

ARBITRATION IN THE RESOLUTION OF MARITIME DISPUTES¹

BY

ADEDOYIN RHODES-VIVOURE [MRS]*

I Introduction

Arbitration is the settlement of disputes between parties who agree not to go before the court, but accept as final the decision of dispute resolvers of their choice, in a place of their choice usually subject to laws agreed upon in advance and usually under rules which avoid much of the formalities, niceties, proof and procedure required by the courts². Maritime arbitration is simply the process of resolving maritime disputes through arbitration³.

Arbitration is not a new phenomenon in Nigeria and can be traced to our rudimentary and customary method of resolving disputes. In **Okpuruwu v Okpokun**, the Honorable Justice Oguntade JCA (as he then was) observed thus:

“In the pre-colonial times and before the advent of the regular courts, our people [Nigerians] certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom”⁴.

Internationally the origins of maritime arbitration can be traced as far back as voyages of ships owned by ancient Phoenicians carrying the cargoes of Greek traders.⁵ Professor Tetley observed that arbitration may have existed in pre-historic times and was definitely practiced by about 1200A.D on the Atlantic and Northern coasts of Europe and in certain Mediterranean ports, where the customary *lex maritime* prevailed, in its two great medieval codifications, *the Roles of Leron* and *the Consolato del Mare*. He observed that recorded arbitral decisions have been traced back to those rendered in Latin and preserved in the *greffe* of Giraud Amalric, a notary in Marseilles, dating from as early as 1248 A.D.⁶

Maritime disputes usually span international borders. The reluctance of parties in international contracts to submit to foreign national courts emphasizes the importance of arbitration in the maritime field. Maritime international arbitration offers the option of privately resolving the dispute outside the national court system. The advantages of arbitration activities within a state's borders include the attraction of

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*LLB, LLM, MA [London] FCI Arb, Chartered Arbitrator, CEDR [UK] Accredited Mediator. Mrs. Rhodes-Vivour is Managing Partner of Doyin Rhodes-Vivour & Co, Solicitors Advocates & Arbitrators. Email: doyin@drvlawplace.com.

² Tetley, *International Conflict of Laws: Common, Civil and Maritime*, Les Editions Yvon Blais Inc., Montreal, 1994 at p.390.

³ Maritime arbitration may be in respect of a dispute relating to hire of a ship [time charter/voyage charter], contracts for sale of ships, contracts of affreightment, ship building contracts, oil trading contracts, aspects of marine insurance e.t.c See Bruce Harris, Michael Summerskill and Sarah Cockrill “London Maritime Arbitration” [1993] *Arbitration International* 275 – 88. See also Mario Ricco Magno “Maritime Arbitration” Vol. No. 4 [Nov. 2004] *JCI Arb* 267.

⁴ [1998] 4 *NWLR Pt 90*, 554 at 586.

⁵ See the Handbook of the Society of Maritime Arbitrators New York 4th Edition. See also Professor Tetley, *Marine Cargo Claims*, 4th Edition Vol. 1 chapter 28.

⁶ See Tetley, *Marine Cargo Claims*, 4th Edition, Vol. 1 p. 1417, fn. 2.

foreign direct investment and the sustenance of high levels of local private sector led investments. Arbitration attracts invisible earnings that are quite valuable and can be utilized towards a state's developmental plans. A discerning country appreciates the advantages of being recognized as a place for international arbitration activities. However, two major concerns must be addressed by any country aspiring to be recognized as an international arbitration center and ultimately an attractive investment destination. Investors will ask; does your country have a favorable legal framework for arbitration? Do your courts have a favorable disposition to arbitration agreements and awards? Thus, are arbitration agreements and awards enforced by Nigerian courts particularly in accordance with current international best practices in the maritime field? Investors will also be concerned about the availability of human resource capability in the field and the existence of strong arbitral institutions.

In this paper an overview of the domestic and international framework and environment for maritime arbitration in Nigeria will be discussed with a view to determining Nigeria's suitability and perception as a favorable forum for domestic and international maritime arbitration.

