News Journal ISSN 1596 - 3918

Vol III No. 11 AUGUST 2021

The Arbitrator

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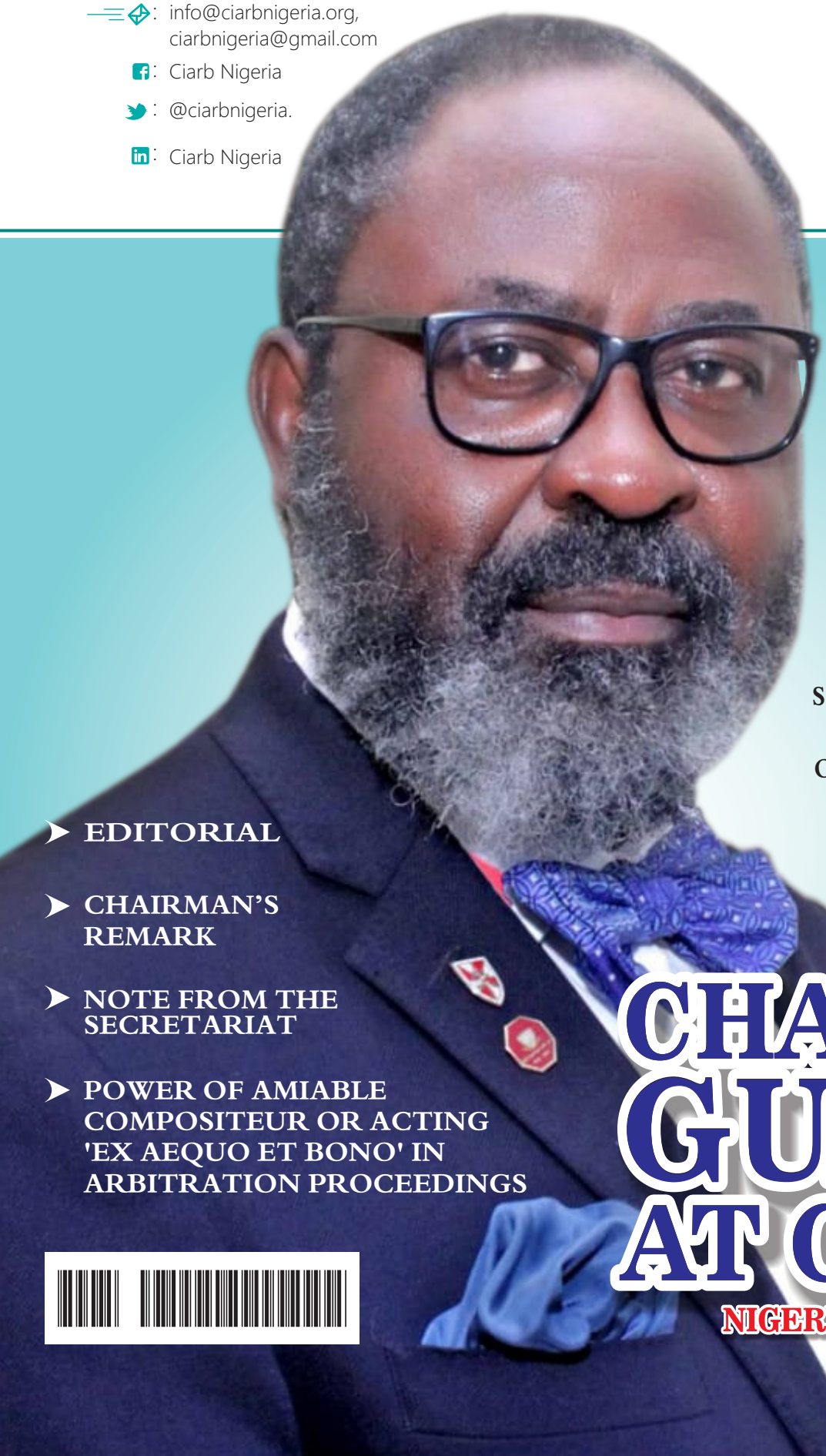
CHARTERED INSTITUTE OF ARBITRATORS (NIGERIA BRANCH)



THE WORKINGS OF INTERNATIONAL COMMERCIAL ARBITRATION

A REVIEW OF THE PROBLEMS WITH ENFORCING INT. ARB AWARDS IN NIGERIA

SOVEREIGN IMMUNITY AND ENFORCEMENT OF ARBITRAL AWARDS

REAPING THE FRUITS OF INVESTMENT ARBITRATION

CHANGE of GUARD AT CIARB

NIGERIAN BRANCH

EDITORIAL

Agada Elachi Ph.D.

Distinguished members of the branch and our esteemed readers, I bring you warm felicitation from the editorial board. This is the second edition of our e-journal. The first was released a year ago, in August 2020 in the wake of the Covid19 pandemic and the realities of our world at the time.

Sadly, Covid19 is still here with us and the reality is that it is likely to be here for a while. Whilst we wait for an enduring solution to the problem, we enjoin our members and our readers to continue to observe the Covid19 protocols and stay safe. The pandemic is real and we are now facing what has been termed the third wave (Delta variant).

As you will recall, we migrated to an e-journal last year in the wake of the pandemic to ensure that we continue in the tradition of providing our members and the reading public with up to date information on the trends and development in the ADR world as we have done through the journal in the past. We are determined, with the support of the Executive committee to sustain that tradition.

The editorial committee had planned for a return to the "hard copy" journal edition but was been mandated to keep the online version going, even if it is a once a year publication. We are however pleased to inform you that we shall have the "hard copy" edition at our annual conference coming up this year in Ibadan. We call on members to send in articles towards that publication. The deadline for submission of articles in that respect is October 31st 2021.

This edition is special. We have dedicated this edition to the "Young Members Group" (YMG). Consequently, members of the YMG contributed 60% of the articles presented here. We salute their industry and willingness to contribute to the body of knowledge. A major challenge that the editorial committee continues to deal with is the unwillingness of members to contribute articles for publication.

The lead article in this edition is titled **"Sovereign Immunity and Enforcement of Arbitral Awards: Breaking the Barrier"** addresses the topical challenges that parties who find themselves in business with state parties, and the ensuing disputes have to deal with in trying to reap the benefits from an arbitral award in their favour. It is a very interesting read.

The second article titled **"The Workings of International Commercial Arbitration (ICA)"** discusses the efficacy of arbitration as a mechanism for the resolution of international trade disputes. It also discusses the drawbacks of international commercial arbitration. This article relies on data collected through interviews and questionnaire and is quite informative.

The 3rd article titled **"A Review of the Problems with Enforcing International Arbitral Awards in Nigeria"** undertakes an in-depth analysis of the process and practice of arbitration in Nigeria, the legal framework, and enforcement regime that currently exists. It also attempts to analyze the challenges with enforcement and suggests reforms that the author believes will bring about improved culture of enforcing international awards.

The fourth article is titled **"Power of the Amiable Compositeur Or Acting Ex Aequo Et Bono in Arbitration Proceedings"** is synopsis of the exercise by the arbitrator of the power to act an amiable compositeur. It undertakes a historical analysis of how the doctrine became applicable in arbitration, its application in domestic and international arbitration, and the limitations of the exercise of such powers even when the parties have granted them.

The fifth and final article titled **"Reaping The Fruits of Investment Arbitration: An Inquiry Into Recognition and Enforcement of ICSID Awards"** is an exposé on the nature of ICSID

arbitration, the practice and procedure, and the issues of recognition and enforcement of ICSID awards. It provides a good insight into the workings of investor-state disputes as a specialized area of practice.

This edition as it is customary, contains the remarks from the Chairman of the branch and the report from the secretariat. On behalf of the editorial committee, I extend our hearty congratulations to **Chief Gbola Akinola C.Arb** who took over the reigns of leadership at the Nigerian Branch recently. We look forward to a successful and productive tenure. We thank the executive committee and our esteemed members for your support and cooperation and the opportunity of continued service to the institute.

Happy Reading!

EDITORIAL BOARD

- **Agada John Elachi Ph.D.**
- **Okey Akobundu FCIArb**
- **Taiye Oniyide FCIArb**
- **Oluwakemi Eweje FCIArb**
- **Racheal Osibu MCIArb**

ABOUT US

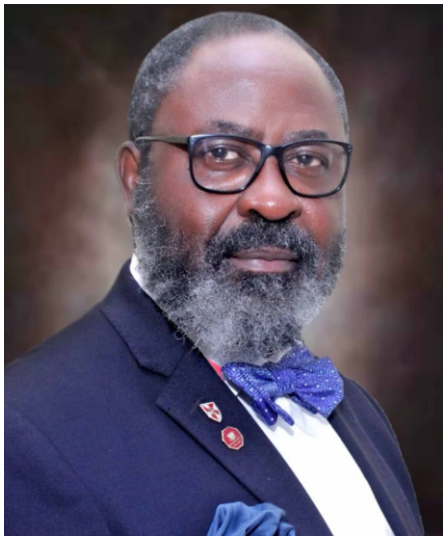
CHARTERED INSTITUTE OF ARBITRATORS
(NIGERIA BRANCH)

OBJECTIVE

To promote and facilitate the determination of dispute by arbitration and alternative means of dispute resolution, other resolution by the court.

VISION

To be a world leader in the promotions and education of professionals, involved with arbitration mediation and other forms of dispute resolution outside the court.



Chief J. Akingbola Akinola C.Arb

(Chair, Nigeria Branch)

REMARKS OF THE CHAIRMAN OF THE CHARTERED INSTITUTE OF ARBITRATORS NIGERIA BRANCH FOR THE 2ND EDITION OF THE E-JOURNAL OF THE CHARTERED INSTITUTE OF ARBITRATORS (CIArb), NIGERIA BRANCH

Dear Members,

I am delighted to present to you the 2nd edition of the CIArb Nigeria Branch E-Journal. This is my first remarks to you in the E-Journal as the Chairman of the CIArb Nigeria Branch. I consider it a privilege to be given the opportunity to serve as the Chairman of the fastest growing Branch of the Institute. The Executive Committee under my leadership will continue to build on the foundations laid by my predecessors and ensure the continued growth and the development of the Branch.

Since December 2019, the world has been grappling with the Covid-19 pandemic, which necessitated that Governments around the world put in place measures to curb the spread of the pandemic. With the gradual lifting of the lockdown and restrictions, normal business activities have resumed. However, I enjoin us all to remember that the virus is still very much around and we need to continue to take recommended precautions to keep safe and adhere to Covid-19 protocols even as the 3rd wave threatens. It gives me great pleasure to give you an update of our activities.

Executive Committee Meeting

The Branch held two Executive Committee meetings, on the 8th April, 2021 and 22nd April 2021. The meetings discussed issues affecting the Branch.

Annual General Meeting

The Annual General Meeting of the Branch was held on 22nd April, 2021with over 130 (One Hundred and Thirty) of our members in attendance. Issues considered at the meeting include the Branch Chairman's Annual Report and the Branch Audited Account.

Election of New Officers for the CIArb Nigeria Branch

At the Inaugural Meeting of the 2021-2022 Executive Committee held on Thursday the 22nd day of April 2021, the following officers were duly elected into the Executive Committee, to wit;

1. **Mrs. Olusola Adegbonmire, C.Arb**
   1st Vice Chairman
2. **Prof Paul Idornigie, SAN, C.Arb**
   2nd Vice Chairman
3. **Mrs. Obosa Akpata, C.Arb**
   3rd Vice Chairman
4. **Mrs. Josephine Akinwunmi, FCIArb**
   Secretary
5. **Mr. Akin Omisade, FCIArb**
   Treasurer
6. **Dr. Adeyemi Agbelusi, FCIArb**
   P.R.O
7. **Mr. Ibifubara Berenibara, FCIArb**
   Assistant Secretary
8. **Mr. Tonye Krukrubor**
   Chapter Liaison

Other positions filled on the Executive Committee were

1. **Mr. Seyilayo Ojo, C.Arb**
   Chairman Training Committee
2. **Mrs. Obosa Akpata C.Arb**
   Chairman Membership Committee

3. **Chief J. Akingbola Akinola, C.Arb**
   Chairman Sub-Committee to Explore Amicable Settlement with NICARB
4. **Mr. Olumide Sofowora, SAN, C.Arb**
   Regional Representative
5. **Mr. Olumide Sofowora, SAN, C.Arb**
   Fundraising Sub-Committee
6. **Mrs. Sola Adegbonmire, C.Arb**
   Chair, Review of Scale of Fees Sub-Committee
7. **Mrs. Sola Adegbonmire, C.Arb**
   Chair, Vis-Moot Sub-Committee
8. **Dr. Agada Elachi, FCIArb**
   Chairman, Editorial Sub-Committee

Branch Training Programmes

The Branch continues to conduct various training activities in line with our commitment to deliver qualitative training and enhance the development of a learned society of ADR practitioners not only in Nigeria but the world over.

A summary of the Courses held can be seen in the table below;

S/N	COURSE	DATE	LOCATION	NUMBER OF PARTICIPANTS
1	Introduction to International Arbitration	15th &16th April 2021	Virtual	23
		11th May2021	NBA Lagos	44
		3rd & 4th June2021	Virtual	10
		TOTAL		77

Training for NBA, Lagos Branch

Further to the signing of an MOU between the CIArb Nigeria Branch and the NBA Lagos Branch, the second batch of training for members of the NBA Lagos Branch was held on11th May, 2021. Forty-Four (44) members of the NBA Branch were trained during the course.

Signing of MOU with Babcock University

The CIArb Nigeria Branch signed a Memorandum of Understanding with Babcock University, on Friday the 21st day of May, 2021. The objective of the MOU is to provide training to students of the University. Members of the Executive Committee of the CIArb Nigeria Branch and Babcock University attended the event, which was held at Babcock University, Ilishan-Remo, Ogun State.

Meeting with the Director-General of the Institute

Following my assumption of office, I met virtually with the Director-General of the Institute, Catherine Dixon on the 27th day of May, 2021 to discuss matters affecting the Branch with the Deputy DG, Tom Cadman in attendance.

New Executives of the Abuja Chapter of the CIArb Nigeria Branch

At the Annual General Meeting of the Abuja Chapter of the Branch held on the 31st day of May, 2021, Hon. Sola Ephraim-Oluwanuga, mni, C.Arb was appointed as the Chairman of the Abuja Chapter following the expiration of the tenure of the Mr. Chikwendu Madumere, C.Arb as the Chairman of the Chapter.

Following his appointment, a new Executive Committee was constituted for the Chapter. Members of the newly constituted Executive Committee of the Abuja Chapter are; Hon. Sola Ephraim-Oluwanuga, mni, C.Arb (Chairman), Mrs. Roseline Nwosu, FCIArb, (1st Vice Chairman), Mrs. Ozioma Izuora FCIArb, (2nd Vice Chairman), Mr. Ali Zubairu, FCIArb (3rd Vice Chairman), Ms. Rachael Osibu, MCIArb, (Secretary), Mr. Madu Gadzama, MCIArb (Asst. Secretary), Ms. Chinenye Onyemaizu, MCIArb (Treasurer), Mrs. Ogechi Abu, MCIArb (P.R.O). Other members of the Executive Committee are Mr. Salman A. Salman MCIArb, (Membership Secretary), Ndze Chidi Duru, FCIArb (Liaison Officer), Ms. Abisoye Amosu, ACIArb, (YMG Abuja Chair), Mr. Chikwendu Madumere, C.Arb (Ex-Officio), Engr. Ebele Okeke CON,

FCIArb, Mrs. Funke Dinneh, FCIArb and Mr. Danladi Kifasi, CON, FCIArb

Collaboration with CIArb London Branch

A representative of the London Branch of the Institute, Mr. Jean-François Le Gal met with representatives
of the Nigeria Branch to discuss possible mutually rewarding initiatives between the Nigeria Branch and the London Branch of the CIArb. The meeting was attended by the Chair of the Training Sub-Committee Mr. Seyilayo Ojo, the Branch Secretary, Mrs. Josephine Akinwunmi, the General Manager of the Branch Ms. Chinelo Agbala and myself. The result of the proposed collaboration will be evident to all membersbefore long.

Book/Newsletter/Journal Donation

The Branch received a donation of ten copies of the Newsletter of O.S. Ephraim-Oluwanuga & Co "Ephraim News" to the Branch.

The Law firm of Udo Udoma & Belo-Osagie also donated a copy of the Middle Eastern and African Arbitration Review (2020 Edition) to the Branch. Two of our members Mr. Uzoma Azikiwe, SAN, MCIArb and Mr. Festus Onyia, ACIArb contributed the Nigerian Chapter in the said Review.

We thank Mr. Sola Ephraim-Oluwanuga, mni, C.Arb and the law firm of UUBO for their kind generosity in donating the Newsletters and Review to the Branch.We also congratulate Mr. Uzoma Azikiwe, SAN, MCIArb and Mr. Festus Onyia for their contribution to the Review.

