

# Evolution of Commercial Arbitration Law in Nigeria and Practices

## ABSTRACT

*The article analyses the evolution of commercial arbitration law in Nigeria, through an analytical and systematic approach of the arbitration process, and its practice in Nigeria. Thus, it is imperative to note from the onset that commercial arbitration law is a broad subject. Consequently, the article limits its findings to the following issues; determination of valid arbitration agreements, the principle of party autonomy, confidentiality, public policy and the issue of recognition and enforcement of foreign awards in Nigeria, with a view of making suitable recommendations on how the arbitration process can be properly streamlined to meet best international practice.*

## Introduction

### Background

In contemporary times, arbitration has become the most sort after method for the resolution of commercial or business conflicts.<sup>1</sup> Thus, this is private and informal system of dispute resolution without need to resort to formal system of court settlement. This is often applied in different parts of the world by local tribes, communities and traders.<sup>23</sup> Various countries have either reformed their arbitration laws or have adopted the needful ones. Some of the countries that have either reformed the arbitration laws or adopted new ones include; China, Hungary, Russia, India, Great Britain and Germany.<sup>4</sup> Consequently, Nigeria does not want to be left behind, because the absence of a modern arbitration law could slow development. Similarly, the attractiveness of the UNCITRAL Model Law has also necessitated attitude changes in the Commonwealth countries with regards to arbitration.<sup>5</sup> Thus, due to the importance of commercial arbitration, it is essential that Nigeria, being a

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<sup>1</sup> Wuraola O Durosaro, 'The Role of Arbitration in International Commercial Disputes' (2014) 1 International Journal of Humanities Social Sciences and Education 3, pp 1, 8.

<sup>2</sup> Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, Redfern & Hunter on International Arbitration (5<sup>th</sup> edn, OUP 2009) p 2.

<sup>3</sup> Margaret L Moses, The Principles and Practice of International Commercial Arbitration (2<sup>nd</sup> edn, CUP 2008) P 1.

<sup>4</sup> Eric Robine, 'The evolution of international commercial arbitration over these past years' (1996) International Business Law Journal p 1.

<sup>5</sup> *ibid.*

major partner in Africa and the world economy, is not left behind in establishing practices of settling commercial disputes effectively.

### **Commercial Arbitration in Nigeria**

In 1914, Nigeria made its first attempt to consolidate arbitration by enacting the Arbitration Ordinance of 1914,<sup>6</sup> which was applicable to all the states in Nigeria. The Nigeria Arbitration Ordinance was however modelled after the English Arbitration Act 1889. In the same year, the Ordinance was replaced by an Act and it became the Arbitration Ordinance Act 1919, and 1954, which was applied by all states in the country. Also, it is worthy to note that this Act applied to both domestic and international arbitration. Currently, the principal legislation that governs arbitration law in Nigeria is the Arbitration and Conciliation Act 1990 (hereinafter 'the ACA').<sup>7</sup> This act was promulgated to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation. The Act ratifies and incorporates the New York Convention, which was adopted in 1970 with both the reciprocity and commercial reservations.<sup>8</sup>

Moreover, the ACA is based on the UNCITRAL Model Law and applies to all arbitrations that have their seats in Nigeria, except the ICSID. The ACA also incorporates the UNCITRAL arbitration rules. Although the ACA, which applies to domestic and international arbitration, is to a large extent modelled after the UNCITRAL Model Law, there are still some slight differences. Firstly, the Model Law is on arbitration only, while the ACA is on arbitration and conciliation. Another example is the difference between Article 8(1) and 13(3) of the UNCITRAL Model Law and section 4 and 5 of the ACA. These provisions deal with the same sub-heading 'arbitration agreement and substantive claim before the courts and the provision of the power of the court to stay proceedings. Thus, while the UNCITRAL Model Law does not specifically give the court the power to stay proceedings commenced in breach of an arbitration clause, the ACA specifically gives this power to the court. Article 8 (1) of the UNCITRAL Model Law provides that a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, 'refer the parties to

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<sup>6</sup> 1914 Nigeria Ordinance, Orders and Regulation, 199. Issued as Chapter 9 of the 1923 edition of the Laws of the Federation of Nigeria.

<sup>7</sup> Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria 2004.

