

**LEGAL CHALLENGES IN THE ENFORCEMENT OF FOREIGN
ARBITRAL AWARDS IN NIGERIA**

BY

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CERTIFICATION

This is to certify that this thesis titled '**LEGAL CHALLENGES IN THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN NIGERIA**' was written by **MAGAJI, KUDIRAT** with the Matric No: 14/68IG003. It has been read and approved as meeting part of the requirements for the award of Degree of Doctor of Philosophy (Ph.D.) in Law.

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ABSTRACT

Businessmen have a choice in the resolution of disputes, they may elect litigation or submit to arbitration. Delays, outrageous cost and undue technicalities associated with courts, makes commercial arbitration the preferred mode of settlement in the business world. However, the recalcitrance of an award-debtor to comply with the terms of the award necessitates the intervention of the courts. Nigeria has provisions for enforcement of foreign arbitral awards within her legal system. However, reliance on courts for enforcing foreign awards frequently frustrates the gains initially made by arbitration. Enforcement of arbitral awards via the courts has numerous legal challenges. This study is therefore aimed at analysing the challenges facing enforcement of foreign awards in Nigeria. The objectives of the study were to: (i) analyse the impact of extant legal regimes on the recognition and enforcement of foreign awards in Nigeria; (ii) examine the effects of the concepts of arbitrability and public policy exceptions on the enforcement of awards in Nigeria; (iii) examine the challenges inherent in judicial review on the enforcement of foreign awards in Nigeria; and (iv) examine the adequacy of the Arbitration and Conciliation Act 1988 (ACA 1988) in the recognition and enforcement of Islamic commercial arbitral awards.

The study employed doctrinal methodology of legal research where primary and secondary of legal materials were subjected to descriptive and content analysis. The primary sources used were legislations, regulations, treaties, conventions and case laws, while secondary sources used were texts books, journals, internet materials, conferences and seminars papers.

The findings of the study were that:

- i. the provisions of the laws regulating enforcement of foreign arbitral awards in Nigeria, particularly, Sections 51 and 54 of ACA 1988 have inherent and procedural defects, thus preventing the smooth enforcement of the award;
- ii. the narrow interpretation by the Nigerian courts on ‘arbitrability’ based on Sections 54 and 57 of ACA 1988 which restricts disputes to contractual and commercial disputes only, prevents the enforcement of foreign awards from jurisdictions with liberal interpretation.
- iii. the amorphous nature of the scope of public policy creates a challenge for the courts in Nigeria in determining whether a foreign award violates the country’s public policy or not;
- iv. the powers of the courts to set aside foreign awards based on grounds contained in Sections 29, 30 and 48 ACA 1988 are open-ended and allow the courts to examine the merit of the disputes rather than limit themselves to the validity of the award for enforcement;
- v. the provisions of ACA 1988 on enforcement of foreign arbitral awards do not consider the idiosyncrasies of awards from Islamic law jurisdictions, despite growing investors’ interests in Islamic commercial transactions.

The study concluded that it is obvious that the various legal challenges identified showed that the existing legal frameworks on enforcement of foreign arbitral award in Nigeria are weak and ineffective. The study therefore recommended that the Nigerian arbitral laws in particular, the provisions on enforcement of arbitral awards under ACA 1988 should be amended.

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DEDICATION

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LIST OF ABBREVIATION

• AAA	American Arbitration Association
• AALCO	Asian-African Consultative Organisation
• ABLR	Australia Business Law Review
• ABQB	Court of Queen Bench
• AC	Appeal Case
• ACA	Arbitration and Conciliation Act
• ACD	Arbitration and Conciliation Decree
• ADR	Arbitration and Dispute Resolution
• ADRLJ	Arbitration and Dispute Resolution Law Journal
• AICA	Asian International Arbitration Centre
• A.N.U. L. J	Africa Nazarene University Law Journal
• CAP	Chapter
• Ch.	Chancery Division
• CCP	Code of Civil Procedure
• CLR	Commonwealth Law Report
• COMC	Commercial cases
• CRCICA	Cairo Regional Centre for International Commercial Arbitration
• DAC	Department Advisory Committee
• EBSU L. J,	Ebonyi State University Law Journal
• E.J.C.L.	Electronic Journal of Comparative Law
• EJIF	European Journal of Islamic Finance
• ER	English Report
• EWHC	England and Wales High Court
• F.2d	Federal Reporter (Second Series)
• F. 3d	Federal Reporter (Third Series)
• F. Supp	Federal Supplement (Second Series)

• FDI	Foreign Direct Investment
• FHC	Federal High Court
• FWLR	Federation Weekly Law Reports
• GAFTA	Grain and Feed Trade Association
• I.L.R	International Law Report
• ICC	International Chambers of Commerce
• ICCA	International Council for Commercial Arbitration
• ICDR	International Centre for Dispute Resolution
• ICSID	International Centre for Settlement of Investment Disputes
• IBA	International Bar Association
• ILA	International Law Association
• IJIMS	international Journal of Interdisciplinary and Multidisciplinary Studies
• IOSR	international Organisation of Scientific Research
• JHSS	Journal of Humanities & Social Sciences
• JBL	Journal of Business Law (London)
• JSC	Justice of the Supreme Court
• KB	King Bench
• K.I.U. J. H	Kampala Journal of Humanities
• KLRCA	Kuala Lumpur Regional Centre for Arbitration
• LCIA	London Court of International Arbitration
• LFN	Laws of Federation of Nigeria
• LJEx	Law Journal Exechequer
• LJKB	Law Journal King's Bench
• Lloyd's Rep	Lloyd Law Report
• LMAA	London Maritime Arbitration Association
• LRCICA	Lagos Regional Centre for International Commercial Arbitration
• MOJ	Ministry of Justice

• MLJ	Malaysia Law Journal
• N.Y.L.J	New York Law Journal
• NWLR	Nigerian Weekly Law Report
• NLR	Nigerian Law Report
• OHADA	Organisation Harmonization of African Associations
• QSC	Queensland Supreme Court
• SAC	Shariah Advisory Council
• SCC	Supreme Court Cases
• SW.U.L. REV	South Western University law Review
• UN	United Nations
• UNCITRAL	United Nations Commission on International Trade Law
• UNILORIN L. J.	University of Ilorin Law Journal
• UNIZIK J.	Nnamdi Azikwe University Journal
• US	United States
• USDC	United States Department of Commerce
• WIPO	World Intellectual Property Organisation
• YBCA	Year Book of Commercial Arbitration
• PCA	Permanent Court of Arbitration

CHAPTER ONE

GENERAL INTRODUCTION

1.0.0. INTRODUCTION

The Nigerian Government and the private sector are continuously engaging in global transactions such as international supply contracts, joint venture agreements and indeed transactions between individuals across borders.¹ Globalisation and the developments in information technology has made the world more interconnected with several multinational commercial contracts including Islamic commercial contracts, taking place.² Sometimes, parties violate the terms in the commercial agreements/contracts between them and some of these violations resulting to disputes. This is the more reason why parties usually insist on suitable dispute settlement mechanisms.³

The growth in the number of international commercial transactions between parties from diverse legal backgrounds and jurisdictions necessitate the establishment of an appropriate tool to settle the inevitable conflicts arising from such international contractual relationships.⁴ International commercial arbitration conducted through statutory⁵ or Islamic⁶ has become the most essential alternative means by which transnational commercial differences can be settled. Parties are given the liberty to select an unbiased arbitrator, an expert in the area of dispute who has a requisite

¹ Chukwuemeka A., 'Arbitration and the ADRs as Panacea for the Ills in Administration of Justice in Third World Countries' (2006) 1 EBSU L. J, 102-140,120.

² Redfern A. & Hunter M., *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, London 2004) 560.

³ Rhodes-Vivour A., 'Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform' (Paper Delivered at the NBA, Maiden Conference, Abuja, 2006).

⁴ Rhodes-Vivour A., 'Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform' (2006).

⁵ These are arbitrations conducted under statutes like Arbitration and Conciliation Act.

⁶ These are arbitration conducted under the Shari'ah principles and rules.

authority to decide the dispute.⁷ Also, the advantage of reaching a speedy decision as well as the confidential benefits in the arbitration system have driven the large number of investors to make desirable efforts to give consideration to arbitration by inserting arbitration clauses in their commercial contracts. Arbitration clauses afford parties the opportunity to settle their disputes before an arbitral panel selected by the parties who will hear the matter amicably without going through a formal process such as a court hearing.⁸ The award is therefore rendered at the end of the arbitration proceeding.⁹

Ordinarily, parties are expected to abide by the terms of award however, award-creditor may request the court to compel the award-debtor to comply through available enforcement mechanisms.¹⁰ Courts are allowed to enforce Islamic or statutory awards emanating from international commercial arbitration by using their own procedural rules.¹¹ This is provided for in many international treaties such as Organisation of Islamic Corporation Charter (applicable to Muslims), and notably, in the New York Convention on the Recognition and Enforcement of

⁷ For instance, Islamic arbitrations are usually conducted by arbitrators with prerequisite knowledge in Shari'ah principles.

⁸ Asouzu A.A., *International Commercial Arbitration and Africa States Practice, Participation and Institutional Development* (2011) 458-560.

⁹ Abdullah A., *Arbitration in the GCC States, Arbitration General Framework in the GCC in accordance with the latest amendments including new Saudi Arbitration System* (Arab Renaissance House, U.S 2013) 368-393.

¹⁰ Judicial enforcement may not be necessary if the award-debtor voluntarily complies with the terms of the award. Recognition of arbitral award means to acknowledge and accept an award, hence the meaning of enforcement is beyond mere recognition. For an award to be enforced, it must have been recognised first. Although, an award can be recognised without necessarily being enforced, but there cannot be enforcement without a recognition of such awards.

¹¹ New York Convention on Recognition and Enforcement of Foreign Arbitral Award 1958, 330 U.N.T.S. 38(1959), Article III. See also UNCITRAL Model Law 2006 (United Nation documents A/40/17, annex I and A/61/17, annex), Article 36 and New York Convention 1958, 330 U.N.T.S. 38(1959), Article III

Foreign Arbitral Awards 1958.¹²Also, domestic legislation in most States create provisions for enforcement of both Islamic and statutory awards.¹³

In spite of the enforcement provisions in the ACA, a growing number of parties face various substantive and procedural hurdles where judicial intervention is needed to compel the enforcement of awards given in their favour.¹⁴The adequacy of the extant regimes on arbitration law, judicial attitude in handling the arbitration system as well as unwarranted delay encountered at the stage of enforcement before the enforcing courts are major concern to any award-creditor who intend to enforce in Nigeria.¹⁵This explains reason investors are concerned with the available existing arbitration laws of the host States as well as, the assurance that these laws are accessible and are effective mechanisms that can be easily invoked in the host State by the parties. Hence, Muslim States perceive this as an opportunity to attract investors who are agitating for Shari'ah law (to govern their commercial relationships and disputes settlement) by amending their arbitration laws in line with the Shari'ah principles.¹⁶ It is understand that Islamic law regulates the affairs of the Muslims faithful including his commercial dealings.¹⁷

Hence, Nigerian Muslims have, for many years desired a wider use of Shari'ah outside its traditional usage in worship and family relations.¹⁸ This triggered the use of Shariah in

¹² Herein after referred to as New York Convention.

¹³ See Arbitration and Conciliation Act of Nigeria CapA18 LFN 2004, English Arbitration Act, Chap.23, 1996.

¹⁴ Nacimiento P., 'New Law on Civil and Commercial Arbitration, International Commercial Litigation' (1996) 46 J. Arb. J., 5-10, 8.

¹⁵ City Engineering Nig. Ltd v. F.H.A [1997] NWLR (Pt 520) 224, 226-228.

¹⁶ Kuala Lumpur Regional Centre for Arbitration (KLRC) i-Arbitration Rules (known as 'i-Rules') 2018.

¹⁷ Hossain S., 'Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An analytical Overview' (2013), 1, J of Phil, Cul. & Rel, 1-13,1.

¹⁸ Ladapo A.O., 'Where does Islamic arbitration fit into the judicially recognised ingredients of Customary arbitration in the Nigerian Jurisprudence?'

<http://www.se1.isn.ch/serviceengine/Files/ISN/98430/ichaptersection_single_document/FDAB9607-437F>

commercial transactions and banking and financial products lately.¹⁹ The development of Islamic arbitration in Nigeria both in its present and future potentials can be better appreciated since Islamic banking and financial transactions are increasingly becoming popular in the country. With all these emerging new Islamic business opportunities in the country, resort to Islamic arbitration becomes necessary.

Thus, once Islamic arbitration in principle is accepted, the arbitral award must also be Shari'ah compliant to be enforceable in Nigeria.²⁰ The implication of Shariah go beyond applicability to the contract and arbitration proceedings, but also relevant at the enforcement stage of award when attempting to enforce an Islamic arbitral award. Therefore, this research examines the extant legal regimes on enforcement arbitral awards in Nigeria. The thesis will investigate into the issue whether the existing legal mechanisms in Nigeria allow for an effective enforcement procedure for both statutory and Islamic arbitral awards in Nigeria.

accessed on 21 February, 2019; Panighetti T., 'I-Arbitration: Not the Newest Apple(R) Product, But Sharia Law in International Commercial Arbitration' (2013), 5. Y.B.Arb& Med., 287-294. See also <<http://www.pewforum.org/The-Future-of-the-Global-Muslim-Population.asp+69+999968+86x>>. accessed on 13 January 2019.

¹⁹ Ibid.

²⁰ Hossan S., 'Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An analytical Overview' (2013), 11.

1.1.0 STATEMENT OF THE PROBLEM

The tribunal's lack of coercive powers necessitate dependence on the judiciary for enforcement of awards.²¹ Thus, this requires the award-creditor to invoke the legal and court systems of the place of enforcement where the terms of award is not willingly obeyed.²² Its dependence on the courts for enforcement intrudes parties' desire to reach a dispassionate and depoliticised amicable settlement of disputes.²³ Enforcement procedure available in Nigeria is not free from problems. Enforcement proceedings are now more of pre-trial proceedings; the effectiveness of the extant regimes on enforcement in Nigeria and the endless delays in the judicial process creates concern to investors/ businessmen who desire amicable settlement of their disputes through alternative means. The same is true for the enforcement of Islamic arbitral awards in Nigeria and, the fact that ACA does not take cognisance of the peculiarity of Islamic arbitration and its award is a concern to Muslim investors. Thus, Muslim States around the globe and individual parties who desire for the settlement of their commercial disputes in line with their religious faith and ideology may not be able to achieve it because, the provisions of ACA are not conscious of the Shari'ah principles and rules. Thus, Shari'ah is well-matched with the international commercial arbitration and most Muslim States have started the process of joining the international arbitral system. However, challenges encounter at the enforcement stage of award arise when international customs and practices conflicts with the Shari'ah principles and

²¹ Fillip D., 'Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning' (1991) 12(1) Nw J. Int'l L & Bus. 48-85, 50; Ayinla L.A., 'ADR and the Relevance of Native or Customary Arbitration in Nigeria: A Critique of its Nature and Allied Legal Issue' (2009) 5(1) Unilorin L. J, 254-264, 254.

²² See New York Convention 1958, 330 U.N.T.S. 38(1959), Article III.

²³ Weinberg K.S., 'Arbitration Procedures in the United States-German Income Tax Treaty: The Need for Procedural Safeguards in International Tax Disputes' (1994) 12 B.U Int'l L.J, 180, 192-93.

rules. Sharia's law has its own core variances and paradoxes in issues relating to international commercial arbitration therefore, it becomes necessary to address these issues in this thesis.

Also, the rate at which award-debtor invoke the provisions of the ACA to frustrate the enforcement of an award is disastrous. An aggrieved parties now engage in every trick to delay and defeat the ultimate aim of arbitration as an amicable resolution of disputes. Thus, there is need for a reform of ACA to save the arbitration system from these problems. This reform is urgently indispensable because Nigeria needs to attract foreign investors to invest and transact with Nigeria and with Nigerians for the purpose of enhancing its economy particularly, in oil and gas, commerce, Islamic banking and finance and *halal* products. This is the main reason in which an effective and efficient international commercial arbitration is considered necessary and beneficial to Nigeria. Arbitration is a colossal waste of time if the outcome of the proceeding cannot be enforced. When enforcement proceedings are performed with minimal procedural delay, the use of arbitration will increase in Nigeria thereby inspires economic development.

Parties to an international commercial arbitration attach much importance to the available and effective arbitration law as well as the level at which courts are arbitration-friendly toward enforcement of an arbitration agreements and awards within their jurisdictions.²⁴ This re-emphasised the philosophy that national courts and the legal regimes are the important component in the successful operation of an international commercial arbitration because these factors influence the parties' choice for the seat of arbitration and the place of enforcement. This thesis propose to examine the efficiency of the enforcement provisions in the ACA and the quality of the judicial attitude toward the enforcement of awards in Nigeria. It seems Nigeria is

²⁴Queen Mary University of London, 2015 International Arbitration Survey: Improvement and Innovations in International Arbitration.<<http://www.arbitration.qmul.ac.uk/doccs/164761.pdf>> accessed on 20th June 2016.

not favourably disposed to the arbitration system in a manner that meets with the standards specified in international treaties.

IPCO v. Nigeria National Petroleum Corp (NNPC) remains a remarkable instance concerning the lack of effectiveness of the Nigerian legal and judicial systems for some reasons. The award in *IPCO* case was given in 2004 and 16years later, two separate appeals on the award on different grounds are still pending till date before the Nigerian court. One wonders why the courts will ignore the most basic features (e.g speediness, autonomy) in the arbitral process that attract parties into arbitration. This gives a bad image of the Nigerian legal system to prospective investors.²⁵After the rigorous exercise of arbitration proceedings, parties still find themselves entangled in the national courts they intended to avoid particularly, where judicial enforcement became the only option to compel the compliance of award. *IPCO* case provide a useful case study through which to examine the weaknesses of the Nigerian judicial system. The pertinent question is the extent of these defects in the existing legal framework in Nigeria and how to bring the arbitration system to a stage of consonance with the recognised standard. It is hope that this will ease the process of settlement of disputes which will in turn improve on the investment climate. To gain a fuller understanding of the enforcement challenges in Nigeria, a doctrinal legal research is required to investigate into the problem. The method shall be implored to gather both primary and secondary data with the objective of determining measures to enhance enforcement procedure in Nigeria.

²⁵ In 2004, the first set aside application before the Federal High Court is yet to be determined up till date. *IPCO* appeal to stay the Federal High Court proceedings for set aside from the Court of Appeal to the Supreme Court to is yet to be determined.

1.2.0 RESEARCH QUESTIONS

The following are the research questions that the study seeks to provide answers to:

- a. How effective are the extant legal regimes on the enforcement of foreign awards in Nigeria?
- b. How are the twin concepts of arbitrability and public policy exceptions impacted on the enforcement of foreign awards in Nigeria?
- c. To what extent are the challenges inherent in the judicial review of awards in Nigeria and its effect on the enforcement of arbitral award?
- d. Are the enforcement provisions as contains in the Arbitration and Conciliation Act 1988 adequate in the enforcement of foreign Islamic arbitral awards in Nigeria?

1.3.0 AIM AND OBJECTIVES OF THE STUDY

This thesis aims to examines and analyse the legal challenges facing the enforcement of foreign (statutory and Islamic) arbitral awards in Nigeria. Arbitration and Conciliation Act 1988 is the focus of this thesis for the purpose of investigating and determining the hindrances to the effective enforcement procedure provided in the law. And also to identify measures targeted at ensuring effective enforcement procedure thereby, preserving the integrity and faith in arbitration.

The specific objectives of the study are to:

- i. analyse the impact of extant legal regimes in Nigeria on the recognition and enforcement of foreign arbitral awards;
- ii. examine the effects of the concepts of arbitrability and public policy exceptions on the enforcement of awards in Nigeria;

- iii. examine the challenges inherent in the judicial review system in Nigeria on the enforcement of foreign arbitral awards;
- iv. examine the adequacy of the Arbitration and Conciliation Act 1988 (ACA) in the recognition and enforcement of Islamic commercial arbitral awards.

1.4.0 SCOPE AND LIMITATION OF THE STUDY

This thesis essentially centres on the extant legal regimes regulating enforcement of awards in Nigeria with the aim of investigating their pitfalls and prospects. Consequently, the thesis concerns with the identification and analysis of the challenges affecting effective enforcement procedure of foreign awards in Nigeria. Relevant issues arising in international arbitration, arbitral awards and practices of other jurisdictions and other fields of law are considered wherever necessary, thus leading to comparative twist to the thesis. However, reference to the laws applicable in other jurisdictions and the insight look at the arbitral decisions within these jurisdictions is for illustrative and comparative purpose. In addition, any reference to the enforcement of foreign judgments are for same purpose too.

It must be mentioned that, the aim of the thesis is not to present a general discussion on the principles of arbitration neither is it a thesis about merit or demerits of arbitration as regards other forms of dispute resolution mechanisms; these issues have been given adequate attention by scholars.²⁶ The main objective of the thesis is to do a critical evaluation of the enforcement provisions in the existing legal frameworks in Nigeria as applicable to statutory and Islamic awards. Thus, this thesis does not intend to do a comparative analysis of the statutory and Islamic

²⁶ Izinyon A., 'The law and practice of Arbitration and Conciliation in Nigeria-An Assessment' (Ph.D thesis , University of Uyo, 2003); Redfern & Hunter, *The Law and Practice of International Commercial Arbitration* (1999) 123.

awards but to identify the enforcement challenges of each of these two forms of arbitration under the ACA.

In addition, the thesis shall examine and analyse the provisions of the New York Convention via Section 54 of the ACA and its Second Schedule. This is for the reason that ACA is the focus of this thesis and because the Convention is recognised in Section 54 of the ACA and was incorporated in the Second Schedule of the ACA.

1.5.0 SIGNIFICANCE OF THE STUDY

The importance of recognition and enforcement derives from the fact that arbitration is seen as a wasted exercise if an arbitral award is not enforceable.²⁷ Certainly, availability of an effective mechanism to resolve disputes encourages and attracts investments from different background and, as well improve on the economy of any nation. In other word, an efforts in achieving an increase flow in the Foreign Direct Investment (FDI), requires a sustainable legal frameworks that would make provisions for a strong arbitral regime as a means of resolution of disputes with foreign investors. Hence, it is not only required to establish a transparent and effective enabling legal frameworks for investment but, also a sustainable framework to stimulate investment.

Previous literature written by several scholars did not divert attention to measures towards an effective and efficient available regime as a tool to attract FDI. Unlike previous scholars in this field, particular attention is being paid to the relevant provisions in the ACA and the Second Schedule of the Act. This research is significant in the sense that, investors will be more

²⁷ Park W.W, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 675-678; Fillip D., 'Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning' (1991)55.

confident to do businesses and transactions with States with reliable legal regimes that will guarantee parties with the implementation of agreements, judgements and awards. States and investors are aiming at the best alternative dispute resolution systems as a means of promoting foreign direct investment. Therefore this thesis will in no doubt benefit foreign investors/businessmen who intend to enforce foreign awards rendered in their favour. An effective arbitration law will help win the confidence of foreign companies and encourage foreign investment. The thesis will also enhance the legal system in Nigeria because of it desires for a strong enforcement procedure; it will enrich and inform the system with new ideas and legal perspectives. Policy makers, legislature are not left out from those who are going to benefit from this thesis. More so, this is the first comprehensive research on the legal challenges of enforcement of foreign awards in Nigeria. Thus the thesis will provide a valuable resource.

This thesis therefore provides recommendations towards ensuring an efficient and effective enforcement procedure for foreign arbitral awards in Nigeria with a view to strengthening an amicable settlement between parties through, alternative dispute resolution in line with global practices so as to make Nigeria a conducive environment for investors.

1.6.0 METHODOLOGY

The study employed doctrinal methodology of legal research. The reasoning for this choice of methodology is because the thesis is mainly, a library-based research. This is also because every issues or problem raised in the thesis is discuss and examine from both theoretical and practical perspectives. The theoretical view consider different solutions imbedded in articles, journals, books and existing draft laws formulated by the scholars and the concerned public and private international body. This is aims to ascertain if there are any magnificent ideals or provisions in

the existing arbitration law of various States or Rules of an established arbitration institutions, the treaties and conventions that deal with the enforcement of foreign arbitral awards which can enhance the enforcement procedure in Nigeria. The practical view examines the judicial interpretation of the extant regimes on recognition and enforcement of foreign arbitral awards in Nigeria. Here the thesis primarily concerns with interpretation and application of ACA, Second Schedule of the ACA as well as national rules relating to enforcement procedure and the approaches of the Nigerian courts toward enforcement proceedings. In doing this, the researcher shall make reference to judicial cases in Nigeria and similar cases from different jurisdictions for the purpose of comparing and contrasting the two arbitration regimes and its applicability by the courts. This is to identify the strengths (if any) in the legal framework of these jurisdictions which can be on benefit in Nigeria. In summary, the thesis is library based research, drawing on the libraries of the University of Ilorin, Kwara State University, Al-Hikmah University and Ghalib Chamber. While assessing the library, the primary and secondary sources of materials were utilised and these materials were subjected to evaluative, descriptive and content analysis.

As regard primary sources, the thesis evaluated legislations on arbitration and other relevant statutes applicable in Nigeria and of other jurisdictions, official documents, conventions, treaties protocols and reports pertaining to arbitration and case laws. Secondary sources are a review of an existing literature on the subject including textbooks, theses, journals and, articles. Review of existing legal materials are aimed to provide a broader perspectives in respect of enforcement challenges of foreign arbitral award in Nigeria. Other relevant documents on the subject includes magazines, newspaper reports, internet materials, materials from conferences, seminars papers obtained from the internet were also relied upon.

For every issue identified and raised in this thesis, a general evaluation of the provisions of the extant regimes concerned is given and the relevant court decisions are analysed and compared, identifying those issues on which a general consensus exists and those on which it does not. This explains reason the thesis relies heavily on the descriptive and analytical methods. Descriptive method of research is necessary to describe, identify and explain the current position of the arbitration regimes applicable in Nigeria and how the courts interpret these laws. This will entails describing the legal challenges in the identified law which hinder the smooth and effective enforcement procedure in Nigeria and, consequently undermine the effectiveness of arbitration system as a whole. It is also necessary to analyse the opinions of scholars and judges in order to suggest the best way forward. Analysis of journals, articles, text books shall be carried out using context analysis techniques.

The researcher may encounter hitches in gathering the relevant data of the research. However, efforts shall be made to overwhelm those hitches by exploiting the well-stocked libraries in Ilorin, inter-library loan system and the electronics data bases. Electronic databases such as Kluwer Arbitration, UNCITRAL Web Site, Law Reports Web Site for cases, articles, legislation, *travaux preparatoires* of the New York Convention, the working documents of UNCITRAL, reports and official information. In addition to this, the researcher has been in contact with a number of publishers to obtain some of these materials, notably Sweet and Maxwell, Butterworth, and Cambridge Press.

1.7.0 LITERATURE REVIEW

The enforcement challenges at the enforcement stage of awards particularly in an international commercial arbitration has generated debate among scholars. The concern here is to present a

critical analysis of the ideas of these scholars. The work of these numerous authors have been indeed helpful in the identifying the challenges facing foreign arbitral awards globally but, the relevance of their writings to this thesis is an immense question that this section intends to address. For this reason, observations, comments, opinions and views of scholars on the published work are examined and analysed with a view to appreciate the work already done, ascertain the contributions and gaps in the literature that this thesis intends to fill.

Redfern and Hunter's²⁸ seminal work on arbitration may be described as a huge contribution to the growth of international commercial arbitration. The book captured extensively the rules and procedures applicable to arbitration system as a whole from the preliminary stage of arbitration to enforcement stage of award. The relevance of their book to this research lies in the fact that, it emphasised on the need to recognise and enforce an arbitral award in an in-depth manner. However, the authors only focus on the English legal structure. Hence, it is in this gap in the Redfern and Hunter's work that this thesis aims to address.

Lew, Mistelis and Kroll in their book²⁹ discuss certain key features of international arbitration practices particularly in the role and functions of arbitral tribunal and importance and impact of arbitral awards. The authors discuss the importance of implementing and enforcing an arbitral award before national courts in various jurisdictions. Lew, Mistelis and Kroll were concerned only with international instruments, ACA was not in focus. This thesis intends to examine the relevant provisions in the ACA on enforcement of awards in Nigeria.

²⁸ Redfern A. & Hunter M., *Law and Practice of International Commercial Arbitration* (2004)268.

²⁹ Lew D.M, Mistelis L.A & Kroll S.M, *Comparative International Commercial Arbitration* (Kluwer Law Int'l, Hague, 2003).

Berg³⁰ and Martinez³¹ are of the view that the enforcement challenges is descends from the equivocal provisions in the New York Convention. The authors emphasised that the New York Convention was badly drafted and the judicial interpretation by the courts of various signatory States are not helpful. According to him, the Convention is no longer meet the standard of a modern international treaty because it's too short and brief.³² Berg proposes the adoption of what he calls 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards.'³³ While this researcher agrees with these authors to the extent that the expression of languages as used in the provisions of the New York Convention was not carefully selected because of the ambiguity and uncertainty created in it provisions. However, it must be declared that Berg's work does not states how these have generated obstacles to enforcement of arbitral awards in Nigeria. This gap in Berg's work, is the focus of this thesis. The thesis is to investigate the relevant legal frameworks applicable to enforcement of foreign awards in Nigeria.

Cohen, like Berg does, also questions the efficiency of the New York Convention for the enforcement proceedings of awards.³⁴ Cohen disapproves with the unruly attitude of the courts when face to determine the public policy exception as provided in Article V (2) (b).³⁵ The author

³⁰ Berg A.J.V., 'A Closer look at the Proposed New York Convention' (2008)3(3) Glob. L. Rev., 16-21,21; Berg A.J.V., 'The New York Convention of 1958: An Overview' (2008) <<http://www.arbitration-icca.org/articles.html>> accessed on 13th June, 2015.

³¹ Martinez R., 'Recognition and Enforcement of 1958: The Refusal Provisions' (1990) 24 Int'l Law. 487, 497- 499.

³² Berg A.J.V., 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards (Explanatory Note)'.

³³Berg A.J.V., 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards (Explanatory Note)' < www.AJB/Rev06/29-May-2008> accessed on 21 July, 2015.

³⁴ Cohen S., 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1(1) NY Disp. Resol. L, 47-50, 47.

³⁵ Ibid, 48

further observes that the parties are to face challenges because of inconsistency and uneven in the judicial interpretation of cases by the courts. No form of prediction in the determination of the public policy ground as every States is guided by its own individual idea of fundamental rule, morality and justice. However, she notes that this challenges can be resolved through the drafting of a good arbitration clause that will take cognisance of the arbitration laws of the place where the arbitration proceeding is to be conducted and likely place of enforcement of such awards.³⁶ This solution proposed by Cohen may be valid, this researcher however observes that ensuring enforcement of awards will require more. Judicial discretion also plays an important role when courts are charge to determine the public policy exception despite the laid down fundamental rules hence, the determination of the exception is subjective in nature. This thesis however agrees with Cohen to the extent that public policy exception serves as a hindrance to the effective enforcement of awards hence, this thesis aims to search for a permanent solution that will provide both the courts and the parties which a sense of prediction in this area of law.

Janahi traces the challenges of the enforcement of foreign awards to the absence of standardisation in enforcement procedural guidelines which are at the mercy of the national regime of the enforcing state.³⁷ It is the believe of this author that when the New York Convention is adequately adopted in various domestic law of each signatory State, the enforcement challenges will be reduced to minimal. This thesis differs it opinion with Janahi in the sense that incorporation of the Convention into various national law cannot solve the inconsistency inbuilt in the provisions of the Convention. This thesis therefore aims to analyse

³⁶ Cohen S., 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008), 49.

³⁷ Janahi W., 'Problems and Weaknesses Arising from the enforcement of Foreign Awards in National Courts'(2011)47 J. of Sharia & L, 43-69, 53.

the enforcement\ provisions in the Convention via the Second Schedule. In other word, ACA is the focus of this research. Moss³⁸ notes that the restrictive scope of the written requirement for arbitration clause as contained in Article II of the New York Convention has impacted on the number of awards that can be enforced. She observes that the Convention does not meet the demands of present trade and commerce,³⁹ especially now that the businesses and commercial transactions are entered into and concluded through electronic means such as emails and telephones. Moss concludes that the restrictive scope in the written requirement therefore defeat the very essence of the arbitration process. Moss finally recommends the extension of Article II to cover oral agreement or other means as may be agreed to by the parties. Moss' work is relevant to this current thesis because ACA and its Second Schedule empower the enforcing court to refuse the enforcement of award where the validity of the arbitration agreement is in doubt.

Kenneth⁴⁰ and Appadoo,⁴¹ observe that oftentimes enforcement challenges arise because of the controversial provisions in Articles V and VII of the New York Convention. Article V allows courts to refuse an application for enforcement on certain grounds, whereas Article VII makes provision that if a domestic law or other treaties provide for more favourable means of enforcement, the courts are permitted to rely on that law or treaties and grant the enforcement order notwithstanding if one or two grounds for refusal is applicable. The authors contend that

³⁸ Moss G.C., 'Risk of Conflict Between The New York Convention and Newer Arbitration-Friendly National Legislation' (Being a lecture delivered at the Law Faculty of the Free International University for Social Studies (LUISS), Rome, on September 2001).

³⁹ Ibid.

⁴⁰ Keneth R.D., 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002), 37 Tex. Int'l L.J. 43-88,57.

⁴¹ Appadoo K., 'Enforcement of International Awards: Redress Mechanisms in the event of Non-Compliance.' <<http://ssrn/abstract=2244872>> accessed on 27th February 2017.

the purpose behind the more favourable provision in Article VII is to guarantee enforcement of award to a maximum level, but the aim is defeated because of judicial interpretation of the two provisions.⁴² Therefore, Kenneth suggests that the power of annulment of award should be exclusively conferred on the State whose law the parties have chosen to govern the dispute.⁴³ This thesis therefore agrees with Kenneth to the extent that when parties willingly adopt a particular law to govern their contract and arbitration proceedings, the same parties cannot turn back and grumble about that law where the award is being vacated based on the grounds stipulated in the chosen law. Hence, Kenneth and Appadoo' work relies extensively on the application of the New York Convention in the U.S, the focus of this thesis is Nigeria.

According to Veeder⁴⁴ the low quality of judicial attitude towards the enforcement mechanisms as well as arbitration system generally is a major challenge to enforcement of awards.⁴⁵ Veeder observes that when courts are arbitration –friendly, this positive attitude on its own could enhance the enforcement of an awards without defeating the very base of arbitration. This view is quite relevant to this thesis to the extent that arbitral awards cannot be enforced without court intervention except where parties willingly obey the terms contained in the award. This thesis intends to focus on the judicial attitude of the Nigerian courts toward arbitration system particularly at the enforcement stage. Hwang and Yeo Chuan trace problems and challenges of enforcement of awards to deviations from generally accepted standards contained in the

⁴² Kenneth R.D., 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002)60.

⁴³ Ibid.

⁴⁴ Veeder V.V., 'Is There a Need to Revise the New York Convention?'(2010) 1(2) J of Int'l Disp. Settlement, 499-506, 500.

⁴⁵ Ibid, 504.

enforcement mechanism.⁴⁶ The scholars state that a mere codification of the law is not sufficient condition for effective enforcement. This thesis disagrees with this submission of the authors because the UNCITRAL Model law and the New York Convention have a laid down standard which most States' derived their arbitration regimes from. Yet the enforcement challenges remain one of the strongest obstacles to the effectiveness of arbitration system.

On his own part, Pierter⁴⁷ observes that diversity in the adoption of UNCITRAL Model law has adverse impact in most jurisdictions at the enforcement stage. Some States adopted it wholly while some adopted it partly or subjected it to modifications. For this reason, States adopted and relate the enforcement provisions in the UNCITRAL Model law base on each individual State peculiarity and how they wish the law to apply. As far as Holtman⁴⁸ and Schwebel are concerned,⁴⁹ the New York Convention falls short of attaining a comprehensive international mechanism for commercial arbitration in spite of its wide acceptance. To them, while the Convention offers restrictive grounds in which the court can refuse the enforcement order of awards, it leaves enforcing courts to decide the question whether those grounds exist or not. The authors therefore recommended a creation of a new international court of enforcement separate from the regular national courts with the sole power to deal with enforcement applications and

⁴⁶ Hwang S.C & Yeo Chung T., 'Recognition and Enforcement of Arbitral Awards', in Pryles M & Moser MJ(ed)*The Asian leading Arbitrators' Guide To International Arbitration* (Chap. 16, Juris Publishing, New York, 2004) 407-463, 408 -409& 412.

⁴⁷ Pierter S., 'Unity and Diversity in the Adoption of the Model Law'(1995) 11(1) Arb Int'l, 1-38, 23.

⁴⁸ Holtmann H.M., 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards', In Hunter M, Marriott A. & Veeder V.V (ed) *The Internationalization of International Arbitration, the LCIA Centenary Conference* (Kluwer publishing, London, 1995)109.

⁴⁹ Schwebel S.M., 'The Creation and Operation of an International Court of Arbitral Awards' In Hunter M, Marriott A. & Veeder V.V (ed)*the Internationalization of International Arbitration, the LCIA Centenary Conference* (Kluwer publishing, London, 1995,)115.

also to decide if the award violates any of the grounds which warrant the refusal of enforcement application.

Charles disagrees with the idea of creating a new international court for the enforcement of awards. He argues that a new court cannot remove intervention by States in their own cases with special interest.⁵⁰ He observes further that a combined effort should be made by various States to harmonise arbitration laws around the globe in line with the UNCITRAL Model law with the hope to give better uniformity of the decisions. From the researcher's perspective, it should be mentioned that even if States were to adopt the Model Law word for word, domestic courts would practically without doubt construe the law contrarily. According to Charles this will not only ensure quick dispensation of awards but also, guarantee parties with the confidence that the award is before the judges who are experts in the field of arbitration.

Mayer,⁵¹ Sheppard,⁵² Mante⁵³ and Mistelis⁵⁴ look at the challenge of enforcement of awards from the point of public policy ground. They observe that inability to provide a uniform interpretation guide for the enforcing courts is a major setback on the enforcement mechanisms. The scholars argued that failure to give a definite meaning to public policy leads to several interpretations of the concept by the courts and both parties and States have seen this as an opportunity to evade their contractual duty under the arbitration agreement. The scholars

⁵⁰Brower C.N., 'Keynotes Address at Premier Arbitration Conference' (2002)13 World Arb. & Med. Rep 270, 271.

⁵¹Mayer P. & Sheppard A., 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards'(2003) 19 Arb Int'l, 249, 250.

⁵²Sheppard A., 'Public Policy and the Enforcement of Arbitral Awards: Should There be a Global Standard?'(2004) <http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_67.htm>. accessed on 28 September, 2016.

⁵³Mante J., 'Arbitrability and Public Policy: An African Perspective' (2017) 33(2), Arb. Int'l, 275-294, 278.

⁵⁴Mistel L., 'Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards' (2000) 2(4) Int'l Law Forum Du Droit Int'l, 248-253, 252.

therefore canvassed for a uniform standard as several application have produced unjustified decisions. The researcher of this thesis agrees with the authors to the extent that diversity in the application of public policy exception by various courts obstruct the enforcement of award. However, ACA is not the focus of these authors consequently, an appraisal of the Nigerian courts on the issue of public policy exception is not assessed.

In his thesis, Azousu studies the law and practice of the arbitration system in some selected African States including Nigeria.

He noted that the importance attach with the principle of party autonomy, principle of fairness and the level of power given to the court in the arbitration system are the major ingredients to assess the efficiency of any legal regime on arbitration.⁵⁵ He observes that enforcement provisions in the ACA remains a challenge in the enforcement procedure of awards in Nigeria because it does not meet the ingredients identified above.⁵⁶ He then recommends its review in such a way that the basis of arbitration is not defeated. Azousu's work does not give special attention to the challenges in the provisions of ACA. On his part, Ayinla⁵⁷ writes on ADR in general with little focus on arbitration. He offers a discussion on the implementation of ADR mechanism and the inherent challenges in Nigeria. The author's work emphasised on the ADR only and is not focused on the challenges that might be encountered in enforcing arbitral awards. Orojo and Ojomo⁵⁸ analyse the arbitration practice in Nigeria with major focus on domestic arbitration and not much reference to international commercial arbitration. Similarly, scholars

⁵⁵Azousu A.A., *International Commercial Arbitration and Africa States* (Phd Thesis, London School of Economics and Political Science, London, United Kingdom, 1996) 17.

⁵⁶ Ibid.

⁵⁷Ayinla L., *The Possibilities and Hindrances of ADR in Nigeria: A Critique* (Lambert Academic Publishing, 2016)

⁵⁸ Orojo J.O & Ajomo M.A., *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi and Associates, Lagos, 1999).

such as Idorgine,⁵⁹ Ajokwu,⁶⁰ and Peters,⁶¹ wrote extensively on the arbitration practices in Nigeria. The authors discuss the essential parts of the arbitration including the agreement, appointment of arbitrators, role of national courts, the making of awards and grounds for resisting/setting aside the arbitral award. However, they all pay little attention to the enforcement challenges facing foreign awards in Nigeria.

Ezejirofor⁶² and Akande⁶³ observe that reciprocity reservation adopted along with the New York Convention in 1970 limits the legal applicability of the provision of Section 54 in Nigeria. These authors were right with their submissions however, reciprocity reservation does not have much impact at the enforcement stage of award and should not be seen as a challenge to enforcement of award in Nigeria. Aside the provision of Section 54, enforcement of award can also be obtained via Section 51 of the ACA which does not require reciprocity requirement. Also, Aduaka⁶⁴ observes that ACA which is the extant regime on arbitration in Nigeria was badly drafted and that integration of the New York Convention was not properly domesticated into the Nigeria arbitration law because Section 54 disrupts official declaration made pursuant to Article 1(3) of the New York Convention while incorporating the Convention. The author therefore recommends the review of Section 54 to bear the true intention of the drafter of the

⁵⁹ Idornigie P., *Commercial Arbitration Law and Practice in Nigeria* (Lawlord Press, Nigeria, 2015).

⁶⁰ Ajokwu F., *Commercial Arbitration in Nigeria: Law and Practice* (Centre for Commercial Law Development, Lagos, 2009).

⁶¹ Peters D., *Arbitration and Conciliation Act Companion* (deed-Sagae Nigeria Ltd, Lagos 2006).

⁶² Ezejirofor G., *Law of Arbitration in Nigeria* (Ikeja Longman, Nigeria 2007) 178.

⁶³ Akande R.A., 'Enforcement and Practicability of Sovereign Immunity Doctrine in International Commercial Arbitration' (2014) 7(2) J. of Pol & Law, 143-149, 146.

⁶⁴ Aduaka C.E., 'Enforcement of Arbitral Awards Made Under the New-York Convention in Nigeria: Challenges and Remedies' (2014) 3(3), Int'l J. of Hum & Soc. Scie Inv., 44-50, 46.

Convention.⁶⁵ The submissions of Aduaka is relevant to this thesis because the drafters of the Convention intend its application to cover contractual and non-contractual disputes. Section 54 of the ACA restricts the applicability of the Convention to only disputes that are contractual in nature. Hence, Aduaka's work does not assess the impact of this restriction placed by the provision of Section 54 of the ACA on the enforcement of awards in Nigeria.

On his own part, Aina links the problem faced at the enforcement stage with the procedures of enforcement in the High Courts (Civil Procedure) Rules.⁶⁶ He observes that the Rules provides for Motion on Notice or Originating Summons which, to him, are not suitable means of initiating enforcement proceedings before the court. Neither motion nor originating summons are adequate in arbitral proceedings.⁶⁷ He suggests the amendment of the law through which a distinct procedure for the enforcement of arbitral awards will be created. Until this is done, he states, awards will continue to suffer due to unnecessary delay in enforcing arbitral awards.⁶⁸ Researcher agrees with Aina hence, the author's work is focus on the High Court (Civil Procedure) Rules while ignoring the challenges in the ACA

According to Ogundipe, the challenges of enforcement of awards start from lack of adequate training on arbitration for judges who sit on arbitral matters.⁶⁹ He observes that constant training of the judiciary will ultimately remove this challenge. He agrees with Aina that another

⁶⁵ *ibid*, 50.

⁶⁶ Aina K., 'Nigeria Procedure for the enforcement of domestic arbitral awards in Nigeria Civil Procedure Review' (2014) (5)2, 22-44.

⁶⁷ *ibid*, 31-37.

⁶⁸ Aina K., 'Nigeria Procedure for the enforcement of domestic arbitral awards in Nigeria Civil Procedure Review.' (2014) 44.

⁶⁹ Ogundipe B.O, 'Developing Nigeria into an International Arbitration Centre' (paper delivered at the 2nd Business Law Conference of the NBA, Section on Business Law on March 13, 2007).

substantial problem is procedural and improper management of time.⁷⁰Ojibara in his research thesis identified public policy exception as a challenge to enforcement of awards.⁷¹ He observes that the judicial approach towards public policy exception is the major concern at the enforcement stage of award.

Thus, Ojibara limits his work to the challenge of public policy while other challenges were not captured. Baker in his article notes that⁷² the courts appears more concerned with protecting the courts from becoming entangled in religious affairs, than guarding the rights of religious organisations and individuals themselves. This priority remains ever visible when courts are asked to review religious arbitral awards. The author major attention was on the assessment of Federal Arbitration Act not the ACA hence, his work is relevant to this thesis as it discusses essentials of Islamic arbitration. Alqudah observes that the practice of Shari'ah law is companionable with the practice of international commercial arbitration but can only experience the best practice of Islamic arbitration where the Shari'ah principles and rules are being considered or incorporated in the arbitration regimes regulating the practices of arbitration.⁷³Hence, author only surveyed the Islamic arbitration and its awards within the Gulf Cooperation Council States thus, leaving Nigeria out of discussion.

⁷⁰ Ibid.

⁷¹ Ojibara I.M., 'Judicial Approach to Public Policy and its effect on the Enforcement of Foreign Arbitral Awards in Nigeria' (Ph.D thesis submitted to the University of Ilorin, Nigeria, 2017).

⁷² Baker A.M., 'A Higher Authority: Judicial Review of Religious Arbitration' (2012) *Vermont Law Review* , 37, 157-202, 175.

⁷³ Alqudah M.A., 'The Impact of Sharia on the Acceptance of International Commercial Arbitration inn the Countries of the Gulf Cooperation Council' (2017), 20(1) *JLERI*, 1-17.

According to Altawyan⁷⁴ and Guzeloglu⁷⁵ when Islamic awards is challenge on public policy ground, the courts are to determine its based on what is consider as violation by consensual of scholars (this is known as *Ijtihad*).⁷⁶ This makes an Islamic arbitral award that violates public policy undefined. He recommends the review Islamic public policy as it relates to Islamic awards for it to be more predictable and precise. However, these authors only focus on the enforcement law in Saudi Arabia, as ACA is not captured in his study. Rafa observes that the enforcement procedures of most Muslim State are often unpredictable and time consuming.⁷⁷ The author recommends that the Muslim States are to come together to design a uniform consensus as regard the determination of Islamic public policy exception to reduce the risks of unenforceable awards. The author concludes that Shariah law, if interpreted properly, can be a tool applicable to the challenges of modern age and will allow for appropriate jurisprudence for addressing modern globalisation problems.⁷⁸ The author recommends a regulatory framework which can give rise to a unified arbitration law that can integrate and balance the general principles of law from the three legal systems (Civil, Common and Shariah) and integrate them into a unified code of rules that would ensure best practices and global enforceability of arbitration awards. To him, only by understanding Sharia principles and its divine value, can harmonisation be achieved? Rafa's

⁷⁴ Altawyan A.A., 'Arbitral Awards under the Saudi Laws: Challenges and Possible Improvements'(2017) 3(1) IJLIS, 14-25.