II Legal Framework

1 Domestic

1.1 Arbitration Statutes

Arbitration in Nigeria is governed by Federal and State Statutes. The Federal Statute is the Arbitration and Conciliation Act (the Federal Act)⁷. The Act is a modification of the 1985 United Nations Commission on International Trade Law [UNCITRAL] Model Law on international commercial arbitration⁸. The Model law is the result of the comprehensive study by UNCITRAL into arbitration laws throughout the world with a view to providing a Model law on arbitration which will lead to uniformity and harmonization of the laws relating to international commercial arbitration⁹. There is a perception in the international business world that agreeing to arbitrate in a model law jurisdiction secures a minimum of rights in arbitral proceedings and reduces surprises. Indeed Model Law conformity is advertisement to attract international business. The Model law limits judicial intervention in arbitral proceedings generally referred to as the principle of non intervention. Section 34 of the Federal Act which is modeled on Article 5 of the Model law states thus:-

“A court shall not intervene in any matter governed by this Act except where so provided in this Act.”¹⁰

The intent of Article 5 was to exclude any general or residual powers given to the courts within the domestic system and which are not listed in the Model Law. Foreign parties were therefore protected from surprises. It was also intended that the provision would accelerate the arbitral process by disallowing delays caused by intentional tactics associated with the court system. The adoption of the Model Law worldwide signified a new era in international commercial arbitration. In recognition of the growing use of ADR and the enactment of laws by the states to meet the demands of practice, UNCITRAL adopted a Model law on International Commercial Conciliation at its 35th Session in 2002. UNCITRAL continues

⁷ Chapter A18 2004 Laws of the Federal Republic of Nigeria.

⁸ UNCITRAL is the United Nations body vested with the responsibility to harmonize and unify international trade laws with a view to encouraging international trade and investment.

⁹ The Model law on International Commercial Arbitration was adopted by Nigeria in 1988 by Decree No. 11 of March 14, 1988.

¹⁰ Generally referred to as the principle of non intervention which has also been opted into various national laws including the English Arbitration Act in Part I section 1 (c) of the Act.

its mission to improve the legal framework of international dispute settlement and its recent work includes the review of the provisions of the Model Law on the form in which interim measures and preliminary orders should be presented by arbitral tribunals and the recognition and enforcement of interim orders. The recent work resulted in the 2006 amendments to the 1985 Model law which is yet to be incorporated in the Federal Act.

Section 2 of the Federal Act provides for the enforcement of arbitration agreements. The section stipulates that an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the court or a judge. Section 4 of the Federal Act reflects Nigeria's treaty obligation under the provisions of Article II (3) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)¹¹. The section requires a court before which an action subject to arbitration agreement is brought to stay the court proceedings unless the agreement is null and void, inoperative, or incapable of being performed. Section 31 of the Federal Act (applicable to domestic awards) also obliges the court when considering an application for a stay of court proceedings of matters brought in disregard of arbitration agreements to make an order staying the court proceedings if satisfied-

“a) That there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement, and

b) That the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration”¹²

The New York Convention was ratified by Nigeria on the 17th day of March 1970. The Convention came into force on the 7th day of June 1959 and has been ratified by 144 countries worldwide¹³. The Convention has been described as the single most important pillar on which the edifice of international arbitration rests and which perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law¹⁴. The Convention obliges the Courts of signatory states to recognize and enforce arbitration agreements and awards in the territory of other states. National Courts are thus required to recognize and enforce foreign awards without reviewing the arbitrator's decision except in a few exceptional instances¹⁵. A party desiring assurance that an award will be enforceable under the Convention must ensure that the arbitration proceedings takes place and an award made in Convention State. The required enforcement should also be against the assets of the losing party located in another Convention State. Recognition or enforcement may be refused or an award set aside only if at least one of the exceptional grounds stipulated in the Convention is successfully established. The grounds are listed in Article V (1) (a) to (e) and (2) (a) and (b) as:-

“1 a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or

¹¹ Adopted in New York on June 10, 1958 and entered into force on June 7, 1959.