<sup>8</sup> This means that the Nigerian courts will only enforce awards made in states which is a party to the New York Convention.

arbitration' unless it finds that the agreement is null and void, inoperative or incapable of being performed. However, Section 4 of the ACA, notwithstanding the identical heading, specifically states that the court shall 'order a stay of proceeding and refer the party to arbitration'. The ACA goes further to make more elaborate provisions on stay of court proceedings. Another notable difference can be seen under Article 13(3) of the UNCITRAL Model Law, which allows the parties to challenge the decision of the arbitration tribunal on its competence, the ACA on the other hand grants the tribunal the power to decide on the challenge of an arbitrator but provides no additional remedy to the courts against the decision of the tribunal on that issue.

It is important to note that the ACA is a federal law and some states within the country also have their respective arbitration laws. For example, Lagos State Arbitration Law 2009 (LSAL),<sup>9</sup> which applies to all arbitrations that have their seat in Lagos State except where the parties have expressly agreed otherwise. The LSAL is also modelled on the UNCITRAL Model Law and incorporates recent proposed amendments to Model Law Lagos Court of Arbitration Law 2009 (LCAL),<sup>10</sup> one of the uniquenesses of the law, is that it establishes a court of arbitration in Lagos State. Other independent arbitration centres in Lagos include the Lagos Regional Centre for international commercial arbitration 1989, which has its own arbitration rules.

### **The Arbitration Agreement and enforcement in Nigeria**

An arbitration agreement is primarily a substantive contract between parties to an arbitration.<sup>11</sup> This means that party agreement is indeed crucial to arbitration agreement since its importance has been attributed to a number of factors including party autonomy, with respect to having the choice to settle their dispute through arbitration, and the freedom of parties to mutually enter into an agreement and being able to formulate their own terms.<sup>12</sup> Under section 1 of the ACA,<sup>13</sup> the basic legal requirement or prerequisite of an arbitration agreement is that the agreement must be

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<sup>9</sup> Lagos State Arbitration Law, No 10, 2009.

<sup>10</sup> Lagos Court of Arbitration Law No 8, 2009.

<sup>11</sup> Ar. Gör. Aeyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent' (2012) 1 Yalova Üniversitesi Hukuk Fakültesi Dergisi <file:///ha-033/pers-G/00072E61/Downloads/5000136735-5000215407-1-PB%20(2).pdf> accessed 25 April 2016.

<sup>12</sup> Sunday A Fagbemi, 'The Doctrine of Party Autonomy In International Commercial Arbitration: Myth or Reality?' (2015) 6 Afe Babalola University Journal of Sustainable Development Law & Policy p 226.

<sup>13</sup> *ibid* section 1 (n 8).

in writing or must contain a written document that is signed by the parties or in exchange of letters, telex, telegram or other means of communication that provides a record of the arbitration agreement or in exchange of point of claim and of defence in which the existence of an arbitration agreement is alleged by one party and denied by another. Section 2 of the ACA goes on further to state that any reference in a contract containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make the clause part of the contract.<sup>14</sup> From the provisions above, this indicates that an arbitration agreement must be consensual, it also indicates that an arbitration agreement may be an express clause in a contract where the parties agree to refer future disputes to arbitration or in a separate document. Thus, within the ACA, an arbitration agreement may be contingent from written correspondence or pleadings exchanged between parties.

However, it must be noted that other domestic or national laws may render this provision or requirement as non-mandatory as in other standard consumer contracts and statutes. For example, under the National Pension Commission (PENCOM), the regulator of the commission may refer the matter to arbitration in accordance with the ACA,<sup>15</sup> or to Investments and Security Tribunals in respect to the Pension Reforms Act 2014. Also, section 26 of the Nigerian Investment Promotion Commission Act,<sup>16</sup> stipulates that foreign investors who register under the act are entitled to bring an arbitration under the ICSID scheme. Furthermore, for an arbitration agreement to be valid, it must be in accordance with the provision of section 48 (b) (i) ACA, which provides that the subject matter of the disputes must be capable of being settled by arbitration under the Nigerian law and equally in section 52 (b)(i) of the ACA, the arbitration agreement must be in respect of matters which are capable of being settled by arbitration. What can be understood from this provision is that the agreement must be operative i.e. it must be capable of being enforced against the parties.<sup>17</sup>

Although the ACA does not list or delimit matters that are capable of being settled by arbitration, commercial disputes arising under a valid arbitration agreement are

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<sup>14</sup> *ibid* section 2.

