common law action on the award,[71] some of which are noted above. The author is of the view that even though the grounds listed in section 52 will not apply in domestic arbitration, they could serve as a guide or yardstick for courts faced with deciding applications for refusal under section 32. Be that as it may, the overarching consideration in deciding such an application should be to do what is fair and equitable in the circumstances of each case, for instance, if it proven that the applicant was never given an opportunity to fully present its case then it would be unconscionable to allow enforcement in such a case. Usually, where the award debtor applies for a refusal, any application for enforcement by the award creditor goes into abeyance until the application for refusal is decided. The same rules also apply where the award debtor applies to set aside the award. The ACA does not make provisions for time limits within which an application for enforcement must be made.

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not valid under the laws of Nigeria; that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or; that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

[69] ACA, s 52(2)(b)(i).

[70] ACA, s 52(2)(b)(ii).

[71] Ezejiofor (n 13) 118.

4.3. Enforcement under the Reciprocal Enforcement of Judgments Statutes

The enforcement of foreign judgments in Nigeria is governed by two reciprocal enforcement statutes: The Reciprocal Enforcement of Foreign Judgments (REFJ) Ordinance 1922[72] and the Foreign Judgments (Reciprocal Enforcement) (FJRE) Act 1961.[73] A foreign award may be enforced in Nigeria under either of these statutes as if it were a foreign judgment.[74] A prerequisite for enforcement under these statutes is that the judgment or award for which enforcement is sought must be first be registered with the enforcing court. Under the FJRE Act the time limit for registration and enforcement of foreign awards is six years.[75] For the award to be enforceable in the Nigerian courts, it must be capable of enforcement as a judgment in its country of origin.[76] More importantly, there must be reciprocal treatment between Nigeria and the country from which the award originates.[77] The award creditor who seeks enforcement using this method must not only show that the award is final but that the arbitral tribunal that conducted the reference out of which the award arose had jurisdiction to do so. An application brought pursuant to this Act may be set aside on the grounds that the

[72] Cap 175, Laws of the Federation of Nigeria and Lagos, 1958, hereinafter referred to as the "REFJ Ordinance".

[73] Cap 152, Laws of the Federation of Nigeria, 1990, hereinafter referred to as the" FJRE Act". The REFJ Ordinance, which was promulgated to deal with the issue of the registration of judgments obtained in Nigeria and United Kingdom and other parts of Her Majesty's dominions and territories, was not specifically repealed by the FJRE Act and so it still applies to the United Kingdom and to parts of Her Majesty's dominions to which it was extended by proclamation under section 5 of the Ordinance before the coming into force of the FJRE Act.

[74] Section 2 of the 1961 Act defines the term "judgment" to include an arbitral award.

[75]FJRE Act, section 10(a); *Andrew Mark Macaulay v Raiffeisen Zentral Bank (RZB) Austria* (2003) 18 NWLR (Pt. 85) 282.

[76] FJRE Act, s 2.See also *Tulip (Nig.) Ltd. v Noleggioe Transport Maritime* S.A.S (2011) 4 NWLR (Pt1237)254.

[77] FJRE Act, ss 2 and 12.

rules of the arbitral proceedings were not adhered to or that the tribunal lacked the original jurisdiction. Fraud and public policy issues could also form a basis for challenge. [78]

The REFJ Ordinance was enacted during the colonial era to facilitate the reciprocal enforcement of judgments obtained in Nigeria and in the United Kingdom and other parts of the dominions and territories under the protection of the Queen of England.[79] Some of these crown dependencies are today known as the Commonwealth countries. Section 3(1) of the Ordinance provides for the registration and enforcement in Nigeria, of judgments obtained in the United Kingdom within 12 months of the date of the judgment.[80] Any application made outside this timeframe is statute barred.[81] Although the FJRE Act provides for registration within six years, foreign awards must still be registered within 12 months because the Act is not yet fully operational in Nigeria. For full implementation to be achieved, the Minister of Justice in exercise of his powers under section 3(1) of the Act is required to make an order extending Part I of the Act, with regards to registration and enforcement of foreign judgments, to any foreign country, including the United Kingdom.[82] The import of this order when made is that judgments emanating from the courts of any country specified in the order would be enforceable in Nigeria under the 1961 Act. Once the order is made, the REFJ

[78] See FJRE Act, s 6.

[79] The REFJ Ordinance was extended to judgments of various territories and dominions under Her Majesty's protection by virtue of a number of proclamations made under section 5 of the Ordinance. Some of the territories and dominions to which it was extended include, the Supreme Court of the Gold Coast Colony, Colony and Protectorate of Sierra Leone, Courts of the Chief Commissioners of Ashanti and of the Northern Territories of the Gold Coast, Supreme Court of the Colony of the Gambia, Supreme Court of the State of Victoria, Barbados, Bermuda, British Guiana, Gibraltar, Grenada, Jamaica, Leeward Island, St. Lucia, St. Vincent and Trinidad and Tobago.

[80] The court may however allow a longer period for registration; see REFJ Ordinance, section 3(1).

[81] *Andrew Mark Macaulay v Raiffeisen Zentral Bank (RZB) Austria* (n 75).

[82] FJRE Act, s 9(1).

Ordinance will cease to apply. But before exercising this power, the Minister is required to satisfy himself that judgments of superior courts in Nigeria will be accorded substantial reciprocity of treatment as regards enforcement in that foreign country. [83]

The FJRE Act does not repeal the Ordinance, but preserves it until the performance of the required executive action. Thus, there have been heated debates and arguments within the legal practice community in Nigeria as to which of these two statutes actually govern enforcement of foreign judgments and awards. After a few conflicting court decisions on this issue,[84] the matter appears to have been laid to rest by the Supreme Court decision in *Andrew Mark Macaulay v Raiffeisen Zentral Bank (RZB) Austria*.[85] In this case, the award creditor relied on the six- year time limit under the FJRE Act and sought to register and enforce a judgment of the Queen's Bench Division Commercial Court two years after it was made. Holding that the application for registration was statute barred the court stated that so far as the REFJ Ordinance had not been specifically repealed by the executive action required of the Minister, the 12-month time limit for enforcement prescribed by the Ordinance remained applicable to the enforcement of awards emanating from the United Kingdom and other commonwealth countries.[86] This remains the position of the law today in Nigeria. For awards

[83] FJRE Act, s 3(1).