Webinars

Webinars have continued to be organizedto keep us all abreast of current developments and global trends

- during this COVID-19 pandemic. A number of webinars on Arbitration have also been held featuring our members as speakers. The webinars include;
- On 9th April, 2021, the YMG Nigeria in collaboration with Clifford Chance and Fangda Partners organized a webinar on "Investment Law and Dispute Resolution – From First Dispute to a Career"..Speakers at the webinar were Sam Luttrell, (Partner Clifford Chance) and Olga Boltenko, (Partner Fangda Partners). The webinar was moderated by Ms. Efosa Ewere (Chair YMG Nigeria)
- The Abuja Chapter of the YMG organized a webinar with on 15th April, 2021 which had Mr. Babajimi Ayorinde FCIArb discussing the topic "Navigating the Doctrines of Force Majeure in Arbitration". Ms. Adamma Isamade moderated the webinar.
- The Port Harcourt Chapter of the Branch organized a webinar on 5th May, 2021 on the topic "Infusion of Artificial Intelligence into Arbitration how Practicable?" The webinar featured Mr. Isaiah Bozimo, FCIArb, Prof Catherine A. Rogers, Mr. Ope Olugasa, and Mr. Ben Garietta, C.Arb while the Branch Chair delivered a goodwill message.
- 18th May, 2021 saw the Young Members Group Nigeria collaborating with the Lagos Court of Arbitration in organizing a webinar on Alternative Dispute Resolution: Drafting your Clause to Enforcement. Speakers at the webinar included Dr. Ademola Bamgbose, Mr. Juwon Adenuga, FCIArb, Mrs. Yejide Osunkeye, FCIArb, Mr. Kola Mayomi, FCIArb. The webinar was moderated by Ms. Efosa Ewere, FCIArb with the Branch Chair on hand to deliver a goodwill message.
- Singapore International Arbitration Center Webinar on ***"Effectively Managing International Arbitration Disputes – The SIAC Advantage"*** held on 30th June 2021. Ms. Lim Seok Hui (CFO SIAC) presented the Opening

Remark at the webinar. Panelists at the webinar were Mrs. Funke Adekoya SAN, C.Arb, (Aelex), Mr. Isaiah Bozimo, FCIArb, (Member, YSIAC Committee; Partner, Broderick Bozimo & Co.), Ms. Elodie Dulac, (Partner, King & Spalding), Mrs. Madeleine Kimei, (Principal Director, iResolve), Ms. Rubin Mukkam-Owuor, (Director, JMiles & Co.) and Mr. Kevin Poon, (Deputy Head, International Arbitration, Rajah & Tann, Singapore). Mr. Kevin Nash (Deputy Registrar & Center Director SIAC) and Ms. Perry Wong (BD Manager (Legal) SIAC moderated the webinar.

- The African Subcommittee of the ERA Pledge ***"Meet the Female Arbitrator"*** webinar was held on 30th June 2021. The session featured Samaa Haridi and it was co-moderated by Mrs. Folashade Alli, C.Arb and Thembela Ndwande.

Financial Members

The Nigeria Branch has an active membership of 1,351 members out which about 590 members have paid their membership subscription for 2021.

I urge our members to pay their Annual subscriptions. With this bloc membership, we will acquire the bloc needed to elect a Nigerian President of the Institute.

2021 Conference & Gala Nite

I am pleased to inform you that the Ibadan Chapter is hosting the 2021 CIArb Conference and Gala Nitescheduled to hold from 3rd – 5th November, 2021. The Co-Chairs of the 2021 Conference Planning Committee are Mr. Ayodele Akintunde, SAN, C.Arb and Prince Lateef Fagbemi, SAN, FCIArb.

We wish the members of the CPC success in the discharge of this noble assignment and look forward to receiving you all at the 2021 Annual Conference and Gala Nite in the ancient City of Ibadan.

Courtesy Visit to the Chief Judge of Lagos State

Members of the Exco paid a courtesy visit to the Chief Judge of Lagos State, Honourable Justice Kazeem Alogba on Wednesday, 30th June 2021. The purpose of the visit was to discuss areas of collaboration with the Lagos State Judiciary in training and justice delivery.

Achievement of Members

Our members continue to excel in their careers. I am pleased to inform you of Mrs. Funke Agbor, SAN, FCIArb's appointment to the Standing Committee of the International Chamber of Commerce, (ICC). She has also been appointed as the first female president of the Nigerian Maritime Law Association (NMLA). Mr. Sola Ephraim-Oluwanuga, mni, C.Arb has also been re-elected into the Governing Council of the Institute of Directors.

We congratulate them on these achievements and look forward to more elevations in the near future.

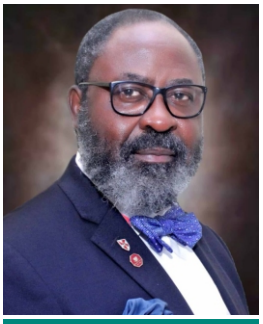
Conclusion:

I thank the Editor-in-Chief of this Journal, Dr. Agada Elachi and his team for putting together this edition of our E-Journal. I also thank all those who have contributed articles for the E-Journal.

Once again, I thank you all for giving me and my Executive Committee the opportunity to serve. We hope to continue to justify the confidence reposed in us and work with you for the growth and development of the Branch.

Chief J. Akingbola Akinola, C.Arb
(Chair, Nigeria Branch)

Executive Officer 2021/2022



Chief
J. Akingbola Akinola,
C.Arb

Mr.
Olatunde Busari,
SAN

Mrs.
Olusola Adegbonmire,
C.Arb

Prof
Paul Idornigie,
SAN, C.Arb

Mrs.
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FCIArb

Mr.
Akin Omisade,
FCIArb

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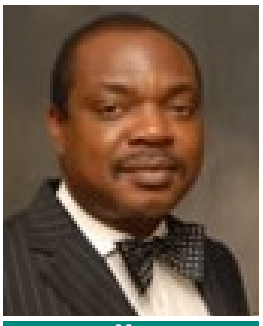
Mr.
Ibifubara Berenibara,
FCIArb

Mr.
Seyilayo Ojo
C.Arb



Mr.
Olumide Sofowora
SAN, C.Arb

Mrs.
Miannaya Essien
SAN, C.Arb

Dr.
Tayo Bello,
FCIArb

Mr.
Charles Musa,
FCIArb

Mr.
Omoyemi Akangbe,
FCIArb

Prince
Lateef Fagbemi,
SAN, FCIArb

Hon. Olusola
Ephraim-Oluwanuga,
mni C.Arb

Mr.
Tonye Krukrubo,
MCIArb

Miss
Efosa Ewere,
FCIArb

CHARTERED INSTITUTE OF ARBITRATORS (NIGERIA BRANCH)

2021 – 2022 BRANCH COMMITTEE MEMBERS

1. Chief J. Akingbola Akinola, C.Arb	Chairman
2. Mr. Olatunde Busari, SAN C.Arb	Immediate Past Chairman
3. Mrs. Olusola Adegbonmire, C.Arb	1st Vice Chairman
4. Prof Paul Idornigie, SAN, C.Arb	2nd Vice Chairman
5. Mrs. Obosa Akpata, C.Arb	3rd Vice Chairman/Chair Membership Sub-Committee
6. Mrs. Josephine Akinwunmi, FCIArb	Secretary
7. Mr. Akin Omisade, FCIArb	Treasurer
8. Dr. Adeyemi Agbelusi, FCIArb	P.R.O
9. Mr. Ibifubara Berenibara, FCIArb	Assistant Secretary
10.Mr. Seyilayo Ojo C.Arb	Chairman Training Sub-Committee
11. Mr. Olumide Sofowora SAN, C.Arb	Regional Representative
12. Mrs. Miannaya Essien SAN, C.Arb	Member
13. Dr. Tayo Bello, FCIArb	Member
14. Mr. Charles Musa, FCIArb	Member
15. Mr. Omoyemi Akangbe, FCIArb	Member
16. Prince Lateef Fagbemi, SAN, FCIArb	Chairman, Ibadan Chapter
17. Hon. Olusola Ephraim-Oluwanuga, mni C.Arb	Chairman, Abuja Chapter
18. Mr. Tonye Krukrubo, MCIArb	Chairman, Port Harcourt
19. Miss Efosa Ewere, FCIArb	Chair, Young Members Group Nigeria Branch

NOTE FROM THE SECRETARIAT

by Chinelo Agbala General Manager

Dear Members,

I welcome you to the 2nd edition of our E-Journal to continue to keep our members informed about our activities and developments in the arbitral community. I hope we are all staying well and keeping safe during these trying times. I would like to thank you all for your support to the Branch. Your contribution to the growth of Branch and the CIArb Network and your support during this COVI-19 pandemic is extremely important to us and is appreciated. Since the last edition of our E-Journal, the Branch has conducted a number of educative and enriching programmes. In view of the pandemic and in line with the restrictions on gatherings, our courses are being delivered remotely. However, due to the internet challenges prevalent in the country our Accelerated Route Courses (Accelerated Route to Membership and the Accelerated Route to Fellowship) are held in-person.

On 18th & 19th March 2021, the Branch held the Introduction to Domestic Arbitration Course on BigBlueButton, the E-learning platform of the Institute. The Introduction to International Arbitration course also held on 15th & 16th April, 2021 and on 3rd & 4th June 2021. The Accelerated Route to Membership Programme was held on the 17th & 18th March 2021 in Lagos, Abuja and Port Harcourt. The 2nd batch of training for members of the NBA Lagos Branch was held on 11th May, 2021 at the Law Firm of Babalakin & Co. The training was held pursuant to the MOU signed with the NBA Lagos Branch in 2019. We have the following activities lined up; Accelerated Route to Membership Programme, International Arbitration on 14th & 15th July, 2021, Introduction to Domestic Arbitration on 15th July, 2021 and Arbitral Secretaries Training on 22nd July 2021. Other courses include Arbitral Secretaries Training on 22nd July, 2021, Introduction to International Arbitration on 5th & 6th August, 2021 and Accelerated Route to Fellowship, International Arbitration on 18th -20th August, 2021.

The Branch had advertised six vacancies on the Executive Committee to which only six nominations were received and in line with the branch Model Rules, the nominees were returned as duly elected since the nominations received were the same number as the vacancies advertised. The newly elected Executive Committee members are.

1) Prof. Paul Idornigie, SAN, C.Arb
2) Mr. Olumide Sofowora SAN, C.Arb,
3) Mrs. Miannaya Essien SAN, C.Arb,
4) Mr. Seyilayo Ojo C.Arb,
5) Mr. Charles Musa FCIArb
6) Mr. Lateef Omoyemi Akangbe, FCIArb.

We still have available at our souvenir corner at the Branch Secretariat items such as wooden membership plaques, lapel pins and branded facemasks. Please call our office lines to +234 803 464 4337, +234 803 464 4338, 014530961 or you can email us on ciarbnigeria@gmail.com to order for your wooden plaques, lapel pins or branded facemasks.

Preparations have commenced for the 2021 Annual Conference of the Branch, which is scheduled to hold on the 4th & 5th November, 2021 in Ibadan, Oyo State. The YMG Conference will precede the conference on 3rd November, 2021. Details about the conference will follow shortly.

Finally, I also encourage you to renew your membership with the Institute and work with us to promote a harmonious society.

Kindly visit the Branch website https://www.ciarbnigeria.org/ for information on the programmes for 2021 and for prospective members, information on how to become a member of the Institute.

SOVEREIGN IMMUNITY AND ENFORCEMENT OF ARBITRAL AWARDS; BREAKING THE BARRIER

By **Adesina Temitayo Bello PhD**

ABSTRACT

In international commercial arbitration, parties that contract with states and state agencies seek to arbitrate disputes, but an increasing problem is the attempt by these state parties to raise the defence of sovereign immunity to challenge the jurisdiction of the arbitral tribunal or to avoid the enforcement of an arbitral award. The article reviewed the judicial decision in Trendtex v. Bank of Nigeria which is critical to the Sovereign Immunity that spreads across the globe. Award being final and binding as agreed in the parties' agreement should always be honoured. The article discovered that many states always resulted to the sovereign immunity doctrine in order to prevent the enforcement of arbitral awards. The article concluded that by the practice of arbitration, it is honourable for states to allow enforcement of arbitral awards against their states or state agencies for the upliftment of global arbitration. The article recommended that states that have not ratified the New York Convention should do so and also the NYC should be amended to provide that any state party to the NYC has automatically waived the right to claim sovereign immunity when the issue of enforcement of award comes up.

Keywords: Sovereign Immunity, New York Convention, Enforcement, Arbitration, Arbitral Award

INTRODUCTION

Arbitration is used for the resolution of varieties of disputes in relation to: technology, shipping, engineering, energy, intellectual property, construction, banking, financial services, real estate, employment grievances and so on. Arbitration may be domestic or international. International arbitration has been the most popular form of arbitration because most people involved in international transactions want confidential and fast mechanism for settling their disputes. The arbitral award is the instrument recording the decision of the arbitral tribunal provisionally or finally determining the claims of the parties. Enforceability of awards has to do with the recognition of an arbitral award and how it is allowed to be effective in settlement of disputes by being enforced by the parties.

The major problem faced by enforceability of awards is the restrictions placed on enforcement and recognition of such awards by the National Laws of each state. The New York Convention (NYC) has somewhat placed making of award enforcement rules subject to National Law. This has made it difficult to enforce awards

uniformly because most states have places some restrictions on the implementation of the convention.

As a result, it has been thought that in terms of enforcement of awards state sovereignty should be done away with and that award once made should not be subject to any National Laws and should be enforceable irrespective of the country where it will be enforced. For the purpose of easy enforcement of arbitral awards applicable enforcement rules should be one and general for all countries and no country should have separate laws restricting enforcement. Indeed arbitration should be made autonomous of domestic laws.

SOVEREIGNITY AND IMMUNITY

The Strouds Judicial Dictionary defines sovereignty as, "A government which exercises de factor administrative control over a country and is not subordinate to any other government in that country or a foreign sovereign state."

This is known as De Jure sovereignty; it involves having independent legal rule over one's own country. This is the government's belief that they have control over their own territory, military, finances and people. The government of that particular country has the ability to cater for its own citizens. This can include handling financial decisions, making laws and managing all of the other facets of governing a country

Sovereignty means that nation states are free to decide for themselves about the kind of democracy that they want, the kind of rulers that they want, and their policies internally and externally. Often, the concept of sovereignty is invoked to delineate the distinction between taking decisions on their own by nation states and resisting external pressures to sway the decision-making process. In this respect, sovereign nations are expected to be autonomous and independent when they pursue policies that are in their interest and their people's interest and not according to the dictates of a foreign power.

Immunity

Immunity involves exemption from penalties, payments or legal requirements, granted by authorities or statutes of a sovereign state. There are two types of sovereign immunity: absolute immunity and restrictive immunity. States have gradually shifted from the former to the latter. Restrictive immunity rests on the distinction between commercial activities and sovereign activities.

SOVEREIGN IMMUNITY AND ENFORCEMENT OF ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

Arbitrators derive their power from the arbitration agreement. Arbitration is a private dispute settlement mechanism, and therefore there is nothing to be immuned from.Consent to arbitration constitutes an irrevocable waiver of immunity from jurisdiction. On the other hand, immunity from execution is not considered implicitly waived through an arbitration clause.

It is the general duty of an arbitral tribunal to give an award which is enforceable; otherwise the whole purpose of arbitration will be frustrated. Parties to arbitration are also mindful of this fact; therefore, they select a place of arbitration which is a party to the New York Convention on Recognition and Enforcement of Arbitral Awards ("NYC"). The NYC makes enforcement of arbitral awards much easier, faster and more effective than court judgments.

Whenever the enforcement of

arbitral awards is mentioned, the NYC comes first to mind. This is the convention signed by 145 countries which have pledged to enforce arbitral awards made in any Convention country with utmost ease, and the enforcing court will proactively make sure that awards are recognized and enforced. Only in very limited circumstances should enforcement of an award be refused. In the list of those limited grounds sovereign immunity does not appear. During the drafting and adoption of the NYC, the issue of sovereign immunity was scantly raised and it was left to the national courts and states to decide. As signatories to the NYC, States are only obliged (through their courts), as Hazel Fox says, "to recognize the agreement in writing and arbitral clause and when seized of a matter relating to such an agreement to refer the parties to arbitration unless the national court finds that agreement 'to be null and void', inoperative, or incapable of being performed and to recognize arbitral awards as binding".

An arbitral award, under the NYC process, is easy to enforce. The party has to submit the arbitration agreement and a certified copy of the award to the enforcement court. The court recognizes the award and then issues the order to the other party to satisfy the claim awarded in the arbitral award. If the opposing party has any objection, it can argue its case using the grounds listed in Article V of the NYC. If the party succeeds in its argument, the court may refuse to enforce the award. The enforcing court can still enforce the award even if the opposing party has successfully argued its case; this is because Article V of the NYC contains the word "may", which gives discretion to the courts. This discretion can be exercised in favour of the enforcement of the awards. The pro-enforcement policy of the NYC has been used even in situations where an award was set aside in the court where the award was made. However, the NYC does not list sovereign immunity as a ground for refusing to enforce an award rendered where one of the parties is a State. Although issues have arisen where states have claimed sovereign immunity as a reason for unenforceability of an arbitral award; there have been argument by those in support of arbitration that once a State agrees to commercial arbitration with a private party, it waives its immunity from the jurisdiction as well as from the execution of the award.In the view of these people, if a State is allowed to raise the defence of immunity at the execution stage, it will make the agreement to arbitrate have no value. Therefore, the agreement to arbitrate should also include the enforcement and execution of the award stage, and "unless commitment to arbitration is firm and enforceable, arbitration agreements with States will be rendered useless. In countries like the Netherlands, the United States of America (U.S.A) and France it is generally understood that "when a State has waived its immunity by submitting to arbitration, the scope of the waiver extends to proceedings for confirmation or recognition and enforcement of resulting award".

Therefore, at the recognition stage if a State raises the defence of sovereign immunity, the national courts are allowed to deal with the matter according to their national law. This also means that the national courts can entertain the possibility of a foreign government or State raising the defence of sovereign immunity at the execution stage, as well.