<sup>15</sup> Pension Reform Act 2014, art IX.

<sup>16</sup> Nigerian Investment Promotion Commission Act, Cap N117, Decree No 16 (Laws of the Federation of Nigeria) 1995.

<sup>17</sup> Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria 2004, s 48(a)(ii) and 52(a)(ii).

generally deemed capable of being settled by arbitration in Nigeria. That said, the question of whether a matter can be resolved by arbitration or not is often left for the interpretation of the court as indicated by the Court of Appeal decision in *Ogunwale v Syrian Arab Republic*,<sup>18</sup> where the court held that the test for determining whether a dispute can be referred to arbitration is that it is necessary that the dispute arises from the clause contained in the arbitration agreement. However, it is mostly disputes arising out of commercial transactions that are referred to arbitration as in Section 57 (1) of the ACA which deals with the definition of arbitration and commercial disputes. More so, not all matters are arbitrable under the ACA, domestic issues particularly are not arbitrable under the ACA, though they may be referred to customary arbitration.

### **Approach of the Nigeria Courts towards enforcement of arbitration agreement**

Historically, the Nigerian courts were presumed to be unfriendly towards arbitration as a mechanism for settling commercial disputes. In other words, the courts were antagonistic and perceived arbitration as a rivalry system that must not be allowed to take roots in Nigeria.<sup>19</sup> However, arbitration grew to gain world-wide acceptance as a preferred method of settling commercial disputes, coupled with trends of globalisation of businesses and the preference of some businessmen in Nigeria to settle business dispute through arbitration. The Nigerian courts attitude began to change to embrace the new trend.<sup>20</sup> Thus, in the words of Oguntade JCA, as he then was, in *Okpuruwu v Okpokam*,<sup>21</sup> it was held;

*“That the regular courts in the early stages of arbitration were reluctant to accord recognition to the decisions or awards of the arbitrators. This attitude showed substantially from reasoning that arbitration constitutes a rival body to the courts. But it was soon realized that arbitration may in fact prove the best way of settling some types of disputes. The attitude of the regular courts to arbitration therefore gradually changed.*

Thus, the case mentioned above marked the beginning of lesser hostility by the Nigerian national courts towards arbitration as a method of settling disputes.

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<sup>18</sup> (2002) 9 NWLR (Part 771) 127.

<sup>19</sup> Percy L Ahiamunnah, 'Relationship between the Courts and Arbitration in NIGERIA', (2013) <<http://www.verbatimngr.com/Arbitration.html>> accessed 27 April 2016.

<sup>20</sup> *ibid.*

<sup>21</sup> (1988) 4NWLR (Pt 90) 544.

Accordingly, arbitration in Nigeria has witnessed successful patronage in commercial disputes. This success can be attributed to the fact that parties to the arbitration, the courts and the arbitrators are more cooperative and judicious with the issues of arbitration.<sup>22</sup> Thus, the Nigerian courts have adopted a more positive approach towards enforcement of arbitration agreement and recognition of arbitration as an alternative dispute settlement mechanism. The positive position of the courts is evident in the following decided cases. In *C N Onuselogu Ent Ltd v Afribank (Nig) Ltd*,<sup>23</sup> here, the court held that arbitral proceedings are recognised means of settling disputes that should not be taken lightly either by the counsels or the parties. But the court went further to state that there must be an agreement to arbitrate, which is a voluntary submission to arbitration. This demonstrates a positive attitude of the Nigerian courts.

Additionally, where there is an arbitration clause in a contract and it becomes a subject matter of court proceedings, if the party of the court proceeding promptly raises the issue of an arbitration clause, the courts in accordance to section 4 and 5 of the ACA will order a stay of proceedings and order the parties to arbitration. Moreso, the Nigerian courts tend to support the provisions of the sections mentioned above provided the necessary conditions have been met. Thus, the Nigerian Supreme Court of Nigeria (hereinafter the SCN) in the case of *Niger Progress Ltd v N E I Corp*,<sup>24</sup> followed the provision of section 5 of the ACA which gives the court the power to stay proceedings where there is an arbitration agreement. The court also followed the provisions of sections 4 and 5 in *Transnational Haulage Limited v Afribank Nigeria Plc & Anor*,<sup>25</sup> where the court granted stay of proceedings pending arbitration. Similarly, in the *Owners of the MV Lupex v Nigerian Overseas Chartering and Shipping Limited*,<sup>26</sup> the SCN granted stay of proceedings and unanimously held that it was an abuse of court process for the respondent to institute a new suit in Nigeria against the appellate for the same dispute that is pending on arbitration proceeding in London.