⁷⁵ Guzeloglu A., 'The Role of Shari'a Law on the Enforcement of Arbitral Awards in the Kingdom of Saudi Arabia'(2016). <www.guzeloglu.legal/en/news-insights/the-role-of-sharia-law-on-the-enforcement-of-arbitral-awards-in-the-kingdom-of-saudi-arabia-99-html> accessed 12 June 2018.

⁷⁶ Ijtihad is an arabic word which means consensus of Islamic scholars

⁷⁷ Rafa M., Islamic Sharia'a, What does it have to do with Arbitration? <http://www.researchgate.net/publication/280254212-Islamic_Sharia'a_what_does_it_have_to_do_with_Arbitration/citation/download> accessed on 17th August 2016.

⁷⁸ Ibid.

work does not establish any possible challenges of Islamic arbitration and awards in Nigeria within the enforcement provisions of the ACA which is the focus of this research.

Rizwan⁷⁹ and Helfand⁸⁰ observe that certain aspects of Islamic law evidentiary tend to create challenges at the enforcement stage of awards. According to the scholar, where Shariah evidentiary rules consider a particular evidence inadmissible, such evidence is automatically inadmissible. This is for the reason that Shari'ah law as adopted by the parties to govern their arbitration is on equal balance with any other law. This is because Shariah law must be placed on balance with any other law chosen by the parties to the arbitration. This certainly is a challenge at the enforcement stage if courts were asked to vacate a foreign award under Article V (1) (b). Specifically, Helfand emphasises that placing Shariah law as equal to other laws would enable courts to ensure that the tribunal panel consider the Shariah rules at the proceeding also, in the rendering of awards. This would allow courts to serve as a backstop for intentionally misguided application of Shariah procedural rules and safeguards and, in so doing would ensure that Islamic arbitration can serve as part of the religious institutional infrastructure that makes religious freedom possible. Rizwan⁸¹ further states the fact that Islamic law consists of many schools of thought creates another challenge for an award given under the Islamic arbitration because each of these schools maintain different views on the binding nature of Islamic arbitration. Helfand and Rizwan' work is relevant to this thesis to the extent that the challenges facing Islamic

⁷⁹Rizwan S.U., 'Foreeable Issues and Hard Questions: The Implications of US Courts Recognising and Enforcing Foreign Arbitral Awards Applying Islamic Law Under the New York Convention' (2013)1Cornell Law Review, 98, 493-520

⁸⁰ Helfand M.A., 'Between Law and Religion : Procedural Challenges to Religious Arbitration Awards' (2015) 9, (7) , Chicago Kent L. Rev, 1-162, 152-43

⁸¹ Rizwan S.U., 'Foreeable Issues and Hard Questions: The Implications of US Courts Recognising and Enforcing Foreign Arbitral Awards Applying Islamic Law Under the New York Convention' (2013)

arbitration and awards are identified however, United States was the focus of the authors, as no reference was made to Nigeria.

Khoukaz⁸² observes that although Shariah is not incompatible with international arbitration however, challenges can be encountered when international customs and practice conflict with the Shariah. The author links this challenge with the fact that Shariah is not codified, therefore diversity occurs from the Islamic schools of thoughts that apply different methodologies in interpreting the Shariah.⁸³ The author recommends that the Islamic communities should develop an Islamic friendly arbitral system which will harmonise the diverse legal interpretations of arbitration with the Islamic world and then mould those concepts into a larger international arbitral system. Khoukaz's work is relevant to this thesis as it discusses Islamic arbitration and the possible challenges affecting the Islamic award. Hence, the work is focus on the U.S law therefore, ACA is not captured in his work.

Wirtz⁸⁴ emphasises that enforcement of Islamic award can be obtain via the provisions of the New York Convention though, it is subject to the grounds for refusal as stipulated in the Convention.

The provisions of the New York Convention are not Shari'ah oriented, the author expressed fear where the Islamic award is challenged on the grounds stated in the Convention. This will create challenge to parties since the determination of the ground raised to challenge the award must be resolved in accordance with the Shari'ah rules and principles. Wirt's work is significant to this

⁸² Khoukaz G., 'Shariah Law and International Commercial Arbitration: The Need for an Intra-Islamic Institution' (2017), 14(1) J. Disp. Resol, 181-196.

⁸³ Ibid, 184.

⁸⁴ Wirtz A., 'Resolving Islamic Finance Dispute Through International Commercial Arbitration in the Gulf Region' (A Paper Presented at the Law School International Immersion Program, Paper No. 4, 2016).

thesis as it captures the Islamic arbitration and award hence, it does not emphasis on the relevance of the ACA on the Islamic awards.

Azizi⁸⁵ observes that the implementation and interpretation of the refusal grounds under the Federal Arbitration Act and the Shari'ah law are significantly different and that the difference is because Shariah is a religious law and the States which apply Shariah principles consider religious values, beliefs, principles, interests and goals which are not in the contemplation under the U.S law. This, therefore, creates lack of a clear position about what each grounds of refusal constitutes under the Shariah law. Hence the author's focus was on arbitration regime in the United States and Shariah. No reference was made to the Nigerian Arbitration Law.

The literature reviewed above show an attempt to look into the work done by several scholars concerning the problems and challenges facing enforcement of foreign arbitral awards globally and particularly in Nigeria. Some of the literature are basically theoretical in nature while those that have looked into the challenges of recognising and enforcing arbitral awards were limited to a general outlook while those that seem to be specific limited their writings to other jurisdictions and not Nigeria. In summary, from the literature reviewed no attention was paid to assess the enforcement provisions in the ACA, most of the literature are on the general overview of the ACA. Also, no court decision or scholarly piece in Nigeria has addressed the approach a court should take if asked to enforce a foreign arbitral award reached through the Islamic arbitral system. Nigeria will have to develop a satisfactory response to such demands as the rapid growth of Islamic finance will undoubtedly lead parties dealing in Islamic finance instruments to seek recognition and enforcements of foreign awards rendered under Islamic arbitration.

⁸⁵ Azizi R., 'Grounds for Refusing Enforcement of Foreign Arbitral Awards under the New York Convention: A Comparative of the US and Sharia Law'(2010) available <<http://ssrn.com/abstract=1616746>> . accessed on 12 June 2018.

1.8.0. DEFINITION OF TERMS

In the body of this thesis some technical words, phrases and, terms are used. For ease of convenience and proper understanding of this thesis, it is pertinent to define some of the words within the context of the thesis.

1.8.1. Arbitration, Statutory Arbitration

Arbitration is a system whereby disputants agreed to submit their differences to a third party for settlement.

Statutory arbitration is a process whereby arbitration proceeding is conducted under the statutes such as Arbitration and Conciliation Act.

This thesis uses the following terms interchangeably, unless otherwise indicated:

‘Arbitration’, ‘international arbitration’ and ‘international commercial arbitration’

1.8.2. International Commercial Arbitration

International arbitration means a process of dispute settlement particularly where parties are from different States.

International commercial arbitration means an alternative method of dispute settlement by an arbitrator between parties who are from different States on a dispute that is commercial in nature.

1.8.2. Commercial and Commercial arbitration

The term ‘**commercial**’ means all relationships concerned with or engaged in commerce.

Commercial arbitration is a means of settling dispute where the underlying subject matter of the dispute is commercial in nature, whether contractual or not.

1.8.3. Foreign Arbitral Awards

‘Award(s)’, ‘arbitral award(s)’, ‘foreign arbitral award (s)’ and ‘International award’ may be used interchangeably, unless otherwise indicated.

Award means an order or decision given by person(s) in authority.

Arbitral award is an order or decision of the arbitrator or arbitral panel. This includes an award made through *ad hoc* arbitration as well as an award given through institutional arbitration.

Foreign Arbitral award is an order or decision emanating from international arbitration.

1.8.4. State, Country, Place, Nation

This thesis uses the words ‘State’ ‘Nation’ ‘Country’ and, ‘Place’ interchangeably to mean sovereign nation, unless otherwise indicated.

State refers to a nation or territory considered as a community under one government.

Country refers to a nation with its government, occupying a particular territory.

Place refers to a portion of space designated for a particular purpose or person.

Nation means a large body of people inhabiting a particular designated territory with a mutual culture and language.

1.8.4. Recognition, Enforcement, Enforcement State, Enforcement Court and Seat of Arbitration

Recognition means the process of recognition, identification, acknowledgement and, admission of an arbitral award.

Enforcement simply connotes giving legal force to an arbitral award.

Seat of arbitration is the State in which an arbitration proceeding takes place or, the State under whose law award is rendered.

Enforcement State is the State where the enforcement proceeding takes place or where an enforcement order is sought.

Enforcement court is the national court of the State which the award-creditor approached for the enforcement order.

1.8.5. Public Policy, Public Policy Exception, Arbitrability

Arbitrability distinguishes disputes that could be settled and resolved by arbitration from the ones with the exclusive jurisdiction of the courts.

Inarbitrability involves categories of disputes that are not permitted to be decided by arbitration but through courts only.

Public Policy refers to the essential or mandatory guidelines that the parties cannot derogate from. These are fundamental rules of every State.

Public Policy Exception' is a ground under which the enforcement order of the awards may be refused or set aside because the award violates mandatory or fundamental rules of the enforcing State.

1.8.6. Judicial Review

Judicial Review serves as a weapon whereby the court is vested with the power to declare illegal and unenforceable any law or order which is inconsistent or is in contravention of the fundamental laws of the land.

1.8.6. Islamic Arbitration, Islamic Arbitral award, Shariah Compliance.

Islamic arbitration are those arbitrations conducted under Shariah rules and principles.

Islamic arbitral award means an award given or rendered under Islamic arbitration

Shariah compliance means complying with Shariah principles.

1.8.7. Tahkim, Hakam

The following words are use as synonyms and interchangeably

‘Tahkim’, and ‘arbitration’

‘Arbitrator’, ‘hakam’

Tahkim means arbitration. Therefore, tahkim is a system where parties agreed to submit themselves to a third party for disputes settlement.

Hakam means arbitrator. Hence, hakam is neutral third party appointed to arbitrate between the disputing parties.

1.9.0. CONCLUSION

This chapter is an introductory part that set the tone of this study. The chapter has highlighted the research problem, the aim and objectives of the study, the significance of the study, the scope and limitations of the study and research methodology. Also, a review of relevant literature was carried out in this chapter and it was revealed that there are still gaps that the current research seeks to fill in relation to the problems and challenges encountered in the enforcement proceedings of an award from the perspective of Nigeria. The next chapter of this thesis will look at the some basic concepts and issues that are fundamental in the realization of the objectives of this study.

CHAPTER TWO
HISTORICAL DEVELOPMENTS AND LEGAL REGIMES ON
ENFORCEMENT FOREIGN ARBITRAL AWARDS IN NIGERIA

2.0.0. INTRODUCTION

The focus of this chapter is the historical developments and legal regimes on enforcement of awards in Nigeria. Various laws applicable in Nigeria particularly from the colonial period till present, on the enforcement of foreign awards are discussed in this chapter. The essence of this is to effectively capture the development in each period and to identify the strengths and challenges associated with these regimes. Prior to colonialism by the British, disputes in Nigeria were settled according to customary rules which, over time, proved to be inadequate in certain areas, particularly in international commercial relations.

The chapter begins with a consideration of the Arbitration Ordinance of 1914 which can be said to be the foundation law for the regulation of arbitration agreement and enforcement in Nigeria. The chapter identifies some received English law such as the Reciprocal Enforcement of Judgments 1922 Ordinance and the Foreign Judgment (Reciprocal Enforcement) Act 1960, which deal with enforcement of foreign judgments but also, specifically make provision for the enforcement of awards. The chapter proceeds to consider, in material depth, the relevance of the Geneva Protocol on Arbitration Clause, 1923 and the Geneva Convention on the Execution of Awards, 1927 to the enforcement of arbitral awards.

The chapter also examines the New York Convention, 1958 which is regarded as one of the most widely recognised international Conventions on enforcement of arbitral awards. A thorough examination of this Convention becomes necessary because Nigeria is a signatory to it. The

chapter then discusses the UNCITRAL law which set the foundation for most domestic legislation of many States on arbitration; for instance, the Nigeria Arbitration and Conciliation Act (ACA) is molded in line with the UNCITRAL law. Finally, the ACA is examined as it is the primary legislation on Arbitration and other ADR mechanisms in Nigeria.

2.1.0 ARBITRATION ORDINANCE 1914

During the era of colonial administration, the English statute on arbitration was part of the received laws in Nigeria. The Arbitration Ordinance of 1914 (1914 Ordinance) was the first enactment which afforded parties the opportunity to resolve and settle their disputes through statutory arbitration.⁸⁶ The 1914 Ordinance improved on the traditional and customary way of resolving disputes in the early days before the arrival of the colonists. It remedied the inadequacy of customary dispute resolution in cases involving patents, copyrights, and so on.⁸⁷ The 1914 Ordinance ensured that parties who had earlier submitted to arbitration cannot revoke the submission unless parties give option to do so though, with the leave of court.⁸⁸

Notwithstanding the brilliant innovations in the 1914 Ordinance, it had limitations.⁸⁹ One major limitation of the 1914 Ordinance was the fact that its provisions were only applicable to domestic arbitration⁹⁰ and as such, it had no role to play with regard to international commercial

⁸⁶ The Nigerian Government Gazette Vol. 1, No 66 , Aug. 27, 1914; The Nigerian Government Gazette No 92, Dec. 10 1914.

⁸⁷ Ajayi F.A., ‘The Interaction of English Law with Customary Law in Western Nigeria: II’ (1960) 4 (2), J. of Afri. L., 98-114, 110.

⁸⁸ Arbitration Ordinance No 16, 1914, Section 3.

⁸⁹ Asouzu A.A., ‘Developing and Using Commercial Arbitration and Conciliation in Nigeria’ (1994) 1(1) Lawyer Bi- Annual J., 1-22, 10.

⁹⁰ Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (Lawlords Publishing, Nigeria, 2015) 19

arbitration.⁹¹ Another challenge was the widely criticised ‘statement of case procedure’ which limited the powers of arbitrators and gave courts unlimited power to interfere in arbitration proceedings.⁹² Specifically, Section 15 of the Ordinance permits an arbitrator in its volition to approach the courts to rule on issues arisen in the course of arbitration proceedings. The provision further authorises the court to offer expert opinion on a particular case if parties so desire.⁹³ The ‘case stated procedure,’ was the most controversial provision of the 1914 Arbitration Ordinance as the courts and parties were using it as an opportunity to intervene in the arbitration system.⁹⁴

Also, because the enactment of the 1914 Ordinance was smoothed by the British colonists, its pedigrees and contents was in consonant with the English Arbitration Act 1889⁹⁵ therefore, the 1914 Ordinance was characterised by the same shortfalls as its predecessor.⁹⁶ Amongst these shortfalls were the scanty provisions and its omission to provide for some important elements of the arbitration procedures.⁹⁷

2.2.0. RECIPROCAL ENFORCEMENT OF JUDGMENT ORDINANCE 1922

The Reciprocal Enforcement of Judgment Ordinance 1922 (1922 Ordinance)⁹⁸ serves as a means under which judgments and awards rendered in foreign States can be enforced in Nigeria.⁹⁹ The

⁹¹ Arbitration Ordinance No 16, 1914, Sections 10, 11, 12 and 15.

⁹² Case-State Procedure in the 1914 Nigerian Arbitration Ordinance, Sections 8(b) and 15.

⁹³ Arbitration Ordinance No. 16 1914, Section 15.

⁹⁴ Asouzu A., ‘Developing and Using Commercial Arbitration and Conciliation in Nigeria’(1994) 12-13.

⁹⁵ Nordon C. L., ‘British Experience with Arbitration’(1935) 1 Uni of Pennsylvania L. Rev., 314- 325, 316.

⁹⁶ Asouzu A., ‘Developing and Using Commercial Arbitration and Conciliation in Nigeria’(1994) 13.

⁹⁷ Ibid.

⁹⁸ Cap. 175, LFN and Lagos 1958. Hereinafter refer to as 1922 Ordinance.

⁹⁹ See the preamble of the Reciprocal Enforcement of Judgments 1922 Ordinance.

presence of the British colonists in the country at the time gave business opportunities to the indigenous Nigerians to transact with foreigners and *verse visa* who were mostly English citizen. As the years go by, the relationships became stronger and deeper thus, necessitates the need for a legal instrument that will cater for the commercial agreements and judgments. The 1922 Ordinance was enacted and its purpose was to guarantee the enforcement of judgments and awards rendered within Nigerian, United Kingdom and other parts of her colonies. The significance of this 1922 Ordinance to this thesis is founded on the detail that the Ordinance placed and bestowed on an arbitral awards the equal standing with the judgment of the courts therefore, making it enforceable as the judgements of the court under the Ordinance.¹⁰⁰ However, the Ordinance only demands to obtain leave of the court where an award is given and that the United Kingdom and its colonies must demonstrate a genuine interest and commitment to enforce an awards or judgments rendered in Nigeria to enjoy similar treatment in Nigeria.¹⁰¹ Hence, one major limitation of the 1922 Ordinance is its restrictive scope as it applies only to money judgments or awards for a specific sum. Also, such judgment or award must have decided all the rights and liabilities of the parties making it forbidden for any court to re-litigate on the same issue.¹⁰² Another limitation of the 1922 Ordinance lies in the fact that for such an award to be enforced, there must be evidence that a similar judgment from Nigeria would be accorded the

¹⁰⁰Reciprocal Enforcement of Judgments 1922 Ordinance Cap. 175, LFN and Lagos 1958, Section 2; Foreign Judgment (Reciprocal Enforcement) Act Cap F35 LFN 2004, Section 2.

¹⁰¹Reciprocal Enforcement of Judgments 1922 Ordinance Cap. 175, LFN and Lagos 1958, Section 5(1). Wallace P., 'Enforcement of Foreign Judgment under Nigeria Law' < <http://www.elexica.com/en/legal-topics/disputes-resolution-commercial/25-enforcement-of-foreign-judgments-under-nigerian-law>> accessed 17 November, 2017

¹⁰² Wallace P., 'Enforcement of Foreign Judgment under Nigeria Law.'

same status and be enforceable in that State.¹⁰³ This is an area where the ACA is indeed innovative in that it has not prescribed the reciprocity requirement as a criteria. Hence, it is pertinent to note that 98years after, the 1922 Ordinance still remains a valid law in Nigeria.¹⁰⁴ The law had not been repealed either by Foreign Judgments (Reciprocal Enforcement) Act No 31 of 1960 or by any other law in Nigeria.

2.3.0 GENEVA PROTOCOL ON ARBITRATION CLAUSE, 1923

International commercial arbitration originated in Central Europe in the 1920s¹⁰⁵ however, there were challenges that affected the system in the early days. First, only existing disputes could be referred to arbitration hence, future disputes were exempt from being arbitrated notwithstanding the parties' interest to resolve any disputes through arbitration.¹⁰⁶ Second, the issue of court intervention created a major obstacle; the courts were given excessive opportunity to interfere at any stage of arbitration in spite of the matters pending before the arbitrators. In effect this means that the insertion of an arbitration clause into any commercial transaction did not debar the court jurisdiction on the subjects. Consequently, arbitration proceeding and judicial proceeding may be conducted on the same subject and the judgement and award can be given respectively. In this case, the only remedy is for the aggrieved party who desires for arbitration to claim for

¹⁰³ Reciprocal Enforcement of Judgments 1922 Ordinance Cap. 175, LFN and Lagos 1958, Sections 2- 4; *Marine and General Assurance Co Plc v. Overseas Union & Others* [2006] 4 NWLR (Pt. 971)622; *Andrew Mark Macaulay v. R.Z.B Australia* [2003] 18 NWLR (Pt. 852)282.

¹⁰⁴ Constitution of Federal Republic of Nigeria 1999, Section 315.

¹⁰⁵ Craig W.L, Park W.W. & Paulsson J., *International Chamber of Commerce Arbitration* (3rd ed, Oceana Publications, Inc., Dobbs Ferry, 2000) 273-274.

¹⁰⁶ *Ibid.*

compensation for breach of agreement to arbitrate. This was grossly insufficient and was often perceived as an intimidation to the party at the receiving end.¹⁰⁷

The apparent disregard for parties' arrangement to arbitrate was successfully removed by the enactment of Geneva Protocol on Arbitration Clauses (1923 Protocol).¹⁰⁸ The 1923 Protocol was a commendable victory both in relation to the quantity of signatory States that showed interest and in relation to the substance of the law itself.

Article 1 of the Geneva Protocol mandates all signatory States to give effect to arbitration clause in a contract as it relates to existing or future disputes between the parties provided the main cause of action can be determined and settled through arbitration and the dispute is a commercial matter. Likewise, the 1923 Protocol also afforded parties the opportunity to pick on the arbitral panel and applicable law of their choice as the parties so desire.¹⁰⁹ The fundamental point here is the relevance of the 1923 Protocol to Nigeria at the time of its adoption. At that time, Nigeria was a colony of great British and thus subject to British laws which makes it appear that the provisions ought to have been automatically applicable in Nigeria as Britain was a party to the 1923 Protocol. However, the Protocol did not apply to any of the Settlements or territories under British control or authority.¹¹⁰ Thus, it could be contended that the 1922 Ordinance was then the only applicable law to foreign awards in Nigeria.

Nevertheless, the enactment of the 1923 Protocol made significant contribution to the development of international regime on arbitration globally. From its preamble, the purpose was

¹⁰⁷ United Nations, *Notes on Dispute Settlement in International Commercial Arbitration* (UN, New York, 2005), 201-22.

¹⁰⁸ 27 LNTS 157 (1924).

¹⁰⁹ Geneva Protocol on arbitration Clause 1923, 27 LNTS 157 (1924), Article 2.

¹¹⁰ Nigeria was not the only territory that the British did not extend the application of the Geneva Protocol. Protocol did not also applicable to countries such as Gambia, Colony and Protectorate of Kenya, Southern Rhodesia (Zimbabwe), Gold Coast (Ghana), Uganda, Mauritius and, Northern Rhodesia (Zambia).

to guarantee and ensure the effective arbitration agreements and awards within the State where the award was delivered.¹¹¹ However, because the Protocol did not permit the enforcement of the arbitral awards worldwide except within its State of origin therefore, a new legal instrument was desirable to cater for the needs of the global community.¹¹² Consequently, the Protocol was replaced in 1927 by the Geneva Convention on Execution of Foreign Arbitral Awards.

2.4.0 GENEVA CONVENTION ON EXECUTION OF FOREIGN AWARD 1927

In the late 20s, Geneva Convention on the Execution of Foreign Arbitral Awards (1927 Geneva Convention) was adopted by the League of Nations (now United Nation).¹¹³ The 1927 Convention was assented to by many States and contained noteworthy provisions.¹¹⁴ Also remarkable is the fact that it was the first bilateral agreement that afforded parties the opportunity to enforce an award in foreign States.¹¹⁵ In fact that was one of the aims as found in its preamble behind the enactment of the 1927 Convention.¹¹⁶

Like its predecessor; the 1923 Protocol 1927 Geneva Convention was also not applicable to Nigeria for the same reason that the Colonists did not deem it necessary to do so.¹¹⁷ Nevertheless, the 1927 Geneva Convention made positive impact in the development of international regime on arbitration globally though, the law was not free problems. The major

¹¹¹ Lew D.M, Mistelis L.A & Kroll S.M., *Comparative International Commercial Arbitration* (Kluwer Law Int'l, Hague, 2003) 179.

¹¹² Geneva Protocol on Arbitration Clause 1923, 27 LNTS 157 (1924), Article 3.

¹¹³ 1927 92LNTS 301(1929-30).

¹¹⁴ Belgium became signatory to 1927 Convention on 27 April 1929; United Kingdom became signatory on July 1930; Ruanda on-Urundi joined on 5 June 1930 and Portugal joined on 10 December 1930 .

¹¹⁵ Geneva Convention 1927 92LNTS 301(1929-30), Article 1.

¹¹⁶ Lew J.M.D, Mistelis L.A & Kroll S.M, *Comparative International Commercial Arbitration* (2003) 20.

¹¹⁷ Ibid, Article 10.

challenge with the 1927 Geneva Convention is the *double exequatur* which requires the award-creditor to first establish and have the award ‘recognised’ by the appropriate authority of the seat of arbitration.¹¹⁸ Therefore, the requirement of ‘recognition’ of such award in forum State is the prerequisite condition for enforcement under the Geneva Convention. That is, ‘recognition’ of award in the State where the arbitration proceedings and award had been given. This condition of “*double exequatur*” greatly restricts the smooth enforcement procedure of foreign awards in foreign States particularly, in the States other than where the award is rendered.¹¹⁹

Thus, the ICC embarked on the appraisal of the 1927 Convention and acquiesced it to the United Nations which had replaced the League of Nations. The need for review was found to be beneficial in order to consolidate the 1923 Geneva Protocol and the 1927 Geneva Convention as a singular law. This therefore brought about the promulgation of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention 1958). Apart from merging the two preceding instruments into a sole text, the primary revolution was that the award itself must be regarded, *prima facie*, as worthy of recognition.

2.5.0 NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 1958

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June, 1958, (known as the New York Convention),¹²⁰ is regarded as the most successful bilateral agreement worldwide with over 149 assenting parties. In fact, it is described by some scholars as the most

¹¹⁸ Geneva Convention 1927, 92LNTS 301(1929-30), Article 2.

¹¹⁹ United Nations, *Notes on Dispute Settlement in International Commercial Arbitration* (UN, New York, 2005) 201-22.

¹²⁰ United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards 1958 330 UNTS

significant and fruitful global Convention of the universe,¹²¹ and as one of the foremost pacts in respect of commercial transactions and trade law.¹²² Over 60 years ago since the New York Convention came into existence, the principles and doctrines imbedded in it have aided the emergence of significant documents such as the UNICTRAL Law and several domestic guidelines on arbitration.¹²³ The New York Convention came into existence because of the imperative need to ensure and guarantee the smooth enforcement procedure of an award around the globe.¹²⁴ Thus, the Convention desires for a hitch-free proceedings of enforcement of award and to enhance the effectiveness of arbitration clauses.¹²⁵

Nigeria assented to the New York Convention in 1970 but it took another 18 years to integrate it into the Nigerian arbitration law.¹²⁶ The integration of the New York Convention was made in the Nigerian Arbitration and Conciliation Decree 1988 (now Act), Section 54 and in the Second Schedule of the Act.¹²⁷ Consequently, the enforcement provisions of the New York Convention can be invoked and utilised via Section 54 of the ACA. This Section mandates signatory States to the New York Convention to ensure the enforcement of foreign arbitral awards within its

¹²¹ Lew J.M.D, Mistelis L.A & Kroll S.M, *Comparative International Commercial Arbitration* (2003).178.

¹²² Annan K., 'Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration,' in *Enforcing Arbitration Awards under the New York Convention, Experiences and Prospects* (Paper presented at 'New York Convention Day' in the Trusteeship Council Chamber of the United Nations Headquarters, New York on 10 June 1998 to celebrate the 40th anniversary of the Convention on Recognition and Enforcement of Foreign Arbitral Awards concluded on 10 June 1958, New York: United Nations) 2.

¹²³ Sanders P., *Foreword in ICCA's guide to the interpretation of the 1958 New York Convention: a handbook for judges* (International Council for Commercial Arbitration, Hague, 2011)7.

¹²⁴ Ibid.

¹²⁵ New York Convention 1958 330 U.N.T.S. 38(1959), Article III; Lew J.M.D, Mistelis L.A & Kroll S.M., *Comparative International Commercial Arbitration* (2003) 21; Sanders P., 'The making of the Convention' in *Enforcing Arbitration Awards under the New York Convention, Experiences and Prospects* (1998) 4.

¹²⁶ Arbitration and Conciliation Decree No 11, 1988.

¹²⁷ Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (2015) 156

jurisdiction using their own procedural rule of enforcement.¹²⁸ The New York Convention further mandates signatory States not to impose unnecessary conditions or excessive costs and the conditions for enforcing foreign awards should be on an equal level with the conditions for domestic awards.¹²⁹ Though, the award itself must be regarded and considered as being capable or worthy of enforcement. Therefore, the court must enforce the awards except where one of the grounds listed in Article V is proved.

The New York Convention improved on the 1927 Geneva Convention in numerous respects by providing for a broader description of enforceable awards.¹³⁰ The Convention prevents courts of signatory States from deciding on issues that are already covered by the arbitration clause. This is irrespective of whether they are existing or future disputes except where the dispute is one that cannot be settled by arbitration.¹³¹ Furthermore, the doctrine of *double exequatur* which was contained in the Geneva Convention as a prerequisite condition for enforcement of foreign award has been successfully eliminated to encourage finality of awards anywhere around the globe.¹³² Before the New York Convention came into force, the doctrine stresses that the arbitral award must undergo an official 'recognition' before the relevant courts in the State where it was given, for such an award to be entitled for enforcement in the foreign States.¹³³ However, the New York Convention has provided some relief and the award-creditor only needs to seek for a

¹²⁸ New York Convention 1958, 330 UNTS 38 (1959), Article III.

¹²⁹ Lew J.M.D., Mistelis L.A & Kroll S.M, *Comparative International Commercial Arbitration* (2003)694.

¹³⁰ Geneva Convention 1927 92LNTS 301(1929-30), Article I.

¹³¹ New York Convention` 1958, 330 UNTS 38, Article II.

¹³² Lew J.M.D, Mistelis L.A & Kroll S.M., *Comparative International Commercial Arbitration* (2003)20.

¹³³ Geneva Convention 1927 92LNTS 301(1929-30), Articles 1-3.

direct enforcement order of award at the foreign court, subject only to available procedures of the enforcing State.¹³⁴

The New York Convention further restructured the evidential burden of proof in arbitration system by shifting the burden of proof away from the award-creditor to the aggrieved party who is contesting the enforcement application. Before now, the burden of proof was on the award-creditors who must not only proof legitimacy of the award but, also that no reasonable ground exists that warrant the refusal of enforcement application.¹³⁵ The New York Convention shifted ground on this issue to establish a new novelty with the justification that ‘he who assert must proof.’ That is, it is the duty of the party who is aggrieved and contesting the award to show a reasonable cause for the refusal of such award. However, voluntarily compliance with the award does not affects this position, the burden of proof remains with the award-debtor.¹³⁶

Article V of the New York Convention set out specified grounds to which courts may refuse the enforcement application and the grounds can be categorise into two sets.¹³⁷ The first sets are procedural irregularity grounds¹³⁸ and the second set are subject matter arbitrability and public policy grounds.¹³⁹ However, the greatest concern is the fact that the New York Convention does not give an adequate and uniform meaning of these two important concepts of arbitrability and public policy; courts have to rely on the national laws in this respect. It has been argued that adequate caution is required when enforcing courts apply domestic standards to determine the

¹³⁴ Lew J.M.D, Mistelis L.A & Kroll S.M., *Comparative International Commercial Arbitration* (2003) 20.

¹³⁵ Geneva Convention 1927 92LNTS 301(1929-30), Article 2.

¹³⁶ New York Convention 1958, 330 UNTS 38 (1959), Article V.

¹³⁷ New York Convention 1958, 330 UNTS 38 (1959), Article V (1).

¹³⁸ The grounds are incapacity of the parties to enter into arbitration or lack of a valid arbitration agreement, lack of proper notice of the proceeding, where the award exceeds the term of agreement, lack of proper procedure for arbitration or improper composition of tribunal or where award is not binding or has been set aside or suspended by the relevant authority

¹³⁹ *ibid*, Article V (2) (a) and (b).

concept of public policy on foreign awards¹⁴⁰ because it can lead to complex legal problems and thereby, discourage the practice of arbitration in an international commercial disputes.¹⁴¹ As regard the subject matter arbitrability, scholars considered it unnecessary to have a separate provision for arbitrability ground in Article V (2) (a)¹⁴² with a view that, where the subject matter of the disputes violate local policies, it is automatically a public policy issue which should be determined in accordance with public policy rule of that State.

Furthermore, the opening paragraph of Article V generates divergent interpretations both by the courts and the scholars. The vague expression ‘may’ as used in Article V (1) of the Convention has been construed to mean that the courts possess discretionary power to enforce or refuse the award depending on the courts volition.¹⁴³ As the Supreme Court of Hong Kong observed, the discretionary power of the enforcing courts can operate to mean that the court can enforce an award even where one or more grounds for refusal stipulated in Article V are proved.¹⁴⁴ However, the concern is the fact that the Convention does not sufficiently provide a guide for the exercise of this discretion, the enforcing court is charge to decide what is fair and just in each situation.¹⁴⁵ Essentially, this means that the court may select the option to enforce an award despite the presence of any fact to the contrary. This, therefore, gives room for abuse of this

¹⁴⁰ Aksen B., ‘American Arbitration Association Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (1971) 3 SW.U.L. REV, 1,4.

¹⁴¹ Ishizumi K., ‘International Commercial Arbitration and Federal Securities Regulation: Reconciling Two Conflicting Policies’(2014) 6 (1), J. Comp. Bus & Capital Market L,(1984) 81-113, 86.

¹⁴² Ibid.

¹⁴³ China Agribusiness Development Corporation v. Balli Trading [1998] 2 Lloyd’s Rep 76, 79.

¹⁴⁴ Ibid.

¹⁴⁵ New York Convention 1958 330 UNTS 38 (1959), Article V.

power by the court. While Article V generally empowers courts to refuse enforcement in certain specific circumstances, the expression ‘may’ give the court the discretion to decide otherwise.¹⁴⁶

2.6.0. FOREIGN JUDGMENT (RECIPROCAL) ENFORCEMENT ACT

In 1960, Nigerian government enacted the Foreign Judgment (Reciprocal Enforcements) Act (1960 Act)¹⁴⁷ with the main purposes of regulating the enforcement procedure and easing the execution of foreign judgments/ awards rendered within the territory of the United Kingdom(UK) and its colonies.¹⁴⁸ The provision of Section 3 of the 1960 Act directs the appointed Minister of Justice of the Federation in Nigeria to treat with reciprocity any judgments/awards from foreign States(other than UK and its colonies) who will be willing to enforce similar judgments/ awards given in Nigeria.¹⁴⁹ Regrettably, as at the time of writing this thesis history revealed that none of the appointed Ministers of Justice in the Nigerian Federation took to this reciprocity treatment order as directed in Section 3. The fundamental question is whether such judgments/awards rendered in the foreign States outside UK and its colonies could be enforced in Nigeria in absenteeism of a reciprocity treatment order by the Minister of Justice.¹⁵⁰

¹⁴⁶ Ibid.

¹⁴⁷ See the opening title to the Foreign Judgment (Reciprocal Enforcement) Act Cap F35 LFN 2004.

¹⁴⁸ Foreign Judgment (Reciprocal Enforcement) Act Cap F35 LFN ,1960, Section 1.

¹⁴⁹ Act Cap F35 LFN 1960, Section 3.

¹⁵⁰ Inam W., ‘Nigeria: Supreme Court Creates Pitfalls on Enforcement of Foreign Judgments in Nigeria’.<<http://www.mondaq.com/nigeria/x/31865/supreme+court+creates+pitfalls+on+enforcement+of+foreign+judgment+in+nigeria>>. accessed 17 October, 2017; Omoaga G., ‘Legal Regime for the Enforcement of Foreign Judgments in Nigeria: An Overview’. <<http://ng.vlex.com/vid/regime-enforcement-judgment>>. accessed on 17 October, 2017.

This question was judicially tested in *Marculey v. R. Z. B Australia*.¹⁵¹ The apex Court in Nigeria made a landmark pronouncement that the major provisions of the 1960 Act will leads to sedentary of the law and remains inoperative in the absence of direct order of the Minister. The court concludes that Section 10 (a) of the 1960 Act could be invoked in the alternative.¹⁵² The court in *Vab Petroleum Inc. v. Mr Mike Momoh*¹⁵³ reasoned in the same direction with the court in the above case.

The positions of the courts in the above cases have ignited heat arguments by scholars. Principally, scholars described the position of the Supreme Court in *Marculey v. R. Z. B Australia* as a set of misperceptions of the law which is capable to cause uncertainty in the legal sphere.¹⁵⁴ Scholars further contended that the relevance of Section 10(a) is in relation to judgements/awards obtained after the Minister of Justice must have ordered for the reciprocity treatment. Hence, the provision of Section 10(a) lacks the strength to stand on its own without the support of an express reciprocity treatment order by the Minister of Justice. Sections 1-3 are the only provisions from the 1960 Act that are actively operational particularly, in the absence of reciprocity treatment order. Consequently, the other provisions of the Act can only gain the strength from Section 3 which without the order of the Minister, cannot operate and function.¹⁵⁵

In summary, it may be submitted that prior to the enactment of ACA in 1988 the 1922 Ordinance remained the only relevant law regulating the enforcement of foreign judgments/awards in

¹⁵¹ [2003] 18 NWLR (Pt. 852) 282.

¹⁵² *Vab Petroleum Inc. v. Mr. Mike Momoh* [2013]14 NWLR (Pt. 1374) 284.

¹⁵³ *Ibid.*

¹⁵⁴ Olawoyin A.A., 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10(1), J. P Int'l L., 140-141, 145; Inam W., 'Nigeria: Supreme Court Creates Pitfalls on Enforcement of Foreign Judgments in Nigeria'; Omoaga G., 'Legal Regime for the Enforcement of Foreign Judgments in Nigeria: An Overview.'

¹⁵⁵ *Ibid.*

Nigeria. Arbitration ordinance 1914, Geneva Protocol 1923, Geneva Convention 1927 and the 1960 Act were deficient for reasons identified above.

2.7.0 UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

The United Nations Commission on International Trade Law on International Commercial Arbitration 1985 (UNCITRAL Law) was established to provide an arbitration legal framework specifically, for international commercial disputes.¹⁵⁶ The UNCITRAL Law came into force to assist States to improve and harmonise their arbitration laws with the intention that each State arbitration law will reflect the international recognised standard as imbedded in the UNCITRAL Law.¹⁵⁷ UNCITRAL Law offers a good foundation for the development of domestic laws on arbitration.¹⁵⁸ It contains provisions for all stages of the arbitration system; the pre-arbitration, arbitration proceeding and, enforcement stages of award.¹⁵⁹

In 2006, the UNCITRAL Law was amended to take cognisance of the new technological innovations in order to develop a standard structure acceptable globally. In a bid to meet international standard Nigerian government embraced and moulded its arbitration law in line with the principles and values set out in the UNCITRAL Law. The UNCITRAL Arbitration Rules is also applicable in Nigeria and serves as a guide for Nigeria's arbitral procedure, offering wide-ranging procedural guideline on arbitral proceedings. The key aim is to produce a unified practical framework for international arbitrations taking into cognisance the flexible nature of

¹⁵⁶ (United Nations documents A/40/17, annex I and A/61/17, annex 1985). Herein after referred to as UNCITRAL Law.

¹⁵⁷ Amasike C.J., *Arbitration and Alternative Dispute Resolution in Africa* (Abuja, Nigeria, Yaliam Press Ltd 2007) 7.

¹⁵⁸ Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (2015) 141.

¹⁵⁹ Ibid.

alternative methods of dispute resolution.¹⁶⁰ UNCITRAL Rules is expressly embraced and adopted in the ACA via Section 53, therefore parties can choose and use the Rules to govern their arbitration proceedings provided it is suitable and agreeable to them.

However, there are numerous similarities in the ACA and the UNCITRAL Law. Both UNCITRAL law¹⁶¹ and the ACA¹⁶² explicitly demand written form of requirement for arbitration agreements, but further recognise some exceptions such as contracts that are concluded through other means of communication including oral agreement between the parties to resolve their disputes through arbitration. This is an indication that the existing laws in Nigeria are liberal and accommodate modern development in technology and, as well as the parties' autonomy to conclude commercial contracts through other means which are not necessarily in written form. The expression 'any means of communication' as used in Section 1 of the ACA indicates the leniency approach adopted by the drafters of the ACA in favour of the parties who are willing to opt for arbitration through other means of agreement other than by the written agreement.¹⁶³ Section 1 of the ACA align itself with the provision of Article 7 of the UNCITRAL Law which explicitly provides that arbitration agreements could be entered into by parties other than in the form of writing-based papers.¹⁶⁴ However, in term of applicability UNCITRAL Law is wider than the ACA. This is because ACA is restricted to disputes that are contractual in nature; the UNCITRAL Law on the other hand, is applicable to all disputes whether contractual or not.

¹⁶⁰ Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (2015) 146-147.

¹⁶¹ UNCITRAL Model Law 2006, Article 7.

¹⁶² ACA Cap.A18 LFN 2004, Section 1(1).

¹⁶³ Ibid.

¹⁶⁴ Nimmer R.T., 'Principle of Contract Law in Electronic Commerce' in Flecher I Mistelis, L & Cremona, M (ed), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell, London, 2001) 24.

Also, the UNCITRAL Law¹⁶⁵ and ACA¹⁶⁶ give parties the right to select their choice of applicable law to govern the resolution of their disputes. Both the UNCITRAL Law and ACA offer parties a wide range to choose from various States' laws, without restricting them to a particular law of a State. Therefore, it is targeted at the disputing parties to a transnational contract with the freedom to choose the law that is most appropriate for their disputes. However, UNCITRAL Law ignores some issues and leaves relevant questions unanswered. For example, the questions such as whether arbitral panel can ingress an implied term into the arbitration agreement or whether the panel is vested with the power to fill gaps where necessary. Importantly, which law should regulate the concept of arbitrability as provided in Article 34(2) (b) (i) UNCITRAL Law?¹⁶⁷ UNCITRAL Law fails to define certain essential terms thereby leaving the law open to various interpretations by the court.¹⁶⁸

It is pertinent to state, however, that the UNCITRAL law is only a model and as such it may be adopted wholly or partly or revised to meet the peculiarities of any State that chooses to adopt it.¹⁶⁹ One-third of the States claiming to have adopted the UNCITRAL Law are yet to recognise the fundamental provisions of Articles 34, 35 and 36,¹⁷⁰ more so, as the UNCITRAL Law is

¹⁶⁵ Article 28(1).

¹⁶⁶ Section 47.

¹⁶⁷ Herrmann G., *The Role of the Courts under the UNCITRAL Model Law Script* in *Contemporary Problems in International Arbitration* (Springer, Dordrecht, 1987) 164-187.

¹⁶⁸ Pierter S., 'Unity and Diversity in the Adoption of the Model Law' (1995) 11(1) *Arb Int'l*, 1-48, 23; Fatureti B., 'Complementary or Disparity? The UNCITRAL Model Law on International Commercial Arbitration 1985 and English Arbitration Act 1996 Revisited' (2012) 2 (1) *Uni Ibadan L. J.*, 97-118, 104; Kerr M., 'Arbitration and the Courts: the UNCITRAL Model Law' (1985) 1 *Int'l & Comp. L. Quarterly* 34, 7.

¹⁶⁹ Asouzu A.A., 'The Legal Framework for Commercial Arbitration and Conciliation in Nigeria' (1994), 9(2), *Foreign Inv. L.J* 214- 236, 230.

¹⁷⁰ Garavi H.G., 'Achievement and Limits of the UNCITRAL Model Laws Annulment Regime,' in *The UNCITRAL Model Law on International Commercial Arbitration* (Ass'n For Int'l Arb, London, 2010) 25, 137.

neither a Convention nor a treaty that would require either ratification or partial rejection by way of reservation clauses.¹⁷¹ However, while arbitration has achieved some form of global flexibility, the diversity of the UNCITRAL Law system around the world gives room for the lengthy arbitral proceedings. Furthermore, the UNCITRAL Law did not stipulate guidelines for the execution of awards.

2.8.0 ARBITRATION AND CONCILIATION DECREE 1988

After independence, the status of the trade connection between the Nigerians and the foreigners opened a new dimension to the use of arbitration in resolving disputes. As the commercial activities of the foreigners extended, their relationship with the natives became stronger.¹⁷² However, the 1914 Ordinance gave a lot of power to the courts over the arbitral process and this created uncertainty for the foreigners who saw this as a drawback.¹⁷³ This roused the desire of the Nigerian Government to raise its arbitration law to global standards particularly as it concerned international commercial disputes between contracting parties.¹⁷⁴ Therefore, the need to legislate a more vibrant arbitration law to deal with commercial transactions that the previous law were not equipped to handle, led to the enactment of the Arbitration and Conciliation Decree

¹⁷¹ Okekeifere A., 'Appointment and Challenge of Arbitrators under the UNCITRAL Model Law Part 1: Agenda for Improvement' (1999) 2(5/6) Int'l A.L.R., 167-198, 167.

¹⁷² Colin O., 'Arbitration and Mediation in Asean: The Law and Practice, Brunei Darussalam' <https://www.aseanlawassociation.org/docs/w4_brunei.pdf&ved=0ahUKEwj6-t-m6vDVAhUGZVAKHb3HDwoQFggMAA&usg=AFQjCNGnAXbY7ilSYqaJ1Ps9MIFawtI2_A> accessed on 24 July 2015; Rhodes-Vivour A., 'Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform' (Paper Delivered at the NBA, Maiden Conference, Abuja, 2006).

¹⁷³ Ibid.

¹⁷⁴ Akanbi M.M., *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (Lanbert Academic Publishing, 2012)78.

1988 (1988 Decree).¹⁷⁵ The 1988 Decree regulates arbitration law and practice in Nigeria and restrict its scope to disputes stemming from commercial interactions. And it applies to domestic and international commercial arbitration.

By virtue of Section 315 of the Constitution, the 1988 Decree remains a valid law in Nigeria because it has neither been repealed nor amended. The transition between military regime and civilian government changed the status as Decree to an Act and is referred to as Arbitration and Conciliation Act (ACA). The ACA is divided into four major parts: the first part contains provisions on arbitration system; the second part deals with conciliation; the third part contains provisions that deal with international commercial arbitration; and the last part contains miscellaneous provisions. In addition, ACA consists of three schedules: the arbitration rules; conciliation rules; and the New York Convention. As mentioned earlier, this chapter of the thesis is not on the detailed analysis of the regimes however, the significance of the discussion is to appreciate the development in the legal regime as it relates to the enforcement of awards.

ACA is considered innovative because it makes provisions for some salient issues as it relates to arbitration such as arbitration agreement;¹⁷⁶ appointment of arbitrators;¹⁷⁷ composition of arbitral tribunal;¹⁷⁸ rendering of award;¹⁷⁹ and enforcement of foreign awards. Another innovative aspect of the law is its application to international relations between parties and in relation to

¹⁷⁵Ibid, 76.

¹⁷⁶CapA18 LFN 2004, Sections 1-4.

¹⁷⁷ ACA CapA18 LFN 2004, Sections 6-11.

¹⁷⁸ Ibid, Section 11.

¹⁷⁹ CapA18 LFN 2004, Sections 24-28.

agreements executed in Nigeria.¹⁸⁰ The ACA is more extensive and comprehensive than the 1914 Ordinance and offers a unified regime for the effective resolution of commercial disputes.

The provisions of ACA captured the flexible nature of arbitration as an alternative to dispute resolution and is essentially founded on the principle of party autonomy. The authority of the arbitrator to act is derived from the parties' agreement; this means that the tribunal panel will continue to exercise power except the parties decide otherwise. The purpose of the arbitration as a form of dispute settlement is clearly stated in the ACA, which is primarily resolving issues between parties by an unbiased tribunal and ensuring full compliance with the essential values of arbitral proceedings.¹⁸¹ Furthermore, Section 34 of the ACA forbids court intervention in arbitration matters other than the specified situations explicitly listed in the ACA.¹⁸²

It is essential to note that arbitration and other similar mechanisms of resolving disputes in Nigeria today are developing and have contributed to the creation of professional bodies such as the Chartered Institute of Arbitrators (Nigeria) and the Association of Professional Negotiators and Mediators. Moreover, the said development has resulted in the formation of dispute resolution houses with booming patronage such as the Abuja Multi-Door Court. Based on this development, it can be rightly stated that in Nigeria, sufficient provision is made for arbitration proceedings in Nigeria. ACA offers specific and admirable legal rules for modern international commercial arbitration that will ensure free flow of business interactions within and outside Nigeria. However, ACA is not without its own limitations. One of the limitations is in the

¹⁸⁰ Akanbi M.M., *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (2012)77; Idornigie P.O., 'Anchoring Commercial Arbitration on Fundamental Principles' (2004) 23(1), *Arb & Med.* 65 ; Orojo J.O & Ojomo M.A., *Law and Practice of Arbitration Law in Nigeria* (Mbeyi & Associates, Nigeria, 1999) 166.