The UNCITRAL Model Law on International Commercial Arbitration was the next stage after the NYC where the issue of sovereign immunity could be

raised and discussed in the context of enforcement of arbitral awards, but even at that time this matter was swept under the carpet. There was a proposition made by a regional consultative committee on international commercial arbitration that "where a governmental agency is a party to a commercial transaction in which it has entered into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of arbitration pursuant to that agreement." The proposal did not make very clear whether "sovereign immunity in respect of arbitration" includes the enforcement stage of the award, too. It is interesting to note that the UNCITRAL secretariat did make it clear that the "intention of that proposal is to prevent a government agency which has entered into a valid arbitration agreement in a commercial transaction from invoking sovereign immunity at all stages of arbitration, including the stage of recognition and enforcement of the arbitral award".

The case of ***Democratic Republic of Congo &Ors v. FG Hemisphere Associates LLC***, demonstrates fully the effect of allowing sovereign immunity to be raised at the enforcement stage of arbitration. The Hong Kong Court of Final Appeal held that a State enjoys absolute immunity from enforcement proceedings in Hong Kong. While *Congo* has already enjoyed its fair share of coverage elsewhere, this brief note sets out some thoughts on what the comparative position in Singapore is, and what the practical effects of the decision are for practitioners advising clients between Singapore and Hong Kong as a potential seat of arbitration.

FACTS

In 2003, an engineering company Energoinvest obtained two ICC awards against Congo. Energoinvest and transferred the benefit of the awards to a U.S.A distressed debt fund, FG Hemisphere Associates. FG sought to enforce the awards in Hong Kong. Congo resisted enforcement mainly on the grounds of State immunity. One of the issues confronting the Court of Final Appeal was whether Hong Kong applied the doctrine of:

(a) Absolute immunity, where the domestic courts of one State would not normally have jurisdiction to adjudicate upon matters in which another State is named as defendant unless there is a waiver; or

(b) Restrictive immunity, which recognizes that States do not enjoy immunity from suit when they are engaged in purely commercial transactions, and do not enjoy immunity from execution if the relevant assets are used for a commercial purpose.

Countries such as Australia, U.S.A. and the United Kingdom (UK) have adopted the latter, whereas China adheres to the former.

Despite vigorous dissents by Bokhary PJ and Mortimer NPJ which saw the former opening his judgment with characteristic flourish on judicial independence, the majority of the Court of Final Appeal (Chan PJ, Ribeiro PJ and Sir Anthony Mason NPJ) held, *inter alia*, that because Hong Kong could not have a doctrine of state immunity that was inconsistent with China, the doctrine of absolute immunity applied. A foreign State is immune from suit, enforcement and execution in Hong Kong, unless waived by that State. An effective waiver is made by an unequivocal submission "in the face of the court". Written waiver clauses, including jurisdiction clauses and arbitration agreements, do not constitute good waiver. Because the Court of Final Appeal found no waiver by Congo, the awards in question could not be enforced. This ruling

was upheld upon referral to the Standing Committee of China's National People's Congress.

The same principle applies to Crown immunity, which concerns whether a State government or a State entity is able to raise immunity before its own courts. The Hong Kong Court of First Instance held that the PRC government and PRC state entities enjoy absolute Crown immunity before Hong Kong courts.

Singapore

The Singaporean position concerning sovereign immunity is codified in the State Immunity Act. The relevant provision concerning arbitration is section 11, which very simply provides as follows:

> *11. (1) where a state has agreed in writing to submit a dispute which has arisen, or may arise to arbitration, the state is not immune as respects proceedings in the courts in Singapore which relate to the arbitration.*
>
> *(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between states.*

In the second reading of the State Immunity Billthe Minister stated that the Bill was meant to move Singapore away from the doctrine of absolute immunity, which according to the Minister, had been the "subject to a great deal of criticism" before the UK courts and the Privy Council. The Bill deliberately reflected the United Kingdom State Immunity Act 1978 shorn of the provisions concerning the European Convention on State Immunity.

Consequently, Section 11 of Singapore's State Immunity Act is in *parimateria* with section 9 of the UK State Immunity Act 1978. While the former has yet to see any action, section 9 of the UK Act came under scrutiny in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and anor.*

In that case, Svenska sought to enforce an ICC award in England against Lithuania. Counsel for Lithuania argued that section 9 of the UK Act is concerned only with proceedings relating to the conduct of the arbitration itself and does not extend to proceedings to enforce any award which may result from it. Moore-Bick LJ rejected this interpretation. His Lordship was of the view that "if a State has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective" and that an application for leave to enforce an award is one aspect of the recognition of an award and "is the final stage in rendering the arbitral procedure effective". Execution on property belonging to the State comes under section 13 of the UK Act (reflected by section 15 of the Singapore Act), which provides that execution on property belonging to a State can only be in respect of property "which is for the time being in use or intended for use for commercial purposes".

Moore-Bick LJ also quoted the Lord Chancellor in the course of Parliamentary debates over the relevant provision, who explicitly said that the provision was "intended to remove the immunity currently enjoyed by States from proceedings to enforce arbitration awards against them".

The intent of the English Parliament therefore could not have been clearer. In choosing to enact the English Act as law in Singapore, the intent of the Singapore legislature is unlikely to differ. Consequently, if a *Congo* situation arises in Singapore

Svenska is likely to be highly persuasive. If this is accepted, this means that in Singapore, unlike Hong Kong, a foreign State is unable to claim immunity against award enforcement proceedings. To be complete, any subsequent execution pursuant to a successful award enforcement proceeding against a foreign State can only be on State property "being in use or intended for use for commercial purpose".

Would the result in Hong Kong be different if the foreign State against which an award is rendered is also party to the New York Convention? China is a signatory to the Convention, Congo is not. The Hong Kong Court of Appeal suggested that, if an award against a foreign State which is signatory to the New York Convention is sought to be enforced in Hong Kong that may amount to an effective waiver in the form of consent given in an international treaty.

It has been pointed out that the New York Convention arguably imposes upon State signatories only an obligation to recognize and enforce foreign arbitral awards — that does not *ipso facto* translate into a representation by signatory States that any immunity enjoyed will be waived. The drafting history of the New York Convention does not appear to suggest otherwise. The title of the Convention itself underscores this point: it is the Convention on the Recognition and Enforcement of *Foreign* Arbitral Awards.

The General provision as regards sovereign immunity in the United States is that the federal Government has sovereign immunity and may not be sued unless it has waived its immunity or consented to suit. The United States as a sovereign is immune from suit unless it unequivocally consents to being sued.The United States Supreme Court in *Price v. United States* observed: "It is an axiom of our jurisprudence. The government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it."

However as regards arbitration, The United States of America, has held through the Supreme Court of the United States in the case of *C & L Enterprises, Inc. v. Citizen Band, Potawatomi Indian Tribe of Oklahoma,* that sovereigns are not immune under the Federal Arbitration Act. Since arbitration is a matter of contract between the parties, agreeing to participate in arbitration constitutes consent to be subject to the arbitrator's jurisdiction, thus constituting a voluntary waiver of immunity.

CAN AGENCY ARBITRATION BE BINDING ON STATE THROUGH AGENCY?

There are agencies established for the sole purpose of governing arbitration. These agencies see to the use and development of arbitration as a dispute resolution mechanism. They make rules to guide the practice of arbitration and the enforcement of awards that proceed from it. Examples of these agencies are; International Center for Settlement of Investment Disputes (ICSID), International Chamber of Commerce (ICC) and so on.

These arbitration institutions have incorporated a special rule which, in effect, prevents a State from raising sovereign immunity during enforcement once it agrees to arbitrate under their rules. The ICC is one of the leading arbitration institutions which have incorporated such a rule. The relevant rule states:

"Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of

recourse insofar as such waiver can validly be made".

This implies that the ICC does not give room for a state or state agency to raise sovereign immunity as a ground to not enforce an arbitral award. The contentious question in this regard is that by submitting to arbitration, does a State also waive its sovereign immunity defence at the enforcement stage? Scholars have analyzed this issue by proposing two-stage approaches. This may suggest that consent to arbitration by a State is different from consent or waiver of sovereign immunity at the enforcement stage by the State. However, some scholars argue that once a State consents to arbitration, the waiver of sovereign immunity at the enforcement stage is deemed to have been given, so that the arbitration can lead to its logical and practical conclusion through enforcement. In general, at the execution stage (i.e., after recognizing the award) if the Court attaches the bank account or diplomatic property of a State, then the State is entitled to raise sovereign immunity. However, if the bank account or property of the commercial arm of the State is attached for the execution, then the State is not allowed to raise the defence of sovereign immunity. Therefore, a State which has consented to international commercial arbitration is deemed to have consented to enforcement (or to not raising the defence of sovereign immunity at the enforcement stage).

REVIEW OF THE CASE OF TRENDTEX V. BANK OF NIGERIA

FACTS

In July 1975, the Central Bank issued an irrevocable letter of credit for over $14,000,000 in favour of the plaintiff, a Swiss company, to pay for 240,000 tons of cement which the plaintiff had sold to an English company. The cement was to be shipped to Nigeria where it was to be used to build government barracks. The plaintiff shipped the cement to Nigeria but there was congestion in the port of discharge and the Central Bank declined to make payments claimed to be due for the price and for demurrage.

By writ of November 1975 the plaintiff claimed against the Central Bank for payments due in respect of the bank's breaches and repudiation of the letter of credit. Mocatta J. granted the plaintiff an injunction ordering the bank to retain $13,968,190 within the jurisdiction until the trial of the action or further order. Donaldson J., on the bank's application, set aside the writ and stayed further proceedings in the action on the ground that the bank was a department of the State of Nigeria and was therefore immune from suit.

The plaintiff therefore appealed. The Court of Appeal were required to consider whether the Bank enjoyed governmental status, as an arm of the government of Nigeria, and if so whether the fact that the transactions in question were of an ordinary commercial nature precluded the Bank from pleading sovereign immunity from the suit of the plaintiffs.

HELD

The Court of Appeal, in allowing the plaintiffs' appeal, held that the Bank was not entitled to governmental status, as it could not be described as an "alter ego" of the state; Moreover, and in line with contemporary trends in international law, sovereign immunity should not extend to commercial transactions, and in that context no distinction could be drawn between commercial and "governmental" transactions until the law was altered by act of Parliament or by decision of the House of Lords.

Shaw LJ (JCA), stated that

Whether a particular organization is to be accorded the status of a department of government or not must depend upon its constitution, its powers and duties and its activities. There could be no intermediate hybrid status occupied by the bank where it was regarded as a government department for certain purposes and as an ordinary commercial or financial institution for different purposes.

From the above quote it is imperative that the Bank of Nigeria would not be allowed to claim to be a governmental organization at will so that it can claim certain immunities that governmental organizations enjoy. Hence the Bank cannot be a governmental organization at times and at other times just a financial institution; if it will be a governmental organization that would be able to enjoy sovereign immunity its activities with contracting parties must depict same. The Court of Appeal in arriving at its conclusion did not only look at the organization involved, whether it is governmental or not but also looked at the subject matter of the case at hand, the activities carried out by the organization and the agreement between such organization and other party. The Court sought to ensure that an organization do not hide under the coverage of sovereign immunity and commit fraud in the international parlance. In as much the body has agreed to the international commercial transaction, it cannot claim sovereign immunity in other to avoid liabilities incurred from such transactions.

POSSIBILITY OF ENFORCING ARBITRAL AWARDS IN THE FACE OF THE EXISTENCE OF SOVEREIGN IMMUNITY

The ***SPP v. Egypt*** case is a very important case on the possibility of enforcement of arbitral awards. In that case there was a decision in 1978 in favour of the claimant, however the defendant claimed sovereign Immunity and this disrupted the enforcement of the award.

However, the claimant in 1984 brought the action before ICSID which gave an award for recovery of damages with interest and also stated that the award can be enforced against Egypt as Egypt cannot raise sovereign immunity as a defence and stop enforcement of the award. This was possible because ICSID through its rules had stated that any person be it state, state agency or individuals that agree to apply the ICSID rules as rules of arbitration or allow ICSID handle their arbitration, has waived the right to claim sovereign immunity as a reason for disallowing the enforcement of the award.

The NYC makes provision for awards to be enforceable globally irrespective of the country where the award was made. However the NYC did not explicitly bar state parties to arbitration from claiming sovereign immunity as a reason for unenforceability of an award. It can be inferred that the convention seeks to ensure the possibility of enforcing arbitral award without allowing the use of sovereign immunity as an impediment.

Countries are beginning to ensure that arbitral awards are enforceable irrespective of the jurisdiction they are coming from, thereby limiting the use of sovereign immunity by states. For instance the United States of America has through the enactment of the Federal Arbitration Act limited judicial intervention in arbitration and also provides that state immunity cannot be used as a ground by states or its agencies to not enforce

arbitral awards granted under the Act.

It is very possible for states to allow enforcement of awards and still not lose its sovereignty, while control of the sovereignty of a state is very germane to the state and has been the main reason why states refuse to be bound by laws of other states or judgments made from the application of such foreign laws. However, just like taking a case to an international court, for example the International Court of Justice (ICJ) arbitration is fast becoming an international Alternative Dispute Resolution Mechanism and as such arbitral awards are becoming similar to International judgments which are enforceable everywhere not minding state sovereignty.

CONCLUSION

In the field of arbitration, an agreement to arbitrate sets the arbitration into motion, and the parties, from the moment they agree to arbitrate, know and can imagine the consequences.

The issue of sovereign immunity has become a difficult in arbitration mainly at the enforcement stage of the arbitral process. It is important that court judgments and arbitral awards are treated differently. Therefore, once a State has agreed to arbitration, it should be assumed that the State has waived its immunity from jurisdiction and execution. If that State is a signatory to the New York Convention or has agreed to arbitrate in a State which is a signatory of the NYC, it should be treated as strong evidence of a waiver of sovereign immunity. If some arbitration rules, such as the ICC rules, include an indication of a waiver of sovereign immunity; states should also follow suit to give room for promotion of the use of arbitration in settling disputes.

The situation has become difficult because national courts dealing with enforcement of awards refuse to develop special rules for the enforcement of arbitral awards and as such they are guided by the principles applicable in judicial proceedings during litigation. Giving room for sovereign immunity to act as an impediment to enforcement of arbitral award will prevent arbitration from developing which, in itself, will make arbitration a dependent system of dispute resolution rather than an alternative dispute resolution mechanism.

As long as arbitration is treated like a court process, the problems of sovereign immunity and many other problems will keep creating hurdles in the path of the smooth operation of arbitration and enforcement of arbitral awards. Unless arbitration exists as an independent system of dispute resolution, the shortcomings identified with litigation will start being a part of arbitration and will in turn keep on colliding with parties' autonomy in arbitration, thus undermining the integrity of arbitration as a true alternative to litigation.

RECOMMENDATIONS

International investors now prefer to settle disputes with partners using arbitration and as such they include an arbitration clause in their contracts with states. Hardly can a state exist without the help of foreign investors which means there will always be need to sign contracts including arbitration clauses. If these investors have the hint that previous arbitral awards were unenforceable on the ground of state immunity, it may prevent them from entering into a contract with a particular state thereby making the country loose potential investors. It is in view of these that it is advised that states should not impede enforcement of arbitral awards by raising the defence of Sovereign Immunity.

The following are hereby recommended to give more room for this:

1. Each country should

ratify and domesticate the New York Convention on Enforcement of Arbitral Awards. This would ensure that there is uniformity in the laws governing enforcement of arbitral award globally.

2. The New York Convention on Enforcement of Arbitral Awards should provide explicitly that every country that has ratified the Convention has waived her right to raise sovereign immunity through her National law or from any other law as a ground to prevent recognition and enforcement of awards.
3. There should be a separate body of laws or judicial system to handle arbitration, arbitral proceedings and enforcement of arbitral awards in each country. Arbitration should not be subjected to same rules that litigation is subjected to as this would rob arbitration of its advantages over litigation.

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The Workings of International Commercial Arbitration (ICA)[1]

By Chinwe Stella Umegbolu

Abstract

International commercial disputes require a significant and expeditious determination as enormous sums are approximately involved. Customarily, such disputes are settled through litigation, which was the only door. However, in modern times, with the growth of other dispute resolution methods, parties to an international commercial agreement have at their fingertips a different range of choices for the settlement of their dispute. One such method is arbitration, which is frequently utilised in modern-day international commerce because of its attractions and popularity.

Consequently, this paper weighs in on these attractions or advantages of arbitration in comparison with litigation. It will also explore the nature, processes and features of ICA, which has drawn parties to international trade agreements to resort to arbitration. However, there are drawbacks, especially the issue of cost and delay that affect efficiency in arbitration. Does this drawback take away the beauty of arbitration? This paper has recourse to questionnaires and laws collected from various Arbitral bodies via email as well as primary and secondary data to analyse *this drawback. The conclusion reveals the current satisfaction with the system while at the same time analysing the challenges raised.*

Keywords: *Alternative Dispute Resolution; Arbitration, Arbitral bodies, Access to Justice; Litigation.*

Introduction

Disputes are inevitable in human existence, whether human frailties, whether mismanagement or over-expectation will always interfere with contractual performance. Thus, the institutional centres of arbitration and states have modernised their laws and set up various arbitration centres to keep up with the surge of business. Amongst all this activity, it can easily be forgotten that arbitration is an easy and simple method of resolving disputes. For instance,

parties in a dispute can agree to resolve their conflict or disagreement through an appointed impartial third party that they trust. This third party (the arbitrator) listens to the evidence and then makes a final decision, which is binding on the parties. Often, these decision leads to a final, binding and enforceable award. This process is preserved in confidentiality, thus making sure that the parties' issues or disputes are unknown to the public. On the other hand, their privacy can be disclosed or breached with the consent of the parties or pursuant to the order of the court.