Although the courts have continued to a pillar of support for the progress of arbitration processes in Nigeria, it should however, be noted that where the defendant fails to

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<sup>22</sup>Olasupo Shasore 'Commercial arbitration in Nigeria' (8 August 2013) <<http://www.kwm.com/en/uk/knowledge/insights/commercial-arbitration-in-nigeria-20130808>> accessed 27 April 2016

<sup>23</sup> (2005) 1 NWLR Part 940 577.

<sup>24</sup> (1989) 3 NWLR (Part 107) 68.

<sup>25</sup> Unreported Suit No LD/1048/2008.

<sup>26</sup> (2003) 15 NWLR (Pt 844) 469.

promptly and raise the issue of an arbitration clause and rely on same, that party will be deemed to have waived his/her right under the arbitration clause as in the case of *Akpaji v Udemba*.<sup>27</sup> Nonetheless, the courts have continued to demonstrate a supporting role by ensuring that the arbitration process in Nigeria is continuously strengthened and empowered to perform its role in the resolution of disputes. Furthermore, under section 6 (3) and section 21 (1) of the Lagos State Arbitration Law 2009, this law empowers the court to grant interim reliefs to preserve the *res* or rights of the parties pending arbitration. However, section 13 of the ACA also gives the arbitration tribunal power to make interim relief or preservation before or during proceedings. This, the provision of the ACA in section 13 does not expressly grant the power of preservative orders on the court and section 34 of the ACA states that “a court shall not intervene in any matter governed by this Act except where so provided in this Act”, thus limiting the courts power of intervention in arbitration proceedings.

### **Confidentiality under the Arbitration and Conciliation Act**

There is a common belief that arbitration is a private and confidential process, and that confidentiality is one of the key advantages and the reason why parties choose arbitration.<sup>28</sup> Thus, parties who select arbitration do so if the process will keep the nature of the dispute as private and confidential since arbitration is conducted outside the court system.<sup>29</sup> Also, most parties assume that the proceedings and the awards will be kept private and confidential and the sensitive and embarrassing records will not be subject to public view. Thus, arbitration parties mostly select arbitration because the process secures privacy and confidentiality.<sup>30</sup>

In Nigeria, arbitration hearings are private unless the parties agree otherwise. Thus, there is an implied duty of confidentiality imposed on the parties through the arbitration hearing.<sup>31</sup> It is worthy to note however, that the ACA does not explicitly contain a provision for confidentiality in respect to arbitral proceedings. Nigeria however, follows the general confidentiality rule under Article 25 (4) of the UNCITRAL Arbitration Rules

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<sup>27</sup> (2003) 6 NWLR (Part 815) 169.

<sup>28</sup> Hong-Lin Yu, 'Duty of confidentiality: myth and reality' (2012) Civil Justice Quarterly.

<sup>29</sup> M Stojcevski and Bruno Zeller, 'Confidentiality and privacy revisited' (2012) Arbitration.

<sup>30</sup> Claude R Thompson and Annie Finn, 'Confidentiality in Arbitration: A Valid Assumption? A Proposed Resolution!' (2007) 62 Dispute Resolution Journal.

<sup>31</sup> Olufunke Adekoya and David Emagun, 'Arbitration Guide: IBA Arbitration Committee (Nigeria Feb 2012) <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=DE581C32>> accessed 1 May 2016

which provides that “hearings shall be held in camera unless the parties agree otherwise”. This impliedly means that arbitration in practice is held in camera and only the parties, their representative and the counsels can attend. That said, parties may, by agreement, waive confidentiality and allow persons who are not parties to the arbitration proceeding to attend the hearing.