[84] In *Dale Power Systems Plc v Witt & Busch Ltd* (2001) 8 NWLR (PT 716), the Court of Appeal held that the applicable legislation for the registration and enforcement of a money judgment issued by the Queen's Bench Division of the High Court of Justice in England was the REFJ Ordinance. However, less than two years after this decision, a similar scenario came up for determination by the same court in *Halaoui v Grosvenor Casinos Ltd* (2002) 17 NWLR (PT 795), where it was held by the Court of Appeal that the relevant statute was the FRJE Act.

[85] See (n 75). *See* also *Marine and General Assurance Co Plc v Overseas Union & Ors* (2006) 4 NWLR (Part 971) 622.

[86] According to Kalgo JSC, 'the Reciprocal Enforcement of Judgments Act 1922, Cap 175 Laws of the Federation and Lagos 1958 which was promulgated to deal with issues of registration of judgments obtained in

from all other jurisdictions, enforcement may be sought pursuant to section 10(a) of the FJRE Act. Such award must also be enforced within 12 months from the date of the judgment. As the Minister of Justice is yet to give life to section 4 of the FJRE Act which allows for a six-year registration and enforcement time limit, all applications for enforcement of a foreign award must be made within 12 months from the date on which the award was rendered.[87] In essence, a foreign award may be enforced under the Ordinance, or pursuant to the Act depending on who the issuing jurisdiction is. In both cases, the application for registration and enforcement is made by originating summons.

It is not clear why more than five decades after the inception of the FJRE Act, the prescribed order has not been made to give full force to the Act. The REFJ Ordinance presents a few challenges. First, it is behind the times. Almost a century old, the Ordinance is out of touch with the realities of cross-border dispute resolution in the 21st century. But then, even where the FJRE Act is eventually fully implemented, Nigeria would still not have a foreign judgment enforcement legislation that is in tune with international best practices because the FJRE Act is also dated. Second, so far as the Ordinance remains applicable, it prevents the application of the six-year time limit which in the view of the author, is a more practicable time frame for the enforcement of foreign awards. Both legislation share some notable commonalities one of which is that the award sought to be enforced must be one for the payment of money. [88] This raises the question of what happens where the award is for the

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Nigeria and the United Kingdom and other parts of Her Majesty's dominions and territories was not specifically repealed by the Foreign Judgments (Reciprocal Enforcement) Act 1961, Cap 1522 Laws of the Federation of Nigeria 1990 and so it still applies to the United Kingdom and to parts of Her Majesty's dominions to which it was extended by proclamation under section 5 of the ordinance before the coming into force of the 1990 Act.' Pg 296 par E-G.

[87] *Teleglobe America Inc. v. 21st Century Tech. Ltd* (2008)17 N.W.L.R (Pt.1115).

[88] FJRE Act, s 3(2)(b).

specific performance of an obligation. Further, there is the requirement for reciprocal treatment. The import of this is that awards emanating from countries that do not assure substantial reciprocity as regards the enforcement of Nigerian awards would be refused enforcement,[89] and may have to be enforced using an alternative method, perhaps under common law.[90] This requirement does not advance the cause of modern day arbitration. The ease of enforcement of decisions is a key reason why arbitration is the preferred dispute resolution method in international commercial transactions. If international businessmen and multinational corporations, who for one reason or the other are unable to proceed under the ACA or New York Convention sense that the only option available to them is the common law system of enforcement with all its attendant issues, this would discourage investments in Nigeria. It must be stated that although the two statutes define the term "judgment" to include "award",[91] the general wordings of these legislation suggest that they were particularly designed to cater for the enforcement of judgments alone. For this reason, enforcement under the New York Convention and the ACA which is based on the UNCITRAL are more workable options so far as enforcement of foreign awards is concerned because they are specifically crafted to meet the needs of international commercial arbitration.

4.4. Enforcement under the New York Convention 1958

The New York Convention 1958 is the most significant international treaty pertaining to international commercial arbitration. It has been described as, 'the single most important

[89] Section 12 of the FRJE Act renders unenforceable in Nigeria, any judgment or award from jurisdictions which do not recognise judgments of Nigerian courts or awards from arbitrations seated in Nigeria.

[90] See *Topher Inc of New York v Edokpolor,* (n 55). See also G. Omoaka, 'Nigeria: Legal Regime for the Enforcement of Foreign Judgements in Nigeria: An Overview' (2004) http://www.templars-law.com/wp-content/uploads/2015/05/Enforcement-of-Foreign-Judg-GOO.pdf accessed 26th July 2017.

[91] FJRE Act, s 2(1).

pillar on which the edifice of international arbitration rests'.[92] The purpose of the Convention is to make it easier to enforce in the courts one State, arbitral awards issued in another State, amongst other things.[93] Essentially, the Convention provides a framework for obviating the enforcement difficulties presented by the irreconcilable differences between various legal systems which otherwise frustrates parties to international commercial transactions.[94] Being a treaty, it imposes serious obligations on member States. The Convention mandates the courts of contracting States to recognize and enforce a foreign award without any review of the arbitral tribunal's decision subject to limited exceptions.[95] It also obliges courts of contracting States to refer parties to arbitration where court proceedings are initiated with respect to a contract containing an arbitration clause. [96] Non-compliance with these obligations constitutes a breach of the States' undertakings under the treaty. The Convention enjoys universal acceptance throughout the world.[97] In fact, it is said to be one which, 'perhaps could

[92] J.G. Wetter, 'The Present Status of the International Court of Arbitration of the ICC: An Appraisal' (1990) 1 Am Rev Intl Arb 91.In: Blackaby and Partasides (n 14) 617 para 11.40.

[93] Jan Paulsson, 'Awards Set Aside at the Place of Arbitration' (New York Convention Day Colloquium, New York, June 1998) <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> accessed 16th April 2017.

[94] M.B. Holmes, 'Enforcement of Annulled Arbitral Awards: Logical Fallacies and Fictional Systems' (2013) 79 Arbitration 244.

[95] These exceptions would apply where the unsuccessful party makes out any of the grounds listed for refusal of recognition ad enforcement in article V of the New York Convention.

[96] New York Convention, art II (3).