In support of the above viewpoint, is the judicial decision in *Ali Shipping Corp* v *Shipyard Trogir* where the court emphasised on the *Dolling-baker* principle that arbitral parties are subject to an implied duty of confidentiality. However, the court made some exceptions to the implied duty of confidentiality, namely:

a) *"by leave of the court,"*

b) *"Where disclosure is made pursuant to the express or implied consent of the party who originally produced the material."*

Flowing from the above, arbitration proceedings apart from the above exceptions are unquestionably private though endorsed by law. For instance, any document produced in the arbitral tribunal shall be bound to confidentiality; this indicates its commitment to making arbitration private. On the contrary, this cannot be said about litigation, which is Public.

The Inherent Nature, Processes and Features of Commercial Arbitration

Similarly, parties in arbitration have the choice to select the number of arbitrators and appoint an arbitrator that is an expert on the subject matter of disputes. This is an essential factor in arbitration because an arbitrator's approach to procedural and substantive issues will impact heavily on the outcome of the dispute. Thus, appointing an arbitrator is an essential step towards representing a party in the arbitration. The parties power to choose the arbitral tribunal is what gives arbitration an edge over the national courts. Leveraging on this, it provides a major difference between arbitration and litigation. Gary Born pointed out that parties are given autonomy or the choice with the decision to select the seat of arbitration, the substantive law, and the language of the contract. On the other hand, Margaret Moses revealed that 'Parties also get to decide whether the resolution of their disputes will be administered by an arbitral institution which has the advantage of having more credibility because award rendered under a well-known institution is widely recognised in the international community and the courts.' However, they can opt for ad hoc, which offers more flexibility in the proceedings and is cost-effective because there is no administering institution.

In the light of the views above, it suggests that arbitration is relatively quick because once an arbitrator has been selected or once the parties select any arbitral body of their choice then proceedings can commence immediately. Unlike in litigation where a case has to wait till whenever the judge has the time to hear it, it might even take a month or even a decade to be heard.

Additionally, the points made above, signify that the fundamental factor of the national court, which differs from an

arbitral tribunal, is the rigidity of its proceedings. This as it were is in contrast with the degree of autonomy bestowed on the parties by arbitration. Thus under the rules of arbitration and the rules of contract, a party to an agreement has the right and freedom to suggest any term he wishes to be included in the contract. This has received judicial backing in the case of *Printing and Numerical Registry Co* v *Sampson,* where the court held that 'public policy requires that an adult of full age and understanding has the freedom to enter into a contract and that the contract shall be enforced by the court.' This further supports the fact that arbitration empowers parties with enormous freedom and control to choose a seat of law that will govern the arbitration aside the confines of their jurisdiction.

Appointing an arbitrator is an essential step towards representing a party in the arbitration.

One of the essential elements of Arbitration is its consensual nature, which has made it more attractive, more popular and has attracted more users to arbitrate. Thus, it constitutes the fundamental distinction between arbitration and litigation. However, it limits the powers of the arbitrator, due to the fact that the arbitrator will only decide on the issue that was covered in the arbitration agreement. On the contrary, a national court can settle any issues that parties do not agree to arbitrate. It is essential to point out that disputes can be resolved in two ways, either by their written agreement; willingly deciding to submit to arbitration from the onset or parties can still agree after a dispute has arisen, referred to as the submission agreement. In order words, arbitration exemplifies simple procedure, due process and swift justice. It is inherently non-coercive and private.

In hindsight it enables parties to resolve -past issues and address future needs by providing them with party autonomy where they can stipulate what they want and how they want it in their contractual agreement. Unlike in litigation, it has been argued that most cases have only benefited the rich because of the complexity involved in the filing of cases in the high court and waiting for the case to be heard. In this regard, clients with low income will find out

that they are left with nothing after being burdened with a large number of fees to commence litigation. This is an area that involves a considerable deal of expenditure on the part of the clients that makes litigation to be an unattractive first choice.

Subsequently, another exciting feature of arbitration is the validity of an arbitration agreement for it to be valid; it has to be in writing and signed by the parties. *Article II (1) (2) (3)* of the New York Convention has provided the requirement to support the fact that the writing requirement must be vital. In most cases, a signature will be required, the disputes must be in a defined legal relationship, and the matter must be settled in arbitration unless the agreement is null and void, inoperative or incapable of being performed.

Furthermore, it is apt to point out that contracting member states are mandated to honour and enforce arbitration agreements that are in writing. So, the courts have a duty in most jurisdictions to stay proceedings and refer a matter to arbitration in situations where a party to a binding arbitration agreement commences an action in court in disregard to the arbitration agreement. Then the question of whether the agreement was in writing, signed and valid is most likely to occur as a recalcitrant party may decide to renege or back out from the contract to arbitrate. Though, even when an arbitration clause has fulfilled all the above requirements for validity, the issue of validity may still be raised if the main contract containing the arbitration clause has been dismissed. In such a situation, the arbitration clause will still be held to be valid based on the principle of separability.

Another important aspect of arbitration is that it involves the submission of disputes to a non-governmental decision-maker selected by the parties. This is another way in which arbitration differs from the court-sponsored litigation. In arbitration the arbitrators are private citizens whereas, in litigation, judges preside and are paid by the government. Arbitrators, unlike judges, tend to be informal in their deliberation of proceedings, and their primary interest lies with the parties.

Additionally, arbitrators need not be lawyers, as the qualification to adjudicate varies from party to party. In some areas like the construction industry, architects and engineers with their technical knowledge have an edge to be selected as arbitrators because of their specialist knowledge.

In summary, International arbitration provides a more neutral forum, speedy, and expert dispute resolution process, largely subject to the parties control in a single centralized forum, with internationally enforceable dispute resolution agreements and decisions. While far from perfect, international arbitration is rightly regarded as suffering fewer ills than litigation of international disputes in national courts and affording parties more practical, efficient and neutral dispute resolution than available in other forums.

The Underlying Principles of International Commercial Arbitration (ICA) Process

Party Autonomy

This is the fundamental basis of arbitration; this principle stipulates that parties have the utmost freedom to organise how their dispute should be resolved. This flows from the full feature or characteristics of arbitration, in that it is a consensual process founded on an agreement between the parties to refer their dispute to an impartial arbitral tribunal. The

principle also provides freedom for parties to choose the substantive law, seat of arbitration, select the arbitral tribunal and the language of the arbitrators. Furthermore, these rights are implemented at the contract stage, or it may arise in future. Sunday Fagbemi succinctly captured it in the following sentence:

"The freedom of parties to consensually execute arbitration agreement is known as the principle of party autonomy."

It follows through that if parties choose the right law they are comfortable with, they will be able to open up during the session. For the following reasons, party autonomy curtails uncertainty and can be predictable. However, party autonomy triumphs when it is not in conflict with the mandatory provisions of the Arbitration Act 1996 that is the seat of arbitration. Hence, this provision in *Ss9-11, S12, Ss75*, is an essential requirement to provide a mechanism for limited court interference to avoid errors or arbitrators acting without jurisdiction.

It is vital to point out that the UK highest courts are in support of autonomy and flexibility in arbitration. The English Supreme Court case of *Jivraj v Hashwani* validated this position, where the court decided that the belief of an arbitrator is quite different from the obligations he must implement, as demonstrated in the Arbitration Act 1996, are essentially not consistent in particular with an employment relationship. This implies that an arbitrator must be neutral and must be impartial towards the parties. This further emphasized that one of the distinctive elements of international arbitration is the broad freedom of choice enjoyed by the parties and the arbitrator to streamline the process for an effective and reliable means of settling a dispute, as indicated in *section 1* of the Arbitration Act. It signifies that one of the attributes of arbitration and its popularity is the choice for a party to select an arbitrator and count on the neutrality of the process; this alone motivates and increases the confidence of its users.

It is evident that arbitration has an autonomous freedom of contract, then the provision mentioned above, should not be a hindrance but rather facilitate the parties to attain or fulfil their choices. To put it more simply, without this element mentioned above, arbitration will not be considered as efficient and a cheaper alternative to litigation.

Separability

On the other hand, Margaret Moses revealed that an 'arbitration clause is part and parcel of the arbitration agreement', yet under most rules, regulations and jurisdictions it is still referred to as a separate agreement because they are essentially independent of each other.

On the contrary, Professor Emilia Onyema highlighted

> *Agreements can be in the form of a pre-dispute clause in a contract or a separate submission agreement covering the disputes that have already arisen. The principle of separability is most relevant to arbitration clauses contained in an underlying contract.*

What this means is that the individual clauses remain valid even where the primary agreement is invalid. As pointed above, in most jurisdictions, the principle of separability facilitates the arbitrators to hear and decide the dispute even if the main contact was vitiated by fraud and even if it was null and void from the onset. This demonstrates another significant difference with litigation and makes arbitration more attractive or a popular option. Whereas, if it were litigation and offences as serious as fraud is alleged it would in most cases terminate the proceedings.

On the other hand, if such a claim is raised, then it does not deprive the arbitrators of jurisdiction because it relates to the main contract and not specifically to the arbitration clause. In other words, from this writer's view, the whole point of separability is to allow the arbitrators to deal with the fallout from the main contract irrespective of fraud, which does not affect the arbitration agreement. Otherwise, parties would simply allege fraud and escape the arbitration agreement.

Arbitrability

Generally, for an arbitration agreement to be enforceable the subject matter must be arbitrable. For instance, the matter must be a subject that the state considers appropriate to be arbitrated. In the first place, arbitration on its own would lack efficacy but for the support provided by the government-backed courts or it would be practically impossible to enforce awards that have been issued by the arbitral bodies but for the power provided by the court backed litigation. But to mention a few, there are areas for which arbitration is ill suited for which litigation is well suited.

However, Bermann stated that arbitrability connotes "*any and all threshold issues' and on the other hand, the domain within the law permits arbitral decision making.*" Therefore from the above statement, it implies that arbitrability is ambiguous depending on the issues raised. Hence, for arbitration agreement to be enforced the subject matter must be considered by the state to be arbitrable, that is issues bothering on criminal matters, child custody, family matters and bankruptcy are not arbitrable in most jurisdictions these can be referred to litigation. However, the issue of intellectual property due to the nature of confidentiality of arbitral proceedings helps to safe guide trade secrets –is arbitrable.

In contrast, patent law might not be arbitrable because this is considered an issue of the courts, but on the other hand, disputes arising out of the agreement to license a patent would be arbitrable, because those disputes are basically contract disputes.

Correspondingly, disputes involving antitrust laws, which were initially not arbitrable, are now arbitrated upon. Therefore, a mere illegality should not deprive the tribunal of jurisdiction to determine the dispute if it falls within its remit. Moreover, in the decided case of *Fiona Trust v Privalov,* where a contractual defect (illegality and fraud) was raised but it did not invalidate the arbitration agreement. The court upheld the application and referred the matter back to arbitration because it was not enough that bribery impeaches the whole contract. However, the only exception would be where bribery impeaches the whole arbitration clause itself.

In furthrance, is the case of *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust- Kamenogorsk Hydropower Plant LLP,* where the court held that the arbitration clause was stated to be invalid by Kazakhstan law because it was contrary to public policy. It then follows that *section 44 of the 1996 Act* and *section 37 of Senior courts Act of 1981* will determine the scope of English court's jurisdiction to intervene. Therefore, an arbitration clause should be given a broader interpretation in order to cover any specific issues or all or any arising disputes that may arise between the parties.

Null and Void

Aside from the necessary provision provided by the New York convention for the enforcement of arbitration clauses, they provided some defences, which must be fulfilled before any court will decide to refer a party to

arbitrate. Yet there is an exception to this general rule and this occurs when the agreement clause is null and void right from the beginning, such as there was no consent before the commencement of the contract agreement or the party was under duress or undue influence. As a result, the arbitration was void from the start.

The seat of arbitration is also an underlying principle in defining the legal framework of the arbitral process. If parties fail to specify or stipulate the seat of arbitration in clear terms, as well as the intentions of the parties not adequately conveyed or too distinct to be understood then the agreement becomes null and void.

Following on the above point for the court to adequately pronounce a judgement or decision, the intentions of the party should be well known and meaningfully conveyed. Thus the arbitration agreement should be drafted with great care and this will have an enormous impact in the arbitral proceedings, it will undoubtedly enhance the efficiency and success of the process if well drafted.

The above view was supported in the Singapore case of *HKL Group Co Ltd v Rizq Int. Holdings Pte Ltd,* where a badly drafted arbitration clause took the court a long time to dissect what the parties intentions was, although the court later upheld the decision, stating that it was evident or obvious that the parties intention was to arbitrate. However, this was contrary, to the decision of the Swiss Supreme Court of *X Holding AG and Ors V Y Investments NV* where the court overruled a pathological clause, for not adequately stating the intents of the parties to arbitrate.

Indeed, when looking at the opposite decisions expressed by the different court above, it is essential to point out that in order for parties to avoid equivocal clause, the clear intention of the parties should be duly stated, plus the terms of the agreement must be broad and free from ambiguity, so as to avoid the misperception that may arise from imprecision. For example, such broad formula that is free from pathological clause was stated in the case of Governor of Gibraltar v Kenny. Equally a good and standard arbitration clause should be constructed to cover all or any arising dispute or claim (anticipated or unforeseen).

Also parties will also be in a position to be able to agree or choose an ad hoc or institutional, subject to their preferences which are tailor-made to the issues surrounding the transaction based upon any factors affecting the same. The London Court of International Arbitration (LCIA) has recommended a conventional model clause, which is as follows:

> *Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which rules are deemed to be incorporated by reference into this clause.*

It should also contain the seat of the arbitration (city or country) number of the tribunal, nature of the procedure, the cost distribution between the parties, and enforcement relating to any procedural matter, award and confidentiality clause. The rationale behind this is that if clauses are framed or inserted in an appropriate manner, the court will uphold it and arbitration will move forward according to its terms. Then efficient proceeding will continue to flourish in, arbitration and delay will be mired in the arbitral process. To put the above viewpoint in context, it should be mandatory for all arbitral agreements to contain a minimum accepted standard to avoid the vagaries of unacceptable standard

discussed above.

Hence, there are so many factors that can vitiate the arbitration agreement as stated in this work, thus drafting of the arbitration agreement can contribute to delay and can complicate the enforcement of the arbitral award. Nevertheless, this can be avoided by drafting a short, broad and straightforward clause, if it contains the very minimum requirements espoused earlier. Then there will be no need for an elaborate or complex clause that might further impede the efficacy of the arbitral proceedings.

The Advantages of International Commercial Arbitration (ICA)

Tt is essential to point out that the eagerness to use arbitration over litigation is because of the success stories in the last decades, not only is arbitration now the primary method of resolving investment disputes; it is also quite popular in the construction industry. This is evident in the statistical research carried out in 2013 by Remy Gaby and Loukas Mistelis indicated that 68% preferred using arbitration in the construction sectors and stated that it is more popular than litigation. However, concerns fuelled by recent events exist regarding both the economics and the consequence of the private dispute. Companies in London, especially, worry about qualified mediators and arbitrators, unnecessary delays, escalating costs that companies are venturing into every day. Despite these concerns, it seems that international arbitration and mediation can be cheaper, effective and practicable conflict management device for the growing number of complex, international commercial trades.

Apart from these reasons stated above, parties to an international commercial transaction frequently opt for arbitration because, of its dynamic nature, neutrality, simple procedure, final and binding award and can be controlled by the parties. A number of these will be discussed in detail below:

Efficiency: It is often assumed that arbitration is quicker than litigation. Furthermore, in many cases, this is true. Conversely the fact that arbitrators can be selected due to party autonomy, and the separablity clause in arbitration, prevents a backlog of cases. This cannot be said about litigation, in different countries and jurisdiction -the number of backlog of cases that can take years before a hearing date can be obtained.

On the contrary, in arbitration, within a short notice, parties can present their case to an arbitrator, and the matter will be resolved with great expedition. The easy access and efficiency of this method of dispute resolution, therefore easily lends itself to members of the public in particular commercial business men.

Flexibility of the procedure: Due to the private nature of arbitration, the procedures can be amended at any time to suit the parties and characteristics of different cases. Hence, in recent years some of the institutional bodies like the (AAA) America Association of Arbitration, (LCIA) London court of International Arbitration, (SWISS) Switzerland and (ICC) International Chamber of Commerce, have amended their rules to provide for more effective and efficient management of the arbitration process. For example, the LCIA amended its rules, which include provisions of emergency arbitrators. This is an avenue of ensuring that parties to an international commercial arbitration can have an enhanced and expedited hearing. Besides, the continual growth of ICA as the preferred method was because most international contracts were drafted under the laws of England and coupled with the fact that parties can expand their dispute resolution options by requesting

for mediation as an 'alternative' if the settlement is not reached in the arbitration agreement, taking cases in recent years to the institutional body has contributed to the recent development and use of arbitration in a different jurisdiction, especially in the UK.

Simple procedure: The simple procedure in the arbitration is an inherent advantage when compared to litigation. Indeed, arbitration can be faster and cost-effective means of settling disputes than litigation. This is because of the complicated and complex rules of taking of evidence, hearings, discovery, answering interrogatories and documents gathering, which can be used as delay tactics in litigation are significantly reduced in arbitration, which makes it faster and cost-effective. This position was also supported by the survey of thirty (30) experienced lawyers conducted by the Herbert Smith City Firm.