¹² See section 5 (2) (a) and (b) of the Federal Act.

¹³ See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

¹⁴ See Mustill, "Arbitration: History and Background" [1989] 6 Journal of International Arbitration 43; see also Schwebel, "A celebration of the United Nations' New York Convention" [1996] 12 Arbitration International 823. See also Wetter, "The Present Status of the International Court of Arbitration of the ICC: an Appraisal" [1990] 1 American Review of International Arbitration 91.

¹⁵ Articles I (1) and (3) of the New York Convention, which is similar to Article I and V Second Schedule of the Arbitration and Conciliation Act, Chapter A18 2004 Laws of the Federal Republic of Nigeria, requires contracting states to recognize and enforce arbitral awards in the territories of other states. Under Article V, the grounds to refuse to recognize and enforce such awards are restrictive.

the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

- b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
 - c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*
 - d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*
 - e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*
- 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
- a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
 - b) The recognition or enforcement of the award would be contrary to the public policy of that country.”*

1.2 Application of The New York Convention In Foreign Domestic Courts.

In Gulf Petrol Trading Company Inc, PETREC Int'l Inc, James S. Faulk, James W. Faulk –vs. NNPC, Bola Ajibola, Jackson Gaius-Obaseki, Sena Anthony, Andrew W.A Berkeley, Ian Meakin, Hans Van Houtte, Robert Clarke the United States Appeal Court affirmed the decision of the US District Court for the Eastern District of Texas declining to set aside an arbitration award made in Switzerland. The Court of Appeal agreed with the District Court that the lawsuit represents a collateral attack on a foreign arbitral award and held that the district court had properly dismissed the suit for lack of subject matter jurisdiction. The appellant at the lower court had sought to nullify the final award under the provisions of

the Federal Arbitration Act of the United States of America on the basis of fraud, bribery and corruption. Proceedings had been bifurcated in the matter. A partial award on liability had issued affirming that the appellants had standing to pursue its claims. However the final award on quantum inter alia held that the appellants lacked capacity to maintain its claims against NNPC.

The appellants challenged the final award in the Federal Court of Switzerland on grounds that it violated Swiss law and public policy but the Swiss Court upheld the arbitral panel's decision. The appellants then filed a lawsuit in the Northern District of Texas seeking confirmation of the partial award in which the panel had found in Petrec's favour on some aspects of NNPC's liability and a determination of damages. The District Court dismissed the action for lack of subject matter jurisdiction. The Court reasoned that in seeking confirmation of the partial award, the appellants was effectively requesting that the final award be set aside or modified; action that the court was precluding from taking by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Court concluded that under the Convention it lacked subject matter jurisdiction to modify or vacate the final award.

The appellants conceded on appeal that its claims seeking vacation was properly dismissed for lack of subject matter jurisdiction and agreed that the New York Convention required the result.

The court classified the different regimes for review of arbitral award into countries of primary and secondary jurisdiction. Countries of primary jurisdiction being those in which or under the law the award was made and that of secondary jurisdiction those where recognition and enforcement are sought. The Court interpreted the Convention as leaving to the country where the award was made primary jurisdiction over the award to decide whether to set it aside whereas the country of secondary jurisdiction may only refuse or stay enforcement of an award on the limited grounds specified in Articles V and VI.

The Appeal Court stated the "essential purpose" of the New York Convention as the recognition and enforcement of foreign arbitral awards and its "underlying theme", the autonomy of international arbitration.

Non application of the Convention by the national courts of signatory states constitutes a breach of treaty obligations. Justice Schwebel a former judge of the International Court of Justice puts the matter succinctly when he stated thus:-

"When a domestic court acts, it acts as an organ of the State for whose actions that state is internationally responsible. When a domestic court issues an anti-suit injunction blocking the international arbitration agreed to in a contract, that court fails 'to refer the parties to arbitration...' In substance, it fails anticipatorily to 'recognize arbitral awards as binding and enforce them...' and it pre-emptively refuses recognition and enforcement on grounds that do not, or may not, fall within the bounds of Article V.