¹⁸¹ CapA18 LFN 2004, Section 14.

¹⁸² Ibid. see also Section 4, 7, 48 and, 52

definition of the term ‘arbitration.’¹⁸³ It describes arbitration restrictively to commercial transactions.¹⁸⁴ This is dangerous since there are other issues which are arbitrable but may not necessarily be commercial in nature.¹⁸⁵ Thus this thesis is in support of the view of some authors that the ACA should be amended to cover other transactions that are not commercial in nature.¹⁸⁶ Another limitation of the ACA relates to evidential rules in arbitration proceedings.¹⁸⁷ Section 20 of the ACA empowers the tribunal to take evidence either by oaths or affirmations but is silent on the application of rules of evidence in receiving such evidence.¹⁸⁸ The Evidence Act excludes itself from being applicable to arbitration proceedings under the ACA, before the arbitral panel in Nigeria. The Evidence Act states that arbitral matters are to be harmonised with the arbitration guidelines¹⁸⁹ thus, the arbitral panel is not under obligation to adopt the rules on the admissibility of documents or the giving of oral evidence. Nevertheless, it is argued that the courts will not uphold the admissibility of any evidence which an arbitral tribunal ought to have excluded. Thus, where it is erroneously admitted, the court may deem it necessary to obliterate those important parts of evidence that is rooted from the main dispute and an award reached from such obliterate evidence will be set aside. However, provided that the arbitrator acts justly and prudently, an award will not be set aside just because it was reached based on evidence inadmissible in court hearings.¹⁹⁰

¹⁸³ Ibid, Section 2.

¹⁸⁴ ACA CapA18 LFN 2004, Section 57.

¹⁸⁵ Akanbi M.M., *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (2012) 78

¹⁸⁶ Idornigie PO, *Commercial Arbitration Law and Practice in Nigeria* (2015) 405.

¹⁸⁷ Evidence Act Cap E14 LFN, 2011, Section 256(1)(a).

¹⁸⁸ Orojo J.O & Ojomo M.A., *Law and Practice of Arbitration Law in Nigeria* (1999) 217, 219-237

¹⁸⁹ Evidence Act Cap E14, 2011, Section 15(2) & (3).

¹⁹⁰ Shihata F.I., ‘Obstacles Facing International Arbitration’ (1986) 4 (1), *Berkeley J. Int. Law*, 209.

Furthermore, ACA fails to stipulate mode of application for the enforcement order of an award. This is governed by the various High Court Rules.¹⁹¹ One is tempted to question the suitability of motion *ex parte* and originating summons as provided in the Rules as a method of initiating enforcement proceedings,¹⁹² because motions are designed for interlocutory applications and any order of courts granted from such applications can only last for 14 days. Whereas enforcement orders are permanent in nature just like court judgments;¹⁹³ an enforcement proceeding is expected to be a summary since the enforcing court only asks to enforce the award without necessarily hear the merits of the case and without sitting as an appellate court.¹⁹⁴ It is therefore argued that the use of motions in enforcement procedure allows for unnecessary delay and denies the party its right to enjoy the outcome of the arbitration.¹⁹⁵

The use of originating summons is most unsuitable also because originating summons are known and used for interpretation and construction of law and legal documents.¹⁹⁶

2.9.0 CONCLUSION

This chapter has considered the history of enforcement regimes in Nigeria. The chapter revealed that arbitration is not novel in Nigeria because it has been a matter of concern from when Nigeria was under British colonialism. The chapter started with a discussion on the 1914 Ordinance and reached the conclusion that in relation to foreign arbitral awards, the Ordinance was a major

¹⁹¹Kuforiji v. Nigeria Railway Corporation [1972] U.I.L.R 29; NNPC v. KLIF Co. Nag Ltd [2011]4 SC (Pt.1) 108; Aina K., 'Procedure for the Enforcement of Domestic Arbitral Awards in Nigeria' (2014) Civ. Proce. Rev., 5(2), 22-44, 36.

¹⁹² Federal High Court (Civil Procedure) Rules 2009, Order 14 Rule 15 of the Federal High Court (Civil Procedure) Rule; The High Court of Lagos State (Civil Procedure) Rules, 2012

¹⁹³ Lagos State High Court (Civil Procedure)Rules 2012, Order 39 Rule 1.

¹⁹⁴ Falobi v. Falobi [1976]1 SC, 9-10.

¹⁹⁵ Aina K., 'Procedure for the Enforcement of Domestic Arbitral Awards in Nigeria' (2014) 32.

¹⁹⁶ Atolagbe v. Awani [1991] 9 NWLR (pt. 422) 536 ; Dapianlone v. Dariye [2007] 4 SC (pt. II)118.

setback because it is exclusively based on domestic matters. This chapter also shows that prior to the 1988 Decree, the Reciprocal Enforcement of Judgments 1922 Ordinance was the only law applicable law to foreign awards in Nigeria as other enactments were inadequate to cater for it. The thesis will take the discussion further in Chapter Three where the relevant provisions in the ACA on enforcement of awards will be discussed. Sections 51, 52 and 54 are the main focus in the next chapter. Challenges posed with these provisions will also be analysed.

CHAPTER THREE
ENFORCEMENT PROVISIONS ON THE ARBITRAL AWARDS
UNDER THE ARBITRATION AND CONCILIATION ACT 1988

3.0.0. INTRODUCTION

In 1988, the ruling military government enacted the Arbitration and Conciliation Decree¹⁹⁷ (now known as ACA) to regulate arbitration commercial practice in Nigeria.¹⁹⁸ ACA unlike the previous arbitral regimes in Nigeria is more comprehensive and dynamic as it is reliably relevant to both domestic¹⁹⁹ and international arbitration.²⁰⁰ ACA creates two principal enforcement regimes, the first can be found in the provisions of Sections 51 and 52 which derived from Articles 35(1) & (2)²⁰¹ and Article 36²⁰² of the UNCITRAL law and the second arbitral regime is provided for under Section 54.²⁰³ This chapter therefore focuses on the analyses of these relevant enforcement regimes identified in the ACA.

Furthermore, the chapter examines grounds for refusal of enforcement application by the courts as provided in the ACA. This is to illustrate the right of an aggrieved party to resist the enforcement upon solid grounds. Finally, the chapter analyses the hindrances to the provisions of

¹⁹⁷ No.11 of 1988. See CapA18, LFN 2004.

¹⁹⁸ The law was made applicable throughout the Federation. Decree expressly repealed the 1914 Act.

¹⁹⁹ Sections 1 to 36 deals with domestic arbitration. Orojo O.J & Ajomo M.A., *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi and Associates, Lagos, 1999)166; Idornigie P.O. 'Anchoring Commercial Arbitration on Fundamental Principles' (2004) 23(1) Arb. & Med. 65.

²⁰⁰ Part III of the ACA contains Sections 43 to 54 that deals with international arbitration.

²⁰¹ Article 35 deals with enforcement of awards.

²⁰² Article 36 deals with grounds under which an aggrieved party can resist enforcement application before the enforcing courts.

²⁰³ The New York Convention has already been discussed in the previous chapter of the thesis.

enforcements of awards in Nigeria especially foreign awards. The area of concern will be the exploration of the inherent defects in the provisions of the arbitration law.

3.1.0. RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

The importance of recognition and enforcement cannot be underestimated in the arbitration system because without an effective enforcement procedure the whole arbitration system is worthless.²⁰⁴ Therefore, the enforcement process serves as the most significant stage in the arbitration process. Thus, the ‘term recognition’ and ‘enforcement’ are two distinct words with different meanings. Courts and scholars have attempted to give meaning to these terms disjointedly and coherently.²⁰⁵ The court in *Tulip (Nig) Ltd v. N.T.M.S.A.S*,²⁰⁶ defined ‘recognition’ to mean a legal acceptance and admission of a certain deed with the intention of giving effect to it.²⁰⁷ Recognition of awards basically implies legal acknowledgement and acceptance. When courts recognise an award, it simply signifies that an act done by the arbitrator is legal. In other word, ‘recognition’ operates as a defense to prevent an attempt to initiate fresh proceedings on the same subject of disputes.²⁰⁸

However, the term ‘enforcement’ connotes giving legal force to an arbitral award.²⁰⁹ Thus, ACA in its provision of Section 31 (1) establishes ‘recognition’ of an award as the prerequisite condition to enable a winning party to seek enforcement in Nigeria. Basically, courts can only

²⁰⁴ Lew J., Mistelis L. & Kroll S., *Comparative International Commercial Arbitration* (Kluwer, London, 2003)689.

²⁰⁵ *Tulip (Nig) Ltd v. N.T.M.S.A.S* [2011] 4 NWLR(Pt. 1237) 279; Lew J., Mistelis L. & Kroll S., *Comparative International Commercial Arbitration* (2003)689-690; Refern A. & Hunter M., *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) 67.

²⁰⁶ [2011] 4 NWLR (Pt. 1237) 279 paras A-B.

²⁰⁷ Ibid.

²⁰⁸ Lew J., Mistelis L. & Kroll S, *Comparative International Commercial Arbitration* (2003) 690.

²⁰⁹ Refern A. & Hunter M., *Law and Practice of International Commercial Arbitration* (2004) 10-09

enforce a 'recognised award' but awards can be recognised without necessarily being enforced by the courts.²¹⁰ Therefore, an enforcement order of an award by the court indicates that such award has been recognised and due for execution; the enforcing court ensures that the award-debtor comply with the decision of the arbitrator to which he has subjected himself.²¹¹

Impliedly, every award duly reached by the tribunal is presumed binding, enforceable and is expected to be complied with by the parties without delay.²¹² This, in effect, means that where the award-debtor voluntarily obey the award given, judicial enforcement of award may not be necessary. It is the dissenting attitude of the award-debtor that frequently force an award-winning party to approach the court to compel the enforcement. This action is required because the arbitral award does not possess any form of legal force in situations where an award failed to obey, the award itself lacks binding force unless the judicial powers gives breathing air through enforcement order.²¹³ Hence, the award is a toothless dog which cannot bite until a court of law gives teeth to it. This was emphasised in *Ofomata & Ors v. Anoka & Ors*²¹⁴ where the court observed that a judicial enforcement order is required since an arbitral award lacks legal force unlike the court judgement. ACA in certain provisions permit award-creditor to seek judicial enforcement in this circumstance.²¹⁵ Section 51 mandates enforcement courts to give effect to foreign arbitral awards though, subject to Section 32 of the same Act. A detail analysis of this provision is discussed below.

²¹⁰ Orojo J.O & Ajomo M.A, 'Law and Practice of Arbitration and Conciliation in Nigeria (1999) 57

²¹¹ *ibid*

²¹² *Environmental Dev. Construction v. Umara Associates Nig* [2000] 4 NWLR (Pt 652)305-306, paras H-A; *Ras Pal Gazi Const. Co v. FCDA*[2001]10 NWLR (Pt.722)574, paras F-H

²¹³ *Okechukwu v. Etukokwu* [1998] 8 NWLR (Pt. 526)529-530

²¹⁴ (1974)4 ECSR 251

²¹⁵ ACA Cap.A18 LFN 2004, Sections 31 and 51. Domestic awards can be enforce under Section 31(1) of the ACA.

3.2.0. ENFORCEMENT OF AWARD UNDER SECTION 51 OF THE ACA

One of the enforcement provisions in the ACA is Section 51. Foreign awards can be enforced via this provision irrespective of the State in which it is given.²¹⁶ The use of the word ‘irrespective’ can indicate that the reciprocity requirement is no more a condition to enforce under Section 51. Prior to the enactment of the ACA, the earlier decisions of the courts established reciprocity treatment as a pre-condition to seek enforcement of foreign arbitral award in Nigeria.²¹⁷ In 1965 the Supreme Court observed that Nigeria will only enforce awards from the State with reciprocity undertaking with Nigeria.²¹⁸ Again, in 1974 the same position was upheld in *M.S.S v. Kano Oil Millers*²¹⁹ by the same court. Can courts’ decisions in these cases construe to mean that foreign awards in Nigeria are still subject to the reciprocal rule despite the provision in the ACA that says otherwise? The courts have not had the opportunity to interpret and rule on the phrase ‘irrespective of the country’ after the promulgation of ACA. It is hoped that courts will give effect to the true intention of drafters of the ACA when faced with such issue in the near future. This is to encourage parties to seek enforcement under this provision without being concerned with the reciprocity rule.²²⁰

Hence, the application for enforcement must be submitted along with the original copy of the award or its certified copy, arbitration agreement or certified copy and, English translated copy of these documents where necessary.²²¹ In *Sundersons Ltd & Milan Nigeria Limited v. Cruiser*

²¹⁶ ACA CapA.18 LFN 2004, Section 52(1). *Tulip (Nig) Ltd v. N.T.M.S.A.S* [2011]4 NWLR (Pt. 1237), 274-275, paras H-A

²¹⁷ *Toepter Inc of New York v John Edokpolor* (1965) All NLR 92; *M.S.S v. Kano Oil Millers* (1974) NNLR 1.

²¹⁸ A.C. *Toepter Inc of New York v John Edokpolor*, (1965) All NLR 92

²¹⁹ (1974) NNLR 1.

²²⁰ Some other regimes (e.g New York Convention) on enforcement make ‘reciprocity rule’ a prerequisite condition for enforcement.

²²¹ ACA CapA18 LFN, 2004, Section 51(2).

Shipping PTE Ltd & Universal Navigation PTE Ltd,²²² the court placed emphasis on the danger in importing additional requirements to the grounds stipulated in Section 52 for resisting an enforcement. The court observed that failure to attach original agreement or its certified copy along with the application for enforcement, did not affect the substance of the enforcement proceedings nor did it render the application incompetent.²²³ Therefore, the requirements in Section 51(2) should not be confined as one of the grounds for refusal in Section 52 of the ACA. The court in *Sundersons & Millers* case was right to have rejected the contention of the aggrieved party objecting to the application for enforcement on technical grounds. This is because doing so would have been detrimental to the party seeking enforcement.²²⁴

What is not clear is the reference to Section 32 in Section 51 of the ACA. This was intended to indicate the rights of an aggrieved party as it relates to enforcement without starting how these rights can be exercised. This is so since Section 32 does not state the grounds to be considered by the courts for refusal of an arbitral award before them.²²⁵ It is submitted that there is no legal reasoning to justify the insertion of Section 32 in the enforcement provision as contained in Section 51 of the ACA. Subjecting the right of enforcement under Section 51 to provision of Section 32 is wasteful of space and inexplicable.

The subsequent part of this chapter will discuss the specified grounds as contained in the ACA upon which the court may refuse the application for enforcement. These refusal grounds are provided for in Section 52 of the ACA.

²²² [2015] 17 NWLR(Pt. 1488) 357 C.A.

²²³ Ibid.

²²⁴ *M.V Lupex v. NOCS Ltd* [2003]15 NWLR (Pt. 844)469.

²²⁵ ACA CapA18 LFN 2004, Section 32.

3.2.1. Grounds for Resisting the Award under ACA

The grounds for refusal of enforcement of award can be classify into two sets. The first are²²⁶ where there is incapacity of the parties; invalid arbitration agreement; lack of due process; jurisdictional issues; no linkage in the submission and award; agreement or relevant law was not obeyed in selection of procedure or arbitral panel; the award cannot be upheld or binding for legal reason or; the competent court had set such award aside or suspend it.²²⁷ Inarbitrability of the subject matter and violation of public policy constitute the second set of grounds for refusal of award in the ACA.²²⁸ The first set as contain in Section 52(2)(a) (i)-(vii) can be raised by the aggrieved party are aimed at protecting the parties against private injustice while the second set contain in Section 52(2)(a &b) are meant to protect the interest of the enforcing State.

These specified grounds contain in Section 52 are of great importance as they signify a globally recognised standard which is identical with the provisions in the Second Schedule of ACA²²⁹ and the UNCITRAL Model Law.²³⁰ The burden of proof remains with the party resisting the application for enforcement.²³¹ Hence, it is apposite to examine each of these grounds stipulated in Section 52 of the ACA in order to assess the judicial attitude in this perspective.

3.2.1.1. Legal Capacity of the Party

The first ground under which an award-debtor can challenge an award is where there is evidence of deficiency in the party's legal capacity to the arbitration. This right of challenge avail to the

²²⁶ Ibid, Section 52(2)(a)(i)-(vii).

²²⁷ 52(2)(a) (i)-(vii)

²²⁸ ACA Cap.A18 LFN 2004, Section 52 (2) (b) (i)-(ii).

²²⁹ Second Schedule contains provision of New York Convention.

²³⁰ UNCITRAL Model Law 2006, (United Nation documents A/40/17, annex I and A/61/17, annex), Article 36.

²³¹ See introductory sentence in Section 52 which afford party opportunity to request the court to refuse enforcement if party furnishes proof of the grounds listed therein.

award-debtor is provided for in Section 52(2) (a) (1) of the ACA and in the Second Schedule of ACA, Article V (1) (a). Conventionally, capacity in this regard demands each party to arbitration to possess a required legal capacity to create an arbitration agreement.²³² Hence, parties to arbitration does not necessarily refer to an individual alone, but it could also be partnerships, corporations, State and States agencies etc.²³³

With regard to an individual, parties' choice of contract law of a particular State determines the capacity.²³⁴ Ordinarily, the general law of contract regulates the legal capacity of the parties however, various States' contract law differ as regard the determination of parties' legal capacity. In Nigeria, legal capacity is examines through parties' choice of contract law as selected to govern their arbitration contract and where parties made no choice, the contract law of the place where arbitration agreement was concluded determines the legal capacity.²³⁵

As regards corporate entities, the contract law put in place at the State where such company/ corporation incorporated its business determines it legal capacity.²³⁶ However, some States impose restrictions on the capacity of it agencies, corporations and parastatals through their arbitration laws as a measure to regulate practice of arbitration particularly where State or it agency is a party.²³⁷ In Nigeria, there is no such restriction. However, France in its French Civil Code prohibits arbitration in a dispute that affects public interest at large, particularly, where a

²³² Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (2015) 305.

²³³ Redfern A., Hunter M., Blackaby N., Partasides C., *Law and Practice of International Commercial Arbitration*(Forth Edn, Sweet & Maxwell, 2004)145.

²³⁴ Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (2015) 305.

²³⁵ ACA Cap.A18 LFN, 2004, Section 52(1)(a); Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (2015) 305-310.

²³⁶ Ibid.

²³⁷ French Civil Code Act No 75-596, 1975, Article 2060; Implementation of the Saudi Arabian Arbitration Regulation Decree of 13.03.1399 (H) 1980.

public agency or State is a party.²³⁸In Saudi Arabia, the State or its agencies need approval of the relevant authorities in order to obtain their legal capacity to enter into arbitration agreement as it relates to international commercial arbitration.²³⁹This restriction on legal capacity in some arbitral regimes have been subject to criticism.²⁴⁰It is the contention of the scholars that efforts of these States would have produced positive result if it had been concentrated on the arbitrability of disputes submitted for arbitration. Once the subject matter is arbitrable, State or its agencies and corporations should have the liberty to choose the appropriate means of settling future disputes.

Surprisingly, while construing the provision of Article V (1) (a) of the Second Schedule of ACA which is similar to Section 52(2) (a) (i), some judges have held that the defence of incapacity could be raised by the aggrieved party to challenge the enforcement application notwithstanding the status of the party involved.²⁴¹ This position creates doubts in the regimes of the States who placed restrictions therefore, one may describe the arguments of scholars who criticised the restriction on the legal capacity as a tenable one that deserves a reconsideration.

However, some courts and scholars have attempted to enlarge the scope of legal capacity in arbitration beyond what is necessary. The Spanish Supreme Court in *Union De Cooperativas Agrícolas Epis-Centre v. La Palentina SA*²⁴² held that failure to obtain power of attorney offends

²³⁸ French Civil Code Act No 75-596, 1975, Article 2060.

²³⁹ Implementation of the Saudi Arabian Arbitration Regulation Decree of 13.03.1399 (H) 1980; Swiss PIL Act Chap.12 1987, Article 177(2).

²⁴⁰ Goldman F.G., 'International Commercial Arbitration,' in *Gaillard E & Savage J* (ed) (Kluwer law, Hague, 1999). 539; Paulsson J., 'May a State invoke its internal law to repudiate consent to international Commercial Arbitration?' (1986) 2 Arb Int'l, 48-98, 76.

²⁴¹ R.L v. JSC Z factory, Supreme Court, Georgia., [2 April 2004], a-204-sh-43-03; Agrimpex S.A v. J.F. Braun & Sons, Inc. , Supreme Court, Greece, [14 January 1977], IV .Y.B.Com Arb. 269 (1979).

²⁴² 17 February 1998, XXXVII Y.B Com. Arb. 533(2002).

incapacity ground under the New York Convention as contained in the Second Schedule of ACA.²⁴³ This decision has created concerns that require caution. Legal capacity and power of attorney cannot be fused and construed as meaning the same thing because, there is clear distinction between the two. Although some writers have argued that incapacity as a ground should cover where the party acts beyond the authority or power conferred on him,²⁴⁴ this attempt is dangerous. The issue of legal capacity of the party should be given restrictive interpretation, extending it beyond what is necessary will have drastic effects on the finality of the award.

3.2.1.2. Invalid Arbitration Agreement

By Section 52(2) (a) (ii), invalid arbitration agreement creates another ground which gives right of challenge to the award-debtor to approach the court and seek for refusal of enforcement. This is comparable to the ground found in the second aspect of Article V (1) (a) contains in the Second Schedule of ACA which is identical with Section 52(2) (a) (ii). The chosen arbitration law regulating the arbitration proceeding is relevant to resolve the issue of validity of the arbitration agreement.²⁴⁵ Where no arbitration law is elected or where parties could not reach a consensus, arbitration law put in place at the seat of arbitration determines the validity.²⁴⁶ However, judicial cases illustrate that courts are eager to consider the available arbitration law of the State particularly where arbitration proceeding was heard, whether or not parties had chosen

²⁴³ Dana Feed A/S v. OOO Artic Salmon , Federal Arbitrazh Court, Northwestern District, Russian Federal, 9 December 2004, XXXIII Y.B. Com . Arb. Arb(2008).

²⁴⁴ Goldman F.G., ‘International Commercial Arbitration,’ in *Gaillard E &Savage J* (ed) (1999)539; Paulsson J., ‘May a State invoke its internal law to repudiate consent to international Commercial Arbitration?’ (1986) 98, 76.

²⁴⁵Ibid.

²⁴⁶Paulsson J., ‘May a State invoke its internal law to repudiate consent to international Commercial Arbitration?’(1986) 98, 76.

the applicable law.²⁴⁷ This was the situation in a case in Sweden where the court applied the law of the seat of arbitration without first considering whether the parties had earlier selected their choice of an applicable law.²⁴⁸

3.2.1.3. Lack of Due Process

Another ground that constitutes a ground for refusal of enforcement is provided in Section 52(2) (iii). This is similar to the provision found in Article V (1) (b), Second Schedule of ACA. This provision demands every arbitration proceeding to follow proper procedure as chosen by the parties. The provision aims to ensure that proper due process is observed as it relates to the notice of appointment of the arbitrators, notice of proceedings as well as parties' presentation of their case before the arbitral panel. The key motive is to instill and boost parties' confidence in the international arbitration as a system that is fair and just regardless of the status of an individual party to the arbitration.²⁴⁹

Globally, the significance accorded to the principle of fair hearing cannot be overemphasised. The Supreme law in Nigeria provides in Section 36 of 1999 Constitution that court or tribunal acting in judicial capacity should observe fair hearing.²⁵⁰ The principle of fair hearing demands equal opportunities to the parties without being biased to one party against the other during and after the proceeding.²⁵¹ Hence, Section 52(2) (a) (iii) requires a 'total denial' of the right to be

²⁴⁷ G.A Pap-KG Holzgrosshandlung v. Ditta Giovanni G Pecoraro, Court of Appeal of Naples, Italy, 1978, VI Y.B. Com. Arb 228 (1981).

²⁴⁸ Planavergne S.A, Fontanes v. Kalle Bergander Stockholm AB, Svea Court of Appeal, Sweden, 2001, T 4645-99.

²⁴⁹ Ibid.

²⁵⁰ Ibid, 205, paras B-E; Bill Const. Co. Ltd v. Imani & Sons Ltd [2006] 19 NWLR (Pt. 1013)1.

²⁵¹ Stabilili Visinoni Ltd v. Mallinson &/ Partners [2014] 12 NWLR, (Pt. 1420)202, paras E-G.

heard, for it to constitute a ground of refusal under this provision.²⁵² Thus, the court observed that party who presented his case in a form of a letter, was not denied of his right to fair hearing.²⁵³ Likewise, physical attendance at the proceedings is not an evidence to show that principle of fair hearing was observed.

As argued in this thesis, lack of due process as contains in Section 52 (2) (a) (iii) overlaps with Section 52 (2) (b) (ii) that deals with public policy ground.²⁵⁴ Violation of due process is as good as mean violation of fair hearing and, thereby constituting a breach of public policy. It is not surprising that parties can raise both provisions in an effort to resist enforcement of award.²⁵⁵ This was what happened in the U.S case, where the court rightly upheld the application seeking to resist enforcement on the ground that the party was denied fair hearing to present its case thereby, contradicting US public policy.²⁵⁶

3.2.1.4. Excess of scope of Jurisdiction

Section 52(2) (a) (iv) provides ground to challenge an award where the arbitral panel acted outside the power and right conferred on him in the agreement. Second Schedule of ACA, Article V (1) (c) contains a replica of this provision.²⁵⁷ The important question relevant to this

²⁵² Continental Sales Ltd v. R. Shipping Inc. [2013] 4 NWLR (Pt. 1343).

²⁵³ Ibid.

²⁵⁴ See Chapter three of this thesis.

²⁵⁵ Parson & Whittemore Overseas Co., Inc v. Societe General de l' Industrie du Papier RAKTA and Bank of America 500F.2d 969(2nd Cir., 1974).

²⁵⁶ Ibid.

²⁵⁷ Kroll S.M., 'Commentary on the German Arbitration Law' (10th Book of the German Code of Civil Procedure) in Bockstiegel , Kroll & Nacimiento (eds) *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International, 2008)243.

thesis is the position of the law where an award contains reliefs not sought in the parties' pleadings before the tribunal. Does Section 52(2) (a) (iv) extend to cover such a situation? Nigerian courts have not yet ruled on this issue of concern, therefore, UNCITRAL guide can be of help here. Going by the UN interpretation guide on Article V (1) (c), which is a similar fashion of Section 52(2) (a) (iv) of the ACA, distinction exist between reliefs sought in the pleadings and those subjects specified in the arbitration agreement.²⁵⁸ Arbitral awards that deal with the reliefs not sought cannot be challenged under Article V (1) (c). This is because arbitrators are permitted to grants reliefs not sought, provided the reliefs are within the wider discretion of the arbitral panel.²⁵⁹ This is usually so where such reliefs are consequential to the main reliefs sought in the agreement. It is therefore, hoped that this same reasoning will be adopted by the Nigerian courts when faced with such an issue so as to do justice base on the individual cases.

3.2.1.5. Beyond the parties' Submissions in the Agreement

An award may be challenged on the ground that the award covers 'matters' that cannot be linked with the submissions in the arbitration agreement. The word 'matters' in Section 52(2) (a) (v) can generates two distinct meaning. First, parties may, by arbitration agreements, specifically identify subjects over which the tribunal is authorised to have jurisdiction. Second, through arbitration agreement, parties can explicitly agree to impose the outcome of the arbitration

²⁵⁸ Ministry of defense of the Islamic Republic of Iran v. Gould, Inc., 1992, 969 F.2d 764; The Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc., District Court, Southern District of California, United States of America, 1998, Civ Case No. 98-1165-B.

²⁵⁹ Telenor Mobile Communications AS v. Storm LLC, District Court, Southern District of New York, United States of America, 2007, 524, F. Supp. 2d 332.

(award) on the parties only.²⁶⁰ On the first point, the enforcing court will assess and determine whether the award emanates from the specified subjects mentioned in the agreement.²⁶¹ The court in Italy took this position where the arbitration agreement between the parties specifically conferred jurisdiction on the arbitrator to hear and determine only on non-technical disputes between them to an arbitral tribunal if a dispute arises. The Appellate Court refused to enforce the technical part of the award that was not in contemplation in the arbitration agreement.²⁶² As regard the second point, an aggrieved party can resist enforcement of awards on the ground that the award was given against a person that was not intended in the agreement between the parties.²⁶³

A US court refused to grant an enforcement order because the tribunal gave an award against a third party who was not envisaged in the agreement.²⁶⁴ Hence, the issue is whether an award emanates within the contemplated ‘matter’ or ‘parties’ as intended within the submission of the agreement. This was the reason why some scholars argued that only specified issues in the agreement are ‘matter’ intended by the parties.²⁶⁵

The ACA further provides that if summited disputes can be disjointed from those not submitted, only parts of awards emanate from submitted disputes will be enforceable.²⁶⁶ This was the

²⁶⁰ Born G.B., *International Commercial Arbitration* (Sweet and Maxwell, Hague, 2014) 1369-72; York Air-conditioning & Refrigeration Inc., v. Lam Kwai Hung T/A North Sea A/C Elect. Eng. Co [1995] 1 HKC 287.

²⁶¹ Ibid.

²⁶² General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria v. SPA. Simer [1981] VIII Y.B Com Arb 386 (1983).

²⁶³ First Investment Corp. (Marshall Island) v. Fujian Mawei Shipbuilding Corp [2007] Min Si Ta Zi No. 35, XXXV Y.B Com Arb 349, (2010); Aoetker Germany v. Sinotrans Nanjing Co., Ltd [2000] Jio Ta Zi No. 11.

²⁶⁴ FIAT SPA v. The Ministry of Finance and Planning of the Republic of Suriname, [1989] WL 122891.

²⁶⁵ Redfern A. & Hunter M., *International Commercial Arbitration* (2004) 645; Born G.B., *International Commercial Arbitration* (2014) 3544-45.

²⁶⁶ See R.M.A & F.C v. U.E.S Ltd [2011] 9 NWLR (Pt. 1252)407, paras B-F.

position in an English case where the court enforced only parts that are subject of arbitration.²⁶⁷ This is a welcome development as this locus ensures all efforts in the arbitration proceedings are not a total waste.

3.2.1.6. Composition of Panel of Tribunal and Procedural Rules do not comply with the Agreement

The sixth and seventh grounds in which the aggrieved party can challenge an award is where the arbitral panel was not properly composed or procedure used in the arbitration proceeding violates the agreement.²⁶⁸ Ordinarily, the courts access the violation of these grounds by examining what is provided for in the parties' arbitration agreement between them.²⁶⁹ Thus, where parties failed or could not reach consensus in the arbitration agreement on the composition of the panel or on procedure to be adopted, the position of the arbitration law of the State where arbitration took place will be access on these issues to guide the court.²⁷⁰

It is imperative to observe that the chosen arbitration law that parties agreed on to govern the issues of composition or arbitral procedure may conflict with the mandatory rules of the seat of arbitration or enforcing State. This is the question of balancing both the parties' independence and the public interest. One side of the argument is that if parties obey the mandatory rules of the

²⁶⁷ Nigeria (NNPC) v IPCO (Nigeria) Ltd, Court of Appeal in England [2008] ECWA Civ 1157; IPCO (Nigeria) Ltd v. Nigeria National Petroleum Corp[2008] EWHC 797 .

²⁶⁸ ACA Cap.A18 LFN 2004, Section 52(2)(a)(vi).

²⁶⁹ Polimaster Ltd , NA &SE Trading Co, Ltd v. RAE Systems Inc. Court of Appeals, Ninth Circuit, United States of America, 28 September 2010, 08-15708, 09-15369; Rederi Aktiebolaget Sally v. S.r.l. Termarea, Court of Appeal of Florence, Italy, 1978, IV Y.B Com. Arb. 294 (1979).

²⁷⁰ ACA Cap.A18 LFN 2004, Section 52(2)(a)(vii); Idornigie P.O., 'Report of the Secretary- General: Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (New York, 1958), A/ CN.9/168', in *X Yearbook of the United Nations Commission on International Trade Law* (UN, Hague, 1979) 106.

State where arbitration proceedings took place, in violation of their agreement, such violation should not constitute a ground to challenge the award at the enforcement stage.²⁷¹ The second side of the argument is that arbitration agreement between the parties supersedes mandatory rules, therefore parties' agreement prevail.²⁷²

The first argument was adopted in *M.V Panormos Bay v. Plam Nig. Plc*²⁷³ where the Nigerian court observed that mandatory law of Nigeria would prevail regardless of any prior agreement consented to by the parties particularly, where such an agreement contradicts public policy or violates any existing law in Nigeria.²⁷⁴ However, where party voluntarily took part either impliedly or by conduct in the procedure or law adopted in the arbitration proceedings, he cannot later resist the enforcement of such award emanating from the outcome of such proceedings that he initially submitted himself to.²⁷⁵

3.2.1.7. The Award Non-binding, Set Aside or Suspended

This is another ground under which the aggrieved party can challenge the award where it is not binding or has been suspended. This provision of the ACA is in *pari pasu* with the provision in the Second Schedule of ACA, Article V (1) (e). The ACA did not define the term 'binding' and thus the subject is left for the Nigerian courts to determine the circumstances under which an award should be considered binding. However, where the court is face to determine the question

²⁷¹ *M.V Panormos Bay v. Plam Nig. Plc* (2004)5 NWLR [Pt. 855]1,14; *Tawa Petroleum v. M.V. Sea Winner* (3 NSC, 25.

²⁷² *Ibid.*

²⁷³ (2004)5 NWLR [Pt. 855]1,14.

²⁷⁴ Idornigie P.O., 'Report of the Secretary- General: Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards(New York , 1958) , A/ CN.9/168', in *X Yearbook of the United Nations Commission on International Trade Law* (UN, Hague, 1979) 106.

²⁷⁵ *Atoju v Triumph Bank Plc* [2016] 5 NWLR (Pt. 1505), 305, paras D-E.

whether the award before it can be regarded as ‘binding’, the first relevant to search is the law of the State where the award was given.²⁷⁶ Conversely, courts may also use their discretion to interpret what a binding award should be and the courts could apply them together.²⁷⁷

As regards setting aside, the award must have been effectively set aside for it to constitute a refusal ground for enforcement. This ground requires actual pronouncement of the court declaring an award as being set aside. Hence initiating a court case as a move to set aside an award is insufficient to raise this challenge.²⁷⁸ In essence, only if the party had successfully won the set aside case with the pronouncement of the relevant court, will he have the right to challenge the award under this ground.²⁷⁹

Hence, an award can also be challenged via Section 52 (2) (a) (viii) where it being been suspended by the relevant court. The meaning of the word ‘suspended’ is not very clear under the ACA. However, the interpretation giving to Article V (1) (e) will be of help. It has been observed that this requires judicial suspension of the award from the relevant courts.²⁸⁰ Therefore, it is only courts of competent jurisdiction that can successfully suspend the award before such a suspension can constitute a ground for resisting an award under the law.

²⁷⁶ Goldman F.G., *On International Commercial Arbitration* (1999) 974-75.

²⁷⁷ Ibid.

²⁷⁸ United Nation Commission, ‘UNCITRAL Secretariat Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Award’. <<http://www.newyorkconvention1958.org>> accessed on 18 May, 2018.

²⁷⁹ Ibid.

²⁸⁰ Creighton Ltd v. Government of the State of Qatar(Ministry of Public Works), District Court, District of Columbia, United States of America[1995]94-1035 RMU, XXI Y.B Com Arb.

3.3.0. ENFORCEMENT OF AWARD UNDER SECTION 54 OF ACA

Section 54 of the ACA establishes the second regime in which the enforcement of foreign awards can be obtained in Nigeria.²⁸¹The provision provides:

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 provided: (a) that such contracting state has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention; (b) that the Convention shall apply only to differences arising out of legal relationship which is contractual.

Hence, the New York Convention is applicable only to those awards rendered in different States from the State of its origin and to matters whether legal or contractual in nature.²⁸²The Convention also applies to awards that are considered as foreign awards within the State's arbitration law despite its domestic features.²⁸³The New York Convention further permits signatory States to consider reservations as provided in Article 1(3) as a way of regulating the application of the Convention within its territory.²⁸⁴Article 1(3) gives option to the States to entertain and apply the Convention to those awards from signatory States only (known as

²⁸¹ LSDPC v. Adold / Stamm International (Nig) Ltd [1994]7-8 SCNJ 625; Royal Exchange Assurance vs. Bentworth Finance (Nig) Ltd [1976] 6 UILR (Pt 2) 293.; GL Kerstan and Company v. Aramco Nig Ltd [1993]FHCLR 330;Tide Water Marine International Inc. V. Consolidated Oil Ltd Lagos [1996] FHCLR 324.

²⁸² New York convention 1958, 330 U.N.T.S. 38(1959), Article 1(1).

²⁸³ Article 1 (2).

²⁸⁴ New York Convention 1958, 330 U.N.T.S. 38(1959), Article 1 (3).

reciprocity reservations) and/or to issues ascending from legal relationship whether contractual in nature or not (known as contractual reservation).

The Nigerian government in 1970 embraced the two reservations as provided in Article 1(3), this is explicitly stated in Section 54 that without any sense of bias to Section 51 and 52, the Convention is applicable to foreign awards, provided reciprocal treatment exist and if the nature of the disputes is contractual. Thus, Nigeria would only recognise and enforce awards made in a foreign State provided, an award made in Nigeria would enjoy the same treatment from that State.²⁸⁵ Equally, the issues must emanate from a legal relationship that is contractual in nature only. Thus, nationality of the parties is not the major consideration but the attitude of the signatory States towards the awards given in Nigeria.²⁸⁶ Hence, one pertinent question is the significance of this reciprocity reservation to a nation like Nigeria that desires to attract foreign investors through Foreign Direct Investment.

Where parties are caught up in the reciprocity reservation provision, there are two options that are available. First, that party can initiate an action to enforce such an award in the court of law and second, the enforcement can be obtained via Section 51 of the ACA since reciprocity requirement is not compulsory as discussed above. On the first option, the award-creditor can commence an action and sue upon the award. Failure to abide by the decision of the arbitration tribunal stands as the cause of action. In *Toepher of New York v Edokpolor (trading as John Edokpolor & Sons)*²⁸⁷ the Supreme Court of Nigeria held that the award-creditor can sue on the award so as to enforce it.²⁸⁸

²⁸⁵ ACA Cap.A18 LFN 2004, Section 54(1)(a).

²⁸⁶ McLaughlin J.T & Geneviro, 'Enforcement of Arbitral Awards under the New York Convention- Practice in UC Courts' (1998) 3 Int'l tax & Bus Law, 249-272.

²⁸⁷ *Toepher of New York v Edokpolor* [1965] All NLR 92, 153.

²⁸⁸ Ibid.

On the second option, enforcement of such awards can also be made under Section 51. It is argued that the provision of Section 51 upheavals the objects imbedded in Section 54²⁸⁹ since the reciprocity requirement reduce the impact in the legal applicability of the provision of Section 54. Section 51 forcefully limits and restrains the effect of that reciprocity on the awards in Nigeria since reciprocity requirement is not a prerequisite for the enforcement. However, the New York Convention as contains in Section 54 and Second Schedule of the ACA sets out certain grounds in which the award-debtor can challenge the award. This is to prevent party from escaping their contractual obligations initially agreed to in their commercial dealings, merely on the absence of reciprocity.²⁹⁰

With regard to contractual reservation, disputes not arising from contractual relationship is not enforceable under the provision of Section 54 of the ACA.²⁹¹ This position has spawned different views among scholars who are of the view that by doing so, Nigeria is in violation of its treaty commitment agreed to under the New York Convention.²⁹² By adopting the two reservations under Article 1(3), Nigeria obliged to adopt the provision in its entirety without deviation; hence unlike Model Law, Conventions do not give room for diversity in their adoption.²⁹³ Thus, restricting the legal applicability of Section 54 to only issues originating from contractual

²⁸⁹ Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (2015) 299-308.

²⁹⁰ *Toepher of New York v Edokpolor* [1965] All NLR 92, 153. Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (2015) 299.

²⁹¹ Ezejiofor G., *Law of Arbitration in Nigeria* (Ikeja Longman, Nigeria 2007) 178.

²⁹² Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (2015) 298.

²⁹³ Pierter S., 'Unity and Diversity in the Adoption of the Model Law' (1995) 11(1) Arb Int'l, 1-48, 23

relationship is unwarranted when the New York Convention actually intends its application to cover both contractual and non-contractual relationships.²⁹⁴

Notwithstanding this, the procedure for obtaining enforcement of an award under the Second Schedule of ACA is simple and it is the same with the procedures under Section 51 of the ACA.²⁹⁵ However, where supporting documents are in other languages, the applicant is required to tender translated documents in the official language of the enforcing States.²⁹⁶ Furthermore, the grounds in which a party can seek the refusal of an enforcement application under the ACA provisions are the same with the grounds provided for in the Second Schedule; hence, it is needless to repeat the grounds here. Nonetheless, this chapter will discuss some noticeable issues entrenched in the grounds stipulated in Article V of the Second Schedule of ACA for the refusal of enforcement of award. Hence, there are slightly difference in the wordings used in Section 52 and Article V, Second Schedule of the ACA.

The introductory paragraph of Article V (1), Second Schedule of the ACA provides that enforcement may be refused ‘only’ if the award-debtor proves any listed grounds in V (1).²⁹⁷ By using the word ‘only’, the enforcing courts are constrained to stipulated grounds contained in Article V without more. However, Section 52(2) of the ACA in its introductory sentence provides that enforcing courts ‘may’ decline to implement an award before it if specified grounds listed in the provision are established. The use of the words ‘may’ and ‘only’ in Section 52 of the ACA and Article V Second Schedule of the ACA respectively bring about different interpretations of the two provisions. By using the word ‘may,’ the Nigerian courts have absolute

²⁹⁴ New York Convention 1958, 330 U.N.T.S. 38(1959), Article 1 (3).

²⁹⁵ Ibid, Article IV (1).

²⁹⁶ New York Convention 1958, 330 U.N.T.S. 38(1959), Article IV (2).

²⁹⁷ N.Z v. Appellationsgericht, Base-Stadt, Switzerland, 1989, XVII Y.B Com. Arb. 581 (1992).

discretion on whether to enforce or refuse enforcement under this provision of ACA. The courts are not restricted to the listed grounds, as the word ‘only’ is absent.

Another remarkable provision in the Second Schedule of ACA is Article II.²⁹⁸ It has been contended that the requirement of Article II Second Schedule does not operate as an additional ground for refusal of enforcement of awards.²⁹⁹ Thus, an award cannot be opposed only because the arbitration agreement did not obey the mode in which the arbitration agreement is expected to come as stated in Article II. Where there is no objection as to the mode of arbitration agreement chosen by the parties, it is assumed that the autonomy of the parties will prevail notwithstanding the provision for the written requirement in Article II. This is based on the reasoning that Article II deals with the validity of written requirement form of the arbitration agreements and it is expected to be invoked during the proceedings before the tribunal not at the enforcement stage of an award.³⁰⁰ The only remedy available to an aggrieved party at the stage of enforcement is to challenge the award where the arbitration agreement itself is not valid on legal ground, this is provided in Article V (1) (a).

Contrarily, it is argued that the intention of the drafters in Article II, Second Schedule of ACA is to encourage courts to enforce only awards which emanate from valid arbitration agreements,

²⁹⁸ New York Convention 1958, 330 U.N.T.S. 38(1959), Article II.

²⁹⁹ Official Receiver in the Bankruptcy of Lanificio Walter Banci S.a.s v. Bobbie Brooks Incl, Court of Cession, 1980, VI Y.B. Com. Arb. 233(1981); Haight G., *Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference*(UN Press, Paris 1958)51.

³⁰⁰ Though in Concordia Trading BV. v. Nantong Gangde Oil Co Ltd, Supreme Court of China, [2009] minsitazi No. 22; Agrimpex SA v. JF Braun & Sons Incl., Supreme Court Greece, 1977, IV YB. Com. Arb. 269 (1979) the courts determined the validity of the arbitration agreement pursuant to the form requirements in Article II. Also in Russia case of Lugana Handelsgesellschaft mbH (Germany) v. OAO Ryazan Metal Ceramics Instrumentation Plant (Russian Federation), the court applied the same reasoning , though not referring to Article II.

hence an arbitral award with no valid agreement is unenforceable.³⁰¹ While both views might be right to some extent, agreement is the foundation upon which an arbitral award rests and as such where the agreement is void or declared invalid, any award arising from such an agreement should not be enforced. Nevertheless, the purpose of Articles II and V are distinct.

Hence, Articles V (1) (e) and VII (1) are the most contentious grounds for the challenge of awards. Article V (1) (e) can be invoked where the award is not ‘binding’ or, ‘set aside’³⁰² or, ‘suspended. Article VII charged the enforcing court to allow enforcement of award if national laws or applicable treaties provide for more favourable and friendly option, notwithstanding the existence of grounds for refusal for such awards.³⁰³ The fundamental concern here is the possible way to reconcile these two conflicting provisions in order not to depart from the confine objectives of the drafter. Courts and scholars have expressed opinions on these controversial provisions.

Scholars argued that the word ‘may’ in the opening paragraph of Article V gives discretionary power to the enforcing courts to enforce awards which was set aside at the seat of arbitration³⁰⁴ and that the word ‘shall’ in Article VII (I) compels courts to enforce such awards if, the domestic law provides more favourable means.³⁰⁵ However, some scholars hold the contrary view that, Article VII does not entail imposition of more favourable rights particularly to vacated

³⁰¹ *China Minmetals Materials Import & Export Co. v. Chi Mei Corp*, Court of Appeal, Third Circuit, United States of America, 2003, 02-2897 and 02-3542.

³⁰² Annulment is also called “vacatur” and “set aside.”

³⁰³ Chan R.Y., ‘Enforcement of Annulled Foreign Arbitral Awards in the United States: A Critique of *Chromalloy*’ (1999) 17 B.U. Intl L.J 147-162. 149.

³⁰⁴ Junita F., ‘Pro-Enforcement Bias under Article V of the New York Convention in International Commercial: Comparative Overview’ (2015), *Indonesia L. Rev.* Vol. 5(2), 140-164, 141.

³⁰⁵ Kenneth R.D., ‘Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (2002), 37 *Tex. Int’l L.J.* 43-88, 57; Berg A.J.V., ‘New York Convention of 1958: Refusals of Enforcement’ (2007), 18 *ICC Bulletin*, 1-17, 15.

awards.³⁰⁶ Therefore, Article VII does not apply to annulment awards but to apply only to grounds listed in Article V (1) a-d.³⁰⁷ The interface between these two provisions have caused and generated conflict in various national laws on enforcement as well as contradictory decisions of the courts.³⁰⁸ This is evident in the following cases: *Hilmarton*³⁰⁹, *Chromalloy*³¹⁰, *Baker Marine*³¹¹ and *Spider*.³¹²

In the case of *Hilmarton Ltd v. Omnium de Traitement et de Valorisation (OTV)*,³¹³ the dispute involved payment of commission to Hilmarton for securing a contract for OTV in Algeria. In an award dated April 2009, the sole arbitrator held that the agreement to pay commission was invalid based on the fact that the Algerian law categorically prohibits payments of such. Upon the application by OTV, the award was recognised and enforced in France. Concurrently, Hilmarton had initiated appeal in Switzerland (seat of arbitration) to set aside the award which was granted as prayed. The Swiss Federal Tribunal pronounced this decision, exactly two months after the same award was enforced in France. However, Hilmarton appealed against the enforcement order and the question before the court was whether to recognise in France an

³⁰⁶ Paulsson J., 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 Int'l & Comp. L. Q. 358-375, 360; Schwartz E.A., 'A Comment on Chromalloy: Hilmar ton, an l'americaine' (1997) 14 J. Int'l Arb 125-140, 125; Berg A.J.V., 'Non domestic Award Under the New York Convention of 1958' (1985) 6 Pace L. Rev, 25-65, 42.