### **The Principle of Party Autonomy under the Nigerian ACA**

According to *Carbonneau*,<sup>32</sup> a universal contemporary principle of arbitration law is that contract plays an important role in the governance of arbitration. Therefore, arbitration is rooted in the principle of freedom to contract, because by means of an arbitration agreement, parties can choose to exclude the jurisdiction of the court but rather to resolve their disputes through an arbitration process.<sup>33</sup> Hence, the freedom of contract allows the parties to plan all aspect of arbitration. In view of the forgoing, it is indeed necessary to state that party autonomy reflects the freedom of contract and it is a ‘key principle’ of arbitration.<sup>34</sup> The principle of party autonomy allows parties to choose applicable laws to substance and arbitration to conduction the arbitration process. This means that with party autonomy, parties can choose the arbitrator, to draw the time tables, to choose the place and language of the arbitration process.<sup>35</sup> Moreover, according to *Grundmann*, the principle of party autonomy is the self-arrangement of legal relation by individuals according to their respective will.<sup>36</sup> And the related autonomy ensures that arbitration will proceed in accordance with the aspirations of the parties.<sup>37</sup>

Nearly all international arbitration laws, conventions and rules recognise the principle of party autonomy. For instance, this concept is recognised under the Nigerian Arbitration and Conciliation Act,<sup>38</sup> the New York Convention,<sup>39</sup> the UNCITRAL Model

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<sup>32</sup> Thomas E Carbonneau, “The Exercise of Contract Freedom in Making of Arbitration Agreements’ (2003) 36 Vanderbilt Journal of transnational Law 1189-1196.

<sup>33</sup> *ibid*

<sup>34</sup> *The Bay Hotel and Resort Limited v Cavarlier Construction Co Ltd* [2001] UKPC 34.

<sup>35</sup> *ibid* (n 12).

<sup>36</sup> Stefen Grundmann, ‘Information, Party Autonomy and Economic Agents in European Contract Law’ (2002) Common Market Law Review 39.

<sup>37</sup> Charles Chatterjee, ‘the Reality of Party Autonomy Rule in International Arbitration’ (2003) 20 Journal of International Arbitration 539, 540.

<sup>38</sup> Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria 2004, ss 1 and 2.

<sup>39</sup> The New York Convention 1958, Art V (1) (d).



Law,<sup>40</sup> the English Arbitration Act,<sup>41</sup> as well as the International Chamber of Commerce (ICC) Arbitration Rules,<sup>42</sup> to mention but a few. Under the UNCITRAL Model Law, one of its main objectives is to liberalise international commercial arbitration by limiting the role of the national courts and to give effect to the doctrine of “autonomy of the will” which permits the parties to choose the law under which their disputes should be governed.<sup>43</sup> Nonetheless, the ‘Model Law does not, and was not intended to, grant absolute autonomy to parties over the conduct of arbitration, but to it was meant to promote the general autonomy to parties but balanced with safeguards of mandatory provisions that could not be contracted out of’.<sup>44</sup> Thus, although the Model Law recognises party autonomy, it does so with some safeguards to ensure that it is not being abused.

In Nigeria, the principle of party autonomy is reinforced under section 2 of the ACA, which provides that “Unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of parties or by leave of the court or judge”.<sup>45</sup> Thus, under the Nigeria law, parties to the arbitration process are free to choose the applicable law to their transaction. Under Art 47 (1),<sup>46</sup> the ACA states that “the arbitral tribunal shall decide the dispute in accordance with the rule in force in the country whose laws the parties have chosen as applicable to the substance of the dispute”. Accordingly, party autonomy to a large extent influences the choice of law that is applicable to the disputes. Also, section 47(4),<sup>47</sup> the arbitral tribunal shall not decide *ex aequo et bono or as amiable compositeur* unless the parties have expressly authorised it to do so. Furthermore, under section 47 (5), the ACA makes it plain that in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of the usages of the trade applicable to the transaction. The principle of party autonomy is further emphasized within the ACA in the sense that, the Act further confers on the parties the freedom to choose by agreement the

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<sup>40</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments As adopted in 2006, Art 19 (1).

<sup>41</sup> English Arbitration Act, s 47.

<sup>42</sup> International Chamber of Commerce (ICC) Arbitration Rules 2012, ART 21. 2012

<sup>43</sup> UNCITRAL Model Law.

<sup>44</sup> Anurag K Agarwal, ‘Party Autonomy in International Commercial Arbitration’ (May 2007) Indian Institute of Management Ahmedabad, India Research and Publication 7.

<sup>45</sup> Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria 2004, s 2.