A party to a treaty is bound under international law-as codified by the Vienna Convention on the law of Treaties- to perform it in good faith. As the Vienna Convention prescribes, a party may not invoke the provisions of its internal law as justification not to perform a treaty. A treaty shall be interpreted in good faith in accordance with the

ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose. The object and purpose of the New York Convention is to ensure that agreements to arbitrate and the resultant awards- at any rate, the resultant foreign awards- are recognized and enforced. It follows that the issuance by a court of an anti-suit injunction that, far from recognizing and enforcing an agreement to arbitrate, prevents or immobilize the arbitration that seeks to implement that agreement, is inconsistent with the obligations of the state under the New York Convention. It may be said to be inconsistent with the letter of the Convention as well, at any rate, if the agreement to arbitrate provides for an arbitral award made in the territory of another State. There is room to conclude that an anti-suit injunction is inconsistent with the New York convention even when the arbitration takes place or is to take place within the territory of the contracting state provided that one of the parties to the contract containing the arbitration clause is foreign or its subject matter involves international commerce”¹⁶

1.3 State Arbitration Laws

Some states in Nigeria have adopted the Federal Arbitration Act as their arbitration law.¹⁷ Lagos, one of the states which hitherto had the Federal Law on its statute book recently passed a State Arbitration Law No. 10 of 2009 which incorporates the UNCITRAL 2006 amendments to the Model Law. The Lagos Law applies to all arbitrations within the state except where the parties have expressly agreed that another arbitration law shall apply.¹⁸ The Law is the most up to date arbitration law in Nigeria.

Unfortunately some states continue to retain on their statute books the 1914 Arbitration Ordinance which is based on the English Arbitration Act (EAA) of 1899. The EAA has since been repealed in England where the current arbitration Law is the 1996 English Arbitration Act¹⁹. The Ordinance based arbitration law is not modern and contains the much criticized case stated procedure. The case stated procedure requires arbitrators to refer questions of law arising in the course of arbitration to the courts. This procedure has been found to cause delay in arbitral proceedings. The modern trend is to empower arbitrators to request for legal opinion if they so wish²⁰.

An up to date legal framework and uniformity in Nigeria’s arbitration laws is desirable. There have been initiatives to ensure that the legal framework for arbitration in Nigeria is up to date in accordance with modern trends and international best practices. In 2005, Chief Bayo Ojo, SAN former Attorney General of the Federal Republic of Nigeria was motivated by the need to ensure that arbitration and the ADR practice continue to meet up with the evolving needs of users constituted a National Committee with the directive to put forward proposals towards the reform of Nigeria’s Arbitration and ADR laws. The Committee recommended for enactment a Federal Arbitration Act and a Uniform States Arbitration law.

¹⁶ Neil Kaplan, The Good, Bad and the Ugly, Journal of the Chartered Institute of Arbitrators, August 2004.

¹⁷ E.g. Rivers State.

¹⁸ Section 2 of the Lagos State Arbitration law No 10 of 2009

¹⁹ The English Arbitration Act 1899 was repealed by the English Arbitration Law of 1996.

²⁰ Section 22 of the Arbitration Act which is modeled on Article 26 of the Model law.

The Uniform States Arbitration Law was used as a template for the recently enacted Lagos State Arbitration Law.

One of the key concerns of the National Committee was the dichotomy between protecting the sanctity of arbitration agreements and affording some form of protection in support of Nigeria as the place of arbitration in particular maritime arbitration. It was observed during the committee's deliberations that foreign arbitration clauses usually found in standard form maritime contracts work hardship on Nigerian parties' oftentimes resulting in the defeat of legitimate claims. Protectionism was thus considered desirable. Section 5 (3) and (4) of the Draft Federal Act drawn up by the committee in respect of the power of court to stay proceedings, provides as follows:-

“ 3) Notwithstanding sub-section (1) of this section, any person carrying on business in Nigeria who is a consignee under, or holder of any bill of lading, waybill or like document for the carriage of goods to a destination in Nigeria, whether for final discharge or for discharge for further carriage, may bring an action relating to carriage of the said goods or any such bill of lading, waybill or document in a competent court in Nigeria and any arbitration clause which purports to limit or preclude this right shall be null and void.