³⁰⁷ Roger P.A., 'The American Influence on International arbitration' (2003) 10 Ohio St. J Disp, Resol. , 69-79. 69.

³⁰⁸ See *Societe Pablak Ticaret Limited Sirketi v, Norsolor S.A* (1984) YB Comm Arb. 1986 489 (Cour de Cassation); *Societe Hilmar ton Ltd v. Societe OTV* (1994) YB Comm Arb. 1995 663 (Cour deCassation).

³⁰⁹ *Hilmarton Ltd v. Omnium de Traitement et de Valorisation (OTV)* (1994) YB Comm Arb. 1995 663 (Cour deCassation).

³¹⁰ *Chromalloy Aeroservices v Arab Republic of Egypt* 191 F.3d 194(1999)909 (US Court of Appeal for the 2nd Circuit, US).

³¹¹ *Baker Marine(Nag)Ltd v. Chevron(Nag)* 191 F.3d 194(2nd Cir.1999).

³¹² *Spider v. Calzaturificio Technica, S.P.A* 77 F. Supp. 2d279(S.D.N.Y 1999).

³¹³ 1994 Revue de'l Arbitrage,327.

award which had been set aside in the State where the award was rendered. In its decision, the Paris Court of Appeal noted that provisions of French New Civil Procedure Code are applicable pursuant to Article VII of the New York Convention. Therefore, it can be implored to enforce the annulled award since it creates a friendly enforcement regime.³¹⁴ This classic case shows how chaotic enforcement proceedings of awards could become when a national court avails itself the full discretion of Article VII with no limitation. Thus, the divergence of opinion on the interpretation of Article VII and Article V(I)(e) of the Convention is a problem, globally, that requires a global consensus.

In *Chromalloy Aeroservices v Arab Republic of Egypt*,³¹⁵ a U.S court implemented the award vacated from the place where arbitration proceeding was conducted.³¹⁶ The court observed that, Article VII affords parties the opportunity to adopt domestic law if the law gives parties a better option than treaties or any other international instruments.³¹⁷ The court therefore emphasised on the US law as a better option and enforced the award. However, this decision generated a lot of arguments. The enthusiasts of the *Chromalloy* judgment perceived the case as one that holds so much importance and respect to international commercial arbitration through various national laws.³¹⁸ The adversaries questioned the attitude of the court for ignoring the treaty obligations

³¹⁴ Appadoo K., 'Enforcement of International Awards: Redress Mechanisms in the event of Non-Compliance.' <<http://ssrn/abstract=2244872>> accessed on 27th February 2017.

³¹⁵ 939 F.Supp. 907 (D.D.C 1996).

³¹⁶ Ibid, 909.

³¹⁷ ibid, 909-910.

³¹⁸ Gary H.S., 'Enforcement of Foreign Arbitral Awards after Annulment in their Country of Original' (1996)11 Mealey's Int'l Arb. Rep, 22-49, 28; Paulsson J., 'Redirecting the N.Y Convention: Further Reflections on Chromalloy' (1997)12(5) Mealey Int'l Arb, 20-58, 24.

signed to and for instigating conflicts in cases of enforcement procedure, therefore hampering with the uniformity in the arbitration process.³¹⁹

Three years later, more decisions followed and contrary views were held. One concerns the *Baker Marine (Nig)Ltd v. Chevron (Nig)* case,³²⁰ where the U.S court observed that the award that was set aside in Nigeria could not be enforced in the U.S. It was held that Article VII does not compel courts to permit parties to avail themselves to more favourable domestic laws.³²¹ The court further expressed concern that if the award-debtor is allowed to run to an available court to seek an enforcement order on an award which had been set aside, it will encourage forum shopping which will ultimately lead to disparate courts decisions.³²² Equally, the court in *Spider v. Calzaturificio Technica, S.P.A.*,³²³ followed the court's reasoning in *Baker Marine* and refused the enforcement application because the award had earlier been vacated in Italy, the place where arbitration was conducted.

It may be inferred that the purpose of Article VII is to maximise enforcement of awards. However, can this purpose be achieved where the applicability of the Article has a long lasting controversial effect on the enforcement procedure?³²⁴ One way to resolve this conflicting provision of the Convention is to presume that grounds in Article V are mandatory unless the

³¹⁹ Gharavi H.G., 'Chromalloy: Another View'(1997) 12, Mealey's Int'l Arb Rep, 21-54, 23; Gharavi H.G., 'Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention'(1996)6 J. Trans. L. &Pol., 93.

³²⁰ 191 F.3d 194(1999)909 (US Court of Appeal for the 2nd Circuit, US).

³²¹ *ibid*, 197.

³²² *Ibid*, 197.

³²³ 77 F. Supp. 2d279(S.D.N.Y 1999).

³²⁴ Robert C.B., 'Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention' (2011)37 N.C J. Int'l. Com. Reg, 1013-1053, 1034; Kenneth R.D., 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 260.

domestic law offers more favourable rights.³²⁵ Another way out of this contradiction is to shift annulment power to the State, who its law was chosen by the parties to govern the dispute hence, vacated awards by these must be honoured by the enforcing court.³²⁶ If parties prefer and decide to choose a particular law on arbitration, by implication they should be ready to abide to that State's national courts if the court annuls the award.³²⁷ This will reduce the controversies surrounding the application of Article VII to enforce annulled awards. This means that once an appropriate court has annulled an award, its decision should bar enforcement anywhere in the world.

3.4.0 HINDRANCES TO EFFECTIVENESS OF THE PROVISION OF SECTIONS 51 AND 54 OF THE ACA

3.4.1. Court intervention

Where parties have submitted their disputes to arbitration, Section 34 of the ACA restricts court involvement except in certain circumstances. Hence, ACA does not intend total prohibition of courts from the arbitration system but provides for the courts' involvement in some exceptional circumstances such as stay of proceedings to honour the arbitration clause agreed to by the parties. Although it is not within the scope of this research, it must be stated that there are instances where courts have interfered in arbitration proceedings therefore obstructing the continuity of the proceedings and hinder its conclusion. A good instance of this is the granting of anti-arbitration injunction to stop proceedings and third parties' right to intervene.

³²⁵ *ibid*, 287.

³²⁶ Kenneth R.D, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 57-69.

³²⁷ *Ibid*.

An anti-arbitration injunction is an order of the court preventing party/parties going into arbitration or to stop arbitration proceedings on a matter from being continued.³²⁸ In *NNPC v. Statoil (Nig.) Ltd & Ors*,³²⁹ (*the Statoil case*) the Nigerian Court of Appeal observed that the targeted aim of the drafters of ACA, Section 34 is to restrict courts' intervention in the arbitration proceedings. In this case, the parties agreed through an arbitration clause to settle any dispute that may arise in the cause of their commercial dealings through arbitration. NNPC raised an objection to the arbitration proceeding that the arbitral panel lacks jurisdiction since the subject has to do with tax related issues. The court observed that permitting the order for the stay of arbitration contradicts the purpose of Section 34 of the ACA; it was emphasised that allowing the prayers sought by the NNPC will absolutely go against what is prophesied by the drafters of ACA to warrant the intervention of the court. This was also the stance of the Court of Appeal in *Nigerian Agip Exploration Ltd (NAEL) v. NNPC*³³⁰ (*the NAEL case*) where the court observed that in situations where parties voluntarily arranged to have their disputes settled by arbitration, courts should not obstruct the practice of arbitration. Hence, from these two cases discussed, one may have expected a smooth operation of the arbitration system without unnecessary courts' interference but that was not the case as Nigerian courts are now more eager to obstruct both the arbitration and enforcement proceedings, ignoring the fact that it is an independent alternative means of dispute settlement.³³¹

In *The SPDC & Ors v. Crestar Integrated Natural Resources Limited*³³² (*the Crestar case*), the applicant requested the court to grant stay of arbitration proceeding. The respondent objected that

³²⁸ *NNPC v. Statoil (Nig.) Ltd & Ors*, (unreported) Suit no. CA/L/758/2012.

³²⁹ (unreported) Suit no. CA/L/758/2012.

³³⁰ (unreported) Suit no. CA/A/628/2011.

³³¹ *The SPDC & Ors v. Crestar Integrated Natural Resources Limited* [2015] LPELR-40034(CA).

³³² 2015) LPELR-40034(CA).

the court did not have the power to grant such a stay. He rested his case on Section 34 of the ACA, as well as the pronouncements of the courts in *Statoil* and *the NAEL* cases to support his contention. In its judgment, the Supreme Court stated that Section 34 does not apply in the instant case because parties had picked English arbitration law to govern their dispute hence, the provision of ACA is not applicable. Therefore, the stay of arbitration was granted as prayed, the Supreme Court relied on *Excalibur Ventures Llc v. Texas Keystone Inc*³³³ to justify this position. If the position of the Nigerian courts is that stay of arbitration proceedings can be granted to stop an arbitration conducted outside the shores and jurisdiction of Nigeria and the ACA, it is a huge impediment to smooth and swift foreign arbitration proceeding.

3.4.2. Third party intervention

The arbitration system derives its essence from the arbitration agreement between the parties, the same way the power of the arbitrators stems from the agreement. This is the more reason parties usually through their arbitration agreements, determine pertinent subjects likely to arise and also the arbitration procedure. Ordinarily, there should be nexus between the parties to arbitration, arbitration agreement and rights and liabilities arising from such an agreement. These rights include right to challenge the award if feel aggrieved. This is because the arbitration system is a mutual and private arrangement between the parties largely regulated through the arbitration agreement entered into by the parties. This was the position in *Folarin Rotimi Abiola Williams V. Chief Oladipupo Akanni Olumuyiwa Williams & Ors*³³⁴ (the *Williams case*) where the court observed that the applicant who requested the court to stay off the proceeding was not authorised to challenge the proceedings since he was not a party to the agreement. Contrarily, the court in

³³³ [2012] 1 ALL ER (Comm.) 933, 947.

³³⁴ 2014) LPELR-22642(CA).

*Statoil (Nigeria) Limited & Texaco Nigeria Outer Shelf Limited v. FIRS & NNPC*³³⁵ observed that a neutral party who is alien to an arbitration agreement cannot contest the jurisdiction of an arbitral tribunal as conferred to him in the agreement. In this case, appellants initiated an arbitration hearing as agreed in the arbitration agreement between the parties. However, Federal Inland Revenue Service (FIRS) raised an objection to the jurisdiction of the courts in Nigeria to hear tax and related issues thereby sought for the stay of arbitration proceedings in this case. The court granted FIRS request notwithstanding that no nexus between him and the arbitration agreement. This position was sustained by the appellate court. This decision creates a lot of controversies as it reflects an unmerited right conferred on the FIRS who was an alien to the arbitration agreement hence, serves as an impediment to the arbitration proceedings.³³⁶

Ufot, expressed his dissatisfaction on the *Statoil & Anor v. NNPC & FIRS* case and described the decision as ‘unfortunate.’³³⁷ This is so because this will serve as an avenue for organisations with statutory roles like that of FIRS to frustrate arbitration system. Therefore, decisions of the courts in the above case went against the spirit of arbitration by permitting an alien to arbitration agreement to interrupt an arbitration proceeding thereby hinder it from concluding.

3.4.3. Delays

Justice Eso, observed that the justice system in Nigeria is very slow.³³⁸ The Nigerian judicial system is seen and perceived as a very slow mechanism, and the arbitration system is no

³³⁵ (2014) LPELR-23144 (CA).

³³⁶ Ufot D., ‘Arbitration Practice Area Review’, August 2015, <<http://whoswholegal.com/news/analysis/article/32446/arbitration-practice-area-review>> accessed on 10 October 2015.

³³⁷ Ibid.

³³⁸ IPCO (Nigeria) Ltd. v Nigerian National Petroleum Corporation [2008] APP.L.R. 04/17.

different. The enforcement proceedings take a longer period of time to be resolved because of the delay encountered at the enforcing court. This can also be for the reason that there is no limit to the number of appeals that an award can accommodate. An aggrieved party can oppose an arbitral award right from the High Court or Federal High Court hierarchically to the Supreme Court. Parties hardly throw in the towel when an arbitral award is not in their favour. For instance, in *NNPC v. Clifco Nigeria Limited*,³³⁹ (the *Clifco case*), the award was rendered in 2000 though was challenged on procedural irregularity ground. Hence, the Supreme Court finally determined the issue 11 years after, with the arbitral award enforced in part.³⁴⁰ This appeal could have been avoided if the existing arbitration law can adequately regulate the number of right of parties to appeals in an arbitration system. The enforcement procedure is more or less of post-arbitration litigation because of this ineffective nature of the Nigeria legal framework.

3.4.4. Limitation Law as a bar to enforcement of award

Statutory time limits imposed by the Limitation Act³⁴¹ apply to the arbitration system as they do to other legal proceedings.³⁴² The justification for this is the need to have an end to litigation so it would not prolong too long and to also sensitize people not to sleep on their genuine claims.³⁴³ Hence, when action is statute-barred, it means no legal steps related to that action can be initiated. This is because the specific time limit laid down by statute of limitation to institute such an action in the relevant court/ tribunal has lapsed. Time begins to count the moment a

³³⁹ (2011) LPELR-2022(SC).

³⁴⁰ Ibid.

³⁴¹ Limitation Act, Cap 522, LFN 1990, Sections 59-66; English Arbitration Act Chap.23 1996, Section 13(1).

³⁴² *Nwadiaro v. Shell Development Company Ltd* (1990) 5 NWLR [pt 150] 322, 337-338; *Egbe v. Yusuf* (1992) 6 NWLR [Pt. 245] 1, 13; *UBN Ltd v. Oki* [1999] 8 NWLR (Pt 614) 244, 253-254.

³⁴³ Idornigie P.O., 'Statutes of Limitation and ADR Processes' (2004) 23(2) J. Institute arb. & Med., 1-12, 1.

cause of action has arisen. Section 7 of Limitation Act³⁴⁴ states that in any civil action, the statutory time limit to initiate that action is six years from the date of cause of action. Similar provision can be found in Lagos State Limitation Law, Section 8(1) (d).³⁴⁵ Hence, judicial interpretation of this Section 7 of the Limitation Act as it relates to arbitration had caused much confusion in this field. The provision fails to establish a clear distinction between a simple contract and those arbitration agreements that can originate from the underlined contract in the form of an arbitration clause.³⁴⁶ The existing limitation law only anticipates the cause of action in a simple contract.³⁴⁷

Specifically in the arbitration system, arbitration proceeding and enforcement proceeding are unavoidable³⁴⁸ Judicial pronouncements have established that these two proceedings in an arbitration system are a single action for the purpose of statutory time limit.³⁴⁹ To have a singular provision for arbitration proceeding and enforcement proceedings does not make for a good law.³⁵⁰ Hence separate statutory time limits should regulate such actions. In *Murmansk State Steamship Line v. Kano Oil Millers Ltd*,³⁵¹ the Supreme Court pronounced that the cause of action arose from the date the award-debtor breached the main contractual agreement; therefore the enforcement proceeding did not comply with the six years requirement.³⁵²

³⁴⁴ Cap. 522, LFN 1990.

³⁴⁵ Cap. 67, Laws of Lagos State, 2003.

³⁴⁶ Idornigie PO, 'Statutes of Limitation and ADR Processes' (2004) 5.

³⁴⁷ Sutton, David S. J & Gill J., *Russel on arbitration* (22nd ed, Sweet & Maxwell, London, 2003) 64.

³⁴⁸ *Bremer Vulkan Schiffbau und Maschinenfabrik v. South Indian Shipping Corporation Ltd* (1981) 1 Lloyd's Rep 253, 259; Idornigie P.O, 'Statutes of Limitation and ADR Processes' (2004) 5.

³⁴⁹ Ibid.

³⁵⁰ Idornigie P.O, 'Statutes of Limitation and ADR Processes' (2004) 5.

³⁵¹ (1974) 1 ALR Comm1, 4, 7, (1974) 12 SC 1.

³⁵² Ibid. Asouzu A.A., 'The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards' (1999) 1 J.B.L, 185-204.

The same position was held in *City Engineering Nig. Limited vs. Federal Housing Authority*.³⁵³ In that case, the breach of contract occurred in December 1980. Between December 1981 and November 1985, arbitration proceedings were conducted and award was rendered. The Supreme Court pronounced that the action to enforce the award which was initiated in 1988 fell outside the statutory time limit because the statutory limitation period started to count from December 1980 when the defendant breached the terms of the main contract.³⁵⁴ The consequence of these decisions in the *City Engineering* and *Murmansk* cases is that arbitration proceeding and the enforcement proceeding mean a single action which must be heard, determined and enforced within the stipulated statutory period. This creates a challenge to parties who intend to enforce the outcome of the arbitration. It is expedient to separate the two actions because the time limit can actually expire before the award is even delivered. This had been the position of the courts globally, particularly in England,³⁵⁵ though courts in England has since moved away from these pronouncements and has changed its reasoning.

In *Agromet Moto Import Ltd v. Maulden Engineering Co. (Beds) Ltd*³⁵⁶ the English court held that, in arbitration cases cause of action will run from the day the award-debtor disobeyed the terms in the award.³⁵⁷ Also in *IBSSL v. Minerals Trading Corps*³⁵⁸ and *International Bulk Shipping and Services Ltd v. Minerals and Metals Trading Corporation of India*³⁵⁹ the English Courts

³⁵³ [1997]9 NWLR (Pt. 520),224.

³⁵⁴ Ibid, 240.

³⁵⁵ Asouzu A.A., 'The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards' (1999) 195.

³⁵⁶ (1985) 2 All ER 436.

³⁵⁷ This Section is in *pari material* with Section 8 of the Limitation Laws of Lagos State.

³⁵⁸ (1996) 1 All ER.

³⁵⁹ (1996) 2 Lloyd's Rep 474, 476-477.

aligned themselves with the conclusion reached in the *Agromet* case.³⁶⁰ The authors of Russell on Arbitration have also in their 22rd Edition reconsidered their position in line with the *Agromet* case to show that England has moved away from the old way of calculating statutory time limit in arbitration.³⁶¹ Drawing inferences from the *Agromet* and *IBSSL* cases, the Nigerian law should however improve on the existing laws to meet with the current international standard especially in England. Nigeria can attract foreign investors through a viable arbitration regime that will guarantee the enforcement of arbitration agreements and awards.³⁶²

It is noteworthy, however that the new Lagos State Arbitration Law (LSAL)³⁶³ has introduced significant innovations to limit the effect of the Limitation Act in Nigeria. Specifically, Section 35 (2) (a) of LSAL excludes period of proceedings and the day court gives order for the purpose determining the statutory time limit for the commencement of an action before the court, either in arbitration or any other proceedings.³⁶⁴ LSAL further distinguished the cause of action in arbitration and enforcement proceedings; the time limit in enforcement proceedings starts to count from the date party breach the award.³⁶⁵ This is a good innovation that is worthy of emulation. The Nigerian Limitation Act and the Lagos State Limitation law as well as ACA should take these provisions of LSAL into consideration and amend the law accordingly.

³⁶⁰ Good Challenger Navegante S.A v. Metal Export/Import S.A (2003) EWCA (civ) 1668.

³⁶¹ Sutton D., Gill J, *Russell on Arbitration* (2003) 5-10.

³⁶² The National Assembly has the power to legislate for the Federal Capital Territory under the 1999 Constitution of the Federal Republic of Nigeria.

³⁶³ Law No 10 of 2009. Now ChapA11 of the Laws of Lagos State 2015.

³⁶⁴ Lagos State Arbitration Law No 10 of 2009, Section 35(2) (a)–(b). Now Chap.A11 of the Laws of Lagos State 2015.

³⁶⁵ Lagos State Arbitration Law No 10 of 2009, Section 35(5) Now Chap.A11 of the Laws of Lagos State 2015.

In 2018, the Supreme Court of Nigeria in the case of *Sifax Nigeria Limited v. Migfo Nigeria Limited*,³⁶⁶ excluded the date of initiating the action, the time used in hearing the case and the period the case was finally determined while calculating the time limit in civil action before it. It however appears there is better future for the arbitration system in Nigeria with the pronouncement of the apex court in *Sifax* case. Hopefully, courts in Nigeria will maintain the stance of the Supreme Court when faced to determine the statutory time limit in arbitration. Thus, the issue of time limitation is still one that seriously hinders the development of commercial arbitration in Nigeria, as it gives an avenue for parties to ignore their obligations to carry out the award.

3.5.0. CONCLUSION

In this chapter, enforcement provisions in the ACA were discussed and analysed. The chapter began with the conceptualisations and definitions of key words such as ‘foreign arbitral award’ and ‘recognition and enforcement of award.’ Furthermore, two provisions of the ACA that deal with enforcement of awards; namely Sections 51 and 54 were identified. The chapter further analysed enforcement under Section 51 and concluded that the enforcement under this provision is not automatic but subject to Section 52 of the ACA. Thereafter, the chapter distinguished enforcement provisions under Section 51 and Section 54 and identified some key differences between the two Sections of the law. Finally, the chapter identified hindrances to the effectiveness of enforcement provisions in Nigeria.

The thesis will take the discussion further in chapter four where the concepts of arbitrability and public policy shall be the major considerations. These concepts are necessary for discussion in this thesis for the reasons that the parties’ legal right to elect arbitration as against litigation and

³⁶⁶ Appeal SC 415/2015.

the right to seek the enforcement of the outcome of arbitration depend on whether two important questions can be answered affirmatively. That is, can the cause of dispute capable of being settled through arbitration and, if the enforcement of award will not disrupt any public policies of the enforcing State. Hence, the impact of the arbitrability and public policy concepts particularly at the enforcement stage cannot be overemphasised.

CHAPTER FOUR
EFFECTS OF ARBITRABILITY AND PUBLIC POLICY EXCEPTIONS
ON THE ENFORCEMENT OF AWARDS IN NIGERIA

4.0.0 INTRODUCTION

This chapter examines the concept of subject matter arbitrability and public policy exception as grounds in which the enforcing court can, on its own volition, refuse enforcement application of awards before it. The chapter proceeds in six parts.

The first part examines the concept of arbitrability, this is done with a view to laying a background on subject matter arbitrability. The second part examines arbitrability within the framework of the ACA and its second schedule.³⁶⁷ The importance of this is to ascertain matters that are not arbitrable and as such incapable of being enforced; this is done through the analysis of the case-law. The third part examines the concept of public policy within the intended objectives of this chapter. The purpose of this is to understand the significance of this concept in the enforcement proceeding of awards. The fourth part examines the judicial approach to public policy exception from a global perspective. This is achieved through the analysis of the relevant national and international laws on arbitration and judicial interpretations on the established rules in which the award may be refused for the reason that it violates public policy. The fifth part examines the public policy exception in Nigeria. The last part serves as the conclusion to the chapter.

³⁶⁷ Second Schedule of the ACA contains New York Convention 1958.

4.1.0. CONCEPT OF ARBITRABILITY

Arbitrability regulates disputes that could be determined by arbitration and those disputes which only the national courts have authority to adjudicate and determine thereby restricting such disputes being settled by arbitration.³⁶⁸ Most domestic laws on arbitration are clear on this by identify and distinguish disputes which are arbitrable and those which are not for the purpose of uttering the judicial power of the national courts on certain matters.³⁶⁹ Also, party can only exercise the right to enter into an arbitration agreement and the prospect of enforcement award given in his favour if dispute is one capable of being resolved by arbitration.³⁷⁰

Globally, the issue of whether a particular subject is capable of being settled by arbitration or not is neither here nor there³⁷¹ because it varies from jurisdiction to jurisdiction and besides, peculiarity of each State contributes to the kinds of disputes each State considers arbitrable.³⁷² Therefore, while a particular matter may be arbitrable in a specific State, it might not be in another State.

Nigerian ACA which is the primary domestic law on arbitration in Section 52(2)(b)(i) and in its Second Schedule, Article V(2)(a)³⁷³ empowers courts to decline the enforcement of awards if the

³⁶⁸ Redfern A., Hunter M., *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London, 2004) 5.

³⁶⁹ Section 52 (2) of the ACA and its Second Schedule, Article V (2). For example, Article 2060 of the French Civil Code Act No 75-596, 1975 permits parties through their arbitration agreement to restricts certain disputes from being settled through arbitration, particularly in disputes involving public at large.

³⁷⁰ ACA Cap.A18 LFN 2004, Section 35.

³⁷¹ According to Section 57 of the ACA, arbitration means commercial arbitration regardless whether it is conducted through ad hoc or any arbitral institution. It further defines commercial as any sort of relationships which is commercial in nature.

³⁷² Take for instance, some States such as Saudi Arabia, UEA issues that are not Shariah compliance cannot be subject to arbitration. Whereas in other States, that are non-Muslim States can arbitrate the same disputes without restriction.

³⁷³ Second Schedule of the ACA, Article V(2).

nature of the dispute which is the basis for the outcome cannot be resolved through arbitration.³⁷⁴ Therefore, where the issue of arbitrability is raised, the court may be asked to intervene. It is pertinent to observe the relevant provisions of the law on the subject matter arbitrability which can be raised to resist application for enforcement of awards in Nigeria.

4.2.0 SUBJECT MATTER ARBITRALITY UNDER THE ACA 2004

The discussion under this part of this chapter, focuses on the subject matter arbitrability of disputes that can be submitted to the arbitral tribunal. The discussion further analyses those disputes which either by their nature or by relevant laws cannot be arbitrated and the outcome of such arbitration cannot be enforced in Nigeria. Section 52(2) (b)(i) of the ACA and its Second Schedule, Article V(2)(a) are the focus of this section.

4.2.1. Arbitrability Provisions in Section 52(2) (b) (i) of the ACA and its Second Schedule, Article V(2)(a)

Before an in-depth discussion on Section 52(2)(b)(i) and Article V(2)(a) of the Second Schedule it is necessary to mention briefly the other provisions on arbitrability. The Second Schedule of the ACA contains numerous provisions for arbitrability directly or indirectly.³⁷⁵ The relevant provisions are Articles I, II and V respectively.³⁷⁶ By Article I, the Convention permits a signatory State to be explicit in their domestic arbitration law to the categories of disputes that will be considered ‘commercial.’³⁷⁷ This permits the signatory State to stipulate requirements as

³⁷⁴ ACA determines arbitration in the context of commercial relationships between the parties.

³⁷⁵ Mistelis L. & Brekoulakis S., *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, London, 2009)87.

³⁷⁶ Second Schedule of the ACA; New York Convention 1958, 330 U.N.T.S. 38(1959).

³⁷⁷ Second Schedule of the ACA, Article 1(3); New York Convention 1958, 330 U.N.T.S. 38(1959), Article 1(3).

to matters that are regarded as being commercial in nature.³⁷⁸ This position informed the drafter of ACA to define commercial to cover all kinds of contractual relationships provided it is commercial in nature.³⁷⁹ The judicial support of this is the case of *Kano State Urban Development Board v. Fanz Construction Co*,³⁸⁰ where the court held a similar view by defining ‘commercial’ to mean dealings between parties that are commercial in nature. In essence, any dispute arising from a relationship which is not commercial in nature is inarbitrable in Nigeria. Another significant provision is Article II of the Second Schedule of the ACA.³⁸¹ By this provision, signatory States are mandated to abide by any agreement voluntarily entered into by the parties to settle their disputes, whether contractual in nature or not, so long as it is within the power of the arbitral tribunal to sit and hear the matter.³⁸² Thus, the issues to be determined must fall within those anticipated in the arbitration agreement.³⁸³ Finally, arbitrability can also be invoked via Article V (2) (a) Second Schedule of ACA to challenge an award at the enforcement stage before the court. Section 52(2) (b) (i) and its Second Schedule Article V (2) (a) of the ACA are identical.³⁸⁴ Hence, the Second Schedule of the ACA together with the provision of Articles I and II establish an imperative for parties to ensure that the nature of their disputes can be settled

³⁷⁸Second Schedule of the ACA.

³⁷⁹ ACA CapA.18 LFN 2004, Section 57.

³⁸⁰ *Kano State Urban Development Board v. Fanz Construction Co* [1990]4 NWLR (Pt. 142) 1.

³⁸¹ New York Convention 1958, 330 U.N.T.S. 38(1959), Article II.

³⁸² Second Schedule of the ACA, Article II; New York Convention 1958, 330 U.N.T.S. 38(1959), Article II. Article II(2) further imposed obligation on the courts of the signatory States to enforcement any agreement between parties except where such agreement violates any existing law or where the disputes is incapable of being settled by arbitration.

³⁸³ See Second Schedule of the ACA, Article V.

³⁸⁴ The two provisions allow the party to raise arbitrability of the subject matter as a defence to resist enforcement of award, though the difference lies in their applicability.

by arbitration; where the nature of the dispute is inarbitrable so also its outcome becomes forbidden for judicial enforcement.

In Nigeria, the commercial nature of the disputes is the first step that guides the court, where the defence of arbitrability is raised by the aggrieved party.³⁸⁵ Section 35 of the ACA further elaborates on the issue of arbitrability. It provides that where certain existing laws in Nigeria have placed restrictions on the submission of any matter to arbitration, the ACA shall not be applicable notwithstanding the presence of an arbitration clause to resolve such disputes by arbitration.³⁸⁶ This Section precludes the settlement of some subjects by arbitration particularly where such matters have been prohibited from being submitted to arbitration by other laws.³⁸⁷

Instances of such prohibitions are found in Companies and Allied Matters Act,³⁸⁸ Admiralty and Jurisdiction Act,³⁸⁹ Copyrights Right Act,³⁹⁰ Trademark Act,³⁹¹ Patents and Design Act.³⁹² Each of these laws contains provisions which prohibits the submission of issues arising therefrom to arbitration. Particularly, the Trade Disputes Act³⁹³ explicitly prohibits submission of any kinds of trade disputes to arbitration. Basically, industrial disputes must be heard and determined as stipulated in the Trade Disputes Act. However, with the trending view globally, this position of the law in Nigeria seems to be obsolete as most States have made issues arising from trade,

³⁸⁵ ACA CapA18 LFN 2004, Section 57.

³⁸⁶ Ibid, Section 35.

³⁸⁷ Akanbi M.M., 'Domestic Commercial Arbitration in Nigeria: Problems and challenges' (PhD Thesis, Kings College London 2006) 211; United World Ltd .Inc v. M.T.S Ltd [1998] 10 NWLR (Pt.568) 117; Kano State Urban Development Board v. Fanz Construction Co. [1990] 4 NWLR (Pt.142) 32,33.

³⁸⁸ Cap C20, LFN 2004, Section 407. Herein after referred to as CAMA.

³⁸⁹ Cap A5 LFN 2005, Section 20. Herein after referred to as AJA.

³⁹⁰ Cap 28 LFN, 2004, Section 38.

³⁹¹ Cap T13 LFN 2004, Sections 49-56.

³⁹² Cap P2 LFN 2004.

³⁹³ Cap 432, LFN 1990.

intellectual propriety, and Copyright arbitrable and the courts in some of these States now recognise the jurisdiction of arbitrators on these subjects.³⁹⁴

It has however been argued that despite the stipulation in Section 35 that limits the extent of the application of ACA, all matters are capable of being arbitrated upon under the Act.³⁹⁵ Chukwuemerie contends that only disputes arising from copyright are restricted from being settled by arbitration as every other disputes can be submitted and be settled by a panel of arbitrators.³⁹⁶ The scholar rests his argument on the fact that Section 38 of the Copyright Act aimed to prohibits the courts or any other body acting in judicial capacity with respect to disputes arising from copyright and vests same on the Federal High Court.³⁹⁷ However, Akanbi is of the contrary view when he states that the drafters of the Copyrights Act was not to prohibits arbitration in copyright matters but to restrict the wide powers conferred on the State High Courts to the exclusive jurisdiction of the Federal.³⁹⁸ No justification in the ACA to restrict the

³⁹⁴ *Ganz and Others v. Soc. National des Chemins de fer Tunisiens* Rev. Arb 478(1991) the Court of Appeal in Paris observed that the allegation of fraud was not itself an obstacle to settle the disputes through arbitration. Disputes involving fraud is arbitrable.

Also, in *Ste Liv Hidravlika DOO v. SA Diebolt*, Jurisdata no. 2008-359055 (2008), the court in France affirmed the right of arbitrator to decide on the legitimacy of an intellectual property right. Likewise, in *Deko v G. Dingler et ste Meva* 3 Rev. Arb. 1994, the court held that dispute on intellectual property right is arbitrable.

³⁹⁵ Chukwuemerie A.I, 'Public Policy and Arbitrability under the UNCITRAL Model Law' in Chukwuemerie A.I(ed) *Studies & Materials in International Commercial Arbitration* (Lawhouse Books, Port Harcourt, 2002)124.

³⁹⁶ *Ibid*, 114.

³⁹⁷ Chukwuemerie A.I, 'Public Policy and Arbitrability under the UNCITRAL Model Law' in Chukwuemerie A.I(ed) *Studies & Materials in International Commercial Arbitration* (2002) 114-123.

³⁹⁸ Akanbi M.M., 'Contending without Being Contentious: Arbitration, Arbitrators and Arbitrability' (paper delivered on 152 Inaugural Lecture on Thursdays, 13th Nov., 2014)19. Available at <<https://www.unilorin.edu.ng/UII/152.pdf>> accessed on 12 May, 2017.

scope of arbitrability in some certain situations identified in the Companies and Allied Matters Act (CAMA),³⁹⁹ Admiralty and Jurisdiction Act,⁴⁰⁰ (AJA) and Copyright Act.⁴⁰¹

The provision of Section 35 is fraught with many challenges, uncertainty and lack of uniformity especially with regard to the manner in which the courts approach the concept of arbitrability. This exhibits probable challenge to the award-creditor who seek to enforcement an award originates from copyrights, intellectual properties, maritime or trade disputes. It is therefore pertinent to do an analysis of the judicial responses and highlight the period when courts will consider the nature of a particular dispute arbitrable or inarbitrable.

4.2.2. Judicial Responses

Several decisions of the courts have provided an insight to some subject that are not capable of settlement by arbitration.⁴⁰² In *Ogunwale v. Syrian Arab Republic*,⁴⁰³ it was observed that arbitrability ground can be raised where the award dealt with the disputes which are outside the expected disputes anticipated in the agreement. In other word, the arbitral tribunal must reach a decision base on the disputes submitted which must also be commercial in nature.⁴⁰⁴ This position is premised on Section 57 that limits arbitration to commercial issues and that of Article II, Second Schedule of ACA which empowers the court to ensure implementation of arbitration

³⁹⁹ Cap C20 LFN, 2004.

⁴⁰⁰ Cap A5 LFN, 2005.

⁴⁰¹ Cap 28 LFN, 2004.

⁴⁰² *United World Ltd Inc v. M.T.S Ltd* [1998] 10 NWLR (Pt. 568) 116.

⁴⁰³ [2002] 9 NWLR (Pt. 771) 127.

⁴⁰⁴ ACA CapA18 LFN 2004, Section 57.

agreement that intends to settle a dispute which is capable of being heard and determined through arbitration.⁴⁰⁵

Furthermore, criminal matters in Nigeria are not arbitrable.⁴⁰⁶ However, parties can opt for Plea Bargain in certain criminal matters as legislated under the Administration of Criminal Justice Act 2015.⁴⁰⁷ The reason why criminal cases are inarbitrable is that national courts are vested with exclusive jurisdiction to hear and determine criminal matters.⁴⁰⁸ Also, dissolution of marriage conducted under the Marriage Act is not arbitrable in Nigeria.⁴⁰⁹ Furthermore, illegal contracts cannot be resolved through arbitration since upholding such contacts will violate public policy of Nigeria.⁴¹⁰ Tax related disputes are by virtue of courts' pronouncements in *Esso Petroleum and Production Nigeria Ltd & SNEPCO v. NNPC*⁴¹¹ and *Shell (Nig.) Exploration and Production Ltd*

⁴⁰⁵ Section 52(2) (a) (iv) and Second Schedule of the ACA, Article V(1)(c) permit enforcing courts in Nigeria to refuse an application for enforcement if award deals with issues not contemplated by the parties or where the award is not within the terms of arbitration agreement.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ayinla L.A., Ayodele J. & Ahmed B.A., 'The AJC Act 2015, Plea Bargain and Other Innovations: Review towards Peaceful Resolution in Nigeria' (2016) 1(2) K.I.U. J. H, 257-275; Ayinla L.A, Olusola G.H & Ahmed B.A., 'Applicability of ADR and Plea Bargaining in the Nigerian Criminal Justice System' (2014)2(2) A.N.U. Law J.; Oguabor C.A, Obi-Ochiabutor C.C & Okiche E.L., 'Using Alternative Dispute Resolution (ADR) in the Criminal justice System: Comparative Perspective' (2013) 6, Bassey Andah J, 215 238, 218.

⁴⁰⁸ Lew J., Mistelis L. & Kroll S., *Comparative International Commercial Arbitration* (Kluwer Law Int'l, Hague, 2003) 689.

⁴⁰⁹ Marriage Act Cap M6 LFN 2004, Section 2; Eyongndi D., 'Settlement of Matrimonial Disputes in Nigeria through Alternative Dispute Resolution'. <http://www.academia.edu/34100242/SETTLEMENT_OF_MATRIMONIAL_DISPUTES_IN_NIGERIA_THROUGH_ALTERNATIVE_DISPUTES_RESOLUTION.docx> accessed on 18 July 2018. However, researcher disagrees with the contention of Eyongndi that in a requirement to present certificate of conciliation , for the parties to establish have gone through amicable settlement before filling of divorce is an evidence that, arbitration may also be suitable to resolve divorce petition. Hence, the researcher of this thesis disagrees with this because, conciliation cannot be equate with the conciliation with no binding force.

⁴¹⁰ R.M.A& F.C v. U.E.S Ltd[2011] 9 NWLR (Pt. 1252),415-416, paras H-B.

⁴¹¹ Unreported Appeal NO CA/A/507/2012, delivered on 22nd July, 2016.

& 3 Others v. Federal Inland Revenue Service cannot be submitted before the arbitral tribunal for resolution.⁴¹² The Appellate court in *MV MSC Agata & Anor v. Comet Shipping Agencies Nig. Ltd*,⁴¹³ observed that any dispute that requires declaration of title to property or/and rights of parties to property cannot be heard and determined by an arbitral tribunal.⁴¹⁴

The analysis of cases above shows that the courts in Nigeria adopt and apply a very restrictive approach towards the concept of arbitrability, this is evidence in the judicial attitudes in interpreting the concept as the approach of the courts not anywhere close to lenience. Hence, restricting the scope of arbitrability to commercial and contractual issues is a sign of weakness in the Nigerian arbitration law considering the usual cramming of the courts with judicial cases in Nigeria. This thesis is of the view that the courts should be more concern with an express and implied submitted disputes identified in the arbitration agreement. Some jurisdictions have taken a liberal approach and as such Nigeria should not be an exception. For instance, in China, following the court's decision in *Jilin Chemical* case, a tortious matter can now be arbitrated once there is a valid agreement to that effect.⁴¹⁵ Equally, in *Ganz and Others v. Soc. National des Chemins de fer Tunisiens*,⁴¹⁶ the court in Paris held that the allegation of fraud in a dispute did not itself debar the arbitral tribunal from hearing and determining the matter and affirmed that fraud is arbitrable.⁴¹⁷ Also, in France the appellate court permitted an arbitration proceeding that involved an issue concerning the legitimacy of an intellectual property right.⁴¹⁸ Equally, in

⁴¹² Unreported Appeal NO CA/A/ 208/2012, delivered on 31st August 2016.

⁴¹³ [2014] 1 NWLR (Pt. 1388) 270.

⁴¹⁴ Ibid.

⁴¹⁵ *Jilin Chemical Industrial Co ltd v. WP International Group Inc.* (2005) Min Si Zhong Zi No . 1, SPC Ruling, May 10, 2005.

⁴¹⁶ Rev. Arb 478(1991).

⁴¹⁷ Ibid, 480.

⁴¹⁸ *Ste Liv Hidravlika DOO v. SA Diebolt*, Jurisdata no. 2008-359055 (2008).

Deko v G. Dingler et ste Meva,⁴¹⁹ the court held that disputes on the intellectual property right is arbitrable. In view of the above analysis, courts in Nigeria should take a more liberal approach to the arbitrability issue. Therefore, if the law intends to provide utmost opportunity to parties to proceed with arbitration, the issue of arbitrability should be stretched to include the liberal interpretation to matters that are not commercial or contractual in nature.

Specifically, it is essential to consider the concept of arbitrability in admiralty matters as applicable in Nigeria. There are divergent opinions on the issue of arbitrability in the admiralty matters, some consider the subject arbitrable,⁴²⁰ while others are of the contrary view.⁴²¹ Section 20 of the Admiralty Jurisdiction Act (AJA)⁴²² declares it invalid any arbitration agreement between the parties that prohibits the power of the court in hearing disputes related to admiralty.⁴²³ In essence, courts will not stay a proceeding merely because an agreement between parties contain an arbitration clause. Originally, this provision was supposed to apply only to foreign jurisdiction clause, that is, where arbitration proceedings intended to be conducted outside Nigeria.⁴²⁴ However, from all indications, the pronouncements of Nigerian courts have

⁴¹⁹ 3 Rev. Arb. 1994.

⁴²⁰ Chukwuemerie A.I., 'Public Policy and Arbitrability under the UNCITRAL Model Law' in Chukwuemerie A.I(ed) *Studies & Materials in International Commercial Arbitration* (2002) 124.

⁴²¹ Akanbi M.M., 'Examining the Concept of Arbitrability under Nigerian Domestic Arbitration Laws' (2005) 3(1) Nig. Bar J, 26; Idornigie P.O, *Commercial Arbitration Law and Practice in Nigeria* (Lawlord Press, Nigeria, 2015) 283.

⁴²² Cap. A5, LFN 2004.

⁴²³ Admiralty Jurisdiction Act Cap. A5, LFN 2004 (hereinafter referred to as AJA). Daibu A.A & Abdulrauf L.A., 'Challenges of Section 20 of the admiralty Jurisdiction Act to International Arbitration Agreement' (2015), 6(4), *Gravitas Rev. Bus. L. & Prop. L.* 16-25, 20.

⁴²⁴ Egede F., 'Foreign Maritime Arbitration Clauses: Applicability and enforcement in Nigeria' <http://www.businessdayonline.com/ARCHIVE/index.php?option=com_content&view=article&id=5611:foreign-maritimearbitration-clauses-applicability-and-enforcement-in-nigeria-&catid=133:legal-indignity&Itemid=557>. accessed on 23 January 2018.

revealed that the provision of Section 20 is not only applicable in cases of foreign jurisdiction clause but also in any arbitration clause that ousts the jurisdiction of the Nigerian courts.⁴²⁵ Hence, it is necessary to examine the impact of the provision of Section 20 of AJA as it relates to provisions of Sections 4⁴²⁶ and 5⁴²⁷ of the ACA.

The contentious issue between the ACA and AJA is that, AJA empowers courts to disregard the arbitration clause and proceed with jurisdiction in admiralty matters.⁴²⁸ On the other hand, ACA mandates courts to encourage parties to go into arbitration and charged courts to stay of proceeding while waiting for the outcome of the matter before the arbitral tribunal particularly, where there is an existing arbitration agreement.⁴²⁹ Consequently, Nigerian courts have had to contend with the seemingly contradictory statutory provisions of these two laws. That is, the stipulation of the AJA which forbids arbitration in admiralty matters on one side and the provisions of Sections 4 and 5 of the ACA which encourage and ensure the compliance with the arbitration clause, on the other hand.

In *Owners of the MV Lupex v. Nigerian Overseas Chartering and Shipping Ltd*,⁴³⁰ the disputes involved violation of a charter agreement and the Plaintiff initiated an action for breach in the

⁴²⁵ Daibu A.A & Abdulrauf L.A, 'Challenges of Section 20 of the Admiralty Jurisdiction Act to International Arbitration Agreement' (2015) 19.

⁴²⁶ Section 4 permits court to order for the stay of proceedings and authorise parties to settle their disputes through arbitration particularly where there is an existing arbitrable clause.

⁴²⁷ Section 5 afford parties an opportunity to approach court to stay proceedings where an action has been filed on a disputes that is subject to arbitration agreement.

⁴²⁸ Admiralty Jurisdiction Act, Cap. A5, LFN 2004, Section 20.

⁴²⁹ ACA CapA18 LFN 2004, Sections 4 and 5.

⁴³⁰ [1994] 5 NSC 182.

High Court. The Defendant invoked the court to stay the court hearing to allow settlement outside the courtroom as provided in Sections 4 and 5 of the ACA. The Federal High Court and the appellate court declared the arbitration agreement invalid and declined to stay of proceedings since it's against public policy in Nigeria to debar courts in admiralty matters.⁴³¹ However, since the *Owners of the MV Lupex* case was decided there have been numerous contradictory pronouncements of the court in this area of law.⁴³² Therefore, the vital issue is the enforceability of maritime arbitration agreement/ awards based on the express stipulations in Section 20 of the AJA.

In *MV Panormod Bay v. Olam Nigeria Plc*,⁴³³ the disputed issue was whether Section 20 can impliedly prevail over Sections 2⁴³⁴ and 4 of the ACA where contractual agreement between the parties contained foreign jurisdiction clause. The court observed that AJA operates as a limitation against any arbitration clauses whether intended for foreign or local courts in Nigeria. Section 20 therefore serves as a restriction as regards arbitration agreements in admiralty matters particularly to those agreements having Nigeria as the forum. The appellate court in this case, appeared not to have considered the provision of Section 10 of AJA which permits the court to stay a proceeding pending arbitration in suitable cases whether in Nigeria or away.⁴³⁵ Contrarily, in 2004 the Supreme Court ruled on the appeal in *Owners of the MV Lupex v. Nigerian Overseas*

⁴³¹ Ibid, 200.

⁴³² Daibu A.A & Abdulrauf L.A., 'Challenges of Section 20 of the admiralty Jurisdiction Act to International Arbitration Agreement' (2015) 20; Egede F., 'Foreign Maritime Arbitration Clauses: Applicability and enforcement in Nigeria' <http://www.businessdayonline.com/ARCHIVE/index.php?option=com_content&view=article&id=5611:foreign-maritimearbitration-clauses-applicability-and-enforcement-in-nigeria-&catid=133:legal-indignity&Itemid=557>. accessed on 23 January 2018.

⁴³³ [2004] 5 NWLR (Pt. 865)1.

⁴³⁴ Section 2 makes arbitration agreement between parties irrevocable unless agreed otherwise or by leave of court.

⁴³⁵ Daibu A.A & Abdulrauf L.A., 'Challenges of Section 20 of the Admiralty Jurisdiction Act to International Arbitration Agreement' (2015) 20.

Chartering and Shipping Ltd,⁴³⁶ which was earlier decided by the court below in 1994 that, the autonomy of the parties is paramount and the courts must obey and implement arbitration agreements where parties have decided to resolve their maritime disputes via arbitration. However, in *Onward Enterprises Ltd v. MV Matrix & 2 Ors*,⁴³⁷ the court aligned itself with the reasoning adopted by the Supreme Court in *Owners of the MV Lupex*. The Court of Appeal in *Onward Enterprises* case explicitly departed from its previous decision in *MV Panormos Bay v. Olam Nigeria Plc*.⁴³⁸ Several years later, the Supreme Court had another instance to rule on Section 20 of AJA in *JFS Investment Ltd v. Brewal Line Ltd*,⁴³⁹ but this time, the court refused the jurisdiction of arbitral tribunal to hear and determine admiralty matters in spite of the presence of arbitration clause inserted in the contract between the parties. The Supreme Court pronouncement here contradicts its earlier verdict in 2004 in the case of *Owners of the MV Lupex v. Nigerian Overseas Chartering and Shipping Ltd*.⁴⁴⁰

In conclusion, the analysis of cases above shows the effect of two conflicting laws in Nigeria relating to arbitration. The courts are not helping the situation from the cases analysed above. There is need for steadiness and consistency in the pronouncements of the Nigerian courts on the issue of arbitrability of the admiralty disputes. It is desirable for the Supreme Court to set out precedents on this issue that the courts below will follow. The court cannot continue to appropriate and at the same time expropriate on the same issue. As it stands currently, each case is to be decided on its own merit.