<sup>46</sup> *ibid*

<sup>47</sup> *ibid* s 47 (4).

number of arbitrators and their appointment,<sup>48</sup> place of arbitration,<sup>49</sup> and the language to be used during proceeding.<sup>50</sup> By so doing, the ACA recognises this principle and has limited the powers of the court or the arbitrators from intervening unnecessarily. Thus, party autonomy prevails and preserves the rights of parties to agree what powers if any, the tribunal should have as regards the arbitration proceeding and awards of interest.<sup>51</sup>

## **Recognition and Enforcement of Arbitral Awards in Nigeria and Public Policy**

### **Domestic Awards**

With respect to recognition and enforcement of awards, in Nigeria, there is provision for enforcement of domestic arbitral awards as well as for foreign arbitral awards. With respect to domestic awards, according to *Ibe*, some writers suggest that there are three ways of enforcement of domestic awards in Nigeria, namely; (a) enforcement by action upon award (b) enforcement under section 31 (1) of the ACA (c) and the enforcement pursuant to section 31 (3).<sup>52</sup> However, *Ibe*,<sup>53</sup> opines that there are indeed only two methods of enforcement of domestic awards, namely; enforcement by action at law and enforcement pursuant to the provision of the ACA. To enforce a domestic award by action at law, this method can only be used where the award arises out other domestic means such as customary awards. The state of the law is however, stipulated by the Supreme Court in *Eke v Okwaranya*,<sup>54</sup> here, the court stated what is needed in order to enforce a customary arbitration award to include; a voluntary submission of the matter in dispute to arbitration, an express or implied agreement by the parties to be bound by the outcome or decision of the arbitrators, the arbitration must have been done in the custom of the parties trade or business, arbitrators reached a decision and an award was published and lastly that the decision of the award was accepted as at the time it was made. Moreover, under the ACA, the legal framework for enforcement of domestic awards under section 31 (3) the ACA states that 'an award

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<sup>48</sup> *ibid* ss 6 and 7.

<sup>49</sup> *ibid* s 16.

<sup>50</sup> *ibid* s 18.

<sup>51</sup> Egbede Tamara, 'An Analysis of the Effect of Public Policy on Party Autonomy in International Arbitration' <[http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=CAR-11\\_6...pdf](http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=CAR-11_6...pdf)> accessed 2 May 2016.

<sup>52</sup> Chukwuemeka E Ibe, 'the Machinery for Enforcement of Domestic Arbitral Awards In Nigeria Prospects for Stay of Execution of Non-Monetary Awards: Another View' (2011) 2 Nnamdi Azikiwe University Journal of International Law and Jurisprudence, 305-310.

<sup>53</sup> *ibid*.

<sup>54</sup> (2001) 4 SCNJ 300 at 323-324.

may, by leave of the court or a judge, be enforced in the same manner as a judgement or order to the same effect'. Thus, an application for recognition and enforcement of domestic awards shall be accompanied by a duly authenticated original award and certificate

### **Enforcement of Foreign Arbitral Awards in Nigeria**

With respect to foreign awards, Nigeria is a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereafter the New York Convention) 1958. Nigeria became a signatory to the New York Convention in 1970, where it adopted both the reciprocity reservation and the commercial reservation. Moreover, the recognition and enforcement of foreign judgements which includes arbitral awards is regulated by the 1958 Ordinance,<sup>55</sup> (this ordinance applies to judgements from common wealth countries), the Foreign Judgement (Reciprocal Enforcement) Act,<sup>56</sup> and the Arbitration and Conciliation Act 2004 which applies to Contracting States of the New York Convention. In view of the above, the Nigeria will therefore enforce awards made in a state which is also a party to the New York Convention as well as judgements from members to the International Convention on Settlement of Investment Disputes (ICSID).<sup>57</sup> That said, not only has Nigeria signed and ratified the New York Convention for the enforcement of awards, Nigeria has also taken further steps to domesticate the Convention principles as illustrated in section 54 of the ACA 2004.<sup>58</sup>

Section 54 (1) provides that "Without prejudice to section 51 and 52 of this Act, where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the Convention on the Recognition and Enforcement of Foreign Awards (hereafter referred to as "the Convention") set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any contracting state". The procedural requirement for enforcement of award as was stipulated by the Court of Appeal in *Imani & Sons Ltd v BIL Construction Co Ltd*,<sup>59</sup>

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<sup>55</sup> CAP 175, Laws of the Federation of Nigeria and Lagos, 1958 (a colonial statute in Nigeria which was originally enacted as LN 8, of 1922 and is still in force as an enabling statute).