[97] With the deposit of its instrument of accession to the New York Convention on 6th March 2017, Angola became the 157th State party to the Convention. See the United Nations Commission on International Trade Law (UNCITRAL) Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed on 7 April 2017.

lay claim to being the most effective instance of international legislation in the entire history of commercial law'. [98]

The Convention applies to two categories of awards. These include: (i) arbitral awards made in the territory of a State other than where the recognition and enforcement of such awards are sought and; (ii) arbitral awards not considered domestic awards in the State where their recognition and enforcement are sought.[99] In effect, the Convention applies to foreign awards only. The New York Convention allows an award emanating from the courts of a non-contracting State to be enforced in a contracting State. This means that non-State parties may enjoy the benefits offered by the Convention. However, the Convention waters down this advantage by allowing contracting States to make reciprocity reservations.[100] The effect of this reservation where made, is that State parties would only enforce in their courts, awards emanating from the courts of a contracting State. Article I(3) of the Convention also allows State parties to make commercial reservations, the import of which is that a State party may declare that it will only apply the Convention to disputes arising out of legal relationships considered to be commercial under its domestic laws.[101] It is important to note that article VI of the Convention permits a national court before which an application for recognition and enforcement is made, to adjourn the application where there is a pending set aside proceedings at the seat of the arbitration.

[98] M.J. Mustill, 'Arbitration: History and Background' (1989) 6 J Intl Arb 43. In: Blackaby and Partasides (n 14) 617 para 11.40.

[99] New York Convention 1958, art 1(1).

[100] New York Convention 1958, art 1(3).

[101] New York Convention, art 1(3).

The New York Convention applies with full force in Nigeria by virtue of its incorporation into the 2nd Schedule to the ACA.[102] Section 54 (1) of the Act provides that:

> Without prejudice to sections 51 and 52 of this Act, where the recognition and enforcement of any award arising out of an international commercial arbitration is sought, the Convention on the Recognition and Enforcement of Foreign Award (hereafter referred to as "the Convention") set out in the second schedule to this Act shall apply to any award made in Nigeria or in any contracting State.

The ACA does not preclude the application of the New York Convention in Nigeria. Thus, a foreign award made in Nigeria or in another contracting State may be enforced as a New York Convention award by the Nigerian Courts. Because Nigeria made the reciprocity reservation, her courts will only enforce an award emanating from a contracting State. [103] An arbitral award made in a non-contracting State would not be enforceable in Nigeria under the New York Convention. At first thought, this reservation appears to have a limiting effect like the reciprocal enforcement statutes discussed above, but this defect is cured by the fact that today, the Convention enjoys the acceptance of 157 countries, including the world's major trading nations in Africa, Asia, Europe, Latin and North America.[104] As the number of State parties to the Convention continues to grow, the reciprocity reservation loses its significance because more and more countries, including Nigeria, can now have their awards enforced by the courts of other countries.

The power accorded State parties to make commercial reservations as permitted by article I(3) of the New York Convention has been criticised on the basis that it narrows the scope of application of the Convention and hinders uniform practice by allowing each State to

[102] Nigeria acceded to the New York Convention on the 17th of March 1970, but it was not domesticated until 1988, when the ACA was enacted.

[103] ACA, s 54(1)(a).

[104] See Blackaby and Partasides (n 14) 619 para 11.45.

determine for itself what it considers to be 'commercial'.[105] Nigeria also makes this reservation.[106] In determining whether the legal relationship out of which a foreign arbitral award arose can be considered as commercial under Nigerian law, the ACA will apply. Section 57(1) of the ACA provides that the Act will only apply to disputes arising out of a relationship of a commercial nature. Such relationships include:

> Any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, 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.

In essence, any foreign award arising out of a legal relationship which falls outside the ambit of section 57(1) may not be enforced in Nigeria as a Convention award. However, as section 57(1) of the ACA appears to cater for almost every conceivable legal relationship out of which disputes may arise, it is thought that only a few categories of foreign awards would be caught by this reservation. Be that as it may, enforcing courts world over, must take cognizance of the fact that the business world is constantly evolving and with the expansion of global trade and investments, more and more activities are becoming a crucial part of international trade. For this reason, a liberal construction should as much as possible, be given to the term 'commercial' in order to accommodate these changes and also, to ensure that the purpose of the New York Convention is served.[107]

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[105] *ibid* (n 17) 619 para 11.47.

[106] ACA, s 54(1)(c).

[107] In *Indian Organic Chemical Ltd v Subsidiary 1(US), Subsidiary 2(US) and Chemtex Fibres Inc. Parent Co.(US)* (1979) IV YBCA 271, the High Court of Bombay (now Mumbai) stated that it is not enough to show that the agreement is commercial , it must also be established that it is so by virtue of a law or an operative legal principle in force in India. This was however, overruled by the Indian Supreme Court in *RM Investment &*

The requirements for enforcement under the Convention are largely similar to the prerequisites under section 51 of the ACA.[108] This is not surprising because the ACA is predicated upon the Model Law on International Commercial Arbitration designed by UNCITRAL, which is also responsible for creating the New York Convention. However, unlike section 52 of the ACA which lists ten grounds upon which recognition and enforcement of a foreign award may be refused, the grounds under article V(1) of the New York Convention are limited with only seven grounds listed.[109] Thus unless the ground for refusal proven by the award debtor comes within the terms of article V(1) of the Convention, the courts must recognise and enforce the award. The refusal grounds under the Convention

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Trading Company v Boeing Company 1994(4)SCC,(1997) XXII Ybk Comm Arb 711, which pronounced that the expression 'commercial' as used should be construed broadly having regard to the manifold activities which are an integral part of international trade today. In: Blackaby and Partasides (n 14) 619 para 11.47 – 11.50.

[108] New York Convention, art IV (1).

[109] The grounds for refusal under article V(1) of the New York Convention include: that the parties to the arbitration agreement were under the law applicable to them, under some incapacity, or that the arbitration agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made; or that the party against who the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or he was otherwise unable to present his case or; that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or; that the award contains decisions on matters which are beyond the scope of the submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be recognized and enforced; or that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties or the law of the country where the arbitration took place, amongst other things; or that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made. The court in a country where recognition and enforcement is sought may also refuse recognition and enforcement where the subject matter of the arbitration is not arbitrable or contrary or public policy.

are similar to those under the ACA. As the ACA does not preclude the use of the enforcement system under the New York Convention, it can be used as an alternative to the ACA. Thus, an award emanating from a non-contracting State may be enforced under section 51 of the ACA. The Convention leaves the fine points of procedure to be filled in by the national laws of the various State parties, thus it makes no provisions for the time limit for making an application for enforcement.