⁴³⁶ [2003]15 NWLR (Pt. 844)469.

⁴³⁷ [2010] 2 NWLR (Pt. 1179) 530,556.

⁴³⁸ [2004] 5NWLR (Pt. 865)1.

⁴³⁹ [2010] 18 NWLR (Pt. 1225)SC 495.

⁴⁴⁰ [2003]15 NWLR (Pt. 844)469.

4.3.0 THE CONCEPT OF PUBLIC POLICY

The court may decline to grant an application brought by the award-creditor for an enforcement of an award just for the reason that execution of such an award will encroach on public policy/policies of the State.⁴⁴¹ This process is known as public policy exception. The feasible meaning of public policy shall be considered in this section of the chapter. Also discuss are the two approaches to public policy, stages applicable to public policy exception and other related grounds with the public policy.

4.3.1 Meaning of Public Policy

It is a tough task to proffer a definite description of the public policy exception because ACA and its Second Schedule ignored to provide for it. Equally, these laws overlook a probable strategy on how the public policy exception should operate as a measure to safeguard the interest of the enforcing State by way of raising this exception in an application to oppose the enforcement.⁴⁴² Possibly, what could be responsible for this omission in the existing arbitration law is the fact that public policy touches virtually all areas of law and as such its qualitative content varies from jurisdiction to jurisdiction and from time to time.⁴⁴³ Hence, this makes it possible to come across different meanings of the concept in relation to foreign awards. However, public policy can mean essential mandatory rules that the parties cannot derogate from.⁴⁴⁴ Also, it can mean fundamental rules of every State⁴⁴⁵ that operate as the basis upon

⁴⁴¹ ACA Cap A18 LFN 2004, Section 52(2)(b)(ii), and Second Schedule of the ACA, Article V(2)(b).

⁴⁴² Second Schedule of the ACA, Articles V (1) (a), V (2) (a) and VII.

⁴⁴³ Ojibara I.M, *Judicial Approach to Public Policy and its Effects on the Enforcement of Foreign Arbitral Awards in Nigeria*(Ph.D. thesis, University of Ilorin, 2017)145.

⁴⁴⁴Ibid, 140; Pierre L., 'Transnational (or Truly International) Public Policy and International Arbitration: Comparative Arbitration Practice and Public Policy Arbitration' (1987)1, ICCA Int'l Arb Cong., 257-3182, 61.

which courts are permitted to decline the enforcement application before it.⁴⁴⁶ Thus, courts are skilled with discretionary power to refuse enforcement application if the execution of such an award will infringe the mandatory or fundamental rules or basic morality and justice of the enforcing State.⁴⁴⁷

Public policy can be classified into three namely, domestic, international and transnational.⁴⁴⁸ Domestic public policy involves policies of a particular State. This may be because parties come from the same country of resident or where the contractual relationships between parties starts and ends in that particular State. In that case, fundamental or mandatory rules of that State alone will be considered as the applicable rules of public policy.⁴⁴⁹ International public policy comes into play where the performance of the business/contract between parties involves two or more States and the parties are from different States or adopt another State's law to govern their arbitration proceedings.⁴⁵⁰ It therefore comprises of the fundamental or mandatory rules of the States involved.⁴⁵¹ International policy adopts a liberal approach because it allows application of the States' domestic public policy in global context. By

⁴⁴⁵ Ibid.

⁴⁴⁶ New York Convention 1958, 330 U.N.T.S. 38(1959), Article V(2)(b).

⁴⁴⁷ Bockstiegel K., 'Public Policy and Arbitrability, Comparative Arbitration Practice and Public Policy Arbitration' (1987)2, ICCA Int'l Arb Cong, 179.

⁴⁴⁸ Ibid.

⁴⁴⁹ James D.F., 'Desordre Public Policy International Under the New York Convention :Wither Truly International Public Policy' (2009) 8(1) Chinese J. of Int'l L., 81-134,54.

⁴⁵⁰ Mark A.B., 'Public Policy International and International Commercial Arbitration' (1988) 26 (3) AM. Bus. L.J , 511-545,513, 514.

⁴⁵¹ May L., 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England'(2006) 23(3) Ariz J. Int'l & Comp. Law, 747-785, 772.

this, the enforcing court can, weigh these States' domestic public policies with the needs to meet international commerce.⁴⁵²

Transnational public policy arises when States come together to come up with a unified legal principle. It involves universal business practices, norms and customs that are recognised and applied by the global community.⁴⁵³ What differentiates international public policy from transnational public policy is the fact that international public policy considers the domestic policies of two or more States, while transnational public policy reflects basic norms and standard which are universally recognised within the business practices.⁴⁵⁴

But because it is open-ended in nature, public policy exception is often use as a ground to bring up frivolous applications to oppose the enforcement just for the purpose of causing substantial delay or to disobey the terms of awards.⁴⁵⁵ Therefore, to maintain a little consistency within the framework of this thesis, public policy is seen as those fundamental rules within the exclusive judicial jurisdiction of each State that operate as impediments to the arbitration proceedings and the enforcement proceedings.

4.3.2 Approaches to Public Policy Exception

Approaches to the public policy exception as it relates to foreign awards can be discussed under two headings. One is pro-enforcement policy approach (also known as narrow approach) and the other is the expansive policy approach. The 'pro-enforcement policy' narrowly maintains and

⁴⁵²Ibid.

⁴⁵³ Sever J.R., 'The Relaxation of In arbitrability and Public Policy Checks on U.S and Foreign Arbitration: Arbitration out of Control?' (1991) 65 Tul. L.Rev, 1661-1691, 1688.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ojibara I.M., 'Judicial Approach to Public Policy and its Effects on the Enforcement of Foreign Arbitral Awards in Nigeria' (2017) 160-178.

attaches much importance to the finality of awards, encourages compliance with the outcome of the proceedings and ensures enforcement.⁴⁵⁶ This policy is derived from the primary objectives of the New York Convention. Hence, arbitral awards are presumed to be final, conclusive and enforceable subject only to specified grounds stipulated in the law to resist enforcement. The pro-enforcement approach emphasises on the narrow interpretation of these grounds for refusal so as to allow many enforcements of awards as possible.⁴⁵⁷ In effect, an enforcing court is expected to narrow itself when faced to determine public policy exception to safeguard the aims the New York Convention set out to achieve.⁴⁵⁸

The expansive approach confers on each enforcing State the discretionary power to regulate the measure for determining public policy exception within their States which can serve as a ground to resist enforcement. For some courts public policy exception can be invoked simply where there is a violation of morality and justice. While other courts will determine public policy exception based on the State's mandatory/fundamental rule or together with the idea of morality and justice.⁴⁵⁹ However, when courts are invoked to refuse enforcement of an award based on public policy exception, there are stages the courts must follow in order to reach a justifiable decision whether to uphold the alleged violation of public policy thus constitute a ground to refusal of enforcement or to hold otherwise.

⁴⁵⁶ Mistelis L., 'Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards' (2000) 2(4) Int'l Law Forum Du Droit Int'l, 248-253, 248.

⁴⁵⁷ Redfern R. & Hunter M., *Law and Practice of International Commercial Arbitration* (2004) 513; Lew J., Mistelis L. & Kroll S., *Comparative International Commercial Arbitration* (2003) 689.

⁴⁵⁸ Stewart D., 'National Enforcement of Arbitral Awards Under Treaties and Conventions' in Richard L. & Charles B. (eds), *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (Transnational publishers, Hague, 1994) 189.

⁴⁵⁹ Mayer P. & Sheppard A., 'Final ILC Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arb. Int'l 249, 255.

4.3.3 Stages in the Court Approach to the Public Policy Exception

There are three insignificant stages courts are bound to apply particularly where public policy exceptions are invoked to oppose an enforcement application before the court. The first stage deals with the relevant applicable public policy to be applied by the courts. At this stage the most vital question as to whose State's public policy is applicable for determining the exception is considered. A useful guide published by the United Nation Commission on the New York Convention provisions establishes a strong bent on the public policy of the enforcing State.⁴⁶⁰

The Commission made certain emphasis that the intention of the drafters can be grasp from the wordings used in Article V (2)(b) that 'the public policy of that country.' These wordings according to the Commission is an indication that public policies of the enforcing States are expected to be applied by the courts.⁴⁶¹ In essence, applicable public policy is restricted to the violation of the fundamental or mandatory rule, or basic ideas of morality and justice, of the enforcing State.⁴⁶² Thus, as observed above, this largely depends on whether it is domestic, international or, transnational public policies as the circumstances of each case dictates.

At the second stage, the enforcing court is faced with the question whether if the court gives enforcement order on the award, such enforcement would violate public policy or otherwise. If the court answers this in the affirmative, then the next question is, what is the prerequisite degree of violation required to constitute violation? Scholars contend that such a violation must be fundamental to the extent that if enforcement application is granted it negative impact is on the

⁴⁶⁰ United Nation Commission, 'UNCITRAL Secretariat Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Award 1958'. <<http://www.newyorkconvention1958.org>> accessed on 18 May, 2018.

⁴⁶¹ Ibid.

⁴⁶² Redfern A. & Hunter M., *Law and Practice of International Commercial Arbitration* (2004) 542; Mayer P. & Sheppard A., 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arb. Int'l 249, 255.

public at large and is severe in an unbearable way.⁴⁶³ In other words, the purported public policy violation must be sufficiently severe in order to justify the ground of refusal of enforcement.

The third and last stage weighs the importance of finality of award as against the exception. At this stage, the courts determine if there are more benefits attach with the enforcement of such award notwithstanding conspicuous violation of the State's public policy. This is the stage where the approaches discussed above come into play.⁴⁶⁴ The enforcing court may adopt either the narrow approach or the expansive approach. The expression 'may be refused' in Article V, Second Schedule of the ACA confers discretionary powers on the enforcing court. As regard the narrow approach, the court has the power to interpret public policy exception restrictively therefore enforcing the award before it even if it means, upholding such of an award infringe public policy of the enforcing State, provided that the importance of implementing the award outweighs that particular fundamental/mandatory rule.⁴⁶⁵

The court could construe and interpret public policy exception narrowly as he wishes if the impact of such violation on the public policy is minimal to the society at large. However, where an expansive approach is adopted, the court could use the discretionary power expansively to decline the enforcement application before it on ground of public policy exception. This is usually where court gives a wider interpretation to it.

Theoretically, public policy overlaps with other grounds stipulated in the ACA and, its Second Schedule for resisting an enforcement of awards.⁴⁶⁶ It is imperative to discuss this intersection.

⁴⁶³ Lew J., Mistelis L. & Kroll S., *Comparative International Commercial Arbitration* (2003)690.

⁴⁶⁴ United Nation Commission, 'UNCITRAL Secretariat Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Award.' <<http://www.newyorkconvention1958.org>> accessed on 18 May, 2018.

⁴⁶⁵ Ibid.

⁴⁶⁶ Junita F., 'Public Policy Exception in International Commercial Arbitration-Promoting Uniform Model Norms' (2012)5 (1) Contemporary. Asia Arb. J., 45-81, 49.

4.3.4 Public Policy and Related Grounds

Public policy exception is interrelated with due process and the concept of arbitrability. This is discussed fully below.

4.3.4.1. Public Policy and Due Process

Public policy exception overlaps with the notion of due process. As discussed in the previous chapter, due process is provided in the ACA, 52 (2) (a) (iii) and Second Schedule, Article V (1) (b) as a ground to challenge an award at the stage of enforcement. Due process demands absolute compliance with the procedure adopted by the parties in relation to arbitrator appointment, composition of the arbitral panel, arbitration proceedings, and evidential rule.⁴⁶⁷ Hence, failure to comply with these issues above as agreed by the parties constitutes violation of due process and may as well be raised in some circumstances as violation of public policy under the ACA and its Second schedule.⁴⁶⁸ The pertinent concern is the danger in intertwining these two grounds of due process and public policy exception particularly at the enforcement stage of award. Oftentimes the relevant questions that begs for an answer are, what level of violations of due process required to constitutes infringement on the public policy exception? And, does waiver of due process violation also amount to waiver of public policy therefore, precluding both exceptions to enforcement?

With regard to the first question, the most common perception from scholars is that severe due process violation may not amount to a refusal of enforcement, unless the procedural abnormality had significant impact on the award.⁴⁶⁹ There are some fundamentals principles of procedural law

⁴⁶⁷ Second Schedule of the ACA, Article V(1)(d); ACA CapA18 LFN 2004, Section 52(2)(a)(vi).

⁴⁶⁸ ACA Second Schedule, Article V (1) (b).

⁴⁶⁹ Miller D., 'Public Policy in International Commercial Arbitrations in Australia' (1993) 9 Arb. Int'l 167, 171.

that are interrelated with the public policy⁴⁷⁰ hence, any form of defects in the procedure of this nature may prompt the court to decline enforcement based on the public policy defence. Thus, the party must establish that the alleged violated due process also violates the public policy exception.⁴⁷¹ In other words, not all due process violations are grave and fundamental. However, the court would enforce an award, where there is an indication that the arbitral tribunal would have reached a similar decision in the absence of irregularity in the procedure.⁴⁷² Lack of due process turn out to be the most invoked ground by the parties to resist enforcement since it is easy to get away with it. And because due process derives its roots from the principles of fairness makes it essential doctrine to observe in the arbitration system.

The objective of the due process ground is to ensure that each and every contracting parties are given the opportunity to put forward his or her own case and be heard by the court/tribunal without deviating from the fundamental terms in the parties' agreement to resolve their dispute through arbitration. Thus, a party who desires to resist enforcement must show and establish links between these grounds hence, enforcing State on its part must have equated lack of due process with violation of public policy before the two intertwined grounds can be utilised.⁴⁷³

⁴⁷⁰ Junita F., 'Public Policy Exception in International Commercial Arbitration-Promoting Uniform Model Norms' (2012)5 (1) *Comtemp. Asia Arb. J.*, 45-81, 49, 53; Bockstiegel K.H., 'Public Policy as a Limit to Arbitration and Its Enforcement' (2008)123 *J.Dip. Resol.*, 6-7. http://www.arbitrationicca.org/media/0/12277202358270/bckstiegel_public_policy...iba_unconference_2008.pdf accessed on 17 August, 2017.

⁴⁷¹ Luttrell S.R., *Bias Challenges in International Commercial Arbitration, The Need For 'Real Danger' Danger Test* (Kluwer Law International, Netherlands, 2009)13; Rubino-Sammartano R., *International Arbitration Law and Practice* (2nd Ed , Kluwer Law International, 2001)507.

⁴⁷² Ibid.

⁴⁷³ Bishop D.R & Martin R., 'Enforcement of Foreign Arbitral Awards'. <http://www.kslaw.com/library/pdf/bishop6.pdf> accessed on 23 January 2016.

As to the second question, whether waiver of due process amounts to waiver of public policy. It is a general principle of law that any objection based on lack of due process must be raised during the arbitration proceedings,⁴⁷⁴ otherwise, an enforcing court could interpret the failure to act to mean that he has waived his right to resist the enforcement application.⁴⁷⁵ This is to afford the tribunal the opportunity to address the issue before it gives its final award on the subject.⁴⁷⁶ If the defence of due process is raised for the first time at the enforcement stage, this will in no doubt slow down the system and can be perceived as way to obstruct the enforcement proceedings of award.⁴⁷⁷ Ordinarily, where a party waived his right to object at the appropriate time, such would be interpreted to mean a renunciation of his right to challenge an award on the grounds as stipulated in the ACA including public policy exception. Though the case will be different where it could be established that the party had no knowledge of the violation during the arbitration proceedings. Despite the link between the public policy exception and due process, the enforcing court should refrain from applying the two as a single ground except they are premised on the same actual foundations. This will enable the enforcing courts to avoid gross contraventions of due process on their own volition.

⁴⁷⁴ AAOT Foreign Economic Association (VO) Technostroy Export v International Development & Trade Services Inc 139 F 3d 980 (2nd Cir, 1998).

⁴⁷⁵ Different jurisdictions have affirmed this view, even in the absence of express agreements to this effect; for instance in *Dardana Ltd v Yukos Oil Co.* [2002] EWCA Civ. 543 (English Court of Appeal); *Qinhuangdao Tongdo Enter. Dev. Co. v Million Basic Co.* (1994) XIX YBCA 675 (Hong Kong Supreme Court, 5 January 1993) 676-77.

⁴⁷⁶ ILA Report 2012, Recommendation 2 (c). Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards, adopted at the International Law Association's 70th Conference held in New Delhi, India 2002. www.ila-hq.org/pdf/int%20Arbitration/International%20Commercial%20Arbitration%202002.pdf accessed on 17 August 2017.

⁴⁷⁷ Mantilla-Serrano F., 'Towards a Transnational Procedural Public Policy' (2004) *Arb. Int'l* 333. AAOT Foreign Economic Association (VO) Technostroy Export v International Development & Trade Services Inc, 139 F 3d 980 (2nd Cir, 1998).

4.3.4.2. Public Policy and Arbitrability

Public policy and concept of arbitrability are intertwined. Some scholars observed that the provisions for the concept of arbitrability in the ACA, 52(2) (b) (i) and Second Schedule, Article V (2) (a) may not necessarily required as a separate ground because arbitrability forms essential ingredients of the public policy.⁴⁷⁸ Contrary to this view is that, though arbitrability is the most essential requirements under most States' arbitration laws, they do not certainly reflect essential national policies.⁴⁷⁹

The subject matter arbitrability is relevant particularly at the enforcement stage since an award cannot be enforced unless the nature of the disputes can be resolved through the means of arbitration. Arbitrability issue is determined by reference to the existing arbitration law of the enforcing States however, where it is being invoked at the proceedings before the arbitral panel the preferred arbitration law adopted in the arbitration agreement regulates the issue of subject matter arbitrability.⁴⁸⁰ Ordinarily, the concept of arbitrability is habitually detached from public policy and as such, the two are though intertwines but treated distinctly in this thesis. Hence, it may be not an easy task to segregate between the public policy exception and other interrelated grounds stipulated in the ACA and in its Second Schedule which are available to the parties to resist the enforcement in Nigeria.

The sphere of public policy is so extensive that it could as well be considered the only relevant ground for resisting an award since the other grounds listed in ACA Section 52(1) and (2) (i) and

⁴⁷⁸ Ibid.

⁴⁷⁹ Sever J.R., 'The Relaxation of Inarbitrability and Public Policy Checks on U.S and Foreign Arbitration: Arbitration Out of Control?' (1991) 65 Tul. L.Rev, 1661-1691, 1664.

⁴⁸⁰ Laxic V., 'The Impact of Uniform law on National Law: Limits on Possibilities- Commercial Arbitration in Netherlands' (2009) 13 (2) E.J.C.L.I, 1-21. <<http://ejcl.org/132/art132-3.pdf>> accessed on 15 January 2017.

its Second Schedule, Articles V (1) and V (2) (a) could be regarded as essential components through which the public policy exception is created.⁴⁸¹ It therefore seems not difficult to see why some scholars advocate limiting public policy exception to substantive issues.⁴⁸² However, as this work has shown, it is necessary for courts to distinguish these grounds and avert mixing them.

The next section of this chapter examines the judicial approach to public policy exception from a global perception.

4.4.0 JUDICIAL APPROACH TO PUBLIC POLICY EXCEPTION FROM A GLOBAL PERCEPTION

Public policy exception empowers courts with the right to exercise control over arbitral awards. Courts do this by safeguarding the mandatory/ fundamental rules of the enforcing States. However, public policy exception has been seen and perceived as a barrier to the smooth running of the arbitration system particularly to the outcome of the arbitration proceedings.⁴⁸³ This may not be right because public policy idea strives to encourage and build, rather than weaken, public trust in arbitration. For this reason, some courts around the globe refused enforcement on the ground of public policy, if only the underlying contract is tainted with illegality and where there is evidence or acts of corruption etc.

⁴⁸¹Ibid.

⁴⁸² Maurere A.G., *Public policy exception under the NEW York Convention, History, Interrelation and Application* (New York: Jurisnet, 2012) 70.

⁴⁸³ Ibid.

4.4.1 Illegality

A contract may be statutorily void by its nature or void because of the disobedient to fulfil the statutory requirements.⁴⁸⁴ Hence, there is a direct link between illegality⁴⁸⁵ and public policy. An illegal act, contract or activity that is prohibited under a statutory or existing law automatically infringe the public policy exception. In this situation, an objection against an award base on the public policy exception needs not to be raised because the nature of the act, contract is illegal itself. That alone is sufficient to establish that the contract is inexistence hence, the question of public policy exception may not be required.⁴⁸⁶ Equally, where the relevant statute declares the contract illegal and thus void because it failed to obey the stated requirements, the issue of unenforceability of award on public policy ground may not even arise.⁴⁸⁷ However, where the illegality arises from the breach of statutory stipulations or requirements, it is the seriousness of the illegality that would determine whether contract or an award arising therefrom should be enforced or otherwise as the court is not expected to condone illegal acts or activities.⁴⁸⁸

In an Australian case, the court determined the enforceability of contracts by considering the gravity of the illegality and then whether the illegality was intentional or not.⁴⁸⁹ In the case of *Fitzgerald v Leonhardt*,⁴⁹⁰ the Australian Court enforced the contract to dig a borehole because the contract by itself was not illegal, only its performance was illegal for failure to seek approval.

⁴⁸⁴ R.M.A & F.C v. U.E.S Ltd [2011] 9 NWLR (Pt. 1252),415-416, paras H-B.

⁴⁸⁵ Any contractual relationship or award will be declared illegal if the consideration or term of award involve violation of public policy. See *Nnadozie v. Mbagwu* [2008]3 NWLR (Pt. 1074) 363.

⁴⁸⁶ Where a specific contractual relationship or, performance of such contract is prohibited under relevant law, in effect such contract is illegal therefore null and void.

⁴⁸⁷ Though void contract may not be illegal unless otherwise stated by status.

⁴⁸⁸ R.M.A& F.C v. U.E.S Ltd[2011] 9 NWLR (Pt. 1252),415-416, paras H-B.

⁴⁸⁹ *Fitzgerald v Leonhardt Pty Ltd* [1997] HCA 17.

⁴⁹⁰ *Fitzgerald v Leonhardt Pty Ltd* [1997] HCA 17 (Kirby J).

It was observed that the societal benefits in the contractual agreement agreed to by the parties outweighs the gravity of the unauthorized behaviour in issue. Nevertheless, Kirby J remarked that enforcement of such contractual right would have been declined for violating public policy exception had the parties intentionally agreed to break the law.⁴⁹¹ If the parties had deliberately ignored to seek the approval as authorised by the statute, the case would have been different.

The position under the English law is more explicit. In England, not all illegal contracts would not be enforced on ground of public policy. Likewise, it is not every award seeming to enforce illegal contracts that would not be enforced under the public policy exception.⁴⁹² The English judges appear to differentiate between severe illegality capable of being enforceable despite its violation against English public policy and illegality which is not sufficient enough to rationalise refusal for enforcement on public policy ground.⁴⁹³ This position could further be broken down into two categories.⁴⁹⁴

First, where the alleged policy is of great significance that is widely recognised in several jurisdictions, the English Court will not enforce such a contract and any award arising therefrom whether or not England is the place of performance and irrespective of the applicable law.⁴⁹⁵ This category of public policy falls under the international or transnational public policy. Second, England would enforce any contract or an award except, parties are to perform the

⁴⁹¹ Ibid.

⁴⁹² Brown E., 'Illegality and Public Policy –Enforcement of arbitral awards in England : *Hilmarton Limited v. Omnium de Traitement et de Valorisation SA*' (2000) 3(1) Int'l Arb L. Review, 31.

⁴⁹³ *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 All ER 513; *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [1999] QB 740 (Colman J at first instance) [1999] 3 All ER 864 ; *Soleimany v Soleimany* [1999] 3 All ER 847.

⁴⁹⁴ Brown E., 'Illegality and Public Policy –Enforcement of arbitral awards in England : *Hilmarton Limited v. Omnium de Traitement et de Valorisation SA*' (2000) 35.

⁴⁹⁵ Ibid.

contract in England and, the performance of such contract breach its domestic public policy. England will also enforce any contract or award except, where contract breach the domestic policy of the State chosen for the performance of that contract, if the place is not England.⁴⁹⁶

The court first applied these rules stated above in *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*,⁴⁹⁷ and has since been referred to as rules in *Lemenda* case. The court declined the enforcement application because the contract breached the public policies of the State where the contract is to be performed. The inference arising from the *Lemenda* case is that the English courts may look into the fundamental policies of other countries in order to determine whether to enforce the awards before it. The courts in England are more particular with the domestic policies of the choosing State for the performance of contract or State whose law parties choose as an applicable law to govern the contract between them.

In 1999, a different view was held by another court in England contrary to the rules laid in *Lemenda* case some years back. In *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*,⁴⁹⁸ arbitrators did not agree with the submissions of the aggrieved party that the contract between them was facilitated through the bribing therefore, the public policy of the State where contract is to be performed (Kuwait) is infringed. At the enforcement proceeding, the defendant again resisted enforcement in England by relying on the illegality of the contract and alleged corruption. The English court rejected this contention and enforced the awards.

Another case worthy of examining is an English case of *Soleimany v Soleimany*.⁴⁹⁹ The court frankly refused the enforcement order on public policy ground. The court observed that a

⁴⁹⁶ Ibid.

⁴⁹⁷ [1988] 1 All ER 513.

⁴⁹⁸ *Westacre Investments Inc. v. Import-SPDR Holding Co Ltd* [1999] QB 740 (Colman J at first instance) [1999] 3 All ER 864 (English Court of Appeal) (the *Westacre* case).

⁴⁹⁹ *Soleimany v Soleimany* [1999] 3 All ER 847.

contract agreement which was unlawful at the place of performance (Iran), is itself a violation of English public policy. English courts showed readiness to disregard foreign judgment that gives recognition to an illegal contract particularly, where the illegal contract was entered into with the purpose of violating the law.⁵⁰⁰ Waller LJ then decided that the same rule applies to an award aimed at enforcing an illegal contract consequently, Waller LJ declined the enforcement application before it. The court laid emphasis on the fact that the main contract that resorted into this current dispute was soiled with illegality therefore, an agreement/award emanated from such dispute settlement is affected. Hence, the court declared the award unenforceable on the ground that the underlining contract was contrary to the English public policy. Hence, *Soleimany* case established the precedent that English court would refuse enforcement in the following circumstances where:

- (a) the underlying contract is illegal under the existing law in the State where the contract is to be performed or where the contract violates the law chosen to regulates the contract;
- (b) the award violates the English domestic policies particularly where England is the State of performance of the contract or the chosen English law was violated or;
- (c) most States would not have enforced such an award because it infringe transnational public policy.

The justification for this decision is premised on the fact that any award seeking to enforce an illegal contract is ultimately enforcing such illegal contract, and hence infringing on the veracity of the legal system.⁵⁰¹ However, it should be stressed that the *Soleimany case* is in relation to domestic award and public policy exception. This means that the decision in this case might have been different where the award is a foreign/international award. Therefore, the issue whether it

⁵⁰⁰ Ibid, 853.

⁵⁰¹ *Soleimany v Soleimany* [1999] 3 All ER 860.

violates English public policy would not even arise except where the illegality is one recognised by several States as being contrary to public policy.

4.4.2 Corruption

The public policy exception can be raised to resist enforcement on the ground that the main contract is tainted with corruption. A commentary guide by United Nations has recognised that bribery, corruption, fraud and other related severe instances could be a basis for resisting an award.⁵⁰² In the *Westacre case*,⁵⁰³ the defendant contended that the contract was obtained by corruption therefore, it violates the public policy. The court declined the application to resist the award on the ground that the defendant is estopped from raising the issue since it had been decided earlier by the tribunal. In this case, the court attached importance to the option of preserving the finality of the award as against re-hearing of the same issue. The enforcing court can only look into the issue of whether or not it falls within the kinds of policies that can operate as a ground to resist the award.

4.5.0 APPLICATION OF PUBLIC POLICY EXCEPTION IN NIGERIA

Section 52 of ACA sets out circumstances in which the Nigerian court could, on its own volition, decline the enforcement an award upon an application by the aggrieved party to the court. One of these grounds is the public policy exception. Without reproducing the relevant Sections, a careful

⁵⁰² UN Doc. A/40/17, United Nation Commission, 'UNCITRAL Secretariat Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Award'. <<http://www.newyorkconvention1958.org>> accessed on 18 May, 2018

Para 297.

⁵⁰³ *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740 (Colman J at first instance); [1999] 3 All ER 864 (English Court of Appeal) (the *Westacre case*).

look at Section 52 shows that the Section encompasses all the conditions stipulated in Article V (1) and (2), Second Schedule of the ACA. This simply shows that the two legislations are identical in nature. However, each State seems to come up with fundamental or mandatory rules that guide the court when face to decide on public policy exception particularly at the enforcement proceedings of awards. Section 52(2) (b) (ii) charges court with the discretionary power to reject the enforcement application before it, if enforcing such an award will infringe public policy of Nigeria.

In *Macaulay v R.Z.B. of Austria*⁵⁰⁴ the Supreme Court observed that public policy could mean those essential moralities and ethics that fall within the domain of each States that serve as a safeguard for the interest of public at large. The vital question is how do the courts in Nigeria determine when the awards contradict public policy exception under Section 52(2)(b)(ii)? In answering this, analysis of the judicial cases in Nigeria is desirable to establish courts' approach in the application of public policy exception.

In *Mutual Life and General Insurance Ltd v Kodi Iheme*,⁵⁰⁵ the respondent was a director of the appellant's company. He was suspended from his duty upon failure to tender his certificates within a given time. The matter was referred to arbitration and an award was given which favor the respondent. He thereafter approached the court to seek judicial enforcement of award. On his part,

Appellant resisted the enforcement application on the contention that it violates public policy among others. The Appellant contented that the respondent had altered his age and that the validity of his first degree was in issue. Hence, implementing such an award which was the product of an illegal contract of employment contradicts public policy in Nigeria. Regrettably,

⁵⁰⁴ [1999] 4NWLR 599.

⁵⁰⁵ [2013] All FWLR 336.

Court of Appeal ruled that the public policy exception was not pertinent to the case at hand thus, the court ignored the submissions of the Appellant as regard the public policy exception without stressing further.

As it is today, it appears no exhaustive judicial cases on public policy exception in Nigeria as it relates arbitral awards.⁵⁰⁶ However, there should be a guiding rule as to when an award would be refused on ground of public policy. A consideration of the relevant provisions of Foreign Judgment (Reciprocal Enforcement) Act⁵⁰⁷ may be helpful in assessing the court approach toward the public policy exception in Nigeria. This is significant because Section 2(1) of the Act extends the definition giving to the judgments to cover arbitral award.⁵⁰⁸ Thus, provisions of this Act also applicable to arbitral award as well. Section 6 of the Act comprises of grounds in which the award may be refused for enforcement; these include public policy exception.⁵⁰⁹ It suffices to claim that judicial cases under Foreign Judgment (Reciprocal Enforcement) Act has been able to provide guiding principles to courts to determine public policy exception in proceedings to enforce an award in Nigeria. In *Macaulay v R.Z.B. of Austria*,⁵¹⁰ the appellant contended that the purported agreement to which he had agreed to stand as a guarantor to a loan facility in England is illegal and as such its enforcement will infringe the public policy ground. The appellant relied on provision of Section 8(1) of the Exchange Control Act that:

⁵⁰⁶ Ojibara I.M, *Judicial Approach to Public Policy and its Effects on the Enforcement of Foreign Arbitral Awards in Nigeria* (2017) 146.

⁵⁰⁷ Cap. F35 LFN 1960 (now Act Cap F35 Laws of the Federation of Nigeria 2004).

⁵⁰⁸ Section 2 Reciprocal Enforcement of Judgments, Cap.175 LFN and Lagos 1958. This Ordinance was enacted in 1922 L.N.8, 1922.

⁵⁰⁹ The same provisions contains in Section 6, Reciprocal Enforcement of Judgments.

⁵¹⁰ [1999] 4 NWLR 599.

any contract to which any person residing in Nigeria agreed to make any payment, or to guarantee any bank loan in favour of any person or corporation outside Nigeria shall be null and void except the Minister gives his approval.⁵¹¹

The Court of Appeal rejected the Appellant's argument and held that since an illegal contract violates public policy, to allow a debtor to get away with his obligation under the fruits of a valid judgment will also go against the Nigerian public policy. To justify its pronouncement, the court weighed the implications of not enforcing the contract on ground of illegality as against discharging the party of his obligation under the law. This is a case of measuring a lesser and a greater evil. In this case, it would be a greater evil to permit the appellant to rely on a specific law as an escape route to get away with his obligation under a valid contract. In effect, the Nigerian court will neither recognise nor enforce an agreement/award where the contract is illegal notwithstanding that the contract in this case is not illegal in the place of performance (England). A similar decision was given in *Dale Power Systems Plc. v Witt & Busch Ltd*⁵¹² where the award-debtor relied on the public policy ground to resist the enforcement application. The Court, while rejecting the contention of the award-debtor, observed that parties are to honour their contractual obligations and it is not against public policy in Nigeria to enforce such a contract agreement against a Nigerian company who obtained goods on credit and failed to honour its obligation to pay. This suggests that public policy in Nigeria favours honouring an obligations and agreements particularly where such an agreement is lawful in the State where is to be performed.

As commendable as these cases seem, courts have not been able to formulate in clear terms, circumstances that will constitutes or likely to qualify as an abuse of public policy so as to

⁵¹¹ Emphasis added

⁵¹² [2001]8 NWLR 705.

function as a guide to both the courts and the prospective investors in Nigeria. However, it is certainly not in doubt that the public policy exception for resisting the enforcement of an awards and judgments exist and recognised in Nigeria. Therefore, the jurisprudence is still growing in this area and with time it is hoped that Nigerian courts will be able to come up with exhaustive rules of public policy in this regard.

4.6.0 CONCLUSION

This chapter considered the concept of arbitrability and public policy from the relevant provisions in the ACA and its Second Schedule. The chapter discovered that to determine whether a dispute is arbitrable or not, recourse must be made to Sections 35 and 57 of the ACA and judicial cases in Nigeria were reviewed.

Further, the chapter established the diversity in the courts' approach from various jurisdictions towards the public policy exception. Also, in this chapter it was revealed that both the ACA and its Second Schedule (New York Convention is containing in the Second Schedule) ignore to offer a description of the notion of public policy or offers direction as to how it should operate as a ground for refusing enforcement. The chapter contended that public policy touches virtually all areas of law in several ways and as such its qualitative content varies from jurisdiction to jurisdiction and from time to time. The chapter further highlighted the two approaches to public policy, namely, the pro-enforcement policy approach (narrow approach) and the expansive policy approach and identified three stages of public policy.

In addition, public policy and other related grounds were examined. It was discovered that public policy interrelates with other grounds stipulated in the ACA and its Second Schedule for resisting the enforcement application. The analysis here showed that it may be difficult to

differentiate between public policy and interrelated grounds. Finally, the chapter discussed public policy exception in Nigeria and analysed the manner in which Nigeria courts apply and interpret this exception.

The next chapter of this thesis discusses the challenges in the judicial review of awards, particularly where the court is invoked to set aside an award. Section 34 of the ACA prohibits court interference with the arbitration system in Nigeria. One of the exceptions to this provision is where the court is faced with an applicable for the setting aside of an award before the enforcement order is sought. This is a form of appeal on the award and only the court of the State where arbitration takes place can vacate an award in a proceeding before it. Impacts of the review system on the foreign awards is the focus of the next chapter

CHAPTER FIVE

JUDICIAL REVIEW OF ARBITRAL AWARDS AND THE INHERENT

CHALLENGES ON THE ENFORCEMENT

5.0.0 INTRODUCTION

Generally, seeking an enforcement order can be quite problematic if the award-debtor decides to contest the award by requesting court of the seat of arbitration to set it aside. This is a form of appeal on the award and the court has power to review and determine the legality or otherwise of such an award, depending on the ground upon which the award is being challenged. The fundamental purpose of a judicial review in arbitration is not for the re-hearing of the merits of a case. Rather, it is to ensure that the tribunal employed the right legal reasoning and complied with the terms of submission.⁵¹³ Oftentimes this drive is not strictly complied with as Nigerian courts are now mostly found guilty of reviewing the merits of the case which was the bone of contention before the arbitral tribunal. This is usually viewed as contrary to what the parties have wished for, as reviewing the merit disrupts the very advantage of submitting to arbitration.⁵¹⁴ The controversial issue before the courts is the appropriate level of judicial review required where such a review is unavoidable.

The chapter begins by examining the general scope of judicial review within the objective of this thesis. This is necessary because the concept of judicial review is wide and thus, a definition of the concept within the intended objective of this chapter is desirable. Furthermore, the chapter

⁵¹³ Galender J.L., 'Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitration' (1997) 80(2), *Marquette L Rev.*, 625, 625.

⁵¹⁴ Berg A.J.V., 'Should Setting Aside of the Arbitral Award be abolished?' (2014) *ICSID Rev.*, 1-26, 16.

examines the scope of judicial review under the ACA. Instances upon which arbitral awards may be reviewed are identified. Also, analysis of cases will be done in order to clarify the challenges inherent in the judicial review of awards. The chapter further discusses and raises a critical question as to the importance of public policy ground for setting aside of an arbitral award in Nigeria particularly, in cases of international arbitration. Finally, the chapter examines the need to maintain a balance between the judicial review system and parties' autonomy to settle their disputes through independent dispute resolution. This is because the desired outcome can only be achieved when there is a balance between 'fairness' and 'finality'.

5.1.0. THE GENERAL SCOPE OF JUDICIAL REVIEW OF ARBITRAL AWARDS

Judicial review is the power given to the courts to decide on the constitutionality/legality of actions or decisions of other governing bodies such as the legislature or executive, as well as individuals or a panel of persons such as arbitrators.⁵¹⁵ Judicial review is meant to determine the legality or otherwise of the issues challenged before it.⁵¹⁶ It therefore serves as a weapon through which the court can declare illegal any law or order which is inconsistent or in contravention of the fundamental laws of the land.⁵¹⁷ The basic purpose of the judicial review is to ensure that the authority does not misuse its power and that the individual receives just and fair treatment.⁵¹⁸

⁵¹⁵ Frances T.F.J., 'Judicial Review of Arbitration on Judicial Attitude' (1960) 40 (3), Cornell L. Rev., 516-557, 517.

⁵¹⁶ Park W. W., 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989), 63 TuL. L. REV. 647, 656; Frances-Freeman J., 'Judicial Review of Arbitration the Judicial Attitude' (1960) 520.

⁵¹⁷ Herzog K., 'Judicial Review of Arbitration Proceedings- A Present Need' (1955) 5, DePaul L. Rev. 14, 15-17; John F., 'The Scope of Judicial Review of Arbitration Awards' (2003), 7, N.Y.L.J., 122-135, 126.

⁵¹⁸ Abedian H., 'Judicial Review of Arbitral Awards in International Arbitration: A Case for Efficient System of Judicial Review' (2011) J of Intl Arb., 28(6), 589-626, 890; Galender J.L., 'Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitration' (1997) 625.

Basically, parties choose to submit to arbitration to avoid being subjected to normal court stress and the benefit of confidentiality that comes with it. The advantages of arbitration also include the right to select their choice of arbitrator and conduct the proceeding in a neutral, and in an economical and swift manner.⁵¹⁹ With these benefits in mind, parties insert an arbitration clause into their agreements with the hope that parties will not experience delays in obtaining an award.⁵²⁰

Hence, in situation where an aggrieved party approach the court for the review an award on certain ground or base on the court discretion it is reviewed, the attitude is usually seen and perceived as differing from what the parties had wished for in their submission for arbitration.⁵²¹ Therefore, the judicial review in this context is seen as undermining the very ultimate advantages of submitting to commercial arbitration. Nevertheless, there may be need for some elements of review; this is for the reason that any system without any form of check and balancing arrangement is vulnerable to abuse.⁵²² For instance, some essential procedures in the arbitration cannot be ignored as this may bring doubts in the award itself.⁵²³ Therefore, the review system is designed to preserve the principle of fairness and to safeguard the importance of finality of arbitral award.⁵²⁴ Nonetheless, the vital question remains the extent to which the courts may go when reviewing an arbitral award so as not to jeopardise the importance of these

⁵¹⁹ Ibid.

⁵²⁰ Gelander J.L., 'Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitration' (1997) 627.

⁵²¹ Berg A.J.V., 'Should Setting Aside of the Arbitral Award be Abolished?' (2014) 16.

⁵²² Alexandros-Catalin B., 'The Benefits of a single-tier judicial court review of arbitral award' (2018)

<<https://arbitrationblog.kluwerarbitration.com/2018/12/20/the-benefits-of-a-single-tier-judicial-court-review-of-arbitral-awards/>> accessed on 20 February 2019.

⁵²³ Ibid.

⁵²⁴ ACA CapA18 LFN 2004, Section 52 ; Second Schedule of the ACA, Article V.

‘fairness’ and ‘finality’ considerations. It is therefore pertinent to examine the model of the review system in the arbitration regime in Nigeria.

5.2.0 MODEL OF JUDICIAL REVIEW IN NIGERIA

There are different approaches to the review system as applicable in various arbitral regimes. There are noticeable models by which different States approach the review system of awards particularly in their domestic arbitration law. Some arbitration regimes restrict the scope of review to procedural irregularities and violation of public policy,⁵²⁵ while in some other regimes, the review has been expanded to allow review on the merits of the case.⁵²⁶ Hence, some States permit little or no form of judicial review within their territories.⁵²⁷ This chapter will not dwell further on the perception from different jurisdictions; rather, it will look into the various grounds by which the power of judicial review in Nigeria may be exercised under the existing law.

Section 34 of the ACA explicitly forbids court interference in the arbitration matters except where so approved by the Act.⁵²⁸ The intention of the drafters is to limit courts’ involvement in arbitration matters, so as not to defeat the aims of the arbitration proceedings.⁵²⁹ Thus, courts can interfere in an arbitral process as specified in certain situations mainly⁵³⁰ in respect of: revocation

⁵²⁵ French is one State that adopts a restrictive approach of review of international arbitral award to procedural irregularity and public policy. French New Code of Civil Procedure, Article 1502 and 1504; Swiss Civil Procedure Code Article 190.

⁵²⁶ A good example is English Arbitration Act Chap.23 1996. Sections 67 and 68 deal with certain grounds in which the court can review an arbitral award on procedural irregularities. Abedian H., ‘Judicial Review of Arbitral Awards in International Arbitration: A Case for Efficient System of Judicial Review’(2011) 593.

⁵²⁷ This is done in two ways. First, the review system may be mandatory excluded through arbitral regime. Second, some regime allow parties themselves to voluntarily exclude the judicial review through their arbitration agreements.

⁵²⁸ *Adamen Publishers (Nig) Ltd v. Abbulimen* [2016] 6 NWLR (Pt. 1509), 431,454, para C.

⁵²⁹ *Ibid* 454, paras E-F; *Tulip (Nig) Ltd v. N.T.M. S.A.S* [2011] 4 NWLR (Pt. 1237) 254; *S.P.D.C.N Ltd v. C.I.N.R. Ltd* [2016] 9 NWLR (Pt. 1517) 300,322 paras D-H.

⁵³⁰ *B.C. N.N. Ltd v. Backbone Tech. Net. Inc.* [2015] 14 NWLR (Pt.1480), 511, 529, paras D,F,G.

of arbitration agreement;⁵³¹ appointment of arbitrator;⁵³² court order for attendance of witnesses;⁵³³ court order for the setting aside of award,⁵³⁴ and judicial enforcement of award.⁵³⁵ Hence, in the preceding chapter, analysis of judicial enforcement was duly discoursed therefore, this present chapter focuses on the specified grounds in the ACA upon which foreign arbitral awards may be set aside or vacated in Nigeria upon application for judicial review. However, references will be made to some jurisdictions to establish where there is the need for improvement.

In Nigeria, aside the procedural irregularity and public policy grounds of review, there are other grounds in the ACA that give room for extensive review of awards. ACA is modelled in line with UNCITRAL law, but deviates from the restrictive grounds stipulated in the Model Law for the challenge of awards. This deviation expands the scope of the review system in Nigeria beyond the imagination because the review process is now more or less with the hearing of the case that apply to first instance court decisions. Sections 29, 30, 48 of the ACA provide for the grounds on which an award can be reviewed thereby set aside upon application. These grounds are as follows:⁵³⁶

- a. where award was procured by fraud, or by improper means;
- b. where there was misconduct by the arbitrator
- c. where there was error of law
- d. where there was procedural irregularity and violation of public policy.

⁵³¹ ACA CapA18 LFN 2004, Section 2.

⁵³² ACA CapA18 LFN 2004, Section 7.

⁵³³ Ibid, Section 23.

⁵³⁴ ACA CapA18 2004, Sections 29, 30 and 48.

⁵³⁵ *ibid*, Sections 31, 32, 52.

⁵³⁶ *B.C. N.N. Ltd v. Backbone Tech. Net. Inc.* [2015] 14 NWLR (1480), 511, 529, paras D,F,G.

Before in-depth analysis of these grounds above, it is pertinent to note that the provisions in the ACA are grouped into Parts I, II and III. Part I is title ‘Arbitration,’ Part II is title ‘Conciliation’ and Part III is title ‘Additional Provision Relating to International Commercial Arbitration and Conciliation.’ Based on the separate titles attached to the Parts of the ACA scholars however, argued that in an international commercial arbitration the drafters of the ACA intended the application of Part III of the Act in addition to the provisions in Part I of the same Act.⁵³⁷ Hence, Section 48 falls under Part III of the ACA. Contrarily, it has been argued that the grounds stipulated in Part I Sections 29 and 30 do not apply to foreign awards that emanate from international commercial arbitration thus, this has not been fully tested judicially in Nigeria. However, the title heading of Part III and wording of Section 43 suggest that these provisions, in addition to other provisions of the ACA, apply to international arbitration. Among these other provisions are Sections 29 and 30 which allow the courts to review awards on grounds of misconduct of arbitrator, fraud, improper means, and error of law. Therefore, within the context of this thesis the provisions contain in Part I of the ACA do not exclusively apply to domestic awards but are also applicable to international/foreign awards.⁵³⁸ It is therefore necessary to analyse each of these grounds.

5.2.1 Fraud/ Improper means

By provision of Section 30(1) of ACA, parties are permitted to challenge the award, where it has been improperly procured either by fraud or other means.⁵³⁹ Hence, circumstances peculiar to

⁵³⁷ Idornigie P.O, *Commercial Arbitration Law and Practice in Nigeria* (Lawlord Press, Nigeria, 2015).

⁵³⁸ Ibid.