<sup>56</sup> Chapter C35, Laws of the Federation of Nigeria, 2004 Act.

<sup>57</sup> Enforcement of Award Act, CAP 120 Laws of the Federation of Nigeria 2004.

<sup>58</sup> Cap 19, Laws of the Federation of Nigeria, 2004.

<sup>59</sup>[1999] 12 NWLR [Pt 630] 253 at 263. The requirement includes that, the party seeking enforcement needs to stick to some requirement such as; the arbitration agreement, the original awards, name and

However, pursuant to section 54 (1) (a) the above provision is only applicable where such Contracting State has reciprocal legislation recognising and enforcing awards that are made in Nigeria in accordance to the provisions of the New York Convention.<sup>60</sup> Thus, by virtue of section 54 of the ACA, the Convention has a direct application in Nigeria. This was further confirmed by the Court of Appeal in *Tulip Nigeria Ltd v Noleggioe Maritime SAS*,<sup>61</sup> where it was held that “a foreign arbitral award is now enforceable directly in Nigeria pursuant to the New York Convention to which Nigeria is a signatory. To further stress that Nigeria is a pro-arbitration and a pro-enforcement country, language will not be a barrier to the enforcement of awards as stated under section 51 (c), provided a duly certified interpretation in English Language has been provided.

Although the law provides specialised and highly supportive legal regime to encourage international trade and arbitration, the effectiveness and efficiency of the judicial system will further encourage the free flow of commercial transactions in Nigeria. Arbitration demands speed, and speed is one of its advantages, however, the problem in Nigeria as opined by Abe,<sup>62</sup> is in two folds. Firstly, on the part of the judges, there is little or no experience to cope with the technical aspects of arbitration, and secondly, the lawyers in Nigeria use “delay tactics and evidence of inglorious litigious years, readily overshadow their sense of judgement”. Consequently, there continues to be an attitude of apathy in Nigeria towards arbitration and this comes as a result of the delays when a party seeks enforcement of foreign arbitral award.<sup>63</sup> This longevity and delays in seeking enforcement of an award was played out in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation*.<sup>64</sup> Thus, for Nigerian to be chosen as an arbitration and an enforcement friendly jurisdiction, Nigerian laws and enforcement of those laws must be synchronised with the dictates of current trends.

## Public Policy

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last place of business of the person with whom it is intended to be enforced and statement that the award has not been complied with or partly complied with.

<sup>60</sup> Ibid, section 54 (1) (a).

<sup>61</sup> (2011) 4 NWLR (part 1237) 254.

<sup>62</sup> Oyeniyi O Abe, ‘A Critical Review of the Legal Framework for the Institutionalisation of International Commercial Arbitration in Nigeria’ <[http://www.academia.edu/2254135/A\\_Critical\\_Review\\_of\\_the\\_Legal\\_Framework\\_for\\_the\\_Institutionalization\\_of\\_International\\_Commercial\\_Arbitration\\_in\\_Nigeria](http://www.academia.edu/2254135/A_Critical_Review_of_the_Legal_Framework_for_the_Institutionalization_of_International_Commercial_Arbitration_in_Nigeria)> accessed 3 May 2016.

<sup>63</sup> Ibid.

<sup>64</sup> [2008] EWHC 726 797 (Comm).

Section 48 of the ACA, sets the grounds upon which enforcement of arbitral awards may be set aside in Nigeria. According to *Abe*,<sup>65</sup> 'there is no striking difference' between section 48 ACA and Art V of the New York Convention. Based on the provision of section 48 ACA, arbitral awards may be set aside for many reasons including; lack of capacity to arbitrate, where the subject matter of the dispute is not arbitrable under the Nigeria arbitration law, where that award is against public policy of Nigeria. The violation of public policy is one of the grounds for refusal of enforcement of awards under the Art V (2) (b) of the New York Convention. Also, the courts in Nigeria may set aside awards if it finds out the award is contrary to public policy of Nigeria. However, in *Agro-allied Development ENT Ltd v United Shipping Trading Co Inc*,<sup>66</sup> the issue in contention was whether the award was against public policy to trigger the application of section 52 (2) (b) of the ACA, the Court of Appeal held the case defined public policy as 'the principles under which freedom of contract and private dealings are restricted by law for the good of the community.'<sup>67</sup>