Though, 'there was an increase in the mediated settlements offered, however, the key problems in litigation are related to evidential issues and cost in litigation.' Whereas, in arbitration, it can be simple depending on the parties and the arbitral tribunal. The point stated above is supported by *section 34* of the Arbitration Act 1999 and Article 1(4) IBA rules on taking of evidence in International Arbitration 2010, where both acts placed an enormous power on the tribunal to decide on matters as it deems appropriate pertaining to evidential issues. Due to the simple and limited procedure in arbitration unlike the full disclosure in litigation. This is one of the main reasons that parties are leaning or moving towards arbitration because matters are resolved quickly; this significantly reduces cost for disputants.

Moreover, the ability for parties to select expert arbitrators especially for disputes that arise out of specialist industries is an outright advantage over litigation, where it is unheard of, for parties to decide who would adjudicate over their matter. This also saves time and minimises cost, if parties to arbitral conflict act reasonable and discharge their obligation to each other. Unlike litigation where the judges, do not necessarily have the knowledge to handle disputes arising between parties from different countries or the ability to handle international business transactions and parties cannot influence who their judge might be, this by contrast is different with arbitration. The ability of parties to select experts from different fields makes the settlement of dispute faster and distinguishes international arbitration from litigation. However, the manner in which the parties exercise this freedom to select the arbitrators will determine if the arbitral process saves time and minimises cost. Essentially therefore, a lot of modalities depend on how party's act, but the important element has already been provided by the arbitral system. The eminent Swiss jurist and arbitrator Lalive stated, "*Arbitration is only as good as its arbitrators.*"

This statement implies that, if parties choose a competent arbitrator that has a good knowledge of the subject matter and can effectively conduct proceedings and case management, then this would save time and cost. In fact, if steps are taken to enlighten the parties on an arbitrator's previous experience and skills, then the choice they make will help to determine how long a case will last, which in all probability might be quicker than litigation.

Final and binding: The determination of parties' rights is another salient advantage of arbitration over litigation. This means that an arbitral decision becomes a final judgement that cannot be appealed. Subsequently,

this cannot be challenged, except if the challenge falls within the eight defects of the New York Convention of 1958. This is contrast with litigation, where parties are free to appeal if they are not satisfied with the judgement passed, hence this will accelerate the cost in litigation.

The Arbitral Institution: Arbitration can be perceived to be effective and cost efficient because of the mere reason that the arbitral proceedings have been streamlined to meet the needs of the parties. This is because of the changes made by different arbitral institutions by amending their rules to provide for an emergency arbitrator to be appointed at short notice to hear interim orders in their proceedings and has been immensely beneficial to parties. As a result reduces the interference of the state court, where parties wish to apply for interim measures subsequent upon the constitution of the arbitral tribunal. These changes are borne out of the fact that arbitration unlike litigation has the advantage of hindsight. This means that all the failings of litigation becomes the starting point for arbitration, as arbitration is seen as a remedy for most ills that plague litigation.

The Drawback or Challenges of International Commercial Arbitration

Arbitration is generally recognized as a quick and cheaper alternative to resolve disputes hence its popularity. However, Drahozal suggests that arbitration might be inefficient because in some cases it is cost consuming and frustrating. Thus, it has its drawbacks, which are the legal costs and backlog of cases similar to those in litigation. Generally, arbitration was flaunted as a more efficient and cost effective that results to a binding method of settling disputes. The rationale behind this flows from the U.S Supreme Court case of *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth* that affirmed that following the speedy or efficient results of arbitration, which aids the needs of the parties hence the preference, of parties to arbitrate their disputes. In the USA, arbitration has been 'judicialized,' like litigation due to the huge cost associated with the latter. However, the proponents of arbitration posit that arbitration procedures are trailing the same path as litigation.

This writer suggests that the reason behind this is because arbitrators are determined on striking a balance of equality and efficiency. They may be hesitant to push parties to limit discovery, in anticipation of not upsetting anyone in mere hope that they will be appointed in future appointments. For this entire reasons arbitration hearings are now besieged with extensive discovery. For example, if Mrs PX provided for arbitration and did not stipulate in detail on how discovery will be handled then she might end up with a proceeding like litigation because the arbitrator may not want to impose his opinion on her. This was solely associated with litigation but has now been transferred to arbitration. This in turn has transformed arbitration process, which was designed to be a simple procedure into an expensive expenditure like litigation.

Thus, the recent case in *Boxer Capital Corp v Jel Investments Ltd* demonstrates that the disappointment of the proponents of arbitration to avoid cost and delay of the adversarial system was not attained in the above mentioned case which commenced in May 2013 and lasted till 27th December 2018, more than five and half years after the dispute began. Therefore, it came as no surprise that parties and business counsel are moving towards mediation and other

alternative means of dispute resolution that seems to be fruitful in attaining their goals.

Additionally, another challenge of arbitration is that parties cannot appeal even where it is obvious that the arbitrator decision was invalid. The point here is that the decision can be challenged for mainly procedural defects or illegality but cannot be challenged for example, for unfairness like a court case, though the arbitral process is designed to save time and cost at the same time deprives a party of his right to natural justice, equity and a good conscience and actually failed to adhere to natural justice is a reason to review it.

This practice was also resorted to in Nigerian Supreme Court case- *Agu v Ikewibe* where the court ruled that an award made in a customary arbitration, if the decision is mutually accepted by the parties, and then it is binding and *res judicata*. This decision of the Supreme Court in Nigeria was also in line with the decided Ghanaian case of *Foli v Akese* that once an award has been made based on the customary law that is repugnant to good sense for the losing party not to accept the decision of the arbitrators to whom he had previously agreed.

Taking into account of the two decided cases above, it demonstrates that the courts in these two jurisdictions treat customary law arbitration precisely the same manner as statutory arbitration under the English law. Hence, parties that agreed to arbitrate will have no right to appeal even if the arbitrator has erred on law. Thus, parties are moving towards mediation because mediation costs are less costly and less adversarial than litigation. However, this disadvantage can be tampered by the bare fact that parties have exercised their rights to arbitration and have conceded to whatever decision unlike litigation that is not voluntary.

In England in 2012, the court introduced new procedural code- *Part1, Rule1.1 (1) (2, a, b, c, d)* with the overriding objective of the court, which aids the court to deal with cases of fairness and proportionate cost. This provision ensures that potential litigants are on equal footing, by minimising cost and dealing with cases proportionately. The above-mentioned provision was put in place in a bid to decongest the court, and the court system has improved in so many ways. For example, in some jurisdictions like Nigeria, in recent times the courts have an inbuilt out of Court Mechanism or Court-Annexed Alternative Dispute Resolution (ADR) processes which settles dispute between parties without going into the full trial of litigation. Hence, the Nigerian legal system in most states has provided an efficient solution to the issue of delay that has plagued the legal system for many years.

However, in most cases, the arbitral tribunal has no power to join new parties to their proceedings. The reason behind this is that all parties may be involved in various stages of the dispute and the tribunal's power must spring from the consent or agreement of the parties. Thus, if a party has not consented to arbitrate, then it implies that he cannot be joined in the arbitration. Consequently, a court generally has a right to consolidate similar claims of different parties; hence it is more efficient for the concerned parties, unlike the tribunal who does not have such powers.

In other words, the challenges of arbitration are somewhat similar to the advantages of litigation; therefore, the parties from the onset should carefully consider the controversy that may arise before consenting to arbitration agreement. The rationale behind this is that it is not all cases or issues that are suitable for

arbitration. Unfortunately, from the challenges or drawbacks stipulated above, arbitration is far from performing a miracle to a cheaper and efficient alternative to litigation.

Conclusion

This work has explored the features, underlying principles, advantages and challenges of International Commercial Arbitration and it is concluded that this process has its attraction to users who seek settlement of disputes particularly in international trade disputes. It has shown to a large extent that arbitration is cheaper and a more efficient method of resolving disputes than litigation due to the facilitation of party autonomy and procedural flexibility.

However, this paper has further revealed that there are challenges posed by the process that can make it slow and inefficient. In some cases, an unwilling party may decide to hinder the process by raising the elements stated above, and in most cases, the challenges of arbitration become the advantages of litigation. Hence if parties decide to select the institutional litigation, this has its drawbacks, as parties are not free to select judges or procedure(s) in court. Further to this, even though the award in ICA is final and res judicata, the court must enforce it, which is where the strength of the adversarial process comes in.

On the contrary, these challenges or drawback can be avoided if the parties select the institutional arbitration, which has a detailed procedure, restrictions and control. Because of this; the courts are inclined to grant enforcement of awards made in the institutional arbitration. Thus, the unnecessary delay will be avoided in the arbitral process.

By and large even though the litigation process gives teeth to the enforcement of the agreement of the arbitration awards. In this writer's view, arbitration is a preferable alternative due to its less complicated nature and simple proceedings. It will have more relevance, development, significance and structure in modern-day dispute resolution methods.

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A REVIEW OF THE PROBLEMS WITH ENFORCING INTERNATIONAL ARBITRAL AWARDS IN NIGERIA

By: Alice Lawrence

Abstract

Arbitration is the most common and most preferred means of resolving international commercial disputes. The benefits of arbitration include relative speed, privacy, and party autonomy in selection of their umpire.

The beneficiary of an Arbitration Award expects that it should be complied with; in the event that it is not, resort must be had to legal mechanisms of the State to enforce the Award. The resort to these mechanisms is fraught with legal technicalities that must be navigated to a successful outcome.

In 2019 Nigeria was ranked as Africa's largest economy, and one of the world's largest exporter of crude oil. Nigeria also produces a large proportion of the goods and services for the West African sub-continent. In order to realize the economic potential of Nigeria as an investment destination, the enforcement of International Arbitral Awards must be streamlined for greater efficacy. This essay is an attempt to review of the relevant laws and structures for enforcement of International Arbitral Awards, identify the areas where improvement is needed, and proffer possible solutions. Some of the solutions suggested require constitutional amendment; others, suggest more uniformity and clarity to Court rules.

The author proffers solutions that if implemented would make Nigeria an even more attractive investment destination in the years to come.

Arbitration is the most preferred and common form of resolving commercial disputes

Introduction

"Interestingly, 'greater certainty and enforceability of awards" was selected as the second most likely factor to have a significant impact on international arbitration in the future. It should be noted here that "enforceability of awards" was consistently ranked the most valuable characteristic of international arbitration both in the 2015 survey and in the current survey ..... The fact that 43% of respondents take the view that greater certainty and enforceability of awards is likely to have a significant impact on the future of international arbitration may be indicative of a perceived gap between the theoretical ease of award enforcement promoted by the provisions of the New York Convention and potentially less successful practical experiences of respondents seeking to enforce arbitral awards in various jurisdictions'". - 2018 International Arbitration Survey: The Evolution of International Arbitration.

Arbitration is the most preferred and common form of resolving commercial disputes.Its advantages includeflexibility, relative speed, privacy and party autonomy. However, there is no point to undertaking Arbitration if the Award will not be complied with; if compliance is not voluntary, there must be effective means of enforcing the Award.

It is the practical difficulties with the enforcement of International Arbitral Awards that is the subject of this work.

Chapter One explores both national and state arbitration laws in Nigeria and their effectiveness in Nigeria. It will also examine the New York Convention and other treaties and conventions relating to arbitration in Nigeria, such as the Convention on Settlement of Investment Disputes, the United Nations Commission on International Trade Law (UNCITRAL) Model Law and the Economic Community of West African States(ECOWAS) Energy Protocol. Arbitration bodies such as the Chartered Institute of Arbitrators UK and the Lagos Court of Arbitration among others, will also be reviewed.

Chapter Two details the legal framework for enforcement of International Awards, and the judicial processes required for successful enforcement of International Awards in Nigeria under the New York Convention, ICSID Convention and otherwise.

Chapter Three identifies the practical problems encountered in navigating the framework for International Awards enforcement in Nigeria. Some of the problems highlighted are delay, lack of training of judicial officers, legislative inaction and systemic problems in the legal system of Nigeria itself.

Chapter Four suggests the author's solutions to the problems examined in Chapter Three.

It is hoped that this work will in time result in necessary changes to the legal framework for enforcement of InternationalAwards in Nigeria, and enable Arbitration deliver on its promise of effective and efficient resolution of commercial dispute, and contribute to the economic prosperity of Nigeria and Africa.

Chapter 1
ARBITRATION LAWS AND BODIES IN NIGERIA

1.1. History Of Arbitration In Nigeria

The concept of Arbitration is an ancient one in Africa. In Nigeria, Arbitration formed the bedrock of community living. Parties would refer their disputes to an elder or a council of elders who 'mediated' the dispute not just to determine right and wrong, but to restore harmony to the community by making 'decisions' binding on the parties. The features of the

Traditional Conflict Resolution Systems included faith in the neutrality, impartiality, and capacity of the elders or neutrals, tasked with resolving the dispute. Witnesses were also heard and evidence evaluated before the final decision taken.

In modern times the modern concepts of Alternative Dispute Resolution(ADR) have been added as means to resolve disputes, with a system of laws and procedures enacted to harmonize practices. As the colonial judicial system took over dispute resolution, parties to traditional or customary arbitrations began to refuse to adhere to decisions they considered unfavorable and would resort to litigation. While the Privy Council in 1952 held that it was repugnant and unacceptable for a losing party to reject the judgment or decision of a customary arbitration panel he had agreed to submit his dispute to, 40 years later the definition of Customary Arbitration by the Supreme Court of Nigeria tells a different story:

> *"An arbitration in dispute founded on the voluntary submission of the parties to the decision of the arbitratorswho are either the chiefs or elders of their community, and the agreement to be bound by such decision or freedom to resile where unfavourable".*

However, this detour into denigrating Customary Arbitration (which reached its zenith in the case of *Okpuruwu v Okpokam*, where the Court of Appeal suggested that there was no concept of Customary or Native Arbitration in Nigerian Jurisprudence), was abandoned in favor of a more auspicious view of Customary Arbitration in the Supreme Court decisions of *Agu v Ikewibe*, and *Nwuka v Nwaeche*. Those decisions are of the view that the decision of a Customary Arbitration panel (howsoever called) is binding on parties who submit to Customary Arbitration, and the Arbitration is conducted in line with custom and fair hearing. Again, in the most recent case of *Umeadi v Chibunze* the Supreme Court held (demonstrating an acceptance of Traditional Arbitration as binding on parties such as to make the decisions final as to the substance of the dispute) that *"...where parties decide to be bound by traditional arbitration resulting in oath taking, common law principles in respect of proof of title to land no longer apply. In such situation, the proof of ownership or title to land will be based on the rules set by traditional arbitration...."*

"Arbitration", as a reference to the modern practice of Commercial Arbitration has been defined as '*a procedure for the settlement of disputes under which the parties agree to be bound by the decisions of an arbitrator whose decision is, in general, final and legally binding in both parties. The process derives its force principally from the agreement of the parties, and in addition, from the state as the supervisor and enforcer of the legal process".*

1.2. Legislative Enactments On Arbitration In Nigeria

The first legislative enactment on Arbitration in Nigeria was the Arbitration Ordinance, Number 16 of 1914 modelled after the 1889 English Arbitration Act. This ordinance was re-enacted as Arbitration Act, Cap 13, LOFN, 1958.

In 1960, the Arbitration Act was applicable to the Federal Territory of Lagos, and the Regional Governments of Nigeria had their Arbitration laws: Arbitration Law of Northern Nigeria 1963, Arbitration Law of Western Nigeria 1959 and Arbitration Law of Eastern Nigeria 1963. Out of these Regions were created several states which continued to apply those laws till 1988.

In order to understand the status of the various Arbitration Laws in Nigeria it is necessary to understand the constitutional history of Nigeria. Nigeria was from 1914 administered as a Crown Colony with a unitary system of Government and largely unified system of laws, till 1946 when the colony was re-organised with a Federal Parliamentary system of government. The Federal Parliamentary system recognised 3 regional governments of the Northern Region of Nigeria, Eastern Region of Nigeria and the Western Region of Nigeria, and Lagos as a Federal Capital territory, with regional parliaments enacting laws for the regions and a National Assembly making laws for the nation.

In 1979 a new constitutionremodelled Nigeria as an American style Federal Republic; in 1967 the regions were subdivided into 11 states with the Federal Territory of Lagos becoming the 12th state; these 12 states were further subdivided into 19 states in 1976. State creation by subdivision continued till 1996 when the total number of states created out of the regions and succeeding states totalled 36 states. At creation a state inherited all the laws applicable to the territory of the region and/or or state it was created from till such laws were repealed by more recent enactments.Unfortunately, possibly as a result of the unitary style Military Governments attempting to run a Federation of States from 1966 – 1976, and from 1983-1999, the legislative enactments of in Nigeria (State and Federal) have not been as comprehensive as it should, creating a web of sometimes contradicting and sometimes opaque legislative enactments.

In 1988 the Federal Government of Nigeria adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Arbitration by the promulgation of the Arbitration and Conciliation Decree Number 11 of 1988 by the Federal Military Government. In 1990, that Decree became the Arbitration and Conciliation Act Cap 19 Vol1 LOFN, 1990, and is now CAP A1 LOFN 2004. However, that Act did not repeal the 1959 Arbitration Law of Western Nigeria and 1963 Arbitration Laws of the Eastern and Northern Nigeria (applicable to the states created out of those regions). Because the Federal Military Government was the legislating body for Nigeria at the time and all Houses of Assembly (State and Federal) were suspended at the time, the fact that in 1988 Arbitration was not on the Federal Legislative list was not appreciated at the time.