4) Sub-section (3) of this section shall not apply where the arbitration agreement provides for arbitration in Nigeria under the provisions of this Act or the rules of a Nigerian arbitration institution.”

The draft Federal bill is yet to be enacted into law.

2. National Maritime Legislation and Arbitration

2.1 The Admiralty Jurisdiction Act

The Admiralty Jurisdiction Act (AJA) vests the Federal High Court with jurisdiction in respect of admiralty matters. Section 1 of the AJA extends the jurisdiction to aircrafts and oil pollution damage.²¹ Section 20 provides that agreements which seek to oust the jurisdiction of the Court shall be null and void if it relates to any admiralty matter under the Act and if:-

“a) The place of performance, execution, delivery, act or default is or takes place in Nigeria; or

b) Any of the parties resides or has resided in Nigeria; or

c) The payment under the agreement (implied or express) is made or is to be made in Nigeria; or

²¹ See Section 1(1) (a) and 1(1) (e) of the Admiralty Jurisdiction Act. See also Admiralty Jurisdiction in the Federal Courts of Nigeria: Innovation or Incongruity under the Admiralty Jurisdiction Act 1991, by Adewale A. Olawoyin, Journal of Maritime Law and Commerce Volume 35 No. 1 January 2004.

d) In any admiralty action or in the case of a maritime lien, the plaintiff submits to the jurisdiction of the Court and makes a declaration to that effect or the rem is within Nigerian jurisdiction; or

e) It is a case in which the Federal Government or the Government of a State of the Federation is involved and the Federal Government or Government of the State submits to the jurisdiction of the Court; or

f) There is a financial consideration accruing in, derived from, brought into or received in Nigeria in respect of any matter under the admiralty jurisdiction of the Court; or

g) Under any convention, for the time being in force to which Nigeria is a party, the National Court of a contracting state is either mandated or has a discretion to assume jurisdiction; or

h) In the opinion of the Court, the cause, matter or action should be adjudicated upon in Nigeria”.

The effect of Section 20 has come under considerable debate in Nigeria. In the case of ***MV Parnomous Bay Vs Olam Nig Plc***²² the Nigerian Court of Appeal, held that Section 20 of the AJA 1991 had modified Section 2 and 4 of the Arbitration Act and limited enforceable arbitration agreements to those having Nigeria as a Forum. The Court of Appeal upheld the decision of the lower Court not to stay Court proceedings pending reference to arbitration in London. This decision may be considered within the context of increasing criticism by Nigerian parties against arbitration clauses in standard form contracts which provide for foreign forums. The Hon. Justice Galadima JCA (as he then was) had this to say:-

“It is the contention of the respondent that the clause inserted in the bill were done without any consultation whatsoever with the respondent or its predecessor in title as it is a standard form contract usually lopsided in favour of the carriers, which was not bonafide as its sole aim is to fabricate legitimate claims having undeserved jurisdictional advantage. I am quite satisfied that the learned trial judge, apart from the fact that he has given due consideration to section 5 (2) (b) of the Arbitration and Conciliation Act, he has also considered the legality, genuineness and reasonableness of arbitration clauses in the bills of lading”²³

In ***Owners of M. V Lupex vs. Nigeria Overseas Chartering and Shipping Ltd***²⁴, the Supreme Court set aside the decision of the High Court and affirmed by the Court of Appeal refusing to grant a stay proceedings over a suit commenced in breach of charter party agreement which provided for arbitration in London under English Law.

²² [2004] 5 NWLR pt. 865, pg 1.

²³ 407 US 1 (1971).