4.5. Enforcement under State Arbitration Legislation: The Arbitration Ordinance 1914 and the Lagos State Arbitration Law 2009

Prior to the enactment of the Arbitration and Conciliation (ACA) 1988, the Arbitration Ordinance 1914 was the principal legislation governing arbitration in Nigeria and the various States of the Federation. [110] Although Nigeria has since moved from the now century old Ordinance, a good number of the States of the Federation such as Delta and Edo States still have the Ordinance in their statute books.[111] The 1914 Ordinance provides for the enforcement of awards under section 13 which states that, 'an award may on submission, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.' But it neither stipulates requirements for enforcement nor the grounds upon which enforcement may be refused. Lagos State, has however, shown progress in this area by repealing and enacting in the place of the 1914 based Law, the Lagos State Arbitration Law 2009. Arbitration within Lagos State is governed by the Lagos Law except where it is expressly excluded by the parties.[112] Section 56(1) of the Law provides for the recognition

[110] The Arbitration Ordinance 1914 was based on the English Arbitration Act of 1889.

[111]See A. Rhodes-Vivour, 'Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform', (2006) http://www.drvlawplace.com/media/ADR-DRV-UPDATED-2006.pdf accessed 16 May 2017. See also A. Rhodes-Vivour, 'The Federal Arbitration Act and the Lagos State Arbitration Law: A Comparison'< www.drvlawplace.com/media/Federal-Lagos-Arbitration.pdf> accessed 16 May 2017.

[112] Lagos Law, s 2.

and enforcement of awards arising thereunder. The prerequisites for recognition and enforcement under this system are reflective of section 51(2) of the ACA.[113] Also, the grounds for refusal are largely similar to those under section 52(2) of the ACA, [114] save for some adjustments. The Lagos Law includes a ground that is not in the ACA, that is, refusal on grounds of non-compliance with the form and content of an award,[115] but then overlooks a very crucial ground, that is, refusal on the grounds that the dispute out of which the award arose is not arbitrable.[116] It is not all disputes that can be resolved by arbitration.[117] An award that is based on a dispute that is not arbitrable cannot be enforced.[118] It therefore surprising that the Lagos Law does not include the arbitrability ground considering that it is listed in mainstream international arbitration conventions and most national arbitration legislations including the ACA, as a ground for refusal.[119] This raises questions as to whether an award arising under a tax dispute may be recognised and enforced under the Lagos Law. With the Court of Appeal pronouncement in *Shell Nigeria Exploration and Production v Federal Inland Revenue Service*, [120] that such disputes are not arbitrable, it remains to be seen whether such an award would be enforceable under this enactment. In any case, the Lagos State Law

[113] Lagos Law, s 56(2).

[114] Lagos Law, s 57(2)(a).

[115] See Lagos Law, ss 47 & 57(2)(i).

[116] See ACA, s 52(2(b)(i).

[117] ACA, s 35(a).

[118] ACA, s 52(2) (b) (ii).

[119] UNCITRAL Model Law 2006, art 34(2)(b)(i); New York Convention, art V(2) (a); EAA, s 103(3); ACA, s 52(2)(b)(ii).

[120] (Unreported) Appeal No CA/A/208/2012, judgment delivered on 31 August 2016; see also *Esso Exploration and Production Nigeria Ltd and Anor v. Nigeria National Petroleum Corporation*, (Unreported) Appeal No CA/A/507/2012, judgment delivered 22 July 2016.

positively distinguishes itself from the 1914 Ordinance in various respects,[121] but of relevance to this discussion is the fact that the Lagos Law clearly delineates the requirements for enforcement as well as the grounds on which the courts may refuse recognition and enforcement. This is more than can be said for the Ordinance which merely provides for the enforcement of awards without specifying requirements for enforcement or grounds for refusal. The absence of grounds upon which the courts may refuse to recognise or enforce an award poses a problem because it creates opportunities for baseless applications by award debtors seeking to evade performance of their obligations under the award.

4.6. Enforcement under the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 (ICSID Convention)

The Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) provides for the conduct of investment arbitration.[122] It seeks to facilitate the settlement of international investment disputes with a view to promoting foreign investment.[123] The ICSID Convention only governs arbitrations arising directly out of an investment between a contracting State and an investor who is a national of another contracting State.[124] Thus it has limited scope and jurisdiction. Where parties to an investment dispute consent to an ICSID arbitration, the Convention applies to the exclusion of other laws. [125] As of October 12 2017, 161 countries have signed and ratified the ICSID

[121] For instance, while the 1914 Ordinance confers general powers of intervention on the courts, the Lagos Law permits court intervention in very limited circumstances. See generally the Arbitration Ordinance 1914 and the Lagos Arbitration Law 2009.

[122] The Convention was entered into in Washington DC, United States, thus it is also referred to as the Washington Convention.

[123] Blackaby and Partasides (n 14) 648 para 11.125.

[124] ICSID Convention, art 25.

[125] ICSID Convention, art 44.

Convention.[126] These contracting States are availed of procedures for the conciliation and arbitration of any investment disputes they may have with individuals and corporations by the International Centre for the Settlement of Investment Disputes. The Centre is established pursuant to the ICSID Convention, as an independent international institution with the responsibility of providing facilities for the resolution of investment disputes.[127]

The ICSID Convention imposes obligations on contracting States. Under article 54(1) of the Convention, State parties are obligated to recognize an award rendered pursuant to the Convention as binding. Each State is also mandated to enforce the pecuniary obligations imposed by that award within its territories in the same manner, they would enforce a final judgment of a court in that State,[128] unless the award is revised or annulled under ICSID's own internal procedures.[129] Contracting States are mandated under article 54(2) to designate a court of competent jurisdiction or other authority which will handle requests for enforcement of ICSID awards.[130]

The ICSID Convention is implemented in Nigeria through the International Centre for the Settlement of Investment Disputes (Enforcement of Awards) Act.[131] The Act provides for the recognition and enforcement in Nigeria, of awards rendered pursuant to the ICSID

[126] International Centre for the Settlement of Investment Disputes, 'Database of ICSID Member States' (2017) https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx accessed 12 October 2017.