The Arbitration and Conciliation Act regulates arbitrations arising from written and voluntary agreements to arbitrate.

In addition to the Act, the Civil Procedure Rules of the High Courts of the States have provisions on reference to arbitration as a means of dispute resolution.

There are also statutes which provide that disputes under certain circumstances must be referred to mandatory arbitration. Some of these statutes are the Nigerian Communications Commission Act, Nigerian Investment Promotion Council Act, the Trade Disputes Act, and the Public Enterprises (Privatisation and Commercialisation) Act.

In 2009 the Lagos State House of Assembly enacted into law the Court of Arbitration Law Number 17 of Lagos State and the Arbitration Law Number 18 of Lagos State.

These legislationscontinue to generate considerable debate among legal scholars, as the 1999 Constitution of the Federal Republic of Nigeria appears to reserve the topic of Arbitration to Federal jurisdiction under the Exclusive Legislative List. However, there has been no legislative activity at the Federal National Assembly on Arbitration after 1988 to update the Federal Arbitration and Conciliation Act.

The effects of the non-repeal of the Arbitration Laws of the states inherited from their respective regions and the promulgation of the Arbitration and Conciliation of 1988, and the provisions of the 1999 Constitution on Arbitration as a topic for Exclusive Federal Legislative competence shall be subsequently examined in this essay.

1.3. Domestication of International Arbitration Treaties to Nigeria

Nigeria is signatory to several international Arbitration Treaties, as follows:

1. In October 1966 Nigeria ratified the Convention on Settlement of Disputes Between States and Nationals of Other States (referred to as the 1965 Washington Convention).
2. Nigeria is signatory to over 22 Bilateral Investment Treaties vesting jurisdiction on the International Center for Settlement of International Disputes (ICSID) over disputes connected with said treaties.
3. In 1970 Nigeria acceded to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.
4. The Foreign Judgment (Reciprocal Enforcement) Act enacted in 1960 makes provisions that Foreign Arbitral Awards could be enforced if registered as a Judgment of the High Court in Nigeria in the jurisdiction where enforcement is sought.
5. The Economic Community of West African States Energy Protocol of 31 January 2003 (which Nigeria is a signatory to) provides that disputes between an investor in the energy sector of a state acceding to the protocol, on the one part, and the state, may, at the investing party's discretion, be submitted to International Arbitration or Conciliation. The dispute may be submitted to The International Centre for Settlement of Investment Disputes (ICSID), or the Organization for the Harmonization of Trade Laws in Africa

(OHADA), or the Arbitration Institute of the Stockholm Chamber of Commerce, or a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law. The Protocol also has provisions for states as 'Contracting Parties' to resolve disputes by diplomatic channels and where that fails, by Arbitration before an ad hoc tribunal constituted in accord with the Protocol.

1.4. Arbitration Bodies In Nigeria

Arbitration bodies and institutions in Nigeria include the following:

1. The Regional Center for International Commercial Arbitration, established in 1989.
2. Maritime Arbitrators' Association of Nigeria.
3. The ADR Center of the National Industrial Court of Nigeria, established to facilitate Mediation and Arbitration over Trade Union and Industrial Relation Disputes.
4. The ADR Center of the Federal High Court of Nigeria.
5. The Multi Door Court House of Lagos State.
6. The Multi Door Court House of Ogun State.
7. The Multi Door Court House of Cross River State.
8. The Multi Door Court House of Enugu State.
9. The Multi Door Court House of Edo State.
10. The Chartered Institute of Arbitrators, UK (Nigeria Branch).
11. Chartered Institute of Arbitrators Nigeria (formerly Arbitrators Association of Nigeria).
12. The Lagos Court of Arbitration.

Several other states of Nigeria have enacted Multi-Door Court House Laws, but the Multi Door Court Houses are yet to commence operations in any meaningful manner. Only the states with operational Multi-Door Court House arrangements are mentioned here.

These bodies act as appointing authorities, recommending and appointing arbitrators to arbitrate disputes when called upon to do so. The High Courts of Nigeria (State and Federal) also have appointing authority under the provisions of the Arbitration and Conciliation Act.

Chapter 2

ENFORCEMENT OF ARBITRAL AWARD IN NIGERIA

2.1. The Need for Enforcement of Awards

The outcome of a successful arbitration is an Arbitral Award. Arbitral Awards may declare the responsibilities of the parties within the context of their business relations; they may (and usually) make orders directing the parties what to do, as well as impose costs and damages to be paid.

Where a party fails or refuses to comply with an Arbitral Award, the Award has to be enforced by state mechanisms, as the Arbitration institutions are generally lacking in enforcement mechanisms. The Award has to be elevatedto the status of a Judgment or Order of Court and enforced

ENFORCEMENT OF ARBITRAL AWARD IN NIGERIA

like every other Judgment of the Court. It is how the conversion mechanisms work in Nigeria that we seek to examine in this section.

There have been arguments in the Nigerian Courts seeking to split hairs over technicalities of whether the Award is converted into a Judgment or enforced like a Judgment of Court. Agbaje JSC said that the Award is not a Judgment;Muntaka Coomassie JCA said an Award may by the leave of Court be enforced like a Judgment or in the same manner as a Judgment of the Court, without becoming a Judgment of the Court. This is an important distinction, as the Constitution of Nigeria gives right to every party before a High Court in Nigeria to appeal the Judgment of the High Courts as of right. Any other law or act limiting that right would be inconsistent with that right and to the extent of the inconsistency be null and void. 'Converting' an Award into a Judgment would theoretically open the Award (now Judgment) to appeal on grounds of facts and law that an Arbitration Award would ordinarily not be open to.

It is now common place for Arbitral Awards to have international flavor, span national boundaries and parties seek their enforcement in jurisdictions outside the seat of the tribunal.

The Arbitration and Conciliation Act (hereinafter referred to as the Act) makes provisions for the Enforcement of Domestic Arbitration Awards and International Arbitration Awards. The distinction between International and Domestic Arbitrations in Nigeria is an important one as the legal requirements for enforcements of the resultant awards are not identical, and have slightly different technical requirements.

As has been earlier expressed in Chapter 1, there was no express repeal of the Arbitration Laws of the States inherited from the arbitration laws of the regional governments from which the various states emerged. Technically those state laws still exist, but are in some quarters considered spent and overtaken by the combined effects of the promulgation of the then Military Government of Nigerian in 1988 of the Arbitration and Conciliation Decree, now the Arbitration and Conciliation Act, and the Constitution (Suspension and Modification) Decree Number 107 of 1993, which provides that Military Decrees supersede all conflicting legislation in existence at the time of promulgation. The 1999 Constitution which returned democratic government to Nigeria adopted the Arbitration and Conciliation Decree as an Act of the National Assembly.

However the question of whether those state laws are revived by the repeal of the Constitution (Suspension and Modification) Decree Number 107 of 1993 which had suspended the legislative arm of Government and consolidated executive and legislative functions in the Supreme Military Council and the fact that Arbitration does not

appear on the Exclusive Legislative list of the National Assembly or the Concurrent Lists, (suggesting that Arbitration is an issue that the states can legislate on) leaves the status of the law open to various interpretations. One view is that Federal legislation on the issue has left no room for states to make arbitration law in Nigeria, and the Federal law effectively overrides State law. Another view is that the subject matter of arbitration is contractual in nature, and the efficacy contractual dispute resolution in any legal territory depends on state adjectival laws (upon which the states have exclusive autonomy to make laws and regulations).

A third view is that the Arbitration and Conciliation Act covers only commercial arbitration, while the Arbitration laws of the states cover both commercial and non-commercial arbitration; in effect, Commercial Arbitration is governed by the Act, and the State Laws are still extant in regards non-commercial arbitration.

However, as the bedrock of commercial arbitration is the choice of the parties to decide what rules and procedure they apply, and non-commercial arbitration has not taken off in any appreciable manner, the issue has not been considered to be a pressing issue. In practice the Courts of Nigeria by default, with the exception of Lagos State, apply the provisions of the Arbitration and Conciliation Act. The Arbitration Law of Lagos is not substantially inconsistent with the Act in regards Commercial Arbitration and enforcement of Awards, and for the purposes of this work need not be further examined.

2.2. Procedure for Enforcement of Arbitration Awards in Nigeria

2.2.1 Enforcement Of Domestic Arbitration Awardsunder the Arbitration and Conciliation Act

Domestic Arbitration is not defined by the Arbitration and Conciliation Act; what is defined is International Arbitration, and what is not International Arbitration is by necessity Domestic Arbitration. An understanding of the legal requirements for enforcement of Domestic Awards is necessary in order to understand and examine the requirements for enforcement of Foreign Awards in Nigeria.

Section 57 (2) of the Act provides:

(2) An Arbitration is international if-

(a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different countries, or

(b) one of the following places is situated outside the country in which the parties have their place of business:

(i) the place of arbitration if such place is determined in, or pursuant to the arbitration agreement

(ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject matter of the dispute is more closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; or

(d) the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.

Domestic Arbitrations are therefore arbitrations conducted in Nigeria between Nigerian parties, and where the subject matter of the arbitration or performance of the commercial agreement is most closely connected with Nigeria, and applying Nigerian law.

Enforcement of Domestic Arbitration Awards is regulated by Section 31 of the Act which provides as follows:

(1) An Arbitral Award shall be recognized as binding and subject to this Section and Section 32 of this Act, shall, upon application in writing to the Court be enforced by the Court.

(2) The Party relying on an Award or applying for its enforcement shall supply-

a. The duly authenticated original Award or a duly certified true copy thereof;

b. The original arbitration agreement or a duly certified true copy thereof;

(3) An Award may by leave of Court or a judge be enforced in the same manner as a judgment or order of the same effect.

The Act does not stipulate what manner of application (other than the implication that the application be in writing) is envisaged by Section 31. The formalities of the application for enforcement are therefore decided by the Rules of the various High Courts of Nigeria; some of which are the Federal High Court, the National Industrial Court, and the High Courts of the states of Nigeria.

Typically, the application is by way of Originating Motion on Notice to the defaulting party, with the documents required by Section 31 of the Act attached to the affidavit in support of the Motion. The Nigerian Courts have also by case law stipulated that the application must also be accompanied by statement that the Award has not been fully complied with, and the name and last place of business of the person against whom enforcement is sought. There is no provision in the Act that the Motion or the Application be on notice to the defaulting party, and in States or Courts where there are no specific provisions that the Application be on notice, there is no express reason why the Motion cannot be taken ex parte: however the general reasoning now is that in such Nigerian Courts where there are no express provisions directing the application be on notice, or even where the rules allow that the application be heard ex parte, the application ought to be on Notice to the defaulting party in deference to the Constitutional provision that fair hearing be observed in all Court proceedings.

2.2.2. Enforcement Of International Arbitration Awards under the Arbitration and Conciliation Act

International Arbitration Awards are enforceable in Nigeria (in practical terms) under the Arbitration and Conciliation Act in substantially the same manner as Domestic Awards. However, as we shall see, they may also be enforced under the Foreign Judgments (Reciprocal Enforcements) Act

Sections 51 and 54 of the Arbitration and Conciliation Act make provisions for enforcement and recognition of International Awards.

Section 51:

(1) An Arbitral Award shall irrespective of the country in which it so made, be recognized as binding, and subject to this Section and Section 3 2 of this Act, shall upon application in writing the Court, be enforced by the Court.

(2) The Party relying on an

Award or applying for its enforcement shall supply-

a. The duly authenticated Original Award or a duly certified copy thereof; and
b. The Original Arbitration Agreement or a duly certified copy thereof; and
c. Where the award or arbitration agreement is not made in English language, a duly certified translation thereof into English language.

Section 54:

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 Awards (hereinafter referred to as the Convention') set out in the second schedule to this Act shall apply to any Award made in Nigeria or any contracting state;

a. Provided that such contracting state has reciprocal legislation recognizing the enforcement of Arbitral Awards made in Nigeria in accordance with the provisions of the Convention;
b. That the Convention shall apply only to differences arising out of the legal relationship which is contractual.

The Convention referred to above is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10 1958 (also known as the New York Convention).

Nigeria acceded to this Convention in 1970, declaring that it would apply the Convention to enforcement of Awards made in states party to the convention and where the relationships of the parties would be considered commercial under the laws of the Federal Republic of Nigeria.

In effect, Awards emanating from states not party to the New York Convention may not be enforced under Section 54 of the Act, and Awards so emanating from such states may only be enforced if the relationships between the parties would have been considered a commercial relationship in accordance with Nigerian Law. An Award that fails to satisfy criteria set forth by Section 51 of the Act may however be enforced under Section 51. One benefit to enforcement under Section 54 is that the costs of enforcement under the New York Convention are required to be the same with enforcement of Domestic Arbitration Awards. The technical requirements of the Application for recognition and enforcement of the Award (with regard to manner of application and accompanying documents to be presented to the Court) are identical to Section 51.

2.2.3 Setting Aside Or Refusing Recognition Of An Award Under the Arbitration and Conciliation Act

It appears that the courts take the view that the Award sought to be enforced is prima facie correct on its face, and would, in the absence of opposition by the defaulting party, grant leave to enforce the Award. However, the defaulting party upon service of the application for leave to enforce the award may file a counter affidavit stating reasons why the award should not be enforced, and may also file a request asking the Court to refuse to recognize or enforce the award.

The grounds of such an application to refuse enforcement or opposition to the application for enforcement are not specified in

Section 32 of the Act; however Sections 48 and 52 of the Act make general provisions for the grounds under which a party to an Arbitration agreement may request the Court to refuse recognition or enforcement of the award. These grounds apply generally to both domestic and international arbitrations.

Sections 48 and 52 of the Act are identical and provide that a Court may refuse enforcement or recognition of an Award where:

i. If the party against whom the Award is invoked provides proof-
   a. That a party to the arbitration agreement was under some incapacity; or
   b. That the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the Award was made; or
   c. That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case; or
   d. That the Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or
   e. That the Award contains decisions on matters which are beyond the scope of the submission to arbitration, (but if decision on matters submitted can be separated from decision on matters not submitted, only the decisions on matters submitted may be enforced); or
   f. That the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or
   g. Where there is no agreement between the parties as stated above, that the composition of the tribunal or the procedure adopted was not in accord with the law of the country where the arbitration took place; or
   h. 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

ii. If the court finds-
   a. That the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or
   b. That the recognition or enforcement of the Award is against the public policy of Nigeria

Section 29 of the Act also allows an aggrieved party to apply to set aside an Award on the grounds that

the Award contains decisions on matters not submitted to the arbitrator (Howsoever that where the decisions on matters not submitted can be separated from matters submitted, only the decision on the matters not submitted shall be set aside). However, this application must be brought within three months of the making of the award in question.
Section 30 of the Act also allows an aggrieved party to apply to set aside an Award on the ground that the Arbitrator misconducted himself, or that the Award was improperly procured. It is however unclear if an application under Section 30 needs to be brought within 3 months of the Award as the Section states no limitation on time to apply as Section 29 does.

2.2.4. Effect of the Order of Court granting or refusing Recognition of Award.

Where the Court makes an order granting or refusing the recognition of the award, that order operates as a bar to any other application brought to a High Court in Nigeria to seek the relief, as that would be an abuse of Court process. The parties may however appeal the Order or the terms of the Order as made by the High Court to the Court of Appeal, and thence to the Supreme Court of Nigeria as occasion demands, on the grounds that the Order ought to have been or ought not to have been granted having regard to Sections 29, 31, 48, 51, 52 and 54 as the case may be.

2.2.5. Enforcement of International Arbitration Awards under the Foreign Judgments (Reciprocal Enforcements) Act

The Foreign Judgments (Reciprocal Enforcements) Act is an act of the National Assembly of Nigeria; so is the Arbitration and Conciliation Act. None of the provisions of these Acts are made subject to the other, so where they make provisions on the same subject matter of enforcement of Arbitration Awards, they offer alternative means of securing the same objectives, each as valid at law as the other.
The objective of the Foreign Judgments (Reciprocal Enforcements) Act is to make provisions for the enforcement in Nigeria of Judgments given in foreign countries which accord reciprocal treatment to Judgments given in Nigeria. Section 2 of the aforesaid Act interprets Judgment to which the Act applies to include *"..an award in proceedings in an arbitration if the award has in pursuance of the law in place where it was made become enforceable in the same manner as a judgment given by a Court in that place..."*
However, only judgments of the Superior Courts of the country making the judgment may be enforced in Nigeria under this Act. By the combined effect of Section 2 and Section 3(2), awards to be enforced in Nigeria under this Act must have become enforceable by the Superior Court of the Country where the award was made in order to be enforced under this Act. It would therefore appear that where, by the Laws of the Venue of arbitration, the award is entitled to be enforced as a Judgment of the court of that country, without further registration as a Judgment of the court of that country, such an Award would be enforceable in Nigeria upon satisfaction of the rules of Court in Nigeria prescribing what matters the application for enforcement is required to satisfy under Section 5 of this Act.However, where the Award would have been required to be registered as a Judgment under the laws of the Venue, in order to become enforceable as a Judgment of thecourt of the country of Venue of Arbitration, the Award would have to be registered in that country before being registered (not as an Award, but now as a Judgment of that Foreign Court) in Nigeria for purposes of enforcement (in effect, Registration has to be effected in

the Court of that foreign country to make the Award enforceable as a Judgment, before application to enforce would commence in Nigeria).