Also, in *Conoil PLC v Vitol SA*,<sup>68</sup> which was in respect of reciprocal judgements, the issue of public policy was discussed and the Court of Appeal held that, "the words 'Public Policy' have been held to be that policy of the law of not sanctioning an act which is against the public interest in the sense that it is injurious to the public welfare or public good, furthermore that the words public policy have to be confined to matters that are injurious to public welfare or public good". Therefore, enforcement on any matter considered to be injurious to the welfare of the public will not be enforced in Nigeria. The above case laws, demonstrates how Nigeria interprets public policy and it does so very narrowly, that only concrete violation of public policy for example, 'an agreement to resolve a difference in narcotic drugs transaction will clearly be illegal and contrary to the public policy of Nigeria.'<sup>69</sup>

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<sup>65</sup> *Ibid*.

<sup>66</sup> (2011) 9 NWLR (Part 1252) 258.

<sup>67</sup> *Ibid* at 268.

<sup>68</sup> (2012) 2 NWLR (Part 1283) 50

<sup>69</sup> Dorothy Ufot, 'Public Policy as A Ground for Setting Aside or for the Refusal of Enforcement or Recognition of Awards under the New York Convention' <[www.ibanet.org/Document/Default.aspx?DocumentUid=A8EAF397](http://www.ibanet.org/Document/Default.aspx?DocumentUid=A8EAF397)> accessed 3<sup>rd</sup> May 2016.

## Conclusion

Prior to the advent of colonial rule in Nigeria, arbitration and mediation were recognised as methods of resolving disputes in Africa.<sup>70</sup> Most importantly, country like Nigeria often view disputes as a social imbalance and an attempt at reconciliation is often made to bring balance in the society.<sup>71</sup> As a result, laws of different communities in Nigeria was the law that regulated the lives and transactions of the Nigerian people as was held by Hon Justice Oguntade, in *Okpuruwu v Okpokam*<sup>72</sup> that; “In the pre-colonial times and before the advent of the regular courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred most disputes to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom”. However, with the arrival colonial rule, Nigeria accepted and incorporated common law and statutory arbitration.

Consequently, Nigeria, had no hesitation in embracing commercial arbitration and other forms of ADR as a method of settling disputes whether commercial or otherwise.<sup>73</sup> More so, Arbitration in Nigeria is a long-standing tradition where disputes often referred to some laymen for a decisive decision. This method of disputes settling, has its roots deeply in the customs and traditions and customary laws of some Nigerian communities. Consequently, resolving dispute through this method had long existed before the establishment of the court and formulations of principles of law.<sup>74</sup>

However, there are a few challenges with respect to arbitration in Nigeria which includes; the perception of corruption, the seemingly obsolete federal arbitration law, the risk of anti-arbitration injunction. Most significantly, the lengthy period it could take for the recognition and enforcement of foreign awards to get to the Supreme Court for determination of final rights of the parties.<sup>75</sup> Arbitration is fixed upon key principles

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<sup>70</sup> Paul Obo Idornigie, ‘Overview of ADR in Nigeria’ (2007) 73 Arbitration.

<sup>71</sup> *ibid.*

<sup>72</sup> [1998] 4 NWLR (Pt 90) P 554 at 572.

<sup>73</sup> Andrew I Chukwumerie, ‘Salient issues in the Law and Practice of Arbitration in Nigeria’ (2006) African Journal of International and Comparative Law.

<sup>74</sup> Amazu A Asouzu, *International Commercial Arbitration and Africa States: Practice, Participation and Institution Development* (1<sup>st</sup> edn, Cambridge University Press 2001).

<sup>75</sup> Dorothy Udeme Ufot, ‘arbitrating foreign investment disputes in Nigeria: prospects and challenges’ (2013) International Law Office <<http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Nigeria/Dorothy-Ufot-Co/Arbitrating-foreign-investment-disputes-in-Nigeria-prospects-and-challenges>> accessed 21 April 2016.

such as, arbitrability, party autonomy, confidentiality, and recognition and enforcement of foreign awards.