[127] ICSID Convention, art 1(2).

[128] ICSID Convention, art 54(1).

[129] Blackaby and Partasides (n 14) 648 para 11.125.

[130] Recognition and enforcement of an award may be obtained from the designated courts or authority on the presentation to the court or authority of a copy of the award certified by the Secretary-General. Execution of the award would normally be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought; see ICSID Convention, art 54(3).

[131] Cap 120, Laws of the Federation 2004.

Convention.[132] A party seeking recognition or enforcement of an ICSID award in Nigeria must furnish to the Supreme Court which is the designated court or authority for such requests, a copy of the award certified by the Secretary-General of ICSID.[133] Upon compliance with this requirement, the award assumes the status of a final judgment of the Supreme Court and becomes enforceable accordingly.[134]

An ICSID award is unlike a New York Convention award or an award emanating from a commercial arbitration under the ACA or other national arbitration legislation. This is so for two reasons. First, the arbitration procedure under ICSID is often described as delocalised and denationalised because it is exclusively governed by the provisions of the ICSID Convention and free from the control of the courts of Contracting States.[135] Generally, most local arbitration statutes, for instance the ACA or the English Arbitration Act 1996, permits a party who seeks review of an award to proceed to the national courts to set it aside or annul it, as the case may be. However, in the case of an ICSID award, the review is conducted by an *ad hoc* committee of three persons selected from the ICSID Panel of Arbitrators, and not by the national courts as is the case with the other systems discussed above. [136] The decision

[132] ICSID Convention, art 69.

[133] The ICSID Secretariat consists of a Secretary-General, one or more Deputy Secretaries-General and staff. The Secretary-General is the legal representative and the principal officer of the Centre and is responsible for its administration, including the appointment of staff. The Secretary-General performs the function of registrar and also has the power to authenticate arbitral awards rendered pursuant to the ICSID Convention. See ICSID Convention, art 9 & 11.

[134] ICSID (Enforcement of Awards) Act, s 1(1).

[135] A. R. Parra, 'Enforcement of ICSID Arbitral Awards' (2007) <www.arbitration-icca.org/media/0/.../enforcement_of_icsid_awards.pdf.> accessed 25 May 2017.

[136] The Panel of Arbitrators and Conciliators consist of a list of arbitrators and conciliators available for selection to ICSID Tribunals, Conciliation Commissions and ad hoc Committees. It is usually used to make appointments where parties fail to agree on a nominee; see ICSID Convention, arts 12 -16, 52(1).

of the *ad hoc* committee is final and binding on the parties and is not subject to further review by another committee or by the courts.[137] Thus, the ICSID Convention completely excludes review by the courts by creating a self-contained review procedure that is internal to the ICSID system.[138] Second, the delocalised nature of the ICSID arbitral processes extends to the recognition and enforcement of awards. Unlike other systems of enforcement which permit the award debtor to apply for a refusal where an application for recognition and enforcement is made, the ICSID Convention does not make any such provisions. This means that where the award creditor seeks enforcement before the designated national court or authority, the award debtor would not have the same opportunity open to their counterpart under the ACA because the jurisdiction of the court in ICSID arbitrations is limited to enforcement only and does not include hearing applications for refusal. There are compelling policy considerations for conducting ICSID arbitrations differently from commercial arbitrations. It is necessary to denationalise the process so as to ensure that comity which should exist between States is maintained, irrespective of where culpability lies. Further, if the courts of a State that is party to an arbitration is able to review the decision of the arbitral tribunal, this may not only contravene the rules of natural justice but could encourage judicial protectionism of state departments and agencies.[139]

5.0. Problems with the Legal Regime for the Recognition and Enforcement of Arbitral Awards in Nigeria

[137] The ICSID Convention provides for only five grounds upon which an ICSID award may be annulled; see ICSID Convention, art 52(1).

[138] Attempts to seek the annulment of ICSID awards before national courts have been unsuccessful. In the case of *Tembec Inc v United States of America* 570 F.Supp.2d 137 (2008), the court held that the petition for *vacatur* was barred because of res judicata and collateral estoppel.

[139] See also A. Tweedale and K. Tweedale, 'Cutting the Gordian Knot: Enforcing Awards where an Application has been made to Set Aside the Award at the Seat of the Arbitration' (2015) 81 Arbitration 137.

Clearly, the enforcement systems discussed above have characteristics which make them less attractive or the preferable option for enforcement. Aside the defects already identified, there are other problems associated with some of these enforcement systems that have continued to impede the award enforcement process in Nigeria. Some of these issues are examined below.

1. The ACA does not provide for the time limit within which court action for the enforcement of arbitral awards may be commenced. So also, the 1914 Ordinance which holds sway in most States of the Federation. This has continued to evoke debates and arguments within the Nigerian arbitration community with respect to actions for enforcement brought under these instruments. In an attempt to resolve questions on this issue, the Nigerian courts have had recourse to the Limitation Act of 1966 and the Limitation Laws of the various States of the Federation and the Federal Capital Territory. Section 7(d) of Limitation Act of 1966 provides that actions to enforce an arbitration award shall not be brought after the expiration of six years from the date on which the cause of action accrued, unless the arbitration agreement is under seal or the arbitration is subject to an enactment other than the Arbitration Act.[140] In other words, an action to enforce an arbitral award brought after the expiration of six years from the date the cause of action arose, would only be permitted in two circumstances: (i) where the arbitration agreement out of which the award arose is under seal or (ii) where the award emanated from an arbitration that is not under the Arbitration Act. The Nigerian courts have consistently upheld section 7(d) of the Limitation Act and similar provisions in the various State Limitation Laws. In *Murmansk State Steamship Line v Kano Oil Millers Limited*,[141] the award creditor sought to enforce a foreign award at the High Court of Kano State. The suit was

[140] See section 8(1) Limitation Law of Lagos State Cap L67 Laws of Lagos State ; Limitation Law of Kano State; See also section 7 of the English Limitation Act of 1980.