²⁴ [2003] 15NWLR Part 844 at 469

On appeal the Supreme Court set aside the ruling of the High Court refusing to stay proceedings and stayed the proceedings before the Federal High Court *sine dine*. The Supreme Court referred to the comments of Hon. Justice Ephraim Akpata JSC (as he then was) in the book “The Nigerian Arbitration Law” as stated thus:-

“That the power to order a stay is discretionary is not in doubt. It is a power conferred by statute. It however behoves the court to lean towards ordering a stay for two reasons; namely;

a) The provision of section 4(2) may make the court’s refusal to order a stay ineffective as the arbitral proceedings “may nevertheless be commenced or continued” and an award made by the arbitral tribunal may be binding on the party that has commenced an action in court.

b) The court should not be seen to encourage the breach of a valid arbitration agreement particularly if it has international flavor. Arbitration, which is a means by which contract disputes are settled by a private procedure agreed by the parties, has become a prime method of settling international disputes. A party generally cannot both approbate and reprobate a contract. A party to an arbitration agreement will in a sense be reprobating the agreement if he commences proceedings in court in respect of any dispute within the purview of the agreement to submit to arbitration”

Thus the Supreme Court affirmed the position of the law that an arbitration agreement must be enforced.

2.2 The Federal High Court Act/Rules

Section 17 of the Federal High Court Act refers to Alternative Dispute Resolution (ADR) but not arbitration in particular²⁵. Section 17 provides that the court may promote reconciliation amongst the parties thereto and encourage and facilitate the amicable settlement thereof.

The Federal High Court Rules contains extensive provisions on arbitration including the court’s power to appoint arbitrators²⁶, findings of the arbitral tribunal²⁷, stating the award in the form of a special case for the opinion of the court²⁸, setting aside²⁹ enforcement of arbitral awards³⁰ and registration of foreign arbitral awards³¹. Order 52 Rule 17 on registration of foreign arbitral awards provides for enforcement of awards under the Foreign Judgment [Reciprocal Enforcement Act]³². Sections 2 and 4 of the Foreign Judgment (Reciprocal Enforcement) Act provide for the enforcement of foreign judgments by registration before the superior courts in Nigeria. The section requires foreign judgments to be registered unlike the enforcement regime under the provisions of the Model Law and the New York Convention.

²⁵ Arbitration is not generally classed as an ADR mechanism due to its binding nature.

²⁶ Order 52 Rule 2 of the Federal High Court Rules.

²⁷ Order 52 Rule 8 of the Federal High Court Rules.

²⁸ Order 52 Rule 9 of the Federal High Court Rules.

²⁹ Order 52 Rule 13 of the Federal High Court Rules.

³⁰ Order 52 Rule 16 of the Federal High Court Rules.

³¹ Order 52 Rule 17 of the Federal High Court Rules.

³² Cap F35 Laws of the Federation of Nigeria 2004

Articles III and IV of the New York Convention provides thus:

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article 35 of the UNCITRAL Model Law provide thus: -

“1. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and upon application in writing to the competent court shall be enforced subject to the provisions of this article and of Article 36.

2. *The party relying on an award or applying for its enforcement shall supply the authenticated original award or a duly certified copy thereof, and the original arbitral agreement referred to in Article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language”.*

The corresponding section in the Federal Arbitration Act on enforcement of foreign arbitral awards is found in Section 51 which provides for recognition and enforcement of foreign arbitral awards by application to the court with no requirement for registration. Section 54 of the Act makes applicable the New York Convention to awards made in Nigeria or any contracting State provided inter alia that such contracting States has reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention³³.

The Federal High Court Rules makes no reference to enforcement under the provisions of the domesticated New York Convention.

3. International Framework (Arbitration and Treaties on the Carriage of Goods by Sea)

3.1 The Conventions

The Hague Rules³⁴ and the Hague/Visby Rules³⁵ do not contain provisions on arbitration though the time bar limits may impact on the application of arbitral clauses. Article 3(6) of The Hague and Hague/Visby Rules provide for a one year time limit of bringing suits against the carrier and the ship computed from the date of delivery or the date the goods should have been delivered.