It is worthy of note that the provisions of this Act under consideration specify Venue of Arbitration and not Seat of Arbitration as the determining factor in evaluating Arbitral Awards. This shall be further considered in subsequent chapters of this essay.

An Award to be enforced under this Act shall be enforced further to application made to the High Court or Federal High Court of Nigeria (and to no other Court as the interpretation section of the Act under consideration defines Court to mean these two Courts, and does not mention the National Industrial Court which was not in existence at the time).

The fact that the Nigerian Court would have been precluded from making such a judgment on particular terms or subject matter in an action commenced before said Court is not a bar to enforcing such terms in a foreign award or judgment.

Generally, the application to enforce the award would be accompanied by a Certified Copy of the Award, a Certified Copy of the Order of the Court entitling the Award to enforcement in the Venue of the Award (where applicable), and a statement that the Award/Judgment was wholly or partially unsatisfied.

A registered judgment may be set aside or registration refused under Section 6 of this Act where the party against whom the judgment is sought to be enforced can satisfy the Court that:

I. The Judgment emanates from a country where the Minister of Justice (Nigeria) has made an order refusing enforcement arrangements to that country.

ii. That the Judgment was registered contrary to the provisions of the Foreign Judgment (Reciprocal Enforcements) Act.

iii. That the court of the country of Original Venue had no jurisdiction in the circumstances of the case.

iv. That the party against whom enforcement is sought was not sufficiently notified of the proceedings in order to afford him opportunity to present his case.

v. That the Judgment was obtained by fraud.

vi. That the enforcement of the Judgment would be contrary to public policy in Nigeria.

vii That the rights under the Judgment do not vest in the party seeking to enforce the judgment.

An Order of Court made under these provisions to enforce or refusing to enforce an award, may be appealed to the Court of Appeal and thence to the Supreme Court of Nigeria.

2.2.6 Enforcement of International Arbitration Awards under the International Center for Settlement of Investment Disputes (Enforcement of Awards) Act

Nigeria is a signatory to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also known as the ICSID Convention or the 'Washington Convention'. Domestic provisions to give effect to Awards pursuant to the Convention are provided in the International Center for Settlement of Investment Disputes (Enforcement of Awards) Act.

Section 6, Article 53 of the Convention provides that Awards shall be binding on the parties and shall not be subject to appeal or review save as provided by the Convention. Article 54 (1) obliges

the contracting state to recognize the award as a final judgment of that country enforceable in that country.

Section 1 of the International Center for Settlement of Investment Disputes (Enforcement of Awards) Act provides that copies of awards certified by the ICSID Secretary General to be enforced in Nigeria shall be registered administratively in the Supreme Court of Nigeria and upon registration shall be enforced as a Judgment of the Supreme Court of Nigeria. Upon registration, the Award is not subject to appeal or review, and the registration by the Supreme Court is also not subject to any review.

2.2.7 Enforcement of Arbitral Award by Instituting Civil Proceedings

A requirement of the Arbitration and Conciliation Act is that for an Award to be enforced as a Judgment of Court the application must be accompanied by the Arbitration agreement.

However where there is no written arbitration agreement (Parol Agreement), and the other modes of enforcement are not available, it has been suggested that the successful party may bring action to enforce the rights recognized by the Award; the Award would be conclusive on the issues it has resolved as res judicata.

A Certified or Original Copy of the Award would have to be entered in evidence before the Trial Court. Judgment by the Trial Court would be ordinarily enforceable as a Judgment of that court, but is also subject to appeal to the Court of Appeals and the Supreme Court.

Chapter 3
PROBLEMS WITH ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARD IN NIGERIA

Where a Judgment Debtor fails to comply with the terms of an Award against him, the victorious party engages the machinery of state to enforce the Award. However, this is often where the promise of arbitration fails, as the speed and relative lack of technicality or arbitration runs into technical quagmires in the enforcement of Awards.

The problems with enforcement of Arbitration Awards in Nigeria will be discussed under the following headings:

1. Delay
2. Undue and Inconsistent Technicalities
3. Legislative Inaction
4. Lack of Training in Arbitration

This chapter is an attempt to examine these problems and reflect on the present state of affairs in Nigeria and suggest solutions in the next chapter.

3.1. Delay

The litigation process in Nigeria is plagued with delay, particularly in the commercial cities of Nigeria (Lagos, Port Harcourt and Abuja, are the most affected cities). These are the locations where parties are likely to seek enforcement, as the jurisdiction of the courts is geographically limited to specific states (and even within the states, to specific judicial divisions).

The causes of delay are:

I. Congestion: The judicial systems in the commercial centers are congested with a huge backlog of cases arising from the boisterous commercial activity in those geographical areas. This congestion is caused by structural issues in the judicial system, weak case management practices, corruption, and deficient technology. Judges record proceedings in long hand, rely on personal libraries for research, and do not enjoy financial autonomy from the Executive branch. As a result, Nigerian judges in the commercial cities are burdened with heavy caseloads and insufficient facilities; the result of which is delay and more congestion.

The structural issues that cause congestion include frequent movement of Judges between divisions, and elevation of judges to Appellate Courts with insufficient lead time to conclude trial cases; these trials are required to be retried de novo before another judge. In the case of *Ogbunyiya v Okudo*, an action filed in 1958 came up for judgment in 1977, after 19 years in court. The Trial Judge, Nnaemeka J., as he then was, was elevated to the Court of Appeal after the Judgment was reserved; he however delivered his judgment after he was sworn as a Justice of the Court of Appeal. The Court of Appeal upheld the correctness of the decision which was later set aside by the Supreme Court in 1979 and remitted to the High Court for retrial before another judge on the grounds that on the date the Judgment was delivered, the learned Trial Judge was no longer a Judge of that Court and therefore technically was not competent to deliver the Judgment. The saving provisions should such a situation arise in the Court of Appeal or Supreme Court, allowing a Justice to deliver the written and signed opinion of another absent Justice of the Court (said opinion written and signed while the Justice was in office, in the event that the Justice is not available on the date of delivery of Judgment) does not extend to the High Courts. The legal provisions underpinning this decision have not changed since 1977, and the decision represents the state of the law till date.

ii. Insufficiently Regulated Appeal Process: The Appellate Process in Nigeria allows appeals on almost any issue to the Court of Appeal and thence to the Supreme Court, with orders of stay of proceedings stalling the case for years in many instances. Interlocutory appeals cause needless delay in the litigation process; a problem that the Nigerian legal system continues to grapple with. With insufficient penalties for frivolous appeals and applications brought to stall proceedings, litigants are often frustrated by lengthy delays in litigation proceedings, with actions sometimes lasting as long as three decades in court.

The penalties provided for frivolous actions and appeals have not kept pace with the economic realities of the day as they provide no

disincentive for a litigant with deep pockets to frustrate the enforcement of an unfavorable judgment or award. A prime example is the penchant of the Nigerian costs to refuse claims for solicitors' fees as costs of the action or damages; it is suggested that till this stance is reconsidered, frivolous actions and delays would continue mar Nigerian judicial efforts.

Applications to enforce Awards are subjected to the same delays that other cases have to navigate, defeating the commercial reasons that led to arbitration in the first place. Examples of this phenomenon are exemplified in the cases of *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation*, and*Sundersons Limited &Milan Nigeria Limited v Cruiser Shipping PTE Limited & Universal Navigation PTE Limited.*

In the IPCO case, the English Court of Appeal had to decide on the propriety of an application to enforce an Arbitration Award, despite a challenge pending in Nigerian Courts seeking Orders of Court to set aside the Award. In that case the Court of Appeal (England), appalled at the delay of over 3 years in the Nigerian courts, ruled in favour of enforcing the Award.

In the Sundersons' case, where the judgment of the Nigerian Court of Appeal was delivered in 2015 on an Award entered in 2010, the appellant's appeal was on a technicality: whether the application was properly constituted as the arbitration agreement attached to the application was a faxed copy and not a certified copy. There was no dispute that the content of the copy was accurate; the dispute was as to the form of the document. There is no preventing the judgment debtor from further appealing to the Supreme Court after his appeal was dismissed and there were no penalties assessed for the clearly frivolous appeal.

3.2 Undue and Inconsistent Technicalities and Laws

The legislative requirements for enforcement of Awards are inconsistent as can be seen from the preceding chapter. Coupled with unfamiliarity with arbitration by judicial officers, Judges fall into error in making decisions in regard to enforcement; requiring appeals to correct those errors.

Also, these are areas in need of clarification in the technicalities to enforce Awards:

I. No legislative definition of Arbitrator Misconduct in Nigerian Law.

ii. No definition of the mode of application to apply to the Court for enforcement in the provisions. Judges and Courts therefore allow or disallow various modes of application, creating inconsistency in procedure and difficulty in relevance of appellate decisions across board.

iii. No standard direction or enforcement procedure guidelines.

iv. By the Rules of Court a defendant must be within territorial jurisdiction for Court to have jurisdiction over it or a claim against that defendant. A Judgment Debtor to an Award may operate through a subsidiary company in Nigeria having separate legal personality, effectively shielding the Judgment Debtor from enforcement against it through its

subsidiaries.

v. The enforcement of International Award includes the requirement that the Award must have attained status of judgment in the country where the Award was made, and the composition or procedure adopted must accord with the statutory provisions of the country of Venue of the Arbitration. However, the modern approach to arbitration is to view the arbitration in accordance with the law of the Seat of Arbitration and not the Venue; where the Seat and the Venue are not the same. Nigerian law specifies the Venue and that may have unfortunate consequences and complications in the enforcement of an Award.

3.3 Legislative Inaction

There has been no review, amendment or update to the Arbitration & Conciliation Act since 1988. Developments in Arbitration captured by the Scottish Arbitration Act and the Arbitration Act of England 2010 are non-existent in Nigerian law. The following areas are clearly in need of review and legislative intervention:

I. As stated above, enforcement laws assess the Award through the lens of Venue of Award and not Seat of Award; the Seat is not known to Nigerian Law.

ii. Also, rules and procedures for Judicial Assistance in the Arbitration Process are undeveloped.

iii. The place of arbitration as a matter for the Legislative lists is presently unresolved, creating the potential for conflicting Federal and State laws to be enacted.

iv. Limitation period for setting aside award for misconduct under Section 30 of the Arbitration and Conciliation Act is not stated in the law. The Supreme Court attempted to answer the question in the case of *Araka v Ereagwu*, where the Court applied the three-month period stated in Section 29 of the Act (for application to set aside Award on the ground that the Award is in excess of the jurisdiction of the Arbitrator) which had nothing to do with application to set aside for misconduct under Section 30 (Section 30 specifies no time limit). The Court was of the view that the limitation period specified in Section 29 specifically for applications brought under Section 29, must be read to apply to every application to set aside as there was no other specified limitation period in the Act. It is submitted by this writer that this is clearly unsatisfactory, and the Legislature would do well to settle the question and keep pace with recent developments in Arbitration, by legislative action, and not leave it to judges to engage in judicial legislation.

v. Issues of Limitation Law and its effect have also given rise to some difficult decisions. In the case of *City Engineering Nigeria Ltd. v Federal Housing Authority* the Supreme Court followed its decision in *Murmansk State Steamship Line v Kano Oil Millers Ltd* , that the limitation period within which to apply to enforce Award begins to run from the date cause of action arose and not the from the date of Award. The Court relied on Section 63 of the Limitation Law of Lagos State which provides:

> *"...Notwithstanding any term in a submission to the effect that no cause of action*

shall accrue in respect of any matter required by the submission to be referred until an award is made under the submission, the cause of action shall for the purposes of this law and any other limitation enactment (whether in their application to arbitration or to other proceedings) be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term of submission"

The Court held that Scott v Avery Clauses are no longer effective in Nigeria by virtue of this section and therefore any application to enforce an Award longer than six years after the cause of action accrued, is incompetent.

Lagos State in an attempt to set things on a more effective footing in Section 35 (5) Arbitration Law of Lagos provided that the period between commencement of Arbitration and Award being rendered shall not be computed for the purposes of calculating limitation period within which to bring application for enforcement of award. By this provision the principle propounded in the decision of *City Engineering v Federal Housing Authority* is sought to be avoided; however, this applies only to Lagos, and the law itself may be set aside for inconsistency with the Arbitration and Conciliation Act or for exceeding legislative competence of Lagos State legislature. However, other states still have identical provisions to Section 63 of the Lagos Limitation Law.

The position in *Halsbury's Laws of England* that calculation of time within which to apply to enforce begins from the date of the award is to be preferred as being in keeping with commercial common sense, rather than from the date cause of action arose, lest a protracted arbitration end up being for naught.

It is worthy of note that the Supreme Court has also declared that where parties resolve a dispute by an agreement to terms, the cause of action in the original dispute is extinguished and a new cause of action is created on the agreement, which may then be enforced by specific performance or other action. It does appear to this writer that the position in City Engineering is incongruous with modern thought on limitation period and requires revision.

3.4 Lack of Institutionalized and Mandatory Training in Arbitration

Arbitration does not appear in the curriculum for training Nigerian lawyers in the Universities; it is also not part of the Nigerian Law School training. It is however offered under private arrangements by the CIARB to students for associate level training.

Judicial officers confronted with applications to enforce or set aside Awards may not have any experience in arbitration and may respond to arbitration proceedings by sitting on appeal over the Award, and fail to appreciate the need for dispatch. They also fail to appreciate the standard expected of the arbitrator, and that Arbitration is driven by party autonomy.

An example of the last point is the position of the then Chief Justice of Nigeria whose directives to Heads of State Courts resulted in

practice directions forbidding the High Courts from any participation in litigation where an arbitration clause is mentioned. It is the position of this writer that this extreme position is borne out of inadequate understanding of arbitration and the role of the court in assisting arbitration, as contained in Section 34 of the Arbitration and Conciliation Act. That such an extreme position has now become a practice of the courts in every state of the Federation and the Federal High Court without any modification or push back, shows the dearth of understanding of the role the judiciary is to play in assisting arbitration, and is partially responsible for the quality of decisions in regard to the enforcement of Award and the lengthy appeals that follow.

Chapter 4
SUGGESTED REFORMS AND SOLUTIONS TO PROBLEMS WITH ENFORCEMENT OF ARBITRAL AWARD IN NIGERIA

In the preceding chapter, we examined some of the problems encountered in the process of Enforcement of Arbitral Awards in Nigeria. This chapter is dedicated to suggesting reforms and solutions.

4.4 Granting Special Classification to Arbitration Assistance

Despite the delay of actions in the courts, some applications are given accelerated hearing by virtue of the Rules of Court and legislative instrument. Examples are Fundamental Rights Proceedings and Maritime Claims. Some proceedings are assigned to special courts (for example Juvenile Courts to handle Family Law issues arising from the Child Rights Act). These actions are heard on fast track, delays are met with punitive action and judgment is quickly rendered.

Presently Arbitration Assistance by the courts does not have such classification, and arbitrations in need of Judicial Assistance get bogged down in intractable delays. There is no clear procedure for the Arbitration Assistance contemplated by the Arbitration and Conciliation Act.

It suggested that Arbitration Proceedings generally be classified as special accelerated proceedings. This classification would provide the judicial impetus to effectively discourage delay by the parties, grant judges power to impose stiff fines for tardiness, and effectively fast track the process of Arbitration generally.

It is also suggested that the saving provisions of the Supreme Court Act and the Court of Appeal Act allowing the decisions of a Justice to be read in his absence by his brother Judges could be extended by legislative instrument to apply to actions concerned with Arbitration assistance and enforcement of Awards.

4.2 Enactment of Specialized Rules of Court for Arbitration.

As has been stated earlier in this work, there are no unified specialist rules in relation to Applications to enforce or set aside Arbitration Awards. There are also no specialist rules for Arbitration Assistance applicable throughout Nigeria.

It is submitted that Specialist Rules in this regard would be a welcome development to streamline and standardize the manner and technical requirements of application to enforce or set aside Arbitration Awards, and also deal with the technical issues of Judicial Assistance to the Arbitration process. The benefits of this are to create a uniform standard across the Courts, and clarify expectations to applicants and to Judges. With a uniform set of rules, training Judges and legal counsel would also be an easier task. The decisions of the Appellate Courts could also be streamlined to avoid confusion.
The specialized rules could also expedite hearing by specifying timelines and fines for delay, leading to quicker outcomes.

4.3 Restricting Appeals Process

In the preceding chapter we identified the appeal process as a factor working against the enforcement of awards in Nigeria. Appeals take too long to conclude due to the congestion of the appeal system, with appeals on every technicality and orders to stay proceedings keeping proceedings in stasis for years.
It is suggested that constitutional amendments are in order (as the right of appeal is governed by the Constitution of the Federal Republic) as follows:

i. The Right of Appeal to the Federal Court of Appeal after an Award is refused or granted recognition should be preserved, with the Court of Appeal as the final appellate court for such proceedings. This would require constitutional amendments.

ii. That the right to appeal arising out of enforcement proceedings should be limited to appeal against the final decision of the High Court; interlocutory orders may only be appealed after the final order is granted, where the appellant has to demonstrate that the interlocutory order occasioned a miscarriage of justice in the final order.

iii. Appeals against such orders made by the High Court must be filed within fourteen days (presently an aggrieved party has three months to file an appeal).

Other reforms suggested (which only require amendment to rules of Court) include:

iv. Appeals in regard of enforcement of Award once struck out may not be relisted.

v. Appeals must be heard and determined within ninety days of filing the Appeal.

vi. Stiff penalties and costs should be recovered from the losing party where the Appeal is adjudged frivolous.