[141] (1974) All N.L.R 893.

dismissed on the grounds that it was statute-barred. Upholding the judgment of the lower court, the Supreme Court held that, having commenced enforcement action some eight years after the cause of action arose, instead of within the 6 years limitation period imposed by the Limitation Law of Kano State, the suit was statute barred. In the succeeding case of *City Engineering Nigeria Limited v. Federal Housing Authority*,[142] the Supreme Court reaffirmed its decision in *Murmansk.* These decisions have been criticised as most unsatisfactory. The criticisms are based on the premise that an action for enforcement of an arbitral award is a fresh cause of action completely different from the initial cause of action out of which the award sought to be enforced arose. So, ideally, the six year limitation period for enforcement should count from the time the failure to comply with the award starts. In the words of Nwakoby and Aduaka:

> An arbitration agreement has two main undertakings, the first being an undertaking to submit to arbitration when the dispute occurs, and the second being an undertaking to comply with the arbitral award when made. These two undertakings constitute two distinct contracts. It follows therefore that the time limitation for reference to arbitration runs from the date of the breach giving rise to arbitration whereas the second limitation period for enforcement starts to run from the date the defendant refused to comply with the terms of the award.[143]

The paper aligns itself with this position. Arbitration is generally reputed to allow for speedy dispensation of cases, however there may be occasions where proceedings

[142] (1997) 9 NWLR (520) 244.

[143] G. C. Nwakoby and C. E. Aduaka, 'The Recognition and Enforcement of International Arbitral awards in Nigeria: The Issue of Time Limitation' (2015) 37 Journal of Law, Policy and Globalization< www.iiste.org/Journals/index.php/JLPG/article/viewFile/22555/22930> accessed 15 April 2017.

may drag on. This may be as a result of lack of diligent prosecution of the matter by the participants in the process or judicial intervention which is prolonged by red tape and bureaucracy. So, although participants in the arbitral process are mandated to do all things necessary for the proper and expeditious conduct of arbitral proceedings,[144] it is not always practicable to conclude an arbitration promptly because of supervening events. A good case in point is the Nigerian arbitration involving IPCO (Nigeria) Limited and Nigerian National Petroleum Corporation (NNPC).[145] In this case, the arbitration commenced on 26 February 2003. On 28 October 2004 a decision was made awarding IPCO over USD150m plus interest. In the same year, IPCO proceeded to enforce the award in the United Kingdom. NNPC applied to the Federal High Court, Lagos to have the award set aside on grounds that the arbitral tribunal lacked jurisdiction and misconducted itself. It also applied to the English courts to adjourn enforcement pending the determination of the application to set aside. Thirteen years after, the set aside application remains pending at the Federal High Court due to inordinate delays in the justice system. For this reason, IPCO is yet to enforce the award even after making further attempts to do so. However, following its most recent attempt at enforcement in 2014, the English Court of Appeal as will be discussed below, has shown an inclination to enforce an award more than thirteen years after it was made. It would be interesting to see how the Nigerian courts would have handled such an application giving its stance on limitation of actions in arbitrations under the Limitation Act.

2. Unlike section 52 of the ACA which provides ten grounds upon which an application for refusal of recognition and enforcement of arbitral award may be granted in

[144] Lagos Law, s 1(d).

[145] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Ltd* [2014] EWHC 576 (Comm); [2008] EWCA Civ 1157; [2008] EWHC 797 (Comm); [2005] EWHC 726 (Comm).

international arbitration, section 32 does not specify any grounds for such challenge in domestic arbitration. Regrettably, this omission creates avenues for delays and frivolous applications by the award debtor who may want to frustrate any attempts to enforce the award. As soon as a request is made to refuse recognition and enforcement of an award, the application for enforcement of the award goes into abeyance until the application for refusal is determined.[146] Where such application is based on frivolities, the process becomes protracted, thereby defeating the whole essence of the arbitral process. Again, no provision is made in domestic and international arbitrations under the ACA for time limit within which an application for refusal of recognition and enforcement of an award may be made.

3. It is pertinent to mention certain limitations in enabling statutes which make it practically impossible to enforce arbitral awards against some government ministries, departments and agencies in Nigeria. An often-cited example is section 14 of the Nigerian National Petroleum Corporation Act which prohibits execution or attachment against any asset or property of the NNPC.[147] The implication of this is that a party who prevails against NNPC in an arbitration and seeks to enforce the award against it in Nigeria would struggle to do so. Although the NNPC Act stipulates that any monies awarded against the Corporation would be paid from the general reserve fund of the Corporation, what happens in the case of monetary awards that are too heavy to be serviced by the general reserve fund?[148] Similar provisions exist in the Nigerian Communications Act 2003[149] and the Federal Inland Revenue

[146] M.M. Akanbi, 'Challenges of Arbitration Practice under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations' (2012) 78 (4) Arbitration 325.

[147] See Goodluck (n 7).See also A. Atake, 'Beating the System: Enforcement of Arbitral Awards against State-Owned Entities' (2012) https://www.templars-law.com/413-2/ accessed 20 May 2017.

[148] See Goodluck (n 7).

[149] No. 19, hereinafter referred to as the "NC Act", s 144(1).

Service (Establishment) Act 2007.[150] It must however be noted that the provisions in the NCC Act and FIRS Act are qualified by the requirement for a three-month notice which must be given to the state entity before any execution may be levied or attachment made against any of its assets or property.[151]

4. Aside the deficiencies in the legal framework discussed above, there are red tapes and bottlenecks within the judicial system which hamper the ease of enforcement of arbitral awards in Nigeria. As earlier noted, the recognition and enforcement of awards is one area where courts and the arbitral process are connected. Thus, because arbitral tribunals lack powers to coercively enforce their awards, judicial intervention may be required to assist the process. But the mill of justice grinds slowly in Nigeria.[152] This impedes speed which is one of the hallmarks of arbitration. The slowness in the disposal of cases by the courts in Nigeria, continues to play out in *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* referred to above. A series of events followed the 2004 application by IPCO to enforce the award in the United Kingdom and NNPC's application to adjourn enforcement. The NNPC changed counsels. The new counsel requested that the case be re-assigned to another judge. After further adjournments, the case was re-assigned. When the case eventually came up before the new judge, the NNPC requested that IPCO's preliminary objection be heard *de novo*. The request was granted by the new judge on the grounds that he was unable to decide whether the previous judge handled the case competently or not. Subsequently, NNPC alleged that the award had been obtained by fraud. These allegations resulted in two discontinued criminal prosecutions. As at April 2017 a

[150] No 13, hereinafter referred to as the "FIRS Act", s 55(2)(a).