The Hamburg Rules³⁶ contain specific rules on arbitration. Article 22(2) provides that an arbitration clause in a charter party must be specifically incorporated by reference into the bill of lading by a special annotation for such a clause to be binding upon a holder who has acquired the bill in good faith. Article 22 (3) prescribes that the place of arbitration may be instituted at the option of the claimant at one of the following places:-

“a) a place in a State within whose territory is situated:

i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

³³ Section 54[1][a] makes the provision of the Convention subject to the principle of reciprocity i.e. such contracting State has reciprocal legislature recognizing the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention. Section 54[1][b] provides that the Convention shall apply only to difference arising out of legal relationship which is contractual.

³⁴ The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels, August 25, 1924 and in force June 2, 1931.

³⁵ The Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels February 23, 1968 and in force June 23, 1977.

³⁶ The United Nations Convention on the Carriage of Goods by Sea, 1978.

ii)the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

iii)the port of loading or the port of discharge; or

b) any place designated for that purpose in the arbitration clause or agreement”

Article 22 (4) obliges the arbitrator or arbitration tribunal to apply the rules of the convention. Article 22(5) provides that the provisions of paragraph (3) and (4) of the article are deemed to be part of any arbitration clause or agreement and any term of such clause or agreement which is inconsistent therewith is null and void. Thus, under the provisions of the Hamburg rules the claimant has an option to arbitrate applicable claims in any one of the four places irrespective of whether a bill of lading arbitration clause designates only one place for arbitration of cargo claims arising under the bill. Article 22 (6) provides that the provisions of the article does not affect the validity of agreements relating to arbitration after the claim has arisen. Thus such agreements are valid irrespective of the provisions of Article 22. Furthermore, Article 20 (1) provides for a two year limitation of action for bringing judicial or arbitral proceedings, a welcome development for cargo nations when compared with the one year period in the Hague and Hague/Visby rules.

The Hamburg Rules³⁷ which tend to favour cargo countries was severely criticized by shipping nations with the choice it gave cargo claimants to opt for the seat of arbitration.

The Multimodal Convention 1980³⁸ follows the Hamburg Rules in respect of arbitration. Article 25 (1) of the convention provides that any action relating to international multimodal transport under the Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. However, if notification in writing, stating the nature and main particulars of the claim, has not been given within six months after the day when the goods were delivered or, where the goods have not been delivered, after the day on which they should have been delivered, the action shall be time-barred at the expiry of this period.

Article 27 (1) provides that subject to the provisions of the article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to international multimodal transport under the Convention shall be referred to arbitration.

Article 27 (2) provides that the arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:-

“a) A place in a State within whose territory is situated:

*i)The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant;
or*

ii) The place where the multimodal transport contract was made, provided that the defendant has there a place of

³⁷ United Nations Convention for the Carriage of Goods by Sea, 1978

³⁸ United Nations Convention on International Multimodal Transport of Goods, adopted at Geneva, May 24 1980, not in force.

business, branch or agency through which the contract was made; or

iii) The place of taking the goods in charge for international multimodal transport or the place of delivery; or

b) Any other place designated for that purpose in the arbitration clause or agreement.”

Article 27 (3) further states that the arbitrator or arbitration tribunal shall apply the provisions of the Convention. Article 27 (4) provides that the provisions of paragraphs (2) and (3) of the article shall be deemed to be part of every arbitration clause or agreement and any term of such clause or agreement which is inconsistent therewith shall be null and void. Article 27 (5) continues that nothing in article 27 shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the international multimodal transport has arisen.

Due to the criticisms and reluctance to accept the Hamburg Rules or the Multimodal Convention and the obvious gaps in The Hague and Hague/Visby Rules, several countries filled the gap in international law through national legislation. Some countries adopted a liberal approach while others were more nationalistic.