4.4 Legislative Action

Legislative Action would help clear up some of the issues militating against effective enforcement of Awards in the following areas:

I. Clarify between the Federal Government and the State Government on which Parliamentary list (Federal or State) Arbitration should feature, and to what end. It is suggested that issues concerning International Arbitration, Enforcement of Awards, Limitation Law as Concerning Enforcement of Awards, and the Procedure for Judicial Assistance should feature on the Exclusive Federal List. It is also suggested that Domestic Arbitrations and Non-Contractual Arbitrations within the State should remain within the purview of State Legislature. This would require Constitutional amendments to the Fourth Schedule of the 1999 Federal Constitution.

ii. Amendments to the Limitation Laws of the States to bring them in harmony with practical realities of International Arbitration are required. It is desirable to stipulate that an Award creates a new cause of action, and the limitation period begins to run from the date of the Award.

iii. The Arbitration and Conciliation Act and the Foreign Judgments (Reciprocal Enforcements) Act

are in need of revision, to bring them up to date with recent developments in Arbitration practice. A glaring example is separating the Seat of Arbitration from the Venue of Arbitration. Presently, the Award shall be enforced as a Judgment of the country of Venue, even where the Seat of the Arbitration is another country. Another glaring example is that there is no definition of Arbitrator Misconduct in the Act, and the lacuna in stating a limitation period to bring action to set aside for Misconduct has led to inelegant judicial law making, as earlier postulated by this writer.

4.5 Mandatory Arbitration Training

COVID 19 has necessitated structural changes all over the world. Arbitration is very likely to be increasingly adopted as a means of dispute resolution as public litigation would have to be minimized for practical reasons. This makes it even more imperative that Arbitration training be made mandatory at the Nigerian Law School and at the Nigerian Institute of Advanced Legal Studies in its training program for Judicial Officers. The training curriculum would be updated from time to time to keep up with developments in Arbitration best practices. It is believed that this would result in improved decisions about Arbitration procedures, improved quality of Awards, and more effective enforcement of Awards.

Concluding Remarks

If Nigeria is to realize its potential as the investment capital of Africa, changes need to be made to the legal framework for enforcement of International Arbitration Awards to avoid the frustration of the commercial intention of the parties in making their investments and undertaking business relations. As the government seeks to diversify the economy and move away from an addiction to oil revenues at the expense of other sectors of the economy, access to enforcement of Awards is a key cog in the economic machine that we hope should be roaring out of the West African coast over the course of the next decade.

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Abbreviations and Acronyms

CAP	Chapter of the Laws of the Federation of Nigeria
CFRN	1999 Constitution of the Federal Republic of Nigeria
ECOWAS	Economic Community of West African States
ICSID	The International Centre for Settlement of Investment Disputes
LOFN	Laws of the Federation of Nigeria (2004 Edition)
LPELR	Law Pavilion Electronic Law Reports of Nigeria
NCLR	Nigerian Constitutional Law Reports
NWLR	Nigerian Weekly Law Reports
OHADA	Organization for the Harmonization of Trade Laws in Africa
SC	Supreme Court Cases (Law Report)
UNCITRAL	United Nations Commission on International Trade Law
WACA	West African Court of Appeal Law Reports

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POWER OF AMIABLE COMPOSITEUR OR ACTING 'EX AEQUO ET BONO' IN ARBITRATION PROCEEDINGS

The origins of the notion of Amiable Compositeur goes back to the French 1804 Napoleonic Code and 1806 Civil procedural Code. It promoted peacemaking measures in private dispute resolution and aimed at preserving benign relationship between the parties. The power of Amiable Compositeur or Ex Aequo Et Bono arbitration, is granted to the arbitrators by the will of the parties involved in any dispute. This concept is developed from domestic Civil Procedures Regulations in the nineteenth century. Amiable Compositeur and ex aequo et bono, these two terms are interchangeable.

The basic concept of Amiable Compositeur or Ex Aequo Et Bono has subsequently been transferred and popularized in arbitration practice. The literal mean of the Amiable Compositeur can be assumed as "*Friendly compromise",* it denotes an authority granted to an adjudicator to abstain from an application of Substantive Law to the merits of controversy and to make the decision of the case on the merits of fairness and equity.

Since the medieval era to the modern era, the doctrine of Ex Aequo Et bono is revitalized in both international and domestic law. Amiable Compositeur or Ex Aequo Et Bono operates along within a range rather than at a secure point between law and practice which then illustrates how it can be both formulated and applied. It establishes how to communicate the principles of Ex Aequo Et Bono to the law of equity and how to settle it with "gap-filling" legally.

The Arbitration UNCITRAL Model Law gives specific importance to the use of the provisions of Amiable Compositeur or Ex Aequo Et Bono under the model law through rules and articles contained in the United Nation Commission on International Trade Law (UNCITRAL) Model Law and also replicated by the International Center for the Settlement of Investment Disputes (ICSID) and other major Arbitral institutions.

By conferring this power in an International Commercial Arbitration, the Tribunals resolves the

dispute and decides on the basis of the substantive law chosen by the parties as applicable to the substance of dispute. The tribunal therefore has to decide the dispute in accordance with the domestic laws for such time being enforced in the respective state which the parties have specified in their agreement or chosen in the Reference. The legal system of state or designation by the parties is to be interpreted, unless otherwise expressed, as directly referring to the substantive law of their respective states and not to its conflict of laws rules. When parties do not designate any law, the most appropriate law should be considered by the tribunal based upon all the circumstances surrounding the dispute.

According to International Law drafted under the model law, the powers of an international arbitration tribunal to decide Ex Aequo Et Bono is restricted. The tribunal necessarily concern to "*the general principles of international law, while respecting the contractual obligations of the parties and the final decision of international arbitration tribunals that are binding upon each parties."* It will not be applied on the parties to expressly adjudicate Ex Aequo Et Bono.

UNCITRAL provides the model law of *amiable compositeur ex aquo et bono*. According to Rule 33(2) of UNCITRAL arbitration provides;

"The arbitral tribunal shall decide as amiable compositeur ex aquo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the procedure permits such arbitration." It gives us concept that the model law UNCITRAL emphasizes on the express authorization of the parties and the laws application for proceeding of arbitration.

When we thoroughly analyze the UNCITRAL Model law, we find that the Model Law found it pertinent to add this provision in order to avail the parties and the tribunal of the concept of Amiable Compositeur Ex Aequo Et Bono and its' application in the resolution of commercial disputes given the flexibility and adaptability of the Arbitral process.

The powers of arbitrators during the proceedings acting under the additional powers as Amiable Compositeur or Ex Aequo Et Bono are significant. The Arbitrators shall hear each party and must thoroughly apply the rules of evidence to all the submissions provided by each party to the dispute, to dismiss or establish default against them, and decide accordingly rules of law, unless they are dispensed from so doing by the terms of the submission, or unless they have been appointed as *Amiable Compositeur.* To apply the *lex mercatoria* parties authorize the arbitrators for amiable compositeur. Amiable Compositeur cannot be associated with the use of concept of lex mercatoria. Lex mercatoria is the concept that the arbitrators apply the mercantile customs as it acts as judge. It is applied a legal rule, regardless of facts of the case. This rules have a transnational origin of application. However, such rules do not reproduce the arbitrator's notion of justice and equity because it is expected that without applying the legal rules or principle the arbitrator must focus only on the circumstances of the case. The authority or arbitrator to apply notions of equity secumdum legem or praeter legem contained in substantive law is always linked to the underlying purpose of the law, which is intended to perfect or supplement, the adjudication as a matter of principle in findings on the issues for determination before the tribunal. The arbitrators who are applying rationally the general principles of law have to take into account always the context of lex mercatoria.

Therefore, we come to the point that arbitrators acting as amiable compositeur may decide the case outside the law, except for the principles of international public order, or may apply a particular national law in the absence of an express choice by the parties. In award number 3742 of 1983 the ICC Arbitral Tribunal acting as amiable compositeur used its power to find a law applicable as per merits of the case.

According to Article 13 (5) of ICC rules, "makes a clearly a duty to ICC arbitrators to apply the provisions of the contract in any case, even if they have the power of amiable compositeur."

Past years give us several precedence of the deviation from strict rules of law by the Amiable Compositeur, like awarding of fair and economically adequate damages or distribution of burden of proof respective to the particular circumstances of the case.

In award No. 3344 of 1982 the ICC tribunal stated that "*if the application of the law would lead to an inequitable result, the arbitrator may decide not to apply the rule ay last to mitigate its effects in the case before him to reach an equitable result."* Another litigation is also be assumed by award NO. 1677 of 1975 the ICC tribunal stated that *"even in these cases, however, the arbitrator has to abide by the principles which form part of the international public orders or morals".*

The Tribunal is expected to generally inform the Parties about default powers under the Act and explain the possible need extend these powers specially to provide for equitable remedies. The general powers are as follows: Initiative to ascertain the facts and law, determination of oral or written evidence or submissions, award of interest. This first three are default powers available under the Act where parties fail to agree. The next set of power are inherent and vested on the Tribunal, power to make a declaratory award, powers in case of party's default, power to record the party's agreement, power to appoint expert, injunctive powers to do or refrain from doing, power to order specific performance, power to order rectification of a deed or document, power to order provisional reliefs which practice most arbitrators ae slow to do. The power to act as amiable compositeur therefore extends the power of the Tribunal to decide the dispute not within any formal system of law but by way of equality and goodness. The limitations on this conferment of additional power parties are however limited by public policy, no jurisdiction on third parties and no transfer of powers reserved for the courts.

In conclusion, I wish to submit the arbitral community invests so time in helping practitioners understand this additional power in the constitution of tribunal in view of the time and money spent by parties which may result in outcome where the tribunal cannot decide outside the substantive law and the practical need in settling the issues where technicalities may need to be dealt with in interpretation of the agreement or transactions of parties.

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REAPING THE FRUITS OF INVESTMENT ARBITRATION: AN ENQUIRY INTO RECOGNITION AND ENFORCEMENT OF ICSID AWARDS. By John Aku Ambi, MCIArb*

Introduction

The end game of any dispute settlement process is that parties walk away with a binding pronouncement which definitively determines their rights, obligations and liabilities. This outcome is also applicable in arbitration, whether it is domestic, international, commercial, maritime or investor-state arbitration. Unlike dispute settlement by courts, which result in judgments being handed down, the final outcome of arbitral proceedings are called *awards*. Securing an award from an arbitral tribunal does not entitle a successful party to immediately take the benefits of such an award. Rather certain processes and steps must be followed to actualize such an award.

Investor-State arbitration or Investment arbitration involves the resolution of disputes between foreign investors and host States of such investments.[1] This article shall succinctly examine how awards arising from investment disputes settled by the International Centre for Settlement of Investment Disputes (ICSID) are recognized and enforced in line with the Washington Convention. The article will, in the paragraphs that follow share a few thoughts on; the recognition and enforcement of arbitral awards generally, ICSID arbitration as a generic process and the recognition and enforcement of awards in the narrow context of ICSID.

Recognition and Enforcement of Arbitral Awards at a Glance

Recognition and Enforcement of arbitral awards are the winding-up stages of an arbitral process which involves an award being given effect in the country in which it was made or in another country or in other countries.[2] Recognition arises when a party seeks remedy in court over issues already decided by an arbitral tribunal and the party who was victorious at the arbitral tribunal objects to the grant of such remedy on the ground that an arbitral tribunal had already determined the dispute.[3] Enforcement on the other hand connotes the application of legal strictures to force a party against whom an award was made, to comply with the terms of the award.[4]

It is imperative to state that the above description of recognition and enforcement generally applies to all types of arbitration. However, owing to the distinct nature of investment arbitration under the auspices of ICSID, the focus hereafter would be on the unique mode of recognition and enforcement of ICSID awards.

ICSID Arbitration in Brief

The ICSID or *Washington Convention*[5] (which came into force on October 14, 1966) came into being as a result of the World Bank's longstanding interest in the settlement of disputes between Member countries and foreign

investors. Amongst other key objectives, the Convention provided for the protection of private investors from unpredictable economic decisions of developing Sates.

The World Bank had earlier envisioned a body which would be devoted to the settlement of investment disputes through conciliation and arbitration. Therefore article 1(2) of the convention established a centre to serve the purpose of providing facilities for conciliation and arbitration of investment disputes between foreign-investors who are nationals of member States and member States hosting such investments.[6]

Arbitration between States and foreign investors by ICSID is undertaken in line with ICSID Rules of Arbitration which *inter alia* provides for the appointment of parties, and the procedure to be followed in the course of the proceedings.[7]Most importantly, article 25 of the convention provides for the conditions which would bring parties' disputes within the precint of ICSID's jurisdiction. One of such important conditions is, the written consent of parties to submit to ICSID's jurisdiction. Consent could either be given prior to the dispute or at commencement of the dispute.[8]At the conclusion of the proceedings, final awards become binding on parties and are not subject to appeal.[9]

Recognition of ICSID Awards

An ICSID award earns automatic recognition upon its presentation in any of the member States (168 signatory and contracting States as at May 2021).[10] The Convention binds members to accord ICSID awards the same legal status as a final judgment of their own courts.[11] This translates to a member State's domestic court confirming the legally binding nature of the award and taking necessary steps under the State's law to give legal effect to the award within the State's legal system.

Thus an ICSID award has the juridical character of a national court's judgment and qualities, which include a *res judicata* effect[12]

A party seeking recognition in a member State simply needs to present to the appropriate national court a copy of the award certified by the Secretary- General of ICSID. For instance a party seeking to have an ICSID award recognized in Nigeria, simply needs to forward the award to the Chief Registrar of the Supreme Court of Nigeria. Being a signatory to the ICSID Convention, Nigeria has endowed its Supreme Court with the exclusive jurisdiction to recognise and enforce all ICSID awards.[13] It should be noted that recognition accorded to ICSID awards in this context, inures to only final awards and not provisional measures or procedural orders on issues like jurisdiction.[14]It suffices to say that recognition serves as the first preliminary step to enforcement or execution of an ICSID award. Recognition as a preliminary step to enforcement may be useful even if there are no available assets to be attached in the State where recognition is sought. Once a local courts recognizes an award, enforcement will become easy to undertake when assets become subsequently available.[15]

Enforcement of ICSID Awards

While the obligation of member States to recognise awards extends to all types of final awards, by virtue of Article 54 of the Convention enforcement of ICSID awards in member States is confined to only monetary awards. So non-monetary award obligations like the restitution of confiscated property, the grant of permission to transfer currency, desistance from imposing unreasonable taxes, compliance with performance requirements like the use of local components etc, would not be enforceable.[16]Similar to any award arising from an international arbitration, an ICSID award-

creditor may seek to levy execution on the assets of an award-debtor in the debtor's national court or in other foreign countries where the debtor has assets. The legal instrument through which such assets could be attached remains the national legislation of the State or any applicable international convention like the New York Convention.[17] In other words the procedure for enforcement of ICSID awards is governed by laws of the country where enforcement is sought.

It should be noted that the doctrine of sovereign immunity under international law, limits the enforceability of ICSID awards in a State. Therefore an award against a host State may not be enforced if it would result in a violation of the State's sovereign immunity or any of its national laws.[18] By implication this doctrine limits the execution of an ICSID award to only a State's commercial assets and nothing more. In *LETCO* v. *Liberia*[19], attempts were made to execute an ICSID award in the *United States District Court for the Southern District of New York* against the assets of Liberia. Liberia contended that the assets sought to be attached (which were registration fees and other taxes due from ships flying the Liberian flag and collected in the United States) were State assets covered by sovereign immunity and not commercial assets.

The Court agreed with Liberia's position and held that these were revenues for the support and maintenance of government functions therefore immune from execution. The following have now been established as immune from execution in line with the doctrine of sovereign immunity;funds allocated for specific official activities and are held by designated agencies. For instance funds in bank accounts held by diplomatic missions and embassies[20], military property of foreign States.[21] Properties like furnitures, transport vehicles and buildings owned by diplomatic missions and embassies are equally immune from attachment and execution under the *Vienna Convention on Diplomatic Relations* 1961.[22]

The ICSID Convention established a self-contained system arbitral system some of whose elements include an internal review process called- the annullment committee.[23] The Committee has the power to stay the enforcement of an award during its proceedings under certain circumstances.[24] Though not an exhaustive list, stay of enforcement could be granted in the following circumstances; where the request for stay is legitimate, where there is a prospect of compliance with the award and where there is forseeable difficulty of recovering payment in the event an award is annulled and no continuation of the stay of enforcement has been granted.[25]

Conclusion

Recognition of ICSID awards is a shield used by award-creditors to block any attempt to begin fresh proceedings over issues already resolved by a tribunal. Enforcement on the other hand serves as a sword used by award-creditors to compel a losing party to carry out the contents of an award. The nature of an ICSID

The end game of any dispute settlement process is that parties walk away with a binding pronouncement which definitively determines their rights, obligations and liabilities

award goes a long way in determining recognition and enforcement processes pursuant to the Convention. Where the award is monetary, enforcement becomes automatic as if it was the judgment of a national court. If it is non-monetary, then only recognition would be automatic. ICSID plays no formal part in the processes leading to the recognition and enforcement of its awards in member States; compliance is expected to be consequential.[26] Rather where there appears to be non-compliance by the award-debtor, ICSID Secretariat is known to contact the defaulting party requesting it to provide information on the steps it has taken or it will take to comply with the award.[27]

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