[151] See FIRS Act, sections 55(2)(a) (b); NC Act, s 144(1).

[152] See generally, E. Azinge (ed.), *The Role of Costs and Adjournments in the Speedy Dispensation of Justice in Nigeria* (NIALS Press, 2014).

third criminal prosecution for fraud and forgery privately pursued by NNPC against IPCO was still ongoing. In all this time, IPCO kept applying to the English courts to enforce the award as it appeared the set-aside application would never be the decided. However, the court kept adjourning the applications because it felt the set aside application was *bona fide* and had reasonable prospects of success, so it did not want to pre-empt the decision of the Nigerian courts. Following yet another adjournment in 2014, IPCO appealed to the English Court of Appeal. In 2015, the appellate court decided that in view of the significant delay in resolving the set aside application which had been before the Nigerian courts since 2004, granting yet another adjournment would, in commercial terms, be absurd and inconsistent with the principles underpinning the New York Convention. But if a further adjournment was absolutely necessary in the case then, NNPC would have to provide security in the amount of USD100m. It is worthy of note that in reaching this decision, the English Court of Appeal relied heavily on the expert evidence of Honourable Justice S.M.A. Belgore, who was instructed on behalf of IPCO. Giving evidence in the matter, the former Chief Justice of Nigeria stated that, 'it is conceivable that there will be no fixed determination of the issue of whether the arbitral award will be set aside for twenty or thirty years or longer'. Although NNPC's appeal against the order to provide security was allowed by the House of Lords, [153] the fact remains that the set aside application made at the Federal High Court Lagos more than thirteen years ago, is yet to be decided.

6.0. Towards a More Effective Legal Regime for the Recognition and Enforcement of Arbitral Awards in Nigeria

[153] See the full text of the House of Lords decision at *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* (2017) UKSC 16.

Foreign investors as well as local companies are often anxious about the legal environment in which they will be doing business. An investor would only be comfortable operating in a given economy if they are confident that the extant laws are adequate, and the dispute resolution system, effective enough to interpret market rules and protect their economic rights. More importantly, the investor would also want to be assured that the available dispute resolution system is expeditious and that awards or judgements can be enforced without delay. Thus, an efficient commercial dispute resolution system will attract investment and consequently, foster economic growth and development. Nigeria has continued to rank very poorly on the World Bank's Doing Business annual surveys.[154] In rating economies, the World Bank bases its overall ranking for each country on the average of a number of indices or indicators one of which is the ease of enforcing contracts.[155] This indicator assesses how efficient the courts of the economies included in the survey are in resolving commercial disputes. The benchmark for assessing efficiency in this regard is the time and cost of resolving a standardized commercial sale dispute.[156] Nigeria's performance in this regard has not been impressive as she ranked at 143rd and 139th positions out of 190 countries in 2016 and 2017 respectively.[157] Although, there is a marked improvement with a ranking of 96 in 2018,[158] more needs to be done to improve efficiency of the Nigerian court system. Further, as arbitration has become the preferred method for resolving disputes in international commercial transactions, it is imperative that the laws applicable to the enforcement of

[154] Nigeria's ranking on the World Bank Doing Business Survey for 2016, 2017 and 2018 is 170, 169 and 145 respectively, out of 190 countries. See generally the World Bank Doing Business Index < http://www.doingbusiness.org/rankings >accessed 26 May 2018; see also Trading Economics, 'Ease of Doing Business in Nigeria 2008-2018' https://tradingeconomics.com/nigeria/ease-of-doing-business accessed 26 May 2018.

[155] The indicators and Nigeria's ranking for each in the World Bank Doing Business Report 2018, includes: starting a business -130; dealing with construction permit - 147; getting electricity -172; registering property - 179; getting credit – 6; protecting minority investors – 33; paying taxes – 171; trading across borders -183; enforcing contracts – 96 and;resolvinginsolvency-145.

[156] World Bank. 2016. *Doing Business 2016: Measuring Regulatory Quality and Efficiency*. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-0667-4. License: Creative Commons Attribution CC BY 3.0 IGO < http://www. www.doingbusiness.org/~/media/WBG/DoingBusiness/.../DB16-Full-Report.pdf> accessed 26 May 2018.

[157] See generally World Bank Doing Business Index (n 154).

[158] *Ibid.*

arbitral awards are brought in line with international best practices to encourage participation in the country's investment environment. Accordingly, the paper makes the following proposals:

1. There is need for legislation to reverse the current stance of the courts on the issue of time limits for the enforcement awards under the ACA. The Act has to be amended to expressly include a time limit for the enforcement of awards. More importantly, the date from which the time limit would begin to count should be clearly and unequivocally delineated. Ideally, this should be the time from which the award debtor fails to comply with the award. The Lagos Arbitration Law 2009 is already leading the way on this issue. It provides in section 34(5) that, '…in computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded...' In essence, for arbitrations subject to the Lagos Arbitration Law, the six-year time limit provided by section 8(1) of the Limitation Law of Lagos State for the enforcement of awards will start to count from the time the award is rendered and not from the time the cause of action arose.[159] It must be noted that a Bill to repeal and re-enact the ACA is presently before the National Assembly. Section 36(4) of the 2017 Bill makes proposals similar to section 34(5) of the Lagos Law. It is expected that passing this Bill into law would address the issue of time limit for the enforcement of awards and give Nigeria an arbitration law that is in line with international best practices.[160] Additionally, the Limitation Act and the various Limitation Laws also need to be amended along these lines.

[159] Cap L67, Laws of Lagos State 2003.

[160] See generally the Arbitration and Conciliation Bill 2017; see also EAA, s 13(2).