3.2 Domestic Legislation

The South Africa's Carriage of Goods Act 1986³⁹ allows persons carrying on business in South Africa including consignees and holders of bills of lading, way bills or similar documents for the carriage of goods to South Africa to bring actions in competent courts in the republic irrespective of any exclusive jurisdiction clause in the arbitration agreement. Arbitration proceedings in South Africa on such claims are however permitted. In New Zealand the Maritime Transport Act of 1994⁴⁰ prohibits the ouster of the jurisdiction of its courts in respect of claims for shipments to or from that country under bills of lading and similar documents of title or non negotiable documents. However, arbitration of such claims is permitted either in New Zealand or anywhere else in the world.⁴¹ In China under the provisions of the Civil Procedure Law 1991⁴² parties to a contract are prohibited from filing a law suit with a People's Court in respect of disputes arising from foreign economic relations and trade, transportation and maritime affairs in circumstances where the contract contains an arbitration clause or in the event that a written agreement to arbitrate or refer their dispute to a People's Republic of China agency with responsibility for arbitrating disputes involving foreigners or to any other arbitration agency. The arbitration law of the People's Republic of China agency contains special provisions for arbitration involving foreign concerns including trade, economics, transport and maritime disputes

Due to the disparity in national legislation, the enforceability or otherwise of an arbitration clause in a bill of lading or other maritime carriage document may be complex. Professor Tetley⁴³ suggests that a court faced with a challenge on an arbitration clause should consider nine steps he identified as follows:

³⁹ Act 1 of 1986, in force July 4, 1986, section 3(1) and (2). See also Hare, 1999 at p.505, who states that a South African arbitration clause would be upheld under section 3 (2), displacing the jurisdiction of the High Court in Admiralty.

⁴⁰ No. 104 of 1994, section 210 (1).

⁴¹ *Ibid.*, at sect. 210(2)

⁴² Adopted by the Fourth Session of the Seventh National People's Congress of the People's Republic of China on April 9, 1991. This Law reflects China's accession in 1987 to the New York Convention 1958.

⁴³ William Tetley, *Marine Cargo Claims*, Fourth edition Vol. 1, page 1428, fn 28.

- 1) Decision on jurisdiction.
- 2) Provision of law.
- 3) Prohibition of arbitration in the forum which the clause invokes.
- 4) Scrutiny of the arbitration clause to determine whether it validly calls for the arbitration of the claim at hand.⁴⁴
- 5) Whether the arbitration clause where incorporated by reference into a bill of lading is proper and valid.
- 6) In the event that third parties are bound by the arbitration agreement confirmation that such third parties have been validly included into the terms of that agreement.
- 7) Thereafter the court must decide if it has the discretion to stay or not to stay proceedings. Professor Tetley makes reference to Article II (3) of the New York Convention which obliged the court to impose a mandatory stay and the UNCITRAL Model Law.
- 8) The court, if it has discretion, may declare that the forum or the arbitration is not convenient for the parties in the circumstances.
- 9) If the court does exercise its discretion in favour of arbitration, it should stay the court proceedings under terms and conditions which protect the rights of the parties including the right to security already provided and an undertaking to waive delay for suit in the arbitral venue if it has expired.

3.3 Recent Work of the United Nations

The United Nations General Assembly recognized the need to establish a uniform and modern regime governing the rights and obligations of shippers, carriers and consignees under a contract for door-to-door carriage that includes an international sea leg. It was desirable to have a legal framework that takes into account the many technological and commercial developments that occurred in maritime transport since the adoption of the earlier conventions. Bearing this in mind, the United Nations General Assembly constituted a working group III (Transport Law) to build upon and provide a modern alternative to, earlier conventions particularly the Hague Rules, the Hague-Visby Rules and the Hamburg Rules⁴⁵.

The United Nations General Assembly adopted Resolution 63122 at its 67th plenary meeting held on the 11th day of December 2008. The resolution, inter alia, noted that shippers and carriers do not have the benefit of a binding and balanced universal regime to support the operation of contracts of carriage involving various modes of transport and adopted the annexed United Nations Convention on Contracts for the International Carriage of Goods wholly or partly