⁵³⁹ *Mutual Life & Gen. Insurance Ltd. v. Ihome* [2014] 1 NWLR (Pt.1389) 670, 67-698, paras H-A; *Savoia Ltd v. Sonubi* [2000] 12 NWLR (Pt. 682)539, 547, paras C-D; *R.M.A & F.C. v. U.E.S. Ltd* [2011]9 NWLR(Pt. 1252),379,407, paras D-E; *African Re. Corp v. AIM Consult. Ltd*[2004]11 NWLR (Pt.884), 239-240, paras A- C;

each case determines if the award would be set aside based on the allegation of fraud from the aggrieved party. Neither the ACA nor the judicial cases have been able to reach a stipulated circumstance that will amount to this allegation of fraud or improper means as provided for in the ACA. This position of the laws makes it desirable to analysis the judicial cases in Nigeria and other jurisdictions where award is obtained through improper means or fraud.⁵⁴⁰

It has been observed that the award was improperly procured when evidence showed that an arbitrator acted beyond the scope of his powers.⁵⁴¹ Also, *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp*⁵⁴² is one interesting case on the challenge on allegation of fraud but unfortunately, the case is yet to be decided till date. Nevertheless, the underlying dispute between the parties concerns the contractual agreement to build a petroleum port terminal. Pursuant to the arbitration clause, proceedings were conducted and an award was rendered in favour of IPCO. In Nigeria NNPC initiated review proceedings on procedural irregularities ground thereby set it aside. IPCO also requested the English court for the judicial enforcement order and the request was granted in England. NNPC contended while resisting enforcement that enforcement proceeding ought to be adjourned until the application for setting aside in Nigeria had been dealt with. In 2009, new evidence of fraud emerged. Consequently, NNPC amended its original set aside application to include the new evidence. Regrettably, challenge on fraud allegation is still pending and yet to be decided 10years after. Nevertheless, the *IPCO* case signifies that allegation of fraud is a solid ground under which the court can exercise reviewing power under the extant arbitration law in Nigeria. But because the legal jurisprudence is still

T.E.S.T Inc. v. Chevron (Nig) Ltd [2018]8 NWLR (Pt.1250) 465,493, paras D-E; Stabilini Visinoni Ltd v. Mallinson & Partners Ltd[2014] 12 NWLR(Pt. 1420), 134, 186, paras C-D.

⁵⁴⁰ Taylor Woodrow Nig Ltd v. S.E.GMBH [1993]4 NWLR (Pt.286).

⁵⁴¹ Ibid.

⁵⁴² [2017] UKSC 16.

growing in this area of law, available Nigerian cases are very few. However, references would be made to the courts' decision in other jurisdictions for a guide.

Basically, foreign courts are not always quick to review and set aside an awards on mere allegation that the award was obtained by improper means or fraud.⁵⁴³ The courts can gather from the facts surrounding the granting of such awards and⁵⁴⁴ this usually entails consideration of the relevant events that have significant impacts on the arbitration proceedings and the decision reached by the arbitral tribunal.⁵⁴⁵ In other words, there must be links between the alleged fraud and the award. In *Shearson Heyden Stone Inc. v. Liang*,⁵⁴⁶ the court observed that the applicant must establish a clear and convincing evidence of fraud with no knowledge of the fraud before the rendering of the award and that the fraud was immensely linked to the issues in the arbitration.⁵⁴⁷ Equally, in *Forsythe International, S.A. v. Gibbs Oil Co.*,⁵⁴⁸ the court also emphasised that mere allegation of fraud alone is not sufficient, there must be substantial links between the alleged fraud and the rendering of that award. It must be established that the arbitrator would have reached a different decision if not for the conduct of fraud at the arbitration

⁵⁴³ CELTEL Nigeria BV v. ECONET Wireless Ltd & ors (2014) (unreported) CA/L/895/2012. Helm K.A, 'Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?' (2007), 61(4), Dispute Resol. J, 1-8, 3.

⁵⁴⁴ Section 10(a), Federal Arbitration Act(Pub L. 68-401, 43 Stat. 883, 1925), codified at 9 U.S.C. ch 1.

⁵⁴⁵ CELTEL Nigeria BV v. ECONET Wireless Ltd & ors(2014) (unreported) CA/L/895/2012; Nigerian Agip Exploration Ltd V. NNPC Unreported CA/A/628/2011 ; Ras Pal Gazi Construction Company Ltd v. FCDA [2001] 10 NWLR (Pt. 722)559. See also Helm K.A, 'Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?' (2007) 3.

⁵⁴⁶ 493 F. 3d 321, 324 (1st Cir. 2000).

⁵⁴⁷ Bonar v. Dean Witter Reynolds, 835 F. 2d 1378, 1383 (11th Circuit).

⁵⁴⁸ 915 F.2d 1017, 1022 (5th Cir.1990).

proceedings.⁵⁴⁹Hence, where it can be established that the alleged fraud does not link with the issues dealt with in the award, the party cannot rely on fraud as a ground for vacatur.⁵⁵⁰

Analysis of the cases above shows that courts are not always eager to vacate/ set aside an awards, on the ground of fraud except the alleged fraud is evidently recognised and the fraud itself creates impact in the decision reached by the arbitral tribunal. It is hoped that in the future, the Nigerian courts will emulate the approach of the US courts when faced with the same application to challenge on ground of fraud.

5.2.2 Arbitrator's Misconduct and Error of Law

By the provision of Section 30 of the ACA, Arbitrator's misconduct is another ground under which the aggrieved party may seek court's intervention to have the award set aside. According to Helm, there are three circumstances which may qualify for the arbitrator misconduct in an application for the review of an award.⁵⁵¹First, the arbitrator's acts amount to misconduct where he/she intentionally refused the adjournment on the case without a good cause particularly, where it is essential. Second, where the arbitrator refuses to hear the evidence that is relevant and crucial to the dispute at hand. Third, this entails all kinds of arbitrators' misconducts where the rights of the parties have been infringed upon.⁵⁵²

⁵⁴⁹ Ibid.

⁵⁵⁰ Helm KA, 'Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?' (2007)3

⁵⁵¹ Federal Arbitration Act, Section 10(a) (3). Helm K, 'Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?' (2007) 4.

⁵⁵² United Paperworkers Int'l Union v. Misco , Inc. 484 U.S .29, 36. See Helm K, 'Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?'(2007) 4.

What amounts to misconduct in arbitration proceedings is not specifically stated under the ACA;⁵⁵³ however, a precise viable meaning of the term ‘misconduct’ becomes a challenge particularly to courts and the legal practitioners who are willing to interpret Section 30 of ACA within its restrictive objectives of the drafters of the law.⁵⁵⁴ Hence, judicial approach towards the meaning of ‘misconduct’ is not streamlined. It was observed that where parties are being denied of their right to fair hearing, it constitutes a misconduct under Section 30 of the ACA.⁵⁵⁵ Also, arbitrator’s misconduct can arise where he ignores to obey the submissions in the arbitration agreement; where the award infringe the public policy of the seat of arbitration; where there is evidence of bribe or corruption; where the arbitrator extends the authority given to him under the arbitration agreement; fails to decide all matters submitted to him; or where the rules of natural justice are breached.⁵⁵⁶

Surprisingly, Court of Appeal made a landmark decision when the court held that the arbitrator misconduct can also be raised where the arbitrator violates the provisions of the existing law.⁵⁵⁷ However, the court will not interfere with an award on a complaint against a finding of fact, it can only interfere where the alleged award involves ‘error of law’ on the face of it.⁵⁵⁸ With

⁵⁵³ *Mutual Life & Gen. Insurance Ltd. v. Ihome* [2014] 1 NWLR (Pt.1389), 670, 67-698, paras H-A; *Savoia Ltd v. Sonubi* [2000] 12 NWLR (Pt. 682)539, 547, paras C-D; *R.M.A & F.C. v. U.E.S. Ltd* [2011]9 NWLR (Pt. 1252),379,407, paras D-E; *African Re. Corp v. AIM Consult. Ltd*[2004]11 NWLR (Pt.884), 239-240, paras A- C; *T.E.S.T Inc. v. Chevron (Nig) Ltd* [2018]8 NWLR (Pt.1250) , 465,493, paras D-E; *Stabilini Visinoni Ltd v. Mallinson & Partners Ltd*[2014] 12 NWLR(Pt.1420), 134, 186, paras C-D.

⁵⁵⁴ *Arbico (Nig) Ltd v. N.M.T. Ltd* [2002] 15 NWLR (Pt. 789)1, 24-25, paras E-G, F-G.

⁵⁵⁵ *Stabilini Visnori Ltd v. Mallinson & Partners Ltd* [2014] 12 NWLR (Pt. 1420)189, paras A-F.

⁵⁵⁶ *Savoia Ltd v. Sonubi* [2000] 12 NWLR (Pt. 682)539, 547, paras C-D; *R.M.A & F.C. v. U.E.S. Ltd* [2011]9 NWLR(Pt. 1252),379,407, paras D-E; *African Re. Corp v. AIM Consult. Ltd*[2004]11 NWLR (Pt.884), 239-240, paras A- C; *T.E.S.T Inc. v. Chevron (Nig) Ltd* [2018]8 NWLR (Pt.1250) 465,493, paras D-E; *Stabilini Visinoni Ltd v. Mallinson & Partners Ltd*[2014] 12 NWLR(Pt.1420), 134, 186, paras C-D.

⁵⁵⁷ *Adamen Publishers (Nig) Ltd v. Abhulimen* [2016]6 NWLR (Pt. 1509), 431, 459 paras C-G.

⁵⁵⁸ *Ibid*, 462, paras A-D.

due respect to the court, this is inconsistent and incompatible with the basic notion of the arbitration system as an independent and private disputes resolution mechanism in commercial issues.⁵⁵⁹ Often times, determining the question of law means reviewing the merit of the case, hence the finality nature of the award is jeopardised. Thus, expectations of the parties who opt for arbitration as an alternative dispute resolution mechanism would be frustrated if they are subjected to the court system which the parties intended to avoid in the first instance.⁵⁶⁰ This is true to the extent that cases can rise up to Supreme Court (the highest court in Nigeria) from the High Courts, simply for the reason of determining if the question was one of law, or fact.⁵⁶¹ This situation became worse where courts are to decide on the ‘error of law’ without a required standard of review to guide such a court.

In Nigeria, there is no recognised standard of judicial review; this creates an opportunity for courts to consider applications to set aside widely.⁵⁶² In *Baker Marine (Nig.) Ltd v. Chevron (Nig.) Ltd*,⁵⁶³ the Appellate Court was faced with the question whether court below was accurate to have granted the summation of US\$ 750, 000.00 as damages and to also determine whether the arbitrator exceeded the authority assigned to him. The Court focused on the arbitration agreement and other evidences tendered before the arbitrators while resolving the submitted

⁵⁵⁹ Roger P.A., ‘The American Influence on International Arbitration’ (2003), *Ohio St. J on Disp. Resol*, 19, 69, 70; Brown A.C., ‘Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration’ (2001) *Am. U. Intl Rev*, 16, 969, 1024-25. *The Hill Harmony (Whistler International Ltd v. Kawasaki Kisen Kaisha Ltd* [2001] 1 *Lloyd’s Rep.* 147; *Alfred McAlpine Construction Ltd v. Panatown Ltd* [2001] A.C 518.

⁵⁶⁰ Goode R., ‘Arbitration: Should Courts get involved?’ (2002) 2(2), *Jud. Inst. J.*, 33-49,44.

⁵⁶¹ *Lafarge Redlands Aggregates Ltd v. Sheppard Hill Civil Engineering Ltd* [2001]1 *WLR* 1621.

⁵⁶² *Baker Marine (Nig) Ltd v. Chevron (Nig) Ltd* [2000] 12 *NWLR* (Pt.681)393, paras H-B.

⁵⁶³ *Ibid*, 403.

issues before it. In Exhibit CNCI, Court of Appeal made particular reference to the followings:⁵⁶⁴

12.3.5. The arbitral award shall exclude punitive damages and Attorneys' fees except as expressly provided otherwise elsewhere in this contract and shall contain written reasons on which the award is based.

12.3.6. The contract shall be interpreted in accordance with the laws of the Federal Republic of Nigeria without regard to Principles of Conflict Rules.

The court thereafter reviewed the reasoning behind the decision reached by the lower court on both the substantial disputes and the evidence before it.⁵⁶⁵ No doubt, circumstances like this where the court will have to re-determine the disputes that had been settled by an arbitral tribunal are injurious to the arbitration system. One is therefore tempted to ask if there would be an end to arbitration proceedings, especially where arbitration is now being perceived as a pre-trial procedure to litigation. This enable the enforcement proceedings belligerent because of appeals on the awards. The relevant concern is whether the parties can reach a private settlement without interference of the court?

The problem can be traced to the fact that ACA failed to give a definite meaning to misconduct, therefore courts had to resort to different interpretations.⁵⁶⁶ Also an aggrieved party are at the time coming up with various frivolous applications on ground of arbitrators' misconduct just because the term is not streamlined. The court observed in *Mutual Life & Gen. Insurance Ltd. v.*

⁵⁶⁴ Ibid, 404-410.

⁵⁶⁵ *Mutual Life & Gen. Insurance Ltd. v. Itheme* [2014] 1 NWLR (Pt. 1389), 670; *Baker Marine v. Danos & Curole Marina Contractors Inc.* [2001] 7 NWLR (Pt. 712) 337, 354, 355; *Arbico (Nig) Ltd v. N.M.T. Ltd* [2002] 15 NWLR (Pt. 789) 1; *Adamen Publishers (Nig) Ltd v. Abhulimen* [2016] 6 NWLR (Pt. 1509), 431; *Baker Marin (Nig) Ltd v. Chevron (Nig) Ltd* [2000] 12 NWLR (Pt. 681), 393.

⁵⁶⁶ *Baker Marine v. Danos & Curole Marina Contractors Inc.* [2001] 7 NWLR (Pt. 712) 337, 354, 355; *Arbico (Nig) Ltd v. N.M.T. Ltd* [2002] 15 NWLR (Pt. 789) 1, 40, paras C-F, H.

*Theme*⁵⁶⁷ that to constitute a misconduct the error must have been integrated in the award itself either through the documents tendered; or be related to misconstruction of the law applied in the arbitration proceedings which form the basis for the award.⁵⁶⁸ Importantly, the courts distinguished situations where a particular question of law is submitted and where a question of law becomes material based on the issue submitted.⁵⁶⁹ In the former, court cannot review the award because the matter is *res judicata* but in the latter, the award can be reviewed where on the face of it, the award contains an error of law.⁵⁷⁰

However, the English Arbitration Act 1996⁵⁷¹ contains a similar provision with that of ACA on the right of appeal on the award where it contains an error of law. This is specifically provided for in Section 69 of the Act.⁵⁷² In *Whistler International Ltd v. Kawasaki Kisen Kaisha Ltd*,⁵⁷³ the contention in this case was to decide whether failure to follow the charterer's order constitutes question of law on navigation or employment issue. The majority of the arbitral panel considered it an issue of employment. On the appeal, the High Court maintained contrarily that it was an error of navigation. The award was rendered in 1997 and three years later, the House of Lords ruled on it. Hence, considering the cost of a rigorous exercise of appeal and the delay involved, one is tempted to question how the challenge on 'error of law' fits into the utmost aim of

⁵⁶⁷ [2014] 1 NWLR(Pt.1389) 670.

⁵⁶⁸ T.E.S. T Inc. v. Chevron (Nig)Ltd [2011]8 NWLR (Pt.1250)465,493, paraas E-G.

⁵⁶⁹ Taylor Woodrow (nig) Ltd v. S.E GMBH (1993) 4 NWLR (Pt. 286) 127; K.S.U.D.B v. Fanz Const. Ltd [1990] 4 NWLR(Pt. 142)1706-707, paras F-A., Arbico (Nig) Ltd v. N.M.T. Ltd [2002] 15 NWLR (Pt.789)1, 32, paras A-D; Baker Marine (Nig) Ltd v. Danos & Curole Constructors Inc.[2001] 7 NWLR, (Pt. 712), 337, 354, para C.

⁵⁷⁰ Arbico (Nig) Ltd v. N.M.T. Ltd [2002] 15 NWLR (Pt. 789)1, 33, paras A-C.

⁵⁷¹ Under the English Arbitration Act 1996, the court can review an award if an aggrieved party brings an application to challenge an arbitral award on three grounds. First, on lack of jurisdiction. Second, on serious irregularity causing substantial injustice. Third, on point of law.

⁵⁷² English Arbitration Act, Chap.23 1996, Section 69.

⁵⁷³ [2001] 1 Lloyd 's Rep .147 ; [200] Q.B 241; [2001].

achieving fairness and finality considerations in the arbitration system. Obviously, it is difficult to balance the two considerations where parties can appeal on a slightest opportunity under the guise of error of law.

Goode criticised and argued that the challenge on error of law should be abolished except where parties opt for it.⁵⁷⁴ Scholar further emphasised on the importance of preserving the framework of law on arbitration where the parties' autonomy and arbitral independence are guaranteed.⁵⁷⁵ This thesis therefore agrees with the reasoning of the scholar to some degree that Nigerian courts should not extend the review of arbitral awards beyond necessary. Reviewing an award on error of law is totally out of context.

In 2005, the then A.G of the Federation of Nigeria; Chief Bayo Ojo setup a committee for the purpose of reviewing Arbitration and ADR laws in Nigeria. This is to respond to inadequacy in the ACA particularly in the arbitration agreements, proceedings and awards. It is understood that the meaning and what constitutes 'misconduct' is not streamline therefore, creating opportunities to parties to bring in frivolous applications on the ground of misconduct against the award. The Committee Report reads:⁵⁷⁶

Nigeria's arbitration regime permits wider review of international arbitration awards than what is contemplated by the UNCITRAL Model Law. Although section 48 of the Arbitration Act sets out the minimalist grounds contained in the UNCITRAL Model Law, nevertheless section 43 of the Act makes "other provisions of the Act" applicable to international commercial arbitration. These "other provisions" include section 30(1)

⁵⁷⁴ Goode R., 'Arbitration: Should Courts get involved?' (2002)49.

⁵⁷⁵ Ibid.

⁵⁷⁶ The Report of the National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria. <<http://www.aluko-oyebode.com/files/amended%20report.pdf>> accessed on 25 March, 2018.

which as shown above, allows the courts to review arbitral awards on grounds of “misconduct of arbitrator” (including “error of law on the face of the award”), which has been employed by lawyers to subject many arbitral awards to the length and oftentimes frustrating process of the Nigerian litigation system.

One of the recommendations of the Committee is to modernise the grounds of recourse against the awards in the ACA. The Committee recommends that Sections 28, 30 and 48 of the ACA should be replaced with Clause 42 in the proposed Federal Arbitration and Conciliation Bill which seeks to adopt simple and minimal grounds of recourse against an award. Regrettably, 19 years after the submission of the report, the implementation of its recommendations seems to have been ignored. While we await for the quick action on this, we can only hope the courts will exercise their discretionary power to interpret narrowly the vague and ambiguous ground of ‘misconduct’ when faced to determine the issue before them.

5.2.3. Procedural Irregularity and Public Policy

Section 48 of the ACA permits parties to challenge arbitral awards on procedural irregularity and public policy. Procedural irregularity can be raised where a party lacks legal capacity to enter into an agreement to arbitrate or; where the legitimacy of that agreement is in doubt or the chosen law is not obeyed or; there is inadequacy in the arbitrator’s appointment or arbitral proceedings or; the award contains issues not submitted or contains decisions that exceed issues submitted before the arbitral tribunal or; failure to obey the arbitration agreement or procedure in selection of arbitral tribunal.⁵⁷⁷ Also, award can be challenge on procedural irregularity where

⁵⁷⁷ ACA Cap.A18 LFN 2004, Section 48(a) and (b)(i).

the subject matter is inarbitrable.⁵⁷⁸ As regard the procedural irregularity, this can be explained under the following headings: (i) violation of fair hearing; (ii) evident partiality; and (iii) abuse of power.

Violation of fair hearing can be inferred from Sections 48(a) (i)-(iii) of the ACA.⁵⁷⁹ ACA lay emphasis that the arbitral award must be vacated if an aggrieved party can establish that the arbitrator's denial to hear evidence was pertinent and material to his case.⁵⁸⁰ Judicial cases on violation of fair hearing have been analysed in the previous chapter, hence it may not be necessary to repeat same here. Nevertheless, a foreign case will be helpful. In *Hoteles Condado Beach, La Concha & Convention Center v. Union De Tronquistas Local 901*,⁵⁸¹ an employee was sacked for violating one of the hotel's disciplinary rules. An arbitration proceeding was initiated before the arbitral tribunal which held that the dismissal was unjustified. The employee received the award in his favour though, the tribunal did not consider evidence of the criminal record of the employee tendered at the proceeding before reaching that decision. On appeal, the court while granting the Appellant's request to set aside the award observed that, failure of the tribunal to consider such an important evidence deprived the party of a fair hearing.⁵⁸² The court held further that arbitrators are primarily charged to ensure each of the parties are equally allowed to present its evidence and arguments before them.⁵⁸³

As regard evident partiality, ACA permits parties to object to the appointment of the arbitrator(s) if circumstances in which his appointment comes about creates fears as to the arbitrator's

⁵⁷⁸ ACA Cap.A18 LFN 2004, Section 48(b)(ii).

⁵⁷⁹ ACA Cap.A18 LFN 2004, Section 48(a)(i)-(iii).

⁵⁸⁰ See ACA Cap.A18 LFN 2004, Section 48(a)(i)-(iii).

⁵⁸¹ 763 F.2d 34 (1st Cir. 1985).

⁵⁸² Ibid.

⁵⁸³ *Hoteles Condado Beach, La Concha & Convention Center v. Union De Tronquistas Local 901*, 763 F.2d 34 (1st Cir. 1985) 39.

partiality.⁵⁸⁴ Arbitrators are charged with the obligation to disclose any relationship, connection or personal interest they have in the matter and which is likely to raise doubts on their impartiality.⁵⁸⁵ The evident partiality provision further reinforces and extends to the grounds in Section 48(a) (iii) and (vi) of the ACA. It provides that where there is inadequacy in the arbitrator's appointment or arbitral proceedings or⁵⁸⁶ failure to obey the arbitration agreement or procedure in selection of arbitral tribunal,⁵⁸⁷ the evident partiality may be deduced though subject to the facts of the case.⁵⁸⁸ The aggrieved party only requires to show that the arbitrator was partial to one party as regards notice of appointment, or proceedings etc.⁵⁸⁹ It is an issue of fact and not law and as such circumstances will tell whether there is evidence of partiality or not.

There are factors that guide courts in reaching a decision when the issue of impartiality is raised. These factors are: the magnitude of the alleged arbitrator's personal interest in the arbitration proceeding, how deep the intimacy between the alleged arbitrator and the party alleged to be favoured and, the period at which the alleged arbitrator was involved in the arbitration proceedings lasted.⁵⁹⁰ This simply denotes that the question of evident partiality is determined on the circumstances of each case. It is a question that may not be easily described but could be identified from a given set of facts. Arbitrators are under obligation not to be partial and to disclose any personal interests. Therefore, failure to reveal relevant information can generate an interpretation of likely bias that permits the court to vacate an award.⁵⁹¹

⁵⁸⁴ Section 45(3).

⁵⁸⁵ Section 45(1).

⁵⁸⁶ ACA Cap.A18 LFN 2004, Section 48 (a)(iii).

⁵⁸⁷ ACA Cap.A18 LFN 2004, Section 48(a)(vi).

⁵⁸⁸ *African Assurance Corp v. Aim Consultant Ltd* [2004] 12 CLRN,107-124.

⁵⁸⁹ *Umar v. Onwudiwe* [2002] 10 NWLR (Pt. 774)150.

⁵⁹⁰ *AT& T Corporation v. Saudi Cable Company*[2000]1 All ER (D) 657.

⁵⁹¹ *Ibid.*

However, some basic steps have also been designed for parties to safeguard impartiality of the arbitrators.⁵⁹² This includes demand for a prehearing disclosure of declarations from those appointed as arbitrators thereby, rely on the information obtained to choose whether to accept the arbitrator's appointment or not. Upon the prehearing declaration, court can infer waiver of right if the arbitrator is not challenged based on the information gathered from the disclosure.⁵⁹³ In *Fidelity Federal Bank, FSB v. Durga Ma Corp.*⁵⁹⁴ the court observed that Fidelity had waived his right to raise the evidence partiality ground since he was aware of the acquaintance that exist between the alleged party and the alleged arbitrator and he ignore to raise objection early enough as to the appointment of such arbitrator. However, the party must have full knowledge of the supposed relationship for waiver to operate.⁵⁹⁵ This puts the burden on the arbitrator to establish that the parties were aware of his relationship with the alleged party.⁵⁹⁶ The court's decision in this case is commendable, the waiver principle is to sensitise the parties not to sleep on their rights and to encourage them to raise any objection early before it is too late to do so. There must an end to litigation.⁵⁹⁷

As regards abuse of power, by Section 48 (a)(iv) and (v) of ACA, an arbitral award may be challenged where party can show that the award contains decisions not contemplated by the parties or not within the subject submitted to arbitration.⁵⁹⁸ Abuse of power is the most regularly

⁵⁹² Platt W.D., 'Non-Disclosure of Arbitrator Conflicts and the Evidential Partiality Standard' (2004) 74(6), CPA. J, 12-63, 54; Helm K.A., 'Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?' (2007) 5.

⁵⁹³ ACA CapA18 LFN 2004, Section 33.

⁵⁹⁴ *Fidelity Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1308 (9th Cir. 2004).

⁵⁹⁵ *Ibid.*

⁵⁹⁶ Ajogwu F., *Commercial Arbitration in Nigeria Law and Practice* (Mbeyi & Associate, Nigeria, 2009)75.

⁵⁹⁷ Helm K, 'Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?' (2007) 4.

⁵⁹⁸ ACA Cap.A18 LFN 2004, Section 48(a)(v).

mentioned justification for judicial review of arbitration award.⁵⁹⁹ For instance, the case of *Brother Hood of Railroad Trainmen v. Central of Georgia Railway Co.*,⁶⁰⁰ court emphasised that awards must have gained its origin from the issues or matters contemplated in the agreement.⁶⁰¹ Thus, what is relevant in determining the question of abuse of power is whether the arbitrator is conferred with power to adjudicate on the issues contained in the decision reached and not whether the arbitrator rightly decided the issue before it.⁶⁰² In effect, an award can only be reviewed if the arbitrator abused the power given to him by acting beyond the power given him therefore forcing his own brand of justice.⁶⁰³

Courts have formulated circumstances where they may infer that an arbitrator has abused its power.⁶⁰⁴ This includes where there is no correlation between the award and the submissions in the agreement; where new issues were dealt with in the award which was not expressly/impliedly agreed to in the arbitration agreement; or where the basis of award rests on the general considerations of fairness and equity as against the stipulated issues in the agreement. Hence if any of this inference can be drawn, the court is likely to reach a decision that the arbitrator abused its power.

The second part of procedural irregularity as ground for challenging an award stipulated under the ACA, Section 48 is public policy. A detailed analysis of public policy has been discussed in

⁵⁹⁹ *Brother Hood of Railroad Trainmen v. Central of Georgia Railway Co* 415 F.2d 403, 411-12 (5th Cir. 1969). Helm K., 'Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?'(2007)4; Hayford S.L., 'Law in Disarray: the Judicial Standards for Vacatur of Commercial Arbitration Awards' (1996)30, Ga L. Rev, 731, 747-48.

⁶⁰⁰ 415 F.2d 403, 411-12 (5th Cir. 1969).

⁶⁰¹ *Ibid*; *Westerbeke Corp v. Daibabatsu Motor Co.* 304 F. 3d 200 (2d Cir. 2002).

⁶⁰² Helm K., 'Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?'(2007)5.

⁶⁰³ *Banco de Seguros Del Estado v. Mutual Marine Office*, 344 F.3d 255, 262(2d Cir. 2003).

⁶⁰⁴ *Cement Divs, Nat'l Gypsum Co. v. United Steelworkers, Local 135*, 793 F.2d 759, 766 (6th Cir.1986).

the previous chapter as regard grounds for refusing application for an enforcement in Nigeria. However, it is pertinent to discuss the need to refrain from applying public policy ground to vacate an award.

5.2.3.1. Public policy Exception in Nigeria: A Case for a Transnational Public policy

By Section 48(b) (ii) of the ACA, foreign award can be vacated or set aside if the enforcement of such awards will infringe public policy of Nigeria.⁶⁰⁵ Hence, the court will review the award before it to determine the extent of the violation and if such infringement warrant the vacatur of award. However, this provision contain in Section 48 of the ACA can only be invoke to contest foreign awards in an international commercial arbitration where Nigeria is the State chosen for the seat of arbitration proceedings. This creates the issue of whether the continuous application of this provision as it's relates to public policy exception in an international arbitration is necessary. The reason is that if an award emanates from international arbitration, it may not be materially relevant to reflect on the domestic public policy of the State where arbitration proceeding was conducted. One reason for this is that, oftentimes an arbitral award upon which the appeal is being made on public policy ground does not have direct impact on that State's fundamental rules and policies. This is because the choice of the seat of arbitration or the place of enforcement is typically for geographical convenience and neutrality purposes.

If the public policy exception must be included as a ground for vacatur of award at the State where arbitration proceeding is conducted, the courts should resort to transnational public policy not domestic public policy so as to achieve uniformity in this area of law. Bearing in mind that the domestic public policies of the seats of arbitration are uneven since the various legislations

⁶⁰⁵ Section 48 of the ACA; Article IV of the Second Schedule of the ACA; Article 34 of the UNCITRAL Law are all identical.

and judicial practices of different States on this issue are distinct.⁶⁰⁶ The idea of applying transnational public policy is well established in France and Switzerland,⁶⁰⁷ therefore it is a good innovation that can be adopted in other jurisdictions including Nigeria. In *Fougerolle v. Procofrance*,⁶⁰⁸ the court considered transnational public policy in the proceeding for the setting aside of an award before it. The same position was held in *European Gas Turbines S.A v. Westman International Ltd*,⁶⁰⁹ where the court emphasised on transnational public policy. Also, a Swiss court indicated the same position by adopting the transnational public policy and emphasising that the applicable public policy is that of universal principles and business ideologies of different nations.⁶¹⁰

Nigeria can therefore emulate this and adopt transnational public policy in the proceedings for the setting aside of award particularly where Nigeria is the seat of arbitration. The objective of reaching finality in the arbitration system will prove difficult most especially if every State is allowed to review awards based on their own individual domestic public policy.

Another possible solution is to exterminate the public policy exception entirely as one of the grounds available to be raised particularly, in the State where the arbitration was conducted. This will meet with the international efforts to unify laws in this aspect without necessarily undermining the trust of the international business community. The next section examines measures to be considered which will help to equalise the review system and the autonomous

⁶⁰⁶ Aberdian H., 'Judicial Review of Arbitral Awards in International Arbitration: A Case for Efficient System of Judicial Review' (2011) 609.

⁶⁰⁷ *Fougerolle v. Procofrance* Paris Court of Appeal, 1990, Rev. Arb. 892 (1990). Aberdian H., 'Judicial Review of Arbitral Awards in International Arbitration: A Case for Efficient System of Judicial Review' (2011) 610.

⁶⁰⁸ Paris Court of Appeal, 1990, Rev. Arb. 892 (1990).

⁶⁰⁹ Paris Court of Appeal, 1993, Rev. Arb. 359(1994), XX Y.B. Com. Arb 198 (1995).

⁶¹⁰ Milan Court of Appeal, 1992, XXII Y.B. Com Arb. 725 (1997). See also Swiss court decision in *W v. F & V*, Swiss Federal Tribunal, 1994, ASA Bull. 217 (1995).

nature of the arbitration process. It is doubtful whether in the quest of justice through the use of judicial review system and appeal is appropriate because of the unconventional nature of the arbitration system.

5.3.0 BALANCING THE INTERESTS OF REVIEW AND ARBITRAL INDEPENDENCE

The basic principles of international arbitration are twofold; to guarantee the implementation of the arbitral award and to uphold the principle of fairness.⁶¹¹ Oftentimes, opting out for the arbitration as a method to resolve commercial disputes as against litigation is premised on the desire to avoid normal courts procedure. Thus judicial review might not be proper for an arbitration award because if national courts are allowed to re-determine the outcome of the arbitration, the aim of avoiding normal court procedure will be defeated.⁶¹² While the importance of review is to ensure fairness, its philosophical basis contradicts the autonomous and secluded nature of international arbitration.⁶¹³ Hence, a sense of balance between the autonomous nature of arbitration system and review system is urgently desired.

By educating legal officers and the public at large about the uniqueness and advantages of arbitration, such balance could successfully be merged and achieved in Nigeria. Most judges in Nigeria have little training or skill in arbitration law and practice with little understanding of the procedures and the drives of the arbitration system. This may be because arbitration law is not a course of study for most judges and a qualification in arbitration law and procedure is neither a precondition nor a requisite for judicial appointments. It is thus submitted that occasional

⁶¹¹ Galender J.L., 'Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitration' (1997) 626.

⁶¹² Ibid, 625; Japaridze N., 'Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the nature of International Commercial Arbitration' (2008) 36(4), Hofstra L. Rev, 1415.

⁶¹³ Ibid.

arbitration training or seminar for judges can not sufficiently fill this gap. The role of judges in arbitration ought to be viewed from the standpoint of qualifications, ability, aptitude and expertise.⁶¹⁴ This is because the expectation of parties to arbitration is that the outcome of the process will be final and the award be enforced by a process independent of the court system. Thus, some basic attractive features of international arbitration such as speed, economical benefit, its informal nature and, confidentiality are gradually becoming less feasible and less worthwhile. The best is for the courts and prospective investors to see and attach much importance to the finality of awards. If parties have chosen to settle through arbitration, impliedly the right of challenge should be restricted because it is a voluntary process.

5.4.0 CONCLUSION

This chapter examined the judicial review system of awards and its impacts on the enforcement in Nigeria. This is done by pinpointing two important considerations such as finality and fairness. On one hand, finality demands the compliance with the terms of award and on the other hand, the aggrieved party seeks fairness by approaching the court to intervene where he is aggrieved at the outcome of the proceeding. The chapter discussed the noticeable models in which judicial review of arbitral awards could be approached with reliance on judicial cases. The chapter showed that some arbitration regimes restrict the scope of the review system to procedural irregularities and to public policy; in other regimes, the scope of review has been expanded to cover merit of the case. It is therefore noted that ACA permits extensive review of arbitral awards.

⁶¹⁴ Gelander J.L., 'Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitration' (1997) 628.

Hence, having examined the challenges of enforcement applicable to the statutory arbitral awards, it is also pertinent to examine the challenges as it relates to Islamic arbitral award. The next chapter of this thesis therefore focuses on the adequacy of ACA in relation to recognition and enforcement of foreign Islamic awards in Nigeria. The inevitability of inter-State relationships between Nigeria and Muslim States around the globe and, between individual Muslim investors especially in the area of commerce makes it expedient for Nigeria to provides Shari'ah based law which will cater for the interest of the affected individuals or States and will ensure fairness. Thus, one area of concern relevant to this thesis is in relation to challenges associate with the enforcement provisions in the ACA as applicable to foreign Islamic arbitral awards in Nigeria.

CHAPTER SIX

ENFORCEMENT OF ISLAMIC ARBITRAL AWARDS IN NIGERIA

6.0.0. INTRODUCTION

With the recent survey conducted, ⁶¹⁵world Muslim population is estimated to be 1.8 billion.⁶¹⁶ This population is expected to grow fast in the nearest future considering the pace of Islamic activities and Islam's influence across the world.⁶¹⁷ This growing population of Muslims influences the position of many Muslim States to enhance Islamic law to meet the demands of its citizens. Not only that, Muslims who do not reside in such State, still wish to observe and be governed by Shari'ah in all aspects of their lives including their commercial dealings.⁶¹⁸ This should not be surprising because a Quranic injunction enjoin all Muslims to be holistic in their Islamic outlooks and avoid following the path of the devil.⁶¹⁹

As the world's Muslim population grows, international legal mechanisms regulating commercial transactions are challenged to meet this demand. In spite of restrictions which Islamic law imposes on certain contracts, investors and States around the world are working timeously to facilitate Shari'ah-compliance in commercial transactions. Such important efforts have resorted, among others, in the establishment of Shari'ah compliance MasterCard that charges fees based

⁶¹⁵<<https://www.pewresearch.org/fact-tank/2017/04/06/why-muslims-are-the-worlds-fastest-growing-religious-group/>> accessed on 15 January 2019.

⁶¹⁶ Panighetti T., 'I-Arbitration: Not the Newest Apple(R) Product, But Sharia Law in International Commercial Arbitration' (2013), 5. Y.B. Arb & Med., 287-294; <<http://www.pewforum.org/The-Future-of-the-Global-Muslim-Population.asp+69+999968+86x>>. accessed on 13th January 2019.

⁶¹⁷ Ibid.

⁶¹⁸ Christopher F.R., 'Islamic Finance Opportunities in the Oil and Gas Sector: An Introduction to an Emerging field' (2006) 42(19) Tex Intl, LJ, 119-153,123.

⁶¹⁹Quran 2 verse 168.

only upon usage, with no interest charges.⁶²⁰ To also attract investors all over the world, Muslim States are amending their arbitration laws in accordance with the Shari'ah ethics with the drive to attract investors who are particular about Islamic injunctions.⁶²¹

This chapter examines commercial arbitration from the Islamic law perspectives and clarifies its legal basis and opinions of Scholars from the four orthodox Sunnis of Islamic schools. The chapter also addresses some relevant issues such as whether ACA safeguards the enforcement of Islamic commercial arbitral awards in Nigeria? And if so, does ACA considers the peculiar nature of the Shari'ah? Finally, the chapter examines the relevant provisions in the Asian International Arbitration Centre Rules 2018 (AIAC i-Arbitration Rules) and recommends that the Nigerian legislature can learn from it and improve on the Nigerian arbitration law.

6.1.0. OVERVIEW OF ISLAMIC COMMERCIAL ARBITRATION

This section of the Chapter discusses the concept of arbitration and its legal basis in Islamic law. Some salient features of Islamic arbitration e.g. arbitration agreement, scope of Islamic arbitration and appointment of arbitrator are also discussed in this section.

Islamic law regulates the affairs of the Muslims including his relationships with other people.⁶²²

This should not be surprising because Islam is not just a religion but also a complete way of life that regulates and guides both the private and commercial dealings of Muslims.⁶²³ Consequently,

⁶²⁰ Panighetti T., 'I-Arbitration: Not the Newest Apple (R) Product, But Sharia Law in International Commercial Arbitration.' (2013) 287.

⁶²¹ Kuala Lumpur Regional Centre for Arbitration (KLRCA) i-Arbitration Rules (known as 'i-Rules) 2018

⁶²² Hossain S., 'Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An analytical Overview' (2013) 1 J of Phil, Cul. & Rel, 1-13,1.

⁶²³ Ajetumobi M.A., *Shariah : Legal Practice in Nigeria between 1956-1983* (Kwara State University Press, Nigeria, 2017) 1-5; All'amah S. & Tabataba I., *The Quran in Islam: its Impact and Influence on the Life of Muslim*

if the parties agreed to transact under the Islamic law, any difference arising from such a relationship must be settled in accordance with Shari'ah principles. Hence, once Islamic arbitration in principle is accepted, the arbitral award must also be Shari'ah compliant to be enforceable in Islamic States.⁶²⁴

6.1.1. The concept of Arbitration and its Legal Basis in Islamic law

Arbitration under Islamic law is called *tahkim*. *Tahkim* is a form of Islamic Alternative Dispute Resolution (ADR) which is known as *Sulh*.⁶²⁵ The legal basis for arbitration (*tahkim*) is traceable to the four main sources of Shari'ah namely: the Qur'an, the Sunnah, the Ijma' and, the Qiyas.⁶²⁶ While the Quran and the Sunnah are the primary sources, Ijma and Qiyas are secondary sources. Qur'an contains words of Allah revealed to Prophet Mohammed, through angel Jibril.⁶²⁷ Qur'an consists of 114 *Surahs* (chapters) and 6,666 verses with about 500 verses specifically on legal matters, including arbitration issues.⁶²⁸ References to *Sulh* generally can be found in Quran 49:10 while specific reference to the use of arbitrator (*Hakam*) in amicable settlement of dispute (*Sulh*) can be seen in Quran 4 verse 35.

(Zahra Publications, Blanco, USA,1987) 86; Robert D.S., *Islam : A Westerner's Guide From Business and the Law to Social Customs and Family Life* (Hamlyn, London, 1982) 67-68.

⁶²⁴ Hossan S., Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An analytical Overview'(2013) 11.

⁶²⁵ Ahmad Idi D. & Oseni U.A., 'Appointing a Non-Muslim as Arbitrator in *Tahkim* Proceedings: Polemics, Perceptions and Possibilities' (2014), 5, MLJ xvi, 1-10, 4.

⁶²⁶ Akram Laldin M., *Introduction to Islam*(IIUM Press, Malaysia, 2011)55.

⁶²⁷ Ibid, 56-57.

⁶²⁸ Albert H., *A History of the Arab People* (Grand Central Publishing, UK, 1992)1; Doi A. I., *Shari'ah: The Islamic Law* (A S Noordeen, Malaysia, 1984)36.

Sunnah is the acts, pronouncements and approvals of the Prophet Mohammad which is documented into what is known as the *Hadith*.⁶²⁹ Hence, the Sunnah is only resorted to if the Qur'an is silent on the issue.⁶³⁰ *Ijma'* means 'consensuses of Islamic scholars which over time have gained widespread acceptance through the use of juristic reasoning (*Ijtihad*).⁶³¹ Lastly, *Qiyas* is legal principles arrived at by analogical deduction.⁶³² To constitute *Qiyas*, the logic utilised must be based on the Quran or the Sunnah.⁶³³ It is often used to develop Islamic principles on new or emerging topics; this, therefore, ensures and covers new developments and innovations in a given society.⁶³⁴

These four sources of Shari'ah discussed above in one way or the other recognise, support and legalise arbitration (*takhim*) in their respective wordings. The holy Qur'an provides:

And if you fear a breach between the two, then engage a neutral person from his folks and another person from her side; if the two wish for settlement, Allah will effect harmony between them; surely Allah is knowing, aware.⁶³⁵

⁶²⁹The most recognised six books of the Sunnah of Prophet Mohammed are: the Sahih of al Bukhari(d.256 AH-870CE), The Sahih of Muslim (d. 261 AH-875 CE),The Sunan of al Nasai (d. 303 AH-915 CE),the Sunan of Abu dawud (d.275 AH-888 CE), The Al-Jami of al- Tirmidhi (d.279 AH-892 CE) and, the Sunan of Ibn Majah (d. 273 AH-887 CE).

⁶³⁰Quran Chapter 4 verse 59; Akram Laldin M., *Introduction to Islam* (2011)74; Khalid U., 'Beyond the Veil? : An Analysis of the Provisions of the Women's Convention in the law Stipulated by the Shari'ah' (1995) 2, Buff. J of Int'l L, 1, 9.

⁶³¹ Akram Laldin M., *Introduction to Islam* (2011)89.

⁶³² Ibid.

⁶³³ If any *Qiyas* contradicts the words of Allah in the Quran and Sunnah is considered invalid. Ibn Qudāmah Al-Maqdisi, *Rawdatun Nādhir wa Junnatul Munādhir* (Muassasa Ar Rayyān, Lebanon, 2002) II, 303

⁶³⁴ Khalid U., 'Beyond the Veil? : An Analysis of the Provisions of the Women's Convention in the law Stipulated by the Shariah' (1995) 12.

⁶³⁵ Qur'an Chapter 4 verse 35.

You should always refer disputes to God and to His Prophet. And obey Allah and his Messenger; and fall into no disputes, lest you lose heart and your power to depart; and be patient and persevering: for Allah is with those who patiently persevere.⁶³⁶

Historically, Prophet practiced *tahkim* as a dispute resolution among his followers and this continued after his death.⁶³⁷ There are a number of instances where the Prophet took the position of an arbitrator (*hakam*)⁶³⁸ and where he submitted himself to a neutral *hakam* to hear the dispute between him and another person.⁶³⁹ For instance, Prophet Mohammed agreed with the people of Banu Qurayza tribe to submit and resolve disputes between them to a neutral *hakam*.⁶⁴⁰ This is to show his commitment and participation in the *tahkim* process. However, it is only of recent that the Islamic arbitration practice has received international attention,⁶⁴¹ although the values and philosophies of Islamic arbitration had long been immersed in the economic antiquity of the Arabian region.⁶⁴²

Notwithstanding the foregoing, the legal binding force of the *tahkim* has caused and generated different views among Islamic scholars. There are two divergent opinions of Islamic scholars on this. On the first opinion, some equate *tahkim* with conciliation with no binding force. Proponents of this view justify their position with Quran 4:35 and interpreted the provision to mean that the function of a neutral person (*hakam*) is to assist couples resolve their differences,

⁶³⁶ Qur'an Chapter 8 verse 46.

⁶³⁷ Abdul Hamid El-Ahdab, *Arbitration with Arab countries* (2nd edn, Kluwer law international , 2011)11

⁶³⁸ In Arabic philology, arbitrator is known as *hakam* or *muhkim*.

⁶³⁹ Abu- Nimer M., 'A Framework for Nonviolence and Peacebuilding in Islam' (2001) 15 (1-2), J L. & Religion, 217-265.

⁶⁴⁰ *Libyan American Oil Company v. Libyan Arab Republic* , 17 I.L.M. 3. (1978), 4.Y.B, COM. ARB.177.

⁶⁴¹ Cunningham R.B & Sarayrah H., *Wasta: The Hidden Forces in Middle Eastern Society* (Praeger, London, 1993)12.

⁶⁴² Ibid.

without necessarily imposing any binding decision on them.⁶⁴³ Other scholars assert that *tahkim* serves as an alternative dispute mechanism that comes with a binding nature.⁶⁴⁴ This view relies on Quran 4:58 which imposes the duty to act fairly and justly on any person who is standing-in as a *hakam* (arbitrator). The scholars contend that if parties willingly agreed to a particular *hakam* to adjudicate and determine a matter between them, that power conferred on the *hakam* comes with an implied term to honour the outcome as final and binding decision. Hence, these proponents canvass for a binding nature of *tahkim* as the agreement to settle via alternative method constitutes an agreement to obey and make the decision binding on the parties.

Interestingly, scholars from both sides have respectively revealed both the conciliatory and binding nature of arbitral awards. This leaves parties with the choice to make the process a voluntary one, unlike any other mandatory rubrics in the Quran. This again, shows the flexible nature of Shari'ah which adapts to innovations without necessarily violating the basic rules and principles of Islamic law.⁶⁴⁵

The discussion on Islamic arbitration may not be complete without a brief highlight on the Code of Legal Provisions (Medjella Code), as it relates to binding nature of *tahkim*. This is important because Medjella Code contributed to the evolution of Islamic law in the early days of Islam. Not long after the conclusion of the Crimean War in 1856, the Medjella Code came into existence to codify Shari'ah principles and rules.⁶⁴⁶ The application of the code continued for many years. The civil codes of some Muslim's States were and are still centered on it. However, Medjella Code equates *tahkim* with conciliation. However, the code envisages that since the

⁶⁴³ Quran Chapter 4 verse 35.

⁶⁴⁴ Abdul Hamid El- Ahdab & Jalal El-Ahdab, *Arbitration with Arab countries* (2011) 12.

⁶⁴⁵ Ramahi A., Sulh: 'A Crucial Part of Islamic Arbitration' (2008).<www.lse.ac.uk/collections/law/wps.htm> accessed on 16 February 2019.

⁶⁴⁶ The Ottoman Code of Legal Provisions (Medjella) 1869.

award emanates from the contractual agreement between the parties to settle dispute through *tahkim*, it can as well be seen like any other simple contract conducted under the Shari'ah law, therefore Islamic award can be enforced for that reason.⁶⁴⁷ Hence, the position of Sunni Schools on this issue will be relevant also.