2. While the wait for the passage of the Bill continues the Nigerian courts should be more pragmatic in its support of arbitration. The Supreme Court decision in *Murmansk* was largely informed by Walton's prescription in the 18th edition of *Russell on Arbitration* that, '… the period of limitation [for enforcement of an arbitral award] runs from the date on which the cause of arbitration accrued that is to say, from the date when the claimant first acquired either a right of action or right to require that an arbitration takes place upon the dispute concerned…'[161] Thirty-two years after, the learned authors of the book[162] restated the position of the law by affirming the English court's decision in *Agromet Motoimport Ltd v. Maulden Engineering Co. (Beds) Ltd.*[163] In this case, it was held that time begins to run from the date of the breach of the implied term to perform the award, and not from the date of the accrual of the original cause of action giving rise to the submission. This remains the position of the law in the United Kingdom today.[164] On the strength of this development, the Supreme Court in *City Engineering Ltd* was urged to consider current position in the United Kingdom as expounded in *Agromet* and depart from its decision in *Murmansk*. However, the court took the view that *Murmansk* was correctly decided and that there was no reason why it should depart from its decision. The arbitral process will be an exercise in futility if the prevailing party cannot get the assistance of the courts to reap the fruits of their award where the losing party refuses to voluntarily comply with the decision.[165] So, it is hoped that whenever the learned

[161] See A. Walton, *Russell on Arbitration* (18th edn, Stevens and Sons Ltd Nov 1970) 4-5. In: Nwakoby and Aduaka (n 143).

[162] D. S. Sutton and J. Gill, *Russell on Arbitration* (22nd edn, Sweet and Maxwell Dec 2002). See also D. S. Sutton, J. Gill and M. Gearing, *Russell on Arbitration* (23rd edn, Sweet and Maxwell 2007) 457 para 8.017.

[163] (1985) 2 All ER 436.

[164] Sutton, Gill and Gearing, *Russell on Arbitration* (n 9) 473 para 8.022.

[165] Nwakoby and Aduaka (n 143).

Justices of the Supreme Court are faced again with the question of time limit, they will follow the line of reason.[166]

3. With regards to the absence of grounds for refusal of recognition and enforcement in domestic arbitration, section 59(2) of the Arbitration Bill attempts to correct this anomaly by providing for a single regime for refusal of recognition and enforcement of awards in both domestic and international arbitrations as opposed to the ACA which has a bifurcated regime under sections 32 and 52. The Bill provides for eleven grounds, any of which could be relied upon to request a refusal in both domestic and international arbitration. It is presumed that these grounds just like those under the ACA are exhaustive meaning that no application for refusal on grounds other than the grounds provided would be entertained by the court. For this reason, frivolous and baseless applications will be discouraged.
4. The court system needs to be revamped to improve the ease of enforcement of arbitral awards in Nigeria. The reasoning of the English Court of Appeal that IPCO could enforce the award in the face of inordinate delays in deciding the set aside application is a defining moment in enforcement against government agencies in Nigeria. Indeed, the reasoning has been widely applauded by the international arbitration community. The import of this decision is that unnecessary delays in deciding challenges against an award in a national court will no longer preclude enforcement

[166] On this point, the view has also been expressed that the Limitation Act refers to common law actions to enforce awards and not statutory awards under the ACA and for that reason, time could only count after the award contemplated by section 31 has been made. Also, that based on the principle of separability, a contract containing an arbitration clause equates to two separate agreements, one dealing with the rights and obligations of the parties under the contract and the other dealing with how disputes are to be resolved .The Limitation Act applies separately to both contracts. But where an award is rendered, any right of action with respect to the main contract lapses giving rise to a fresh cause of action where the unsuccessful fails to comply with the award. See Idornigie (n 34) 372 – 393.

by another national court, at least the English Courts. It must however be stated that IPCO was lucky that NNPC had assets in the United Kingdom against which execution could be levied. If Nigeria were the only country in which NNPC had assets, the rather protracted set-aside proceedings would have hindered any attempts to enforce the award in Nigeria. Under normal circumstances a pending application to set aside an award would preclude enforcement, however, the English Court of Appeal in this case, was moved by the delay which it described as "catastrophic". It is unlikely that a Nigerian court would have entertained such an application even in the face of such catastrophic delays, perhaps in solidarity with the court seised of the matter or because of the ouster clause in section 14 of the NNPC Act discussed above. In fact, the limitation in this clause may have been one of the reasons IPCO decided to enforce outside Nigeria. In any case, for the vast majority of award creditors who may not be as fortunate as IPCO, it is imperative that efficiency is entrenched in the Nigerian justice system. Efficiency here denotes access to justice and expeditious disposal of cases.[167] According to Onyema, '…arbitration will get you a decision in good time …but it will not transform the paper on which the decision is written into money – it is the courts that need to do that…'[168] Thus, the importance of an effective judicial system to the arbitral process, and indeed to the enforcement of arbitral awards, cannot be overemphasised.

7.0. Conclusion

[167] E. Onyema, 'IPCO v NNPC Saga and Liability of Nigerian Legal System', *The Guardian* (Nigeria, 22 December 2015) <https://guardian.ng/features/law/ipco-v-nnpc-saga-and-liability-of-nigerian-legal-system/> accessed 16 April 2017.

[168] *Ibid*. See also E. Onyema, 'The Continued Trial of the Nigerian Legal System in IPCO v NNPC',*This Day Lawyer Weekly Pull Out* (4 April 2017).

Evidently, the legal and institutional framework for the recognition and enforcement of arbitral awards needs to be improved in the areas identified in the paper. As earlier noted, with respect to the issue of time limit for enforcement of an award, a more practical approach would be for time to run from the time the unsuccessful party fails to perform the award so that the prevailing party has a practicable time period within which to initiate enforcement proceedings. Further, the speed with which cases are disposed of in the Nigerian courts has to be improved as a matter of urgency. There is no gain saying that an efficient and transparent court system instils confidence and encourages new and existing business relationships. If investors who see some business prospects in Nigeria, perceive that the applicable enforcement laws are inadequate or that they may have to wait forever to reap the fruits of an award made in their favour, this would discourage investments in the country. These defects and challenges as well others that have been raised in this paper have to be addressed to entrench an arbitration friendly Nigeria. As mentioned above, as part of the measures to accomplish this, legislation has to be passed as a matter of urgency to deal with the issue of time limit and other lacunas in the law. More importantly, a conscious effort must be made to improve justice delivery in Nigeria so as to create a conducive investment climate for local and foreign investors.