Sunni Schools (Hanafi, Maliki, Shafi and Hambali) of Islamic jurisprudence was established with the objective of setting standard guiding principles in the interpretation of Shari'ah law and its application to new problems and questions.⁶⁴⁸ Regrettably, Sunni Schools could not reach a consensus as regard the binding force of Islamic arbitration (*tahkim*). No doubt acceptability of *tahkim* is undisputed by these Schools,⁶⁴⁹ however, each school varies its approach to arbitration as a disputes resolution method.⁶⁵⁰ The Hanafi School holds that *tahkim* is contractual in nature, like agency relationships, and has features of conciliation.⁶⁵¹ This school observes that Islamic *tahkim* creates agency relationship between the appointed *hakam* and the parties who appointed him. But because the Hanafi School equates *tahkim* with conciliation, an arbitral award is considered of a lesser force than court judgment. Nevertheless, scholars of this School hold the view that the parties cannot contravene their compulsions to obey the award since the agreement

⁶⁴⁷ Ibid, Article 1848; Ali Hayder, *Durar Al-Hukaam Sharh Majalla Al-Ahkaam* (Daar Al-Jeel, Beirut, 1991) IV, 695.

⁶⁴⁸ Ibid. Khoukaz G., 'Shariah Law and International Commercial Arbitration : The Need for an Intra-Islamic Arbitral Institution' (2017)14(1), 181-196, 184-5.

⁶⁴⁹ The four Schools of Sunni named after their respective founders : the Hanafi School (Abu Hanafi d.767), the Maliki School (Maliki Ibn Anas, d.795); the Shafi School (d.819); and the Hanbali School (d.855).

⁶⁵⁰ Makdisi G., 'Legal History of Islamic Law and the English Common Law: Origins and Metamorphoses' (1985)34, Cleveland State L. Rev. 3,6.

⁶⁵¹ Mula Khasru M., *Durar Al-Hukkām Sharh Gurar Al-Ahkām* (Dar Ihyah Al-Kutub Al-'Arobiyyah, Beirut)II, 411; Bassiouni M.C & Badr G.M., 'The Shariah: Sources, Interpretation and Rule Making' (2002) 2(1) UCLA J. Islamic & Near E.L., 135.

to arbitrate is enforceable in the same way as any other contract.⁶⁵² In justification for this, the jurists of this School rely on Qur'an 16:91 that demands and encourages parties to comply with every agreement reached based on their contractual undertakings.⁶⁵³

The Maliki School developed the most pro-arbitration position by stressing that one of the party to the *tahkim* can act as a *hakam* where there is mutual agreement between them.⁶⁵⁴ The Maliki School emphasised that parties are not allowed to withdraw from a *tahkim* proceeding after their briefs and evidence have been heard and considered by the *hakam*.⁶⁵⁵ Hence, an Islamic award should be enforced in good faith, so far it is devoid of apparent injustice.⁶⁵⁶ This position distinguishes the Maliki School from other Sunni Schools. Hanafi, Hambali and Shafi emphatically hold that parties can cease to participate or withdraw their submission to the *tahkim* before the proceeding reach a final and concluded stage.⁶⁵⁷

The Shafi School holds *tahkim* as a legal practice, though the prestige attached to the position of *hakam* is feeble compared to the respect and dignity accorded to the judges appointed for the regular courts' sittings. The reason for this is simple, according to Shafi's Scholars appointment of *hakam* is fix according to the choice of the parties who are involved in the *tahkim* and same can revoke the appointment at any time if wish. This however, diminish the prestige attached to such appointments of the *hakam*. Thus, revocation of the appointment must have been tendered and brought to the notice of the parties involved before any award is given by the *hakam*, if not

⁶⁵² Ibn Nujaim I., *Al-Bahr Ar-Rāiq Sharh Kanz Ad-Daqa'iq* (Dar Al-Kitab Al-Islami, Cairo) VII, 27.

⁶⁵³ Al-Mawardi A., *Adab al-Qadi* (Saadah Publication, Cairo, 1327H)383; Qur'an chapter 16 verse 91.

⁶⁵⁴ Al-Hattāb M., *Mawaahib Al-Jaleel Sharh Mukhtasar Khaleel* (Dar Al-Fikr, Beirut, 1992) VI, 112. This is the position of the Hanafi and Hambali schools also.

⁶⁵⁵ Ibid.

⁶⁵⁶ Ad-Dusūki M., *Hāshiyat Ad-Dusūki 'ala Ash-Sharh Al Kabeer* (Dar Al-Fikr, Beirut) IV, 135.

⁶⁵⁷ Ibid.

the revocation will not be recognised and cannot be valid.⁶⁵⁸ Equally, award given after the revocation cannot be valid also.

On the contrary, the Hambali School attaches much importance on the binding force of *tahkim*.⁶⁵⁹ The School considers *hakam* as persons with the required qualifications and with their religious expertise,⁶⁶⁰ these qualify the arbitral award as binding and compulsorily imposed upon the parties.⁶⁶¹ Consequently, an award issued by the *hakam* must be adhered to by parties, subject only to the requirement of mutual consent of both parties to arbitration.

Surprisingly, one would expect a consensus by the Sunni Schools on the binding force of *tahkim* because both the Quran and Prophet Mohammed put emphasis on it. The main reason that may be adduced for this divergence in views is that each Sunni School of thought applies different methodologies in interpreting Islamic Law. The teachings of the Malik School were founded more on the sources of Shariah, customs and traditions of the Prophet Mohammed as well as the instances established by his companions.⁶⁶² This demonstrates the reason Malik School developed the most pro-arbitration position for *tahkim* procedure unlike any other Sunni School. The teachings and doctrines of Prophet Mohammed⁶⁶³ as well as the consensus of jurists formed the methodology of Shafi School.⁶⁶⁴ The founder Muhammed ibn Idris Al-shafi laid greater importance on the opinions of jurists from different background to form his own approach in the

⁶⁵⁸ Ibn Hajar Al-Haytami, *Tuhfatul Muhtaaj fee Sharh Al-Minhaaj* (Al-Maktabah At-Tijaariyyah Al-Kubra, Egypt, 1983) X, 119.

⁶⁵⁹ Ad-Dameeri M., *An-Najm Al-Wahaaj fee Sharh Al-Minhaaj* (Daar Al-Minhaaj, Jeddah, 2004) X, 157.

⁶⁶⁰ Al-Buhuuti M., *Kashaaf Al-Qinaa' 'an Matnil Iqnaa'* (Daar Al-Kutubil 'Ilmiyyah, Beirut 1999) VI, 309.

⁶⁶¹ Ibid.

⁶⁶² Ramic S.H., *Language and Interpretation of Islamic Law* (The Islamic Texts Society, 2003) 18, Abdurahman I.D., *Shariah the Islamic Law* (Ta Ha Publisher, London, 2000) 93-100.

⁶⁶³ Ibid.

⁶⁶⁴ El-Fadl K.A., 'The Centrality of Shariah to Government and Constitutionalism in Islam', in Grote R & Roder TJ (ed), *Constitutionalism in Islamic Countries* (OUP, England, 2012) 35-61.

interpretation of the sources of Shariah law.⁶⁶⁵ His philosophy was to establish an equilibrium between different views and opinions of jurists and then draw a final conclusion from the preaching of the Prophet Mohammed as validation. But if the Shafi School had considered arbitration as a legal practice and practice of the Prophet Mohammed, it is of no practice of the same Prophet that the School adhere, to regard the position of the *hakam* as less value of which Prophet Mohammed hold with high esteem. This attitude of the School ultimately diminishes the worth of the award delivered by the *hakam* which was not the intention of the Prophet Mohammed as he emphasised and urged his followers to comply with any agreement in every engagement between them. However, the methodology adopted by Imam Ahmad Ibn Hambali, the founder of the Hambali School, are strictly on the wordings of the Quran and the practice of Sunnah, therefore, less weight is placed on the consensus of the jurists.⁶⁶⁶

These different approaches in methodologies of each Sunni School have implications on the consideration of each School on Islamic arbitration and awards. This has created challenges for international disputing parties and the *hakam*, as well as practitioners interpreting Islamic jurisprudence in international arbitration. For this reason, Saeed recommends having uniformity in the Shariah principles and urged Sunni Schools and Islamic scholars to adhere to the words of God in the holy Qur'an and Sunnah.⁶⁶⁷ Nevertheless, it is safe to conclude that the notion of a *tahkim* subsists and recognise in the Shari'ah law. Although, the annotations of some Islamic scholars on the conciliatory nature of it, is widely pronounced. The issue of binding in Islamic

⁶⁶⁵ Khan J.D.H., *Practitioners' Guide, Islamic Law* (Int'l Network to Promote the Rule of Law, 2013) 20-21.

⁶⁶⁶ Ibid.

⁶⁶⁷ Saeed A., 'Shariah and Finance,' in Peters R. & Bearman P. (ed) *The Ashgate Research Companion to Islamic Law* (Ashgate Publishing Ltd, UK 2014) 249.

arbitration is an open-ended debate among Islamic scholars and this, will continue to generate different perceptions.

One vital discussion relevant to the scope of this research is the salient features of Islamic arbitration. This includes arbitration agreement, scope of arbitration and appointment of arbitrator, all of which are discussed below.

6.1.2. Salient Features of Islamic Arbitration

This section discusses some salient features of arbitration particularly relevant to Islamic arbitration.

6. 1.2.1. Arbitration Agreement

It is the contention of some Islamic scholars that inserting an arbitration clause in commercial contracts with the intention to submit and settle future disputes through arbitration, is against Islamic injunctions on uncertainty.⁶⁶⁸ The scholars claimed that the validity of such arbitration clauses to resolve future disputes is not certain under the Shari'ah law.⁶⁶⁹ Islamic arbitration should not be classified as other types of contract thus, prior arrangement to arbitrate future disputes is not binding under the Islamic law.⁶⁷⁰ This is considered untenable in this modern day.⁶⁷¹ There is only one reason responsible for this misconception; in early days, future disputes did not pose a serious challenge for the simple reason that the commercial situation at the time

⁶⁶⁸ Sayen G., 'Arbitration, Conciliation and the Islamic legal tradition in Saudi Arabia' (2003)24 U. PA. J. Int'l Econ .L., 905,923; Powell-Smith V., 'Settlement of Disputes by Arbitration under Shariah and at Common Law' (1995) 35 (1), Islamic Studies, 5-41.

⁶⁶⁹ Ibid.

⁶⁷⁰ Sayen G, 'Arbitration, Conciliation, and the Islamic legal tradition in Saudi Arabia'(2003)928.

⁶⁷¹ Khokaz G., 'Shariah Law and International Commercial Arbitration: the Need for an Intra-Islamic Arbitral Institution' (2017) J. Disp. Reso., 181, 188.

did not necessitate it.⁶⁷² But in these present days, the high rise in the use of international commercial transactions/ businesses concluded daily across nations, demands for it since disputes are inevitable.⁶⁷³ One humble solution to this is to consider the arbitration clause as any other simple contract since Shari'ah emphasised the need to act in good faith,⁶⁷⁴ adhere and honour private agreements⁶⁷⁵ and debts.⁶⁷⁶ Prophet Mohammed (SAW) also observes that 'Believers should honour their agreement.'⁶⁷⁷ Therefore, arbitration clauses cannot be distinguished from any other contractual agreements and accordingly are binding on both parties so long as it is in accordance with Shari'ah principles and rules. Arbitration clauses and the subsequent awards emanating from their proceedings should be enforced so as to give recognition to the will and true intention of the parties.

The position of the Sunni Schools is that the nature of the dispute regulates the legality of the arbitration clause inserted in a contract to settle future dispute through Islamic arbitration.⁶⁷⁸ Thus, Ibn Rushd who is one of the scholars of Maliki School explained that inserting a clause in anticipation of dispute in the future is lawful in Islam but, only if the anticipated subject matter to the future dispute is certainly guaranteed.⁶⁷⁹ The scholar discriminates circumstances where the subject matter of the dispute is inexistence though with

⁶⁷² Ibid.

⁶⁷³ Hossain S., 'Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An analytical Overview'(2013)12-13.

⁶⁷⁴ Qur'an Chapter 4 verse 29.

⁶⁷⁵ As narrated by Ibn Majah Hadith no 341, Prophet Mohammed observe that: '*la darar wala dirar fi Islam.*' The translation of which is that the law should not oblige or enforce individuals to endure harm, injustice or unfair loss.

⁶⁷⁶ Qur'an Chapter 2 verse 185; Qur'an Chapter 2 verse 286.

⁶⁷⁷ Reported by Abu Dawud Hadith no 3594.

⁶⁷⁸ Muhammad Abu Sadah, 'International Arbitration Contract Principles : Analysis of Middle East Perceptions' (2010), 9(2) J. Int'l Trade L. Policy, 148, 153-157.

⁶⁷⁹ Ibn Rushd M., *Bida'ayatul Mujtahid wa Nihaayatil Muqtasid* (Daar Al-Hadith, Cairo, 2004) III, 179.

certainty that it come into being and, where it exists but with uncertainties as to its existence in the future.⁶⁸⁰ He emphasised that what is not recognised under the Islamic law is uncertainty and not the inexistence of the subject matter.⁶⁸¹ This position is now being documented in the law of contracts in most Islamic States, as the governments have understood the benefits attached and the necessity of having to contract on future relationships and disputes.⁶⁸² Article 202 (1) of the UAE Civil Transaction Act 1985, Article 149(1) of the Qatar Civil Code 2004 allow parties to contract on future disputes so long as there is no form of uncertainty (gharar) in the subject matter. Similar provisions can be found in Article 104 of the Bahraini Civil Code and Article 168 of the Kuwait Civil Code 1980.

Summarily, the prearrangement between parties to resolve future disputes through arbitration was not specifically conceived in the Quran and Sunnah since the need for it was not predicted. However, contemporary Islamic jurists (known as *Ijma*) now recognise arbitration clauses to settle future disputes through arbitration.⁶⁸³

6.1.2.2. Scope of Islamic Arbitration

The scope of Islamic arbitration remains open for debate among Islamic scholars and jurists. Arguments for the restrictive scope on one side and an expansive scope on the other. Scholars in support of the restrictive scope of Islamic arbitration contend that the Quran only antedates the

⁶⁸⁰ Ibid.

⁶⁸¹ Ibn Rushd M., *Bidaayatul Mujtahid wa Nihaayatil Muqtasid* (2004)185.

⁶⁸² UAE Civil Transaction Act, No 5 1985 (as amended by Federal Law No. 1 of 1987); Qatar Civil Code, No 22 , 2004; Bahraini Civil Code and; Kuwait Civil Code 1980.

⁶⁸³ Ibn Rushd M., *Bidaayatul Mujtahid wa Nihaayatil Muqtasid* (2004) 179; Muhammad Abu Sadah, 'International Arbitration Contract Principles : Analysis of Middle East Perceptions'(2010) 153-154; As-Sanhūri A, *Masaadir Al-Haqq fee Al-Fiqh Al-Islaamiy* (Daar Ihya At-Turath Al-'Arabi, Beirut, 2001) II, 40; Ibn Taimiyyah A, *Majumu; Al-Fataawa* (King Fahd Complex for the Printing of Noble Qur'an, Madinah, 1995) XXIX, 150.

use of *tahkim* for family disputes only.⁶⁸⁴ Hence, scholars who favour the expansive use of *tahkim* relied on the antiquity of the companions of Prophet Muhammed who used *tahkim* to resolve disputes involving goods and chattels.⁶⁸⁵ The Caliphate case was also cited, where parties use *tahkim* to resolve political matters on the appointment of a Caliph after the demise of the third Caliph.⁶⁸⁶ Proponents of expansive scope of Islamic arbitration further rely on Quran 4: 65 that specifies that believers are to appoint the *hakam* of their choice in all the disputes that may arise between them.⁶⁸⁷ This is to show that *tahkim* is not restricted to family disputes alone.⁶⁸⁸ Hence, the common view among Sunni Schools is that only disputes revolving around properties and finances are capable of being settled through Islamic arbitration.⁶⁸⁹ This position of the Sunni Schools should not pose a serious challenge since most disputes arising from international arbitration are usually on finances and investment. Conversely, arbitration laws of some Islamic States indicate further that, no consensus exist when it comes to the scope of Islamic arbitration.⁶⁹⁰ Saudi law⁶⁹¹ categorically excludes criminal cases, marital disputes and matters of public policy. Equally, Article 4 of Arbitration Rules of the United Arab Emirates provides that all matters which

⁶⁸⁴ Qur'an Chapter 4 verse 35.

⁶⁸⁵ Kutty F., 'The Shari'ah Factor in International Commercial Arbitration' (2006) 28 LOY.L.A. Int'l & Comp. L. Rev, 565, 598; Sayed H.A., *Commercial Arbitration in Islamic and Iranian Law* (Vahid Publisher, 1988)41.

⁶⁸⁶ Ibid.

⁶⁸⁷ Qur'an Chapter 4 verse 65.

⁶⁸⁸ Abulazeez M.O. & Bander K.Z., 'Arbitration Clause in Islamic Banking Contracts: A Contractual Necessity' (2014)1(7), IJIMS, 1-6,2.

⁶⁸⁹ Sayed H.A., *Commercial Arbitration in Islamic and Iranian Law* (1988) 41.

⁶⁹⁰ Implementation of the Saudi Arabian Arbitration Regulation Royal Decree No M/34, dated 24/5/1433H 2012; UAE Civil Procedure Code, Federal Law No (11) 1992, Part II, Section III, Chap Three.

⁶⁹¹ Implementation of the Saudi Arabian Arbitration Regulation Royal Decree No M/34, dated 24/5/1433H 2012.

are not capable of being settled amicably are not arbitrable.⁶⁹²

Hence, this aspect of Islamic arbitration is in need of further clarification and certainty. The scope of arbitration should not be used and twisted as a restriction in classical Shariah.⁶⁹³ What Islamic scholars should be more concerned with is entrenching respect to the spirit and text of the Holy Qur'an and Sunnah while advising Muslims to refrain from entering into agreements which are forbidden by Islam.

6.1.2.3 Appointment /Capacity of an Arbitrator

Without proper compliance with the relevant procedures on the appointment and qualification of *hakam*, the whole process can be null and void, therefore the whole essence of arbitration on finality of award would be unachievable.

The parties' consent to a particular person or persons to act as *hakam* is an essential requirement in the appointment of *hakam*.⁶⁹⁴ The pertinent question is the position under the Islamic law where parties could not agree on the choice of *hakam*? Unlike Islamic arbitration, most western arbitration laws have overcome this by permitting the courts or relevant institutions to choose an arbitrator in circumstance of this nature.⁶⁹⁵ However, Hanafi, Shafi and Hanbali Schools hold that either the *hakam* himself or parties who appointed him can bring the appointment to an end before the giving of an award.⁶⁹⁶ Contrarily, the Maliki School observes that his appointment is

⁶⁹² Civil Procedure Code, Federal Law No (11) 1992, Part II, Section III, Chap Three.

⁶⁹³ Sayeed H.A., *Islamic Law in the Contemporary World* (Vahid Publications, Glasgow, 1985) 71, 86.

⁶⁹⁴ Ibid. UNCITRAL Model Law on International Commercial Arbitration 2006 (United Nation documents A/40/17, annex I and A/61/17, annex).

⁶⁹⁵ Arbitration and Conciliation Act CapA.18 LFN, 2004, Section 7; UNCITRAL Model Law, Article 11

⁶⁹⁶ Muhammed Ibn Uman Ibn Abidin (Hnafi School, d.1836); Hashiyyat Raddi Al-Muhtar Ala Al- Muhtar 427-432 (1966); Muhi Al-Din Abu Zakariyya Nawawi (Shafi School, d.1277); Minhaj Al-Talibin (Howard E. Trans, 1914); Muwaffaq Al-Din Inb Qudama (Hambali School, d. 1223).

irrevocable from the time he was appointed, except if the *hakam* dies or is unfit for the appointment.⁶⁹⁷

In terms of qualification, the *hakam* is expected to possess the qualification of a judge (Kadi) in addition to being a Muslim and male. However, there are two divergent views on the requirement of ‘Muslim arbitrator.’ Some scholars argue that the requirement only applies where arbitration is to be conducted within the jurisdiction of the Islamic States.⁶⁹⁸ Other scholars insist that it has never been a mandatory requirement in Shari’ah law to appoint a Muslim as arbitrator, hence non-Muslims are not restricted. This latter argument explains why the government of some Islamic States neglect to influence the requirement of ‘Muslim’ arbitrator in their respective arbitration laws.⁶⁹⁹ The reason could also be the need to satisfy and fulfil their commitments with the International instruments assented to.

The arbitration law of the United Arab Emirates (UAE) does not provide for the requirement of Muslim or male, despite the fact that UAE arbitration law recognises and gives priority to the Shariah.⁷⁰⁰ In Saudi Arabia, arbitrators are only required to possess legal capacity and high level of morality standard with university degree in Shariah or administration.⁷⁰¹ Interestingly, the Madjelle Code maintains a contrary position when it provides that a judge must be a male, of

⁶⁹⁷ Burhan al-Din Ibrahim Ibn Ali Farhun (Maliki School, d. 1397); *Tabsirat Al- Hukkam Fi Usul Al-Aqdiyya* No2 43-44(Cairo 1301 A.H).

⁶⁹⁸ Al-Junani , *Al-tahkim fi al-Shariah al -Islamiyyah* (Maktabah Dar al- Imam, 1994) 1414:134.

⁶⁹⁹ United Arab Emirates Arbitration Rules, The Civil Procedure Code, Federal Law No. (11), 1992, Part II; Saudi Arabia Royal Decree No/M34 on 24/05/ 1433AH, 2012.

⁷⁰⁰ United Arab Emirates Arbitration Rules, The Civil Procedure Code, Federal Law No. (11) , 1992, Part II, Section III, Chapter Three, Article 206(1).

⁷⁰¹ Saudi Arabia Royal Decree No/M34 on 24/05/ 1433AH, 2012.

age, wise, free, and Muslim.⁷⁰² Although, Madjelle code did not make direct reference to *hakam*, it is however, being extended to *hakam* in Islamic law.⁷⁰³

This restriction placed on non- Muslims and women in Islamic arbitration signifies danger in attaining uniformity between Islamic arbitration and International arbitration. This anxiety informed the approach adopted in the Accounting and Auditing Organisation of Islamic Financial Institutions (AAOIFI),⁷⁰⁴ where AAOIFI authorises an appointment of non-Muslims if such arbitrator will observe the Shari'ah principles.⁷⁰⁵ Nevertheless, *hakam* must be a Muslim if parties are all Muslims, and possess knowledge in the Shari'ah jurisprudence.⁷⁰⁶ The justification for this is that only Muslim can judge between Muslim parties by applying Shari'ah law.⁷⁰⁷ The emphasis is on Quran 4: 141 that, 'Never will Allah grant the unbelievers a way (to triumphs) over the believers.' However, if all parties are non- Muslims, this requirement is not applicable even though parties permanently reside in Muslim State. Hence, if a Muslim party is involved, application of Shari'ah is mandatory.⁷⁰⁸

As regard the restriction placed on women, the majority of Hanbali, Mailiki and Shafi emphasise on the importance of appointing male arbitrator.⁷⁰⁹ However, Hanafi Scholars disagree, stressing

⁷⁰² Code of Legal Provisions (Madjelle Code) 1869, Article 4.

⁷⁰³ Ibid.

⁷⁰⁴ AAOIFI Arbitration Standard, Article 8 (2).

⁷⁰⁵ Ibid.

⁷⁰⁶ Abdulahi BAwazir O.S & Hussein M.A., 'The Qualifications of Arbitral Tribunal: The Perspectives of Shariah Law and UNCITRAL Model Law' (2018) 6 JSSR, 1213-1217, 1215; Ahmad Idi D. & Oseni U.A, 'Appointing a Non-Muslim as Arbitrator in Tahkim Proceedings : Polemics, Perceptions and Possibilities' (2014) 8.

⁷⁰⁷ Committee of Researchers under the Kuwaiti Ministry of Awqaaf and Islamic affairs, *Al-Mawsoo'at Al-Fiqhiyyah Al-Kuwaitiyyah* (Kuwaiti Ministry of Awqaaf and Islamic Affairs, 1427AH) X, 237.

⁷⁰⁸ Quran Chapter 4 verse 60-61 that explicitly forbid non-Muslim to stand in as an arbitrator between Muslims parties and, where one of the parties to the dispute is a Muslim.

⁷⁰⁹ Al- Jabali N.A., *Al-Tahkim fi al-qawanin al-Arabiyyah: Dirasah Muqaranah fi al-fiqh al-Islami wa al-anzimah al-wad'iyah* (Alexendria, Cairo: al-Maktab al-jamil al-Hadith, 2006).

that a woman can serve as an arbitrator in civil and commercial disputes,⁷¹⁰ except in certain criminal matters.⁷¹¹

6.2.0. RELEVANCE OF INTERNATIONAL ISLAMIC COMMERCIAL ARBITRATION IN NIGERIA

This section examines Islamic arbitration within the Nigerian legal framework. This section begins with the discussion on Islamic Arbitration within the Nigerian law. The section also examines the evolution of Islamic commercial arbitration in Nigeria. The Relevance of Islamic arbitration in Nigeria are highlighted and discussed.

6.2.1. Understanding the Place of Islamic Arbitration within the Nigerian law

In Nigeria, Islam spread majorly through efforts of itinerant preachers.⁷¹² The Islamic law therefore became well entrenched especially in northern Nigeria so much that it became the way of life of the people. Hence, when the British colonialists came, Islamic law was seen and applied as the customary law of Muslims in northern Nigeria.⁷¹³ This position changed with the enactment of certain laws by the Northern Government.⁷¹⁴ These enactments established a clear and explicit distinction between Islamic law and the customary law. Aside these laws, scholars also contend that the Islamic law does not share the same attributes with customary law and

⁷¹⁰ Nizam, A.S., *Al- Fatawa al-Hindiyah* (Vol 3, Dar al-Kutub al-Ilmiyah, Beirut, Lebanon, 2000) 317.

⁷¹¹ E.g *hudud* and *qisas*.

⁷¹² Tukur Usman M., 'Shariah and Muslim Aristocracy in Pre-Colonial Hausaland' in JSC Idris Legbo Kutigi (ed) *Contemporary Issues in Islamic Jurisprudence* (Rawel Printing Press, Nigeria, 2009)20-25.

⁷¹³ Native Court Ordinance 1914, Section 2 provides 'Native law and customs includes Islamic law.'

⁷¹⁴ Native Court Law No 6 of 1956, Section 20; Muslim Court of Appeal law Laws of northern Nigeria, Cap.136, 1960.

cannot be said to have been derived from the customs and usages indigenous to the people, and to that extent it does not qualify as a customary law.⁷¹⁵ Oba⁷¹⁶ and Aboki⁷¹⁷ questioned this approach of classifying Islamic law as a customary law. The two scholars observe that Shari'ah is a divine law which distinguishes it from the law derived from the customs and traditions of indigenous people.⁷¹⁸ To justify this, reference was made to the Nigerian Constitution that provides for a distinct structure for administration of Islamic law⁷¹⁹ and customary law⁷²⁰ respectively.⁷²¹ Following this, it will not be correct to categorise Islamic arbitration within the Nigeria legal framework from the purview of customary arbitration, even though a view has been advanced for mainstreaming Islamic arbitration into the Nigerian law through customary law.⁷²² In effect, Islamic law cannot be subjected to the strict rules of proof and validity to which rules of customary law are subjected to.⁷²³ It therefore remains a challenge posing serious problems of understanding and approach if the enforcement of Islamic arbitral award is assessed

⁷¹⁵ Oba A.A., 'Islamic Law as Customary Law: The Changing perspectives in Nigeria' (2002), 15 (4), Int'l and Comp. L. Quarterly, 817-850; Aboki Y., 'Does Customary law include Islamic Law ?' in Okoh, Alubo et al (eds), *Contemporary Frontiers in Nigerian Law: Essays in Honor of the Honourable Justice Salihu Modibo Alfa Belgore* (Oracle Bu.Ltd, Markurdi, Nigeria, 2006)46.

⁷¹⁶ Oba A.A., 'Islamic Law as Customary Law: The Changing perspectives in Nigeria' (2002) 817-850.

⁷¹⁷ Aboki Y., 'Does Customary law include Islamic Law ?' in Okoh, Alubo et al (eds), *Contemporary Frontiers in Nigerian Law: Essays in Honor of the Honourable Justice Salihu Modibo Alfa Belgore* (2006) 52.

⁷¹⁸ The court also rebuked the notion that Islamic law is the same as customary law. See *Alkama v. Bello* (1998) 8 NWLR 561,173.

⁷¹⁹ Constitution of the Federal Republic of Nigeria 1999, Section 277. *Alhaji Illa Alkamawa v. Alhaji Hassan Bello* (1998)6 SCNJ 127, 136.

⁷²⁰ Constitution of Federal Republic of Nigeria 1999, Section 282.

⁷²¹ Obilade A.O., *Nigeria Legal system* (Sweet and Maxwell, London, 1979)83; Ezejiofor G., 'Sources of Nigerian Law in Okonkwo' (ed) *Introduction to Nigeria Law* (Sweet & Maxwell, London, 1980)14; Park W.A.E., *Sources of Nigerian Law* (Sweet & Maxwell, London, 1968) 68.

⁷²² Akanbi M.M., 'Mainstreaming Principles of Islamic Banking into the Nigeria Banking System.'

⁷²³ Oba A.A., 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 819-820; Asein J.O., *Introduction to Nigerian Legal System* (2nd ed, Ababa Press Ltd, Nigeria, 2005)115.

based on the perspective of customary arbitration. An example of such challenge is seen in the view considering the same validity requirements applicable to customary arbitration in matters of enforcing the Islamic arbitration award.⁷²⁴

Thus, it is arguable and as posited in this thesis that the arbitration system in Nigeria may not be perceived again as a twin system encompassing of statutory and customary arbitration. Rather, it is not more beneficial to be studied and appreciated as a tripartite system of arbitration consisting of statutory, customary and Islamic arbitration systems. Each of these three systems must be treated in its uniquely feature in arbitration particularly in relation to every issue of arbitration, be it in terms of the process, requirements of validity and enforcement procedures, just as it is already being done for customary arbitration distinctively from statutory arbitration. The tripartite nature of the Nigerian arbitration system is hereby demonstrated with the diagram below.

⁷²⁴ Akanbi M.M, 'Mainstreaming Principles of Islamic Banking into the Nigeria Banking System' (2006).

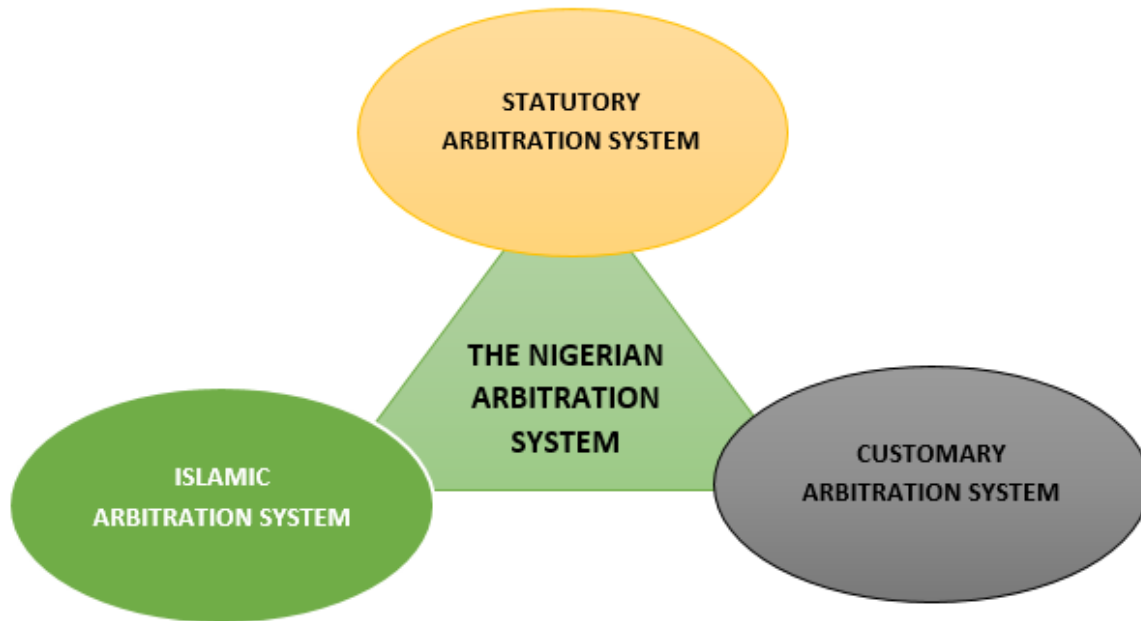


Figure 6.1: Tripartite Nature of Nigerian Arbitration System

Source: Researcher's Design

One area of concern relevant to this thesis is in relation to how foreign Islamic arbitral awards can be enforced in Nigeria. Are provisions of ACA applicable to the enforcement of foreign Islamic commercial awards? Or could it be enforced distinctively in accordance with Islamic law and principles? This will be addressed in the subsequent section of this chapter. First, however, it is necessary to shed some lights on the evolution of Islamic arbitration in Nigeria.

6.2.2. Development of Islamic Commercial Arbitration in Nigeria

For many years, Nigerian Muslims had long desired a wider use of Shariah outside its traditional usage in worship and family relations.⁷²⁵ This agitation have led to a rise in the use of Shariah in

⁷²⁵ Ladapo A.O., 'Where does Islamic arbitration fit into the judicially recognised ingredients of customary arbitration in the Nigerian

commercial transactions and banking and financial products lately.⁷²⁶ As the use of Shari'ah in these realm of commercial relationships increases, conflict is inevitable and this requires appropriate dispute resolution mechanisms to settle it. Ordinarily, voluntary adoption of the Islamic law by the parties in their main contractual relationship should be taken to mean an automatic application of same law to the resolution of disputes arising from such contractual relationships. However, the available judicial authorities suggest that except for Islamic personal law matters, Islamic arbitration would only apply if parties expressly so agreed. In *Maidara v. Halilu*,⁷²⁷ the court held that Islamic personal law applies to all Muslims, but when it comes to Islamic law of contract, all parties have to consent to its application. This principle is also relevant to the Islamic arbitration agreements and parties are required to have agreed to settle through the use of arbitration.⁷²⁸ Insertion of arbitration clauses in commercial contracts between the parties to resolve through arbitration after dispute arises, qualify as a prerequisite consent required under the Islamic law. Such arbitration clauses in an Islamic commercial contract need to be explicit as regard the resolution of disputes in accordance with Islamic law. This will give Muslims the opportunity to benefit from an arbitration system that is Shariah compliant, particularly in Islamic commercial transactions.⁷²⁹

The development of Islamic arbitration in Nigeria can better be appreciated more the manner in which Islamic banking and financial transactions are increasingly becoming popular in the

Jurisprudence?'<http://www.se1.isn.ch/serviceengine/Files/ISN/98430/ichaptersection_single_document/FDAB9607-437F> accessed on 21 February, 2019.

⁷²⁶ Ibid.

⁷²⁷ (2000) 13 NWLR [part 684]257.

⁷²⁸ Ladapo A.O., 'Where does Islamic arbitration fit into the judicially recognised ingredients of Customary arbitration in the Nigerian Jurisprudence?.'

⁷²⁹ Ogunbado A.F., Ahmad U., & Abubakar, 'Islamic Banking and Finance in Nigeria: Exploration of its Opportunities and Challenges' (2017), 5(8), Int'l J. of Innov. Knowledge Concepts, 102- 146, 103.

country. The industry comprises (1) Islamic banking,⁷³⁰ (2) *Takaful* (Islamic insurance) and (3) Islamic capital market (Sukuk, Islamic equity indices and fund management). With all these emerging new business opportunities in the country, resort to Islamic arbitration becomes necessary. It is therefore pertinent to examine the relevance of Islamic arbitration in Nigeria with reference to Islamic banking and finance industry.

6.3.3. The increasing Relevance of Islamic Arbitration in Nigeria

The Nigerian banking industry is considered the most vivacious among its peers in Africa, and the industry has witnessed various reforms over the years, among which is the non-interest banking system.⁷³¹ Nigeria amended its laws on Banks and other Financial Institutions Act (BOFIA) to give recognition to banks that are based on profit and loss sharing and also to legalise 'specialised' banks. By provision of Sections 23 and 61, non-interest banks fit into the description of 'specialised' banks in Nigeria.⁷³² The Central Bank of Nigeria (CBN) for the first time in 1999 issued a license to a conventional bank, Habib Bank Plc⁷³³ to start the operation for non-interest banking in Nigeria.⁷³⁴ Unfortunately, the efforts of the CBN did not yield the desired result because the license was the first of its kind and there was no existing legal framework to regulate non-interest banking at that time. After some years, CBN established guideline rules on

⁷³⁰ Islamic banking refers to a banking system that is Shari'ah compliance.

⁷³¹ Abdullahi N.A., 'Islamic Banking in Nigeria: Issues and Prospect'(2016), 4(2), J. of Emergng Economies and Islamic Research , 1-12, 4.

⁷³² Ogunbado A.F., Ahmad U.,& Abubakar, 'Islamic Banking and Finance in Nigeria: Exploration of its Opportunities and Challenges' (2017) 104 ; Sanusi L.S., 'Islamic Finance in Nigeria: Issues and Challenges' (Lecture delivered at Markfied Institute of Higher Education, Leicester, UK, on 17th June, 2011).

⁷³³ The bank later renamed bank PHB and now keystone bank.

⁷³⁴ Ogunbado A.F., Ahmad U.,& Abubakar, 'Islamic Banking and Finance in Nigeria: Exploration of its Opportunities and Challenges' (2017)104.

the operation of non-interest banking and subsequently granted approval to Jaiz International Plc to operate as a full-fledged non interest bank in Nigeria. Also, between the year 2011-2014, Stanbic IBTC, Sterling bank and Tiraja Microfinance Islamic bank were licensed and commenced operations. In 2016, I-Care microfinance was licensed to operate. These five (5) institutions constitute the Islamic banking sub-sector in Nigeria.⁷³⁵ The essential feature of non-interest banking system is the prohibition of interest and its encouragement of parties' participation on a profit and loss sharing basis (this is known as Musharakah and Mudarabah).⁷³⁶ The Islamic banking industry encourages healthier division of resources and good management control through ethical investments by prohibition of certain haram businesses. Summarily, the main principles of the Islamic banking system are mutual consent, avoidance of prohibited elements (eg, interest, gambling and alcoholism) and lawful contracts objectives.⁷³⁷ As regard *takaful* (Islamic insurance), National Insurance Commission of Nigeria (NAICOM) is charged with the duty to administer and enforce provisions of the Insurance Act in Nigeria.⁷³⁸ In 2013, NAAICOM launched and recorded 'Takaful Operational Guidelines' for the operation of *Takaful* in Nigeria although, *Takaful* products had been in operation as early as 2004 when for the first time in Nigeria, African Alliance Insurance Company Ltd was given license to offer *takaful* services to the general public.⁷³⁹ Subsequently, between the years of 2013-2015, two full-fledged *takaful* companies, namely Jaiz *Takaful* and Noor *Takaful* were given license to

⁷³⁵ Abdullahi N.A., 'Islamic Banking in Nigeria: Issues and Prospect' (2016)6.

⁷³⁶ Ewaolisa E.F. & Kasie E.G., 'Islamic Banking in Nigeria: A Critical Appraisal of its Effect on the Nigerian Economy' (2013) 2(3) Rev. Public Admin. & Mana. 37-48; Abdullahi N.A., 'Islamic Banking in Nigeria: Issues and Prospect.' 1- 3.

⁷³⁷ Abdullahi N.A., 'Islamic Banking in Nigeria: Issues and Prospect' (2016) 7.

⁷³⁸ Ismail E., 'Takaful : The great Potential in Nigeria' <meinsurancereview.com> accessed 30 October, 2018.

⁷³⁹ Aliyu-Ado A. & Saiti B., 'Takaful Practice in Nigeria: History, Present and Future' (2017) 8, EJIF, 1-9, 5.

operate.⁷⁴⁰ In 2016, two additional companies, Niger Insurance Plc and Cornerstone Insurance Plc which are both conventional insurance companies were given approval to offer *Takaful* as a product. *Takaful* contracts are founded on the Islamic principles of profit sharing (*mudarabah*) and agency (*Wakala*) contracts.⁷⁴¹ The industry therefore offers both general and family *takaful* insurance services.

As regard *sukuk*, Lotus capital Halal Fund and Stanbic IBTC- Iman Fund dominate the Nigerian Capita Market (*sukuk*).⁷⁴² *Sukuk* transaction is synchronized by the Investment and Securities Act 2007 and other established guidelines issued by local and international institutions such as Security and Exchange Commission (SEC), CBN, Islamic Financial Services Board (IFSB) and AAOIFI. The Osun State Government *Sukuk* worth \$90 million was the first *sukuk* to be issued in 2013, with 42 investors.⁷⁴³ Also in 2017, the Nigerian Government launched N100billion *sukuk* at a yearly charge rate of 15.743%.⁷⁴⁴ The relevance of this above foregoing on the Islamic banking system, *takaful* and *sukuk* is to establish a considerable number of available Islamic businesses/transactions open to Muslims in Nigeria and abroad. This indicates that Islamic arbitration has a great potential for growth in Nigeria. This would be so because of the increase in pursuit of the Islamic banking and finance products and more importantly the attitude of the general public to Islamic transactions. It is therefore pertinent to examine the prospects of Islamic arbitration and possible implementation of the outcome of its proceedings in Nigeria.

⁷⁴⁰ Ibid.

⁷⁴¹ Aliyu-Ado A. & Saiti B., 'Takaful Practice in Nigeria: History, Present and Future' (2017) 6; Ismail E., 'Takaful : The great Potential in Nigeria.' <meinsurancereview.com> accessed 30 October, 2018.

⁷⁴² *Sukuk* is an arabic word that means bond.

⁷⁴³ See <<http://osun.gov.ng/2013/10/11/osun-successfully-completes-n11-4-billion-sukuk-bond-aregbesola-commended-for--exploring-new-development-options/>> accessed on 15 January, 2019.

⁷⁴⁴ <<http://www.lotuscapitallimited.com/index.php/component/content/category/89-sukuk>> accessed on 15 January, 2019.

6.3.0. PROSPECTS OF ISLAMIC FOREIGN ARBITRAL AWARD IN NIGERIA

In this section, two issues are discussed. First, the section discusses the influence of International Islamic Institutions in Nigeria. The second aspect discusses the possibility of enforcing foreign Islamic arbitral awards in Nigeria.

6.3.1. Influence of International Islamic Institutions in Nigeria

Nigeria subscribes to international Islamic institutions such as Organisation of the Islamic Cooperation (OIC), Islamic Development Bank (IDB) and Accounting and Auditing Organisation for Islamic Financial Institutions (AOIFI). These institutions in some ways enhance the improvement of Islamic banking and finance products by creating an enabling environment for the industry to flourish and also guaranteeing an equal practices standard with conventional finance. In brief, the OIC is one of the biggest organisations with members across the four (4) continents.⁷⁴⁵ The Organisation was established to strengthen the relationship between member States through distribution of wealth and resources, and the creation of employment and educational opportunities among its member, with the motivational drives to establish Islamic common market.⁷⁴⁶ OIC agreement makes provision for the settlement of disputes through arbitration or conciliation.⁷⁴⁷ OIC did not receive much attention until 2012, in *Hesham Talaat M.*

⁷⁴⁵ [www.https://isds.bilaterals.org/?the-organisation-of-islamic](https://isds.bilaterals.org/?the-organisation-of-islamic) , <www.oic-oci.org> accessed on 15 January 2019; Walid B.H., 'A Fabulous Discovery: The Arbitration Offer under the Organisation of Islamic Corporation Agreement Related to Investment' (2013)30 (6) Journal Intl Arb., 6371-663.

⁷⁴⁶ OIC Charter, Preamble and Article 1, 2, and 15 <www.oic-oci.org> accessed on 15 January 2019; Walid B.H., 'A Fabulous Discovery: The Arbitration Offer under the Organisation of Islamic Corporation Agreement Related to Investment' (2013) 6371-663.

⁷⁴⁷ OIC Agreement, Article 17(1).

*Al-Warraq v. Republic Indonesia*⁷⁴⁸ (Al-Warraq case), where a dispute between the parties was successfully settled under OIC provisions. This case paved the way for investors who are willing to initiate arbitration with the host State who is a signatory to the OIC agreement.⁷⁴⁹ Consequently, investors have made use of OIC in *Kontinental v. Gabon*,⁷⁵⁰ *Itisaluna v. Iraq*⁷⁵¹ and *DS Construction FZCO v. Libya*⁷⁵²

Nigeria has gained several economic benefits as a member of OIC. This is evident in the many transactions in favour of Nigeria among which are, the substantial millions of dollars invested in the Malaysia gardens projects in Abuja⁷⁵³ and the \$400 million investment diverted into the Nigerian telecommunications industry.⁷⁵⁴

The IDB, a sub-division of the OIC, is an international finance institution,⁷⁵⁵ with the objective to maintain the welfare and economic growth of its members, in a way that is Shariah compliant.⁷⁵⁶ From its charter agreement, IDB only accepts deposits and seeks financial resources through Shariah compliant means, although the bank charges administrative fee which are not considered as interest. The IDB therefore, generates capital through subscriptions from its members. Nigeria

⁷⁴⁸ UNCITRAL final award dated 15 December 2014, 94,106,334,526.

⁷⁴⁹ The most interesting provision of the OIC Agreement is Article 14 which contains the Most –Favoured Nation Clause (MFN Clause) that gives foreign investor from member State equal rights and protection with the local investors.

⁷⁵⁰ UNCITRAL, Final award dated 2017.

⁷⁵¹ ICSID arbitration initiated by the Jordan companies Itisaluna Iraq LLC and Munir Shukhtian International Investment LLC, UEA registered entities, VTEL Holdings Ltd and VTEL Middle East and Africa Ltd against Iraq

⁷⁵² The case was ad hoc arbitration conducted under UNCITRAL Rules.

⁷⁵³ <https://www.oic.oci.org/>; Abdulbasit Mukhtar, ‘The Organisation of Islamic Conference (OIC) Debates.’ <<http://www.gamji.com/article6000/NEWS7929.htm>> accessed on 23 February 2019.

⁷⁵⁴ Ibid.

⁷⁵⁵ <<https://www.isdb.org>> accessed on 18 January 2019.

⁷⁵⁶ <<http://www.isdb.org>> accessed on 18 January 2019.

contributes 7.66% of the total shares in the IDB with Saudi Arabia being the highest subscriber with 23.50%.⁷⁵⁷

The bank invests and utilises resources generated from its member States to build infrastructural projects, provide technical assistance and enhance foreign trade to the advantage of its members.⁷⁵⁸ Since the time Nigeria joined IDB in 2005, it has indeed reaped immense benefits. IDB made several contributions to assist Nigerian government policies, particularly on food security and education. In 2007, the board of Executive Directors of IDB in its 242nd session approved \$446.3million to finance trade in Nigeria and some other Muslims States.⁷⁵⁹ Also, \$14million was approved in favour of Dangote Industries Limited to purchase flour mill machinery. In addition, \$25million was granted in favour of Chicason Group to buy raw materials.⁷⁶⁰ Nigeria was among the beneficiaries of \$81.00million grants for the Zaria Water Supply Expansion Project in 2012.⁷⁶¹ The same year, at the IDB Group-Nigeria Business Forum held in Abuja, IDB and the Nigerian government entered an agreement with millions of dollars to assist in bilingual education in Nigeria.⁷⁶²

As Islamic banking and finance grows, it becomes necessary to have an accounting standard for Islamic financial institutions. The existing standard did not comply with Shariah principles, thus creating a challenge for Islamic financial institutions who desire to apply Shari'ah compliant

⁷⁵⁷ <<https://www.isdb.org/isdb-member-countries> ;<https://www.bankingallinfo.com/banking-service/banking/islamic-development-bank-idb/>> accessed on 18 January 2019.

⁷⁵⁸ Ibid.

⁷⁵⁹ <<http://www.isbd.org/news/idb-board-of-executive-directors-approves-new-finances-for-more-than-us-446-million>> accessed on 18 January 2019.

⁷⁶⁰ Ibid.

⁷⁶¹ <www.idbgbf.org/portal/details.aspx?id=424> accessed on 18 January 2019.

⁷⁶² <<https://www.isdb.org/news/idb-extends-98-million-support-to-bilingual-education-in-nigeria> > accessed on 18 January 2019.

accounting standards. This led to the creation of Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) in 1990.⁷⁶³ The objectives are to develop and publicise accounting and auditing relevant to Islamic Financial Institutions (IFIs).⁷⁶⁴ The AAOIFI has encouraged Muslim investors to invest in member States and also has enhanced the funding of infrastructure in public and private sectors.

In 2010, International Islamic Liquidity Management Corporation (IILM) was established through joint efforts from various Central Banks from Muslims States including the apex bank in Nigeria; CBN.⁷⁶⁵ The main objective of IILM is to provide a Shariah compliant framework, which will address the liquidity management issue on Islamic banks and at the same time operate as an Islamic legal framework for open market operations involving Islamic financial institutions.

No doubt Nigeria's membership of these Islamic institutions discussed above can influence the position of investors and also serve as a means of attracting foreign businesses and investors. Interestingly, Nigeria was declared one of the fastest economies in the African continent.⁷⁶⁶ The prevailing commercial and contractual relationships between investors and stakeholders mean that differences are unavoidable and these will certainly need to be resolved. Most often than not, Islamic arbitration may be the only efficient means of dispute resolution in the circumstance. This is because the national judges are not usually conversant with Shari'ah issues particularly, in finance and commerce. International commercial arbitration under Islamic law is nothing new in

⁷⁶³ <<http://aaoifi.com/aaoifi/>> accessed on 18 January 2019.

⁷⁶⁴ AOSSG (2015), 'Financial Reporting Issues Relating to Islamic Finance- a Study of Financial Statements of Islamic financial Institutions.' <www.aossg.org/AOSSG_Islamic_Finance_WG-Paper_Post_6th_Meeting-2_Mar15-2.pdf> accessed on 18 January 2019.

⁷⁶⁵ Ibid.

⁷⁶⁶ <www.economist.com> accessed on 18 January 2019.

this century as revealed in Islamic treaties.⁷⁶⁷ Specifically, the OIC agreement encourages Muslim parties to go into arbitration⁷⁶⁸ and guarantees that the Islamic awards are final and enforceable upon the conclusion of the Islamic arbitration process. Therefore, signatory States to the OIC agreement are under obligation to implement Islamic awards in its territories and it does not matter if the host State is a party to the arbitration agreement or not.⁷⁶⁹

Hence, this next section of this chapter discusses the possible Islamic commercial transactions between investors with the need to enforce the outcome of the proceedings in Nigeria.

6.3.2. Possibility of Enforcing Islamic arbitral award in Nigeria.

Globalisation and technological advancements are encouraging more investors to spread their spheres of businesses into other States around the world. Foreign trade is considered a major point in the economic growth of many nations around the world.⁷⁷⁰ There has been an increased interest in Islamic banking and finance around the world with businesses taking place between the investors from different nationalities and backgrounds. Oftentimes, when parties to the disputes are from different States, international commercial arbitration is the most chosen alternative means of dispute settlement, and the disputes arising from Islamic commercial transactions cannot be an exception. Thus, where Islamic award is rendered and is not obeyed, comprehending the State with the assets of the award-debtor is the first essential that determines the choice of the enforcing State.

⁷⁶⁷ OIC Agreement, Article 17(2)(d); <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2399/>> accessed on 18 January 2019.

⁷⁶⁸ OIC Agreement, Article 17(2)(a).

⁷⁶⁹ OIC Agreement Article 17(2)(d).

⁷⁷⁰ Ibrahim A.A., 'The Place of Commercial Diplomacy in Nigeria-China Relations' (2014), 19(7), IOSR JJSS, 63-29, 63.

Soon now or later, Nigeria will become number one choice of the investors for the enforcement of their Islamic arbitral awards, this is because the award-debtor can have an asset in Nigeria or even be a Nigerian citizen with investments in the country. For instance, Habib Bank Plc (now known as Keystone Bank), the first conventional bank to be granted a license to operate Islamic non-interest banking system was jointly owned by Pakistani national and Nigerian investors.⁷⁷¹ If disputes arise between the investors of the Bank and an Islamic award is given, the award-creditor may decide to enforce it in Nigeria where the Bank has substantial. The enforcement mechanism through which the award-creditor can exercise his rights and approach the court for enforcement order in his favour becomes an important instrument in such a circumstance. The relevant question is whether ACA is applicable to enforcement of such awards in Nigeria? And if yes, does ACA consider the peculiar nature of Islamic arbitration and its awards?

6.4.0. ENFORCEMENT OF ISLAMIC COMMERCIAL ARBITRAL AWARDS UNDER ACA

Like any other arbitral award conducted under statutory common law arbitration, an award rendered through Islamic arbitration is subject to the provisions of Nigerian ACA for enforcement procedure.⁷⁷² International treaties applicable to Muslim States, do not make provision for enforcement procedures, therefore, the award-creditor will be forced to depend on the existing law in the enforcing State for the enforcement order of such award.⁷⁷³ Provisions of Section 51, 52 and 54 of ACA are applicable here. What this means is that all the challenges

⁷⁷¹ Ogunbado A.F, Ahmad U., & Abubakar, 'Islamic Banking and Finance in Nigeria: Exploration of its Opportunities and Challenges' (2017) 104.

⁷⁷² OIC Agreement, Article 17 provides that member States are urged to rely on the domestic law of the enforcing State.

⁷⁷³ Ibid.

affecting the enforcement of foreign awards under the statutory law arbitration as discussed in chapters 2, 3, 4 and 5 are applicable to Islamic arbitral awards. Challenges such as restrictive interpretation of the arbitrability concept and the unruly nature of public policy; third parties intervention in arbitration proceedings; limitation law; issue of delay; challenges in judicial review of arbitral award; and court intervention. While it may not be necessary to further discuss these challenges; attention will be focused on public policy exception, concept of arbitrability, and judicial review from the perspective of Islamic law.

Importance of subject matter arbitrability and public policy exception at the enforcement stage of awards cannot be overemphasised, irrespective of whether the award emanates from Islamic arbitration or through arbitration conducted under statutory law. This is because Islamic injunctions warn against certain acts in the interest of the public at large (public policy) and there are also certain transactions that are explicitly forbidden (haram) in Islam. Thus, any transaction that is *haram* is not arbitrable and should not be enforced.⁷⁷⁴ As discussed in the chapter three, both the ACA⁷⁷⁵ and the Second Schedule of the ACA⁷⁷⁶ give the enforcement courts the discretionary power to, on its own motion, refuse enforcement if the dispute by its nature cannot be resolve through the use of arbitration or if the implementation of award will infringe public policy.

⁷⁷⁴ Ad-Dusūki M., *Hāshiyah Ad-Dusūki 'ala Ash-Sharh Al-Kabeer* (Dar Al-Fikr, Beirut) IV, 136; Qadri M., *At-Tahkim fee Dawhi Ahkām Ash-Shari'ah Al-Islāmiyyah* (Dar As-Sumay'i, Riyadh, 2009)145. Islamic jurists maintain that an arbitration award which is against the injunctions of the Qur'an and Sunnah should not be upheld by a Judge if subjected to judicial review.

⁷⁷⁵ Cap.A18, LFN 2004, Section 52 (2)(b)(i) and (ii).

⁷⁷⁶ New York Convention on Recognition and Enforcement of Foreign Arbitral Award 1958, 330 U.N.T.S. 38(1959). Article V (2) (a) and (b) of the Second Schedule of the ACA. For the purpose of this thesis, New York Convention shall be examined through the provision of Section 54 of the ACA and the Second Schedule in the ACA. This is because Section 54 domesticated the Convention and the Second Schedule contains the provisions of the New York Convention.

ACA and its Second Schedule neither anticipated nor took cognisance of the Shari'ah principle concerning description in the determination of arbitrability and public policy exception. The relevant questions are (1) what determines public policy exception in the enforcement of Islamic arbitral award in Nigeria? (2) Can enforcing courts who are not knowledgeable in Islamic law determine public policy exception when faced with the application to enforce an Islamic arbitral award? (3) Can an award that involves interest (*riba*); one which is tainted with unfair trade practices; or an award rendered based on haram dealings infringe the public policy in Nigeria?

The above questions are significant in the sense that parties who choose to arbitrate under the Islamic law will not be pleased to enforce awards that are against Islamic injunctions and principles. Most Islamic States determine public policy exception by reference to Shari'ah law in addition to other factors.⁷⁷⁷ A good example is Article 27 UAE Civil Code⁷⁷⁸ that prohibits courts from enforcing laws, judgments or awards which are in conflict with Shari'ah principles, public order or good morals of the United Arab Emirate.⁷⁷⁹ Nigeria does not possess such provision in its domestic law. This is discouraging for a Muslim party who desires to implement an Islamic award given in his favour. The conception of Islamic public policy is evolve around reverence to the spirit of Shari'ah and its sources. Ordinarily, the court should decline to implement the award or have it vacated if such award involved a fragrant injustice or clashes with the principles of Shari'ah law. This explains reason the legal framework of some Muslim States are structured

⁷⁷⁷ Mahassani H., 'Moslem Law is a main part of Saudi Public Order' (A Paper presented at a Conference in Jeddah, 20th Jan. 1977).

⁷⁷⁸ *Federal Law No. (11), 1992, Part II, Section III, Chapter Three.*

⁷⁷⁹ *Ibid.*

either partly or completely around Shari'ah rules and courts from these States decide the public policy exception by reference to Shari'ah.⁷⁸⁰

Hence, the fundamental question of whether the award rendered with interest (*riba*) or tainted with unfair trade practices or an award rendered based on haram transaction can be enforced in State like Nigeria. ACA is silent on this. The term *riba* means unnecessary increase, unfair gain or, excess.⁷⁸¹ Quran Chapter 2 verses 275-281, Chapter 3 verse 130, Chapter 4 verse 161 and Chapter 30 verse 39 forbid *riba*, therefore it is against Islamic injunctions to ask for additional interest. Prophet Mohammed also discouraged transactions founded with interest and warned his followers from practicing it.⁷⁸² Abu Saad Khudri (R.A) recounted that the Prophet said:⁷⁸³

Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt, like for like, payment being made hand by hand. If anyone gives more or asks for more, he has dealt in *riba*. The receiver and giver are equally guilty.⁷⁸⁴

Sharawy addressed the issue of *riba* by placing a distinction between lawful *riba* and unlawful *riba*. He contended that if *riba* is seen and interpreted the same way as usury, only the unjust, unlawful and illegal *riba* is forbidden in Islam. Thus, where the interest (*riba*) can be justified lawfully, it cannot come under the interpretation of *riba*.⁷⁸⁵ Some Islamic scholars however,

⁷⁸⁰ Alqudah M.A., 'The Impact of Sharia on the Acceptance of International Commercial Arbitration in the Countries of the Gulf Cooperation Council (2017), 20(1) JLERI, 1-17.

⁷⁸¹ Ibn Rushd M., *Bida'at al-Mujtahid wa Nihaayat al-Muqtasid* (2004) III, 148, Abikan A.I., 'Constitutionality of Islamic Banking in Nigeria' in JSC Idris Legbo Kutigi (ed) *Contemporary Issues in Islamic Jurisprudence* (Rawel Printing Press, Nigeria, 2009)102.

⁷⁸² Reported by Muslim Hadith number (1584); Ahmad A., Rehman K. & Humayoun A.A., 'Islamic Banking and Prohibition of Riba' (2011) 5(5) Afri. J. of Bus. Manag., 1763-1767, 1765.

⁷⁸³ Doi A., *Shariah: The Islam Law* (Nordeen AS Publishers, Malaysia, 2007)377.

⁷⁸⁴ Ibid, 1766.

⁷⁸⁵ Sharawy H.M., 'Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Corporation between the Islamic and Western Worlds'(2001)29, Ga. J. Int'l & Comp. L, 153 -179, 163-4.

emphasised that, Quran requires strict interpretation of *riba* therefore, there is no distinction; *riba* is *riba*.⁷⁸⁶ The centre of this argument is that the Quran leaves no room for a liberal interpretation and the term *riba* refers to all forms of interest.

The application of international arbitration in Islamic transactions, Islamic banking and finance is encouraging. Unfortunately, the drafters of ACA did not take consciousness and idiosyncrasy nature of Islamic arbitration when drafting the law. ACA did not provide a Shari'ah compliant arbitration alternative for both Muslim and non-Muslim parties who are willing to arbitrate under the Islamic law, and at the same time enjoy the significant advantages associated with international arbitration. One reason for this omission in the ACA may be the fact that it was only recently that investors/ businessmen realised the benefits associated with Islamic arbitration despite its existence before now. Hence, the drafters of the ACA may not have expected that Islamic arbitration would grow so quickly.

As regard the judicial review of Islamic awards. In Chapter 5 of this thesis review system was extensively discussed. The award may be subjected to the review of the court to determine the extent of the alleged violation.⁷⁸⁷ Courts are required to review the arbitration proceedings to ensure compliance both with the procedures adopted by the parties in their agreement and with various mandatory statutory requirements.⁷⁸⁸ Failure to comply with these requirements can serves as ground for vacating the arbitral award.

Courts in Nigeria are thrust into a complex role particularly when judicial interventions are invoked to address certain issues emanating from the Islamic award. If the tribunal refused to

⁷⁸⁶ Amin S.H, *Islamic Banking and Finance: The Experience of Iran* (Vahid Publications, Tehran, 1986) 15.

⁷⁸⁷ This includes, court order for revocation of arbitration agreement, appointment of arbitrator, power of the court to order the attendance of witnesses, court order for setting aside of award and, court order for enforcement of award.

⁷⁸⁸ ACA CapA.18 LFN 2004, Sections 29,30 and 49.

allow evidence because it is against Shari'ah principles. Not only would the aggrieved party likely raise the objection during the arbitration proceedings, but they would also have a right to raise an objection in an application to vacate the award. Thus, the challenge to the Islamic awards would not simply be based on a basic refusal to admit a 'pertinent and material' evidence but on allegation that the misapplication of Shari'ah rules and principles by the arbitral tribunal led to its rejection.⁷⁸⁹ The determination of this issue can lead to a considerable application and enforcement of Shariah principles which in turn can generate two possible problems.

First, courts are to decide procedural challenges to Islamic award based on the procedural rules adopted under the rules and principles of Shari'ah. For instance, the very precise meaning of what is 'pertinent and material' evidence may be confined to the rules of evidence employed by the parties in the procedural rule adopted under the Shari'ah. This can create a problem for the judges who are not familiar with the principles of Shari'ah. The fact that a tribunal applies Shari'ah law to exclude evidence as against some other arbitration laws or other laws, should not authorise a court to deem that evidence 'pertinent and material' thereby, vacate such award. Accordingly, where Shari'ah evidentiary rules require that a particular evidence be deemed inadmissible, such evidence should be deemed immaterial and should qualify as a ground of vacatur of award. The choice of Shari'ah application by the parties to exclude evidence would hardly seem to qualify as misconduct.⁷⁹⁰ Therefore Shari'ah law must be placed on balance with any other law chosen by the parties to the arbitration. Shari'ah law from this perspective must be treated as law.

⁷⁸⁹ Helfand M.A., 'Between Law and Religion: Procedural Challenges to Religious Arbitration Awards' (2015) 9 (7) Chicago Kent L. Rev, 1-162, 152-43.

⁷⁹⁰ Helfand M.A., 'Between Law and Religion: Procedural Challenges to Religious Arbitration Awards' (2015) 149

Second, judicial review will force Nigerian judges to confront questions of Shari'ah and practices which the courts are being constitutionally prohibited from resolving.⁷⁹¹ This creates tension. On one side is the right imposed on the aggrieved party to approach the courts on the alleged defilement of the procedural requirements levied by the Shariah and, on the other side is the restriction placed on the Federal/ State High Courts on the hearing of disputes relating to questions on Islamic law.⁷⁹²

Questions or issues on Islamic law are beyond the jurisdiction of the High Courts.⁷⁹³ Reviewing an Islamic award by the national court can create controversies and lead to injustice to the parties. Constitutional constraints and statutory requirements insulate Islamic arbitral awards from attack on procedural grounds where the issue raised would require resolution of an Islamic question. It could be right to hold the view that courts lack the institutional competence and constitutional authority⁷⁹⁴ to resolve Islamic questions.

Section 22 of the ACA permits the arbitral tribunal to call on the experts to provide proficient opinion on a particular issue or issues where it is considered necessary to do so.⁷⁹⁵ Can this provision of the ACA be interpreted to mean Islamic expert? The current system of the review of awards in Nigeria leaves parties to Islamic arbitration in a vulnerable position. If Muslims choose to live in accordance to the dictates of their faith, their expectation will be defeated if the outcomes of disputes conducted under that faith are being subjected to judges and courts with no knowledge of that faith. Parties choose to incorporate Shari'ah principles and rules into their

⁷⁹¹ Constitution of the Federal Republic of Nigeria 1999, Sections 251 and 272.

⁷⁹² Helfand M.A., 'Between Law and Religion: Procedural Challenges to Religious Arbitration Awards' (2015) 162.

⁷⁹³ Constitution of the Federal Republic of Nigeria 1999, Sections 262 and 277 contain jurisdictions of the Shariah Court of Appeal of the FCT and the Shariah Court of Appeal of a State.

⁷⁹⁴ Lupu C. & Robert W. T., Courts, 'Clergy and Congregation: Disputes between Religious Institutions and their Leader' (2009)7, Geo J.L & Pub Pol'y , 119,138.

⁷⁹⁵ ACA CapA18 LFN 2004, Section 22.

agreements in order to ensure that both the substance and procedure conform to their mutual belief and religion's ideology.⁷⁹⁶ Without a learned Islamic jurist to review issues and questions of Islamic law, it is not guaranteed that the parties will get what they agreed to.

It is therefore relevant to highlight best key practices on enforcement provisions in certain Islamic arbitration regimes. To this end, the next section focuses on the Asian International Arbitration Centre (AIAC) Rules known as i-Arbitration Rule in Malaysia. The i-Arbitration Rule has some unique provisions that have stood the test of time and are worth emulating in Nigeria.

6.4.1. Lesson from AIAC Rules (i-Arbitration Rules)

In an effort to emerge as the most targeted Centre for international arbitration, Malaysia adopted the Kuala Lumpur Regional Centre for Arbitration (KLRC) i-Arbitration Rules (known as 'i-Rules') in 2018.⁷⁹⁷ i-Rules affords parties opportunity to conduct international arbitration in accordance with Shariah principles, decisions of which are enforceable in all the signatory States to the New York Convention.⁷⁹⁸ This unique feature of i-Arbitration Rule distinguishes it from every other arbitration law or Rules from around the globe. The i-Arbitration Rule is geared towards the needs and desires for Islamic commercial arbitration. KLRC was later renamed the Asian International Arbitration Centre (AIAC).⁷⁹⁹

⁷⁹⁶ Helfand M.A, 'Between Law and Religion : Procedural Challenges to Religious Arbitration Awards' (2015) 162.

⁷⁹⁷ Hodges P., Kaplan C., Godwin P., 'KLRC's New I-Arbitration Rules: A New Option for Islamic Finance Parties' (2012). < <http://www.lexology.com/library/details.aspx?g=f95ce493-1569-4011-8a90-9d560cb13b48/> > accessed 24 December 2018.

⁷⁹⁸ Ibid.

⁷⁹⁹ Panighetti T., 'I-Arbitration : Not the Newest Apple(R) Product, But Sharia Law in International Commercial Arbitration' (2013) 288.

Islamic awards rendered under the provisions of i-Arbitration Rules are considered final and binding. By Rule 13 i-Arbitration Rules, parties are to obey the terms of the award voluntarily without qualms. The rights of appeal, review or recourse to any court or authority are waived under this law, unless parties agree otherwise.⁸⁰⁰ Furthermore, to ensure effective realisation of the goals of Islamic arbitration system and enforcement of its awards, i-Arbitration Rule through its provisions, permits the tribunal to give order to pay for the summation on the award calculated from the time the award-debtor ignored the implied terms to fulfil the award to the time he eventually complies with it.⁸⁰¹ The sum payments are determined by applying the principles of *ta'widh*⁸⁰² and *gharamah*.⁸⁰³ This is to ensure that parties discharge their contractual obligations in the arbitration agreement which they voluntarily agreed to. This will attract investors to Nigeria especially with the knowledge that the tribunal may order the sum on the award if the award-debtor fails to comply from the date of award. The Nigerian arbitration law can reflect this provision thus, the finality of Islamic awards is guaranteed.

Also, with the permission of the parties, i-Arbitration Rules empowers the tribunal to consolidate two or more proceedings into one, particularly where the case before the court involves Shari'ah and non-Shari'ah disputes.⁸⁰⁴ This is to facilitate an effective dispute resolution mechanism for parties. In addition, i-Arbitration Rules permits the tribunal to seek advice and guidance from the Shari'ah Advisory Council (SAC) or Shari'ah expert, whenever it requires to determine questions or, form an opinion on Islamic law.⁸⁰⁵ This gives parties the opportunity to use a Shari'ah expert

⁸⁰⁰ Rule 13(10).

⁸⁰¹ Rule 6(g).

⁸⁰² It means compensation.

⁸⁰³ It means penalty for late payment.

⁸⁰⁴ Rule 10(1)-(2).

⁸⁰⁵ KLRCA i-Arbitration Rules 2017, Rule 11.

or the advisory council to make determinations on Islamic law questions or issues that cannot be properly determined by arbitrators.⁸⁰⁶ Hence, two options are available to the tribunal in this situation; the tribunal may postpone the proceedings while waiting for the decision of the expert to be out or, continue on the part which is not affected by the result of the Shariah expert.⁸⁰⁷ The greatest remarkable portion of the provision of Rule 11 is the aspect that the arbitral tribunal can continue with the portion of the issues which are not affected and pronounce its award based on the available evidence before it. This is so where SAC cannot decide on the issue submitted to him within a reasonable period. Legality of such award decided in that circumstances is not affected by the unavailability of the SAC decision.⁸⁰⁸ Hence, it may be a good innovation to establish something similar to SAC in Nigeria through ACA considering the nature of their roles in advanced jurisdictions like Malaysia and United Arab Emirates.

Oseni contended that the creation of SAC in Malaysia has enhanced the determination of Islamic legal questions and issues particularly, in Islamic banking and finance.⁸⁰⁹ Consequently, SAC has helped in abridging the amount of cases going on appeal to the court where the aggrieved party was dissatisfied with the award.⁸¹⁰ It may be doubtful if in practical sense, the establishment of SAC in Nigeria will give the desired result like that of Malaysia. The truth is, with the existing Supreme Council for Shari'ah in Nigeria, there is a feasible success. The Council under its Lagos chapter established an Independent Shari'ah Panel that involved retired Muslim judges who are

⁸⁰⁶ Rule 11(1)a &b.

⁸⁰⁷ Rule 11, (4).

⁸⁰⁸ Rule 11 (7).

⁸⁰⁹ Oseni U.A., 'Disputes Resolution in the Islamic Financial Industry in Nigeria' (2015), *Eur J. Law & Econ*, 40(3), 545-564, 558.

⁸¹⁰ *Mohd Alias Bin Ibrahim v. RHB bank Berhad & Anor* [2009] 3 MLJ 26, 103-104.

learned in Shari'ah law.⁸¹¹ Because Lagos State does not have Shari'ah Court, judges from the High Court often seek the advice of the Panel on Islamic law related issues. Unfortunately, no single case on Islamic arbitration has been referred to the Panel since its establishment. It seems the Panel is only charged with the duty to determine questions on Islamic law of marriage and divorce.⁸¹² However, the jurisdiction of the Panel may be extended to cover Islamic arbitration where necessary, to consult Islamic experts on questions of Islamic law.

The i-Rules can therefore serve as a guide to the Nigerian legislature to improve on the existing arbitration law, so as to consider and incorporate the idiosyncrasy of the Islamic arbitration system. This will give parties the option to select the most suitable instrument for their arbitration proceedings. Nigeria and Malaysia share a similar colonial history. Some element of legal diversity is another quality the two States enjoy.⁸¹³ Therefore, borrowing from the Malaysian practice as identified in the i-Arbitration Rule will encourage effective Islamic arbitration proceedings and also assist in the development of a Shari'ah compliant enforcement mechanism in Nigeria.

As it is now, the existing Nigerian arbitration law does not consider the nature of Islamic arbitration particularly when it comes to Shari'ah issues. Interestingly, the Lagos Regional Centre for International Commercial Arbitration (LRCICA) is a similar body with that of Asian International Centre for Arbitration (AICA). One would have expected that LRCICA will design

⁸¹¹ Oseni A.U., 'Shariah Court-Annexed Dispute Resolution of the Three Commonwealth Countries-Literature Review' (2014), *Intl J. of Conflict Management*, 1-30 13.

⁸¹² *Madam Aishat Afinni v. President and Members of Grade 'B' Customary Court, Isolo Lagos State and Alh Jumat Owolabi* [Suit No: ID/852M/2007, unreported].

⁸¹³ Oseni A.U., 'Shariah Court-Annexed Dispute Resolution of the Three Commonwealth Countries-Literature Review' (2014) 15.

its rules in a unique way like that of AICA and come up with new procedural rules specifically for Islamic commercial disputes.

The Nigerian legislature need to understand that despite the presence of some strained areas in Islamic law, arbitration proceedings with the engagement of the religious laws to regulate it, play a vital role in dispute resolution mechanism. International commercial arbitration encourages globalisation and also respect for culture, religion and national attachments.⁸¹⁴ If this duality is understood, the system can indirectly ease the tension that comes from national, cultural and religious beliefs.

6.5.0. CONCLUSION

This chapter analysed international arbitration within Islamic jurisprudence. The chapter began with the fundamentals of its origins which are based on the Qur'an, Sunnah, Consensus and Analogy. The opinions of scholars from various schools were discussed. The chapter discovered that Nigerian ACA is applicable to enforcement of foreign Islamic award in Nigeria. The chapter emphasised that ACA does not consider the idiosyncrasy of Islamic arbitration and enforcement of its decision in the provisions. Finally, the chapter examined provisions of the Asian International Centre I-Arbitration Rules which appeared to be the better practice when compared with ACA.

⁸¹⁴Rizwan S.U., 'Foreeable Issues and Hard Questions: The Implications of US Courts Recognising and Enforcing Foreign Arbitral Awards Applying Islamic Law Under the New York Convention' (2013) 98 Cornell L. Rev, 493-522, 508.

CHAPTER SEVEN

GENERAL CONCLUSION

7.0.0. CONCLUSION

The comparative advantages of arbitration over litigation in modern times have made it more desirable for businessmen to include arbitration clauses in transnational agreements. The rising number of international trades between parties from various States with diverse legal systems compel the need for a machinery that will take care the unavoidable disputes of such international contractual relationships. In order to be attractive to foreign businessmen, the government of a host State must show, through its domestic laws, a willingness to encourage the use of international arbitration for the resolution of disputes. However, arbitral proceedings and consequent awards will amount to a wasted effort of time and resources if the award creditor is unable to have the award enforced. The efficacy of international commercial arbitration is influenced by the certainty in the implementation of arbitration contracts and awards. Therefore, investors and businessmen are more willing to invest in States with unswerving courts and legal systems that will guarantee the implementation of agreements, judgments and awards. An effective enforcement regime is thus an important weapon that may determine a decision to transact globally. The appraisal of the literature underlined the need for the Nigerian legal framework to focus more attention on the requisite to enhance the legal applicability of international arbitration. This is to draw capital investment into the country. There are legal challenges heartrending the effectiveness of the enforcement provisions in the ACA.

7.1.0. FINDINGS

Prior to the enactment of ACA, enforcement of foreign arbitral award is an issue of concern to investors/ businessmen because the available laws did not cater for it. The historical exploration revealed that the Arbitration Ordinance 1914, Reciprocal Enforcement Ordinance 1922, Foreign Judgement (Reciprocal Enforcement) Act 1960 and Geneva Treaties that endeavored to sustain the enforcement of awards seemed insufficient in some ways. The Nigerian Government in an attempt to aid foreign investment has responded by updating its laws to meet globally accepted standards; the consequence of this is the enactment of ACA of 1988 which, as at today is the extant law under which commercial arbitration is codified in Nigeria. The New York Convention was adopted in 1970 however, the law could not be made available until in 1988 when the Arbitration and Conciliation Decree (now Act) was promulgated by the then military government.

Sections 51 and 54 were identified as the enforcement provisions in the ACA. Enforcement via Section 51 is being subjected to Section 32 of the Act. Enforcement under the New York Convention can be made in Nigeria via Section 54 as incorporated in the Second Schedule of the ACA thus, this is subject to reciprocity and contractual reservations adopted by the Nigerian government while assenting to the Convention in 1970. These two reservations therefore limits the legal applicability of the provision of Section 54 in Nigeria. Articles V (1) (e) and VII, Second Schedule of the ACA, are contradictory therefore creates legal challenge to parties who intend to enforce foreign arbitral awards in Nigeria. Article V(1)(e) empowers the enforcing courts to refuse the enforcement order if the competent court has set the award aside or where the said award was suspended or where it cannot be binding. Meanwhile Article VII permits enforcing courts to enforce an arbitral award notwithstanding the presence of any grounds

contains in Article V to refuse the enforcement. The concern is how to reconcile the two provisions. Unfortunately, the attitude of the courts toward the annulment of award vary from State to State and as such some courts have been found guilty of enforcing an annulled award notwithstanding that it has been vacated by the courts where the arbitration took place. The interface between these two provisions have caused and generated conflict in various national laws on enforcement as well as a contradictory decisions of the courts.

Hence, the statutory time limit, concept of arbitrability, public policy exception, and judicial review of award, third party intervention, and delay are among the hindrances that affect the effectiveness of the enforcement provisions in the ACA. Statutory time limits imposed by the Limitation Act applies to arbitration system because ACA do not make provision for it. The judicial cases established that in arbitration, arbitration proceeding and enforcement proceeding are a single cause of action which must run within six years of the statutory time limit stipulated in the Limitation law. This create tension for the award creditor who must not only safeguard the compliance with the award but must also ensure judicial enforcement is sought within the statutory time limit in situations where the terms of the award is not complied with.

The significance of the notions of arbitrability and public policy at the enforcement stage of awards cannot be overemphasised. Arbitrability and public policy exception can be raised to resist the enforcement application before the courts and also serve as a control measures put in place by each State to safeguard its policies, moralities and justices. Judicial cases established that criminal matters, dissolution of marriage conducted under the Act, illegal contracts, tax related disputes, action in *rem*, industrial disputes, intellectual disputes, copyright disputes cannot be heard and determined before the arbitral panel. The thesis revealed that the approach of the Nigerian court to the issue of arbitrability is restrictive and as such there is no form of

liberal interpretation. Limiting the scope of arbitrability to commercial and contractual disputes is an indication of deficiency in the Nigerian arbitration law. States like China, UK, France, USA, and Malaysia now embrace the use of arbitration in these area of disputes and the courts in these States recognise the jurisdiction of arbitrators on these subjects. Hence, if the law intends to provide utmost opportunity to parties to proceed with arbitration, the issue of arbitrability should be given a liberal interpretation to matters that are not commercial or contractual in nature.

The thesis further revealed that neither the ACA nor the New York Convention offer useful explanations as regard the concept of public policy exception. No recognised standard is given to establish ways and manners in which public policy exception should function as a ground for resisting enforcement. For this reason and because public policy is unruly in nature, parties are exploiting this lacuna in the law to bring frivolous applications on ground of public policy exception to oppose the enforcement application so as to avoid obeying the award. It is thus noted that the idea of public policy exception is recognised within the legal structure of arbitration in Nigeria. Therefore, the jurisprudence is still growing in this area and with time it is hoped that Nigerian courts will be able to come up with comprehensive rules of public policy in this regard.

However, judicial review system in Nigeria creates another legal challenge to the enforcement of awards. Thesis revealed that judicial review remains a vital part of the arbitration process particularly, where the aggrieved party approaches the court to intervene where he is alleging to have been unfairly treated in the arbitration proceedings. Though judicial review system is a good innovation since it is designed to balance the concepts of ‘fairness’ and ‘finality’ considerations. The award creditor looks toward finality by requesting the enforcement court to

enforce the award rendered in his favor hence, the award debtor seeks for fairness where he is aggrieved and request the court of the seat of arbitration to intervene. However, judicial cases established that courts in Nigeria are unable to balance these two important considerations. Notwithstanding the importance attached with the 'finality' of award some degree of procedural safeguards is necessary which means, to some extent judicial scrutiny is inevitable. Hence, the question still facing Nigerian courts today is how to determine the appropriate level of review where necessary. Aside the procedural irregularity and public policy grounds of review, there are other grounds in the ACA that give room for extensive review of awards. It was found that arbitrator's misconduct and 'error of law' grounds are the main legal challenges under which courts in Nigeria extend the review power to cover merit of the case. For this reason, judicial review of the arbitration award is viewed as running contrary to what the parties have wished for. The judicial review therefore is seen as undermining the very ultimate advantages of submitting to commercial arbitration and has significant impact on the enforcement of its outcome.

The use of international commercial arbitration in Islamic transactions, Islamic banking and finance is encouraging. Thus, where parties adopt Islamic law to govern the resolution of their commercial disputes, enforcement of such outcome of the proceedings must also be Shariah compliance to be enforceable. The provisions of Section 51 and 54 of ACA are applicable to an award rendered through Islamic arbitration for enforcement procedure. The implication is that all the legal challenges in the ACA facing the enforcement of arbitral awards are applicable to Islamic arbitral awards. Challenges such as concepts of arbitrability and public policy, limitation law, third party intervention, judicial review of award, and delay. A critical look of these challenges from the Shari'ah perspective demand for the adequacy of ACA in respect of Islamic arbitration and its awards. Ordinarily, transactions which are *haram* cannot be heard and

determined through Islamic arbitration since it is against Shari'ah law adopted by the parties to govern their arbitration proceedings. Determination of the subject matter arbitrability under the Islamic arbitration goes beyond the description provided in the extant arbitration law applicable in Nigeria. The notions of subject matter arbitrability and public policy exceptions in an Islamic commercial arbitration should be determined by reference to the principles of Shariah and its sources together with other relevant factors. Consequently, violation of Islamic injunctions and principles should qualify as a ground to refuse enforcement or to set such Islamic arbitral award aside. This explain reason Muslim States like Saudi Arabia, Malaysia determine public policy exception by reference to Shari'ah, including its measure of the common good of humanity The provisions of ACA on enforcement does not take cognizance of the idiosyncrasy of the Islamic arbitral awards, despite the growing investor's interest in Islamic arbitration around the globe, who would be willing to enforce in Nigeria.

The thesis further revealed that judicial review of Islamic arbitral award under the extant arbitration law creates tension. On one side is the right imposed on the aggrieved party to approach the High Courts on the alleged defilement of the procedural requirements levied by the Shariah and, on the other side is the restriction placed on the Federal/ State High Courts on the hearing of disputes/ issues relating to questions on Islamic law. Determination of questions on Islamic law are therefore beyond the jurisdiction of the High Courts. The current review system of awards in Nigeria leaves parties to Islamic arbitration in a vulnerable position since it is not guaranteed that the parties will get what they agreed to.

7.2.0. RECOMMENDATIONS

In view of the findings of this thesis, the researcher makes the following recommendations:

1. Provision for the statutory time limit in the ACA.

The ACA should offers provision on the statutory time limit that can distinguish cause of action in arbitration proceedings and enforcement proceedings. This thesis recommends that ACA be amended to expressly provide for the statutory time limits which will cater for the loophole in the Limitation Act. This will ensure that the time limit will not run until the award-debtor failed to obey the terms of the award. A new Section in the ACA can be introduced as drafted in the appendix attached.

2. The concept of arbitrability should be liberal and Public Policy Exception should be determined based on global international standard.

Liberal interpretation of the concepts of arbitrability in the Nigerian arbitration law is urgently required. This will offers parties with the better opportunities to proceed with the arbitration with the little fear on whether the nature of the disputes fall within the categories capable of being settled before the arbitral tribunal. The issue of arbitrability should be given a liberal interpretation to matters that are not commercial or contractual in nature. Courts should also be arbitration friendly. Also, global international standard of public policy can be achieved by adopting universal values which are derived from generally accepted international norms and customs as a basic concept of transnational public policy. In an international commercial arbitration, determination of public policy exception should not be founded on the individual State domestic public policy. This is to achieve uniformity and ensure certainty that will guide both the courts and the parties.

3. Judicial Review System should be restricted to Procedural Irregularity Consideration

Review system of awards should be limited mainly to procedural considerations. It is crucial that the standards of review be clarified and narrowed in such a manner that parties to the arbitration are afforded a reasonable level of certainty in their expectations. Challenge on ‘error of law’ should be abolished except where parties opt for it. The term ‘misconduct’ should be given a narrow interpretation that will only cover procedural irregularity. The framework of law on arbitration is better preserved where the parties’ autonomy and arbitral independence are guaranteed.

4. Peculiar nature of the Islamic arbitration and awards should be considered in the ACA and the relevant Sections should be amended.

Need for ACA to take into cognisance the peculiar nature of Islamic commercial arbitration since Islamic law is part of the sources of Nigerian law and Muslims are now willing to transact, enter into arbitration agreement, or even initiate enforcement proceedings in accordance with Islamic principles. The relevant Sections that require amendment are the introductory paragraph of the ACA, Sections 22, 51 and 52, 57 of the ACA. The new paragraph and Sections can be drafted as appears in the appendix attached. The proposed amendment to Section 52 will ensure certainty as regard public policy exception in Nigeria. It will therefore serve as a guiding rule to the courts which are charged to determine if particular awards violate public policy in Nigeria. Section 57 of the ACA needs to accommodate some key aspects of Islamic arbitration. The

amendment to Section 57 will confer on the Shariah Court of Appeal of the Federal Capital Territory or Shariah Court of Appeal of a State, the jurisdiction to hear applications for enforcement, review of award or any other recourse as it relates to Islamic awards. Hence, Shariah Court of Appeal should have exclusive jurisdiction on the enforcement of foreign Islamic arbitral awards in Nigeria, this will reduce the tension that Muslims parties undergo at the regular courts.

5. Provision for the compulsory Deposit Costs

ACA needs to make provision for compulsory deposits costs to be payable by the parties on an equal amount as a way to secure the compliance of award and other expenses. This will serve as a bond with the possibility of forfeiting it if, the award-debtor fails to perform the awards. This will encourage voluntary compliance of the awards without necessary need for the judicial intervention. The proposed new Section can be drafted as appears in the appendix attached.

6. Amendment to Section 22 of the ACA to cover Supreme Council for Shari'ah in Nigeria.

Section 22 of the ACA allows arbitral tribunal to appoint expert(s) who are skilled in the area of concern to decide on specific issues that require expert opinions except otherwise agreed by the parties. The definition of the term 'expert in Section 22 should be extended to include Supreme Council for Shariah (SCSN). SCSN should be conferred with the jurisdiction to provide expert opinions, reports to the arbitral panel where there is need, for the determination of Islamic questions. It would be most valuable to have an

internationally recognised body such as the Supreme Council for Shariah being tasked with the sole duty to overseeing Islamic arbitrations in Nigeria and acting as an expert on Islamic questions and issues. The amendment to Section 22 can be drafted as appears in the appendix attached.

7. Nigerian Judges need to be proactive

There is need for Nigerian Judges to be creative and proactive in handling arbitration cases by borrowing from the practices of similar jurisdictions. To be creative knowledge is the key; Judges and Kadis can only have initiative and be creative in an area where they have knowledge. Training and retraining of Judges and Kadis of the Shari'ah Courts will be most beneficial for the development and effective arbitration system particularly at the enforcement stage of award.

8. The United Nation should recognise and consider Islamic arbitrations and its awards in the UNCITRAL and other relevant International laws.

This will enable the signatory States to integrate the features of Islamic arbitration into their various national arbitration laws. Since there is high in the number of signatories to the UNCITRAL laws, this will pave way and encourage free flow of Islamic arbitrations around the globe without much pressure on the adequacy of the individual's State arbitration law. Particularly, Nigeria can finds it easier to amendment the existing arbitration law in line with the new innovations proposed for the UNCITRAL law.

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APPENDIX

1. STATUTORY TIME LIMIT CAN BE DRAFTED THUS:

‘(Section...) Computation of Time Limit in an arbitration proceedings

(1) In calculating the time prescribed by the applicable Limitation Laws for the commencement of judicial, arbitral and other proceedings in respect of a dispute which was the subject matter arbitration, the following shall apply-

(i) When court declares an award of no effect or orders it set aside, the time from the beginning of arbitration proceeding through to the day the Court makes it order shall be excluded.

(ii) Cause of action shall not ascend in deference of any matter subject of arbitration until an award is rendered or delivered and the award-debtor disobey to fulfil the terms of the award. This is applicable even where there is any erstwhile terms in the agreement that says otherwise.

(iii) In any enforcement proceedings of awards, the courts shall exclude the periods from the beginning of arbitration proceedings through to the day the award is given when face to compute the statutory time limit.

(iv) Courts may (in an exceptional circumstances) extend the statutory time limit where justice demands it.

(v) Limitation Laws are such laws as relevant to the arbitration regulating subject matter of the dispute.’

**2. THE INTRODUCTORY PARAGRAPH OF THE ACA CAN BE DRAFTED
THUS:**

“An Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.

International commercial arbitration under this Act includes arbitrations conducted under the Islamic law. ”

3. AMENDMENT TO SECTION 22 OF THE ACA CAN BE DRAFTED THUS:

“Section 22 (1) unless otherwise agreed by the parties, the arbitral tribunal may-

(a) Appoint one or more experts to reports to it on specific issues to be determined by the arbitral tribunal;

(b) Require a party to give to the expert any relevant information or to produce or provide access to, any documents, goods or other property for inspection.

2. Unless otherwise agreed by the parties, if a party so request or if the arbitral tribunal considers it necessary, any expert appointed under subsection (1) of the Section shall, after delivering his written or oral report, participate in a hearing where the parties shall have the opportunity of putting questions to him and presenting expert witnesses to testify on their behalf on the point at issue.
3. The arbitral tribunal shall not decide *ex aequo et bono* or as amiable compositeur unless the parties have expressly authorised it to do so.

4. The arbitral tribunal shall decide in accordance with the terms of the contract and shall take account the Shariah principles where applicable and the usages of the trade application to the transaction.
5. Expert(s) mentioned in subsection (1) of this Section includes Supreme Council for Shariah of Nigeria or Shariah expert in the field of Islamic law.”

4. PROVISION FOR THE SUPREME COUNCIL FOR SHARIAH OR SHARIAH CAN BE DRAFTED THUS:

Section... Procedure for Reference to Supreme Council for Shariah

1. “Whenever the arbitral tribunal has to:
 - (a) form an opinion on a point related to Shariah Principles and rules or;
 - (b) decide on a matter ascending from the Shariah aspect of the disputemay therefore request the professional guidance of the Supreme Council for Shariah or the Islamic expert on the issue.
2. The parties shall agree between themselves to a specific Islamic expert or Supreme Council for Shariah of their choice. And where the choice of the expert could not be reached by the parties, the decision may be reach by the arbitral tribunal.
3. Arbitral tribunal shall furnishes any relevant information (s) to the Islamic expert or the Supreme Council as may be required to form its opinion including the question(s) or issue(s) so referred, the relevant facts, issues and questions to be answered by the expert or the Supreme Council.

4. Upon reference of the issue(s) to the Islamic expert or Supreme Council for Shariah, the arbitral tribunal shall adjourn the arbitration proceedings until the ruling of the expert has been given, as the case may be.
5. If there are any other areas of dispute which are independent of the said ruling, the arbitral tribunal shall proceed to deliberate on such areas which are independent of the said ruling.
6. The Islamic expert or Supreme Council for Shariah shall deliberate and make its ruling on the issue or question so submitted within the period of 30days from the day the reference is made.
7. Failure of the Islamic expert or Supreme Council for Shariah to supply its ruling within the specified days contained in subsection (6), the arbitral tribunal may proceed to determine the dispute and give its award based on the submissions it has before it. The validity of such an award as authorised in this subsection shall not be affected in any way by the absence of the ruling of the Islamic expert or Supreme Council.

The ruling of the Islamic expert or Supreme Council for Shariah may only deals with the issue or question so submitted by the arbitral tribunal and the relevant expert shall not have any jurisdiction in making discovery of facts or in applying ruling or formulating any decision relating to any fact of the matter.”

5. AMENDMENT TO SECTION 51 OF THE ACA CAN BE DRAFTED THUS:

“51(1) An arbitral award shall, irrespective of the country in which it is made, be recognised as binding and subject to 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 copy thereof;

(b) the original arbitration agreement or a duly certified copy thereof; and

(c) where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language

(3) Section 51 is also applicable to the enforcement of Islamic award emanating from Islamic arbitration.”

4. AMENDMENT TO SECTION 52 CAN BE DRAFTED AS THUS:

“52(1) Any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award.

(2) The court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse to recognise or enforce any award-

(a) if the party against whom it is invoked furnishes the court with proof that-

(i) a party to the arbitration agreement was under some incapacity, or

(ii) the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made, or

- (iii) he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case, or
- (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or
- (v) the award contains decisions on matters which are beyond the scope of submission to arbitration, so however that if the decision on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced, or
- (vi) the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, or
- (vii) there is no agreement within the parties under sub-paragraph, that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the law of the country where the arbitration took place, or
- (viii) the award has not yet become binding on the parties or has been set aside or suspended by the court in which , or under the law of which, the award was made; or

2(b) if the court finds-

- (i) that the subject matter of the disputes is not capable of settlement by arbitration under the laws of Nigeria, or
- (ii) that the recognition or enforcement of the award is against public policy of Nigeria.

(3) In determining subject matter arbitrability under the Islamic arbitration, reference shall be made to Shariah principles and rules in addition to other grounds stated in this Section.

(4) An award shall contravene the public policy of Nigeria where-

(a) the making of award was induced or affected by fraud, corruption, illegality;

or

(b) the award violates Islamic injunctions and principles where the arbitration proceeding was conducted under the Islamic law.

(c) where the arbitral tribunal violates the rules of natural justice at the proceeding or while making the award.

(5) Where an application for the recognition of an award has been made to a court referred to in subsection (2) (a) (viii) of this section, the court before which the recognition or enforcement is sought may, if it considers it proper, postpone its decision and may on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.”

5. AMENDMENT TO SECTION 57(1) CAN BE DRAFTED AS THUS:

“57(1) In this Act, unless the context otherwise requires-

“arbitral tribunal” means a sole arbitrator or a panel of arbitrators;

“arbitration” means a commercial arbitration whether or not administered by a permanent arbitral institutions;

“commercial” means all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance,

exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail, or road;

“court” means the High Court of a State, the High Court of a Federal Capital Territory, Abuja, the Federal High Court, Shariah Court of Appeal of the Federal Capital Territory or Shariah Court of Appeal of the State;

“judge” means a Judge of the High Court of a State, the High Court of the Federal Capital Territory, Abuja, Shariah Court of Appeal of a State or Shariah Court of Appeal of the Federal Capital Territory, Abuja;

“party” means a party to the arbitration agreement or to conciliation or any person claiming through or under him and

“parties” shall be construed accordingly.’’

6. PROVISION FOR DEPOSIT OF COSTS

Section Deposit of Costs

1. The arbitral tribunal, on its establishment, may request the Parties to deposit substantial amount of the value in dispute on an equal amount as an advancement for the purpose of securing the compliance of award and other expenses.
2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the Parties
3. If an appointing authority has been agreed upon or designated, and when a Party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral

tribunal that it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the Parties in order that one or more of them may make the requirement payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
5. After a termination order or final award has been made, the arbitral tribunal shall render an accounting to the Parties of the deposits received and return any unexpended balance to the Parties.
6. If after determination of the proceeding and the rendering of an award, any Parties that do not comply with the terms of award shall forfeit the deposit paid under subsection 1 of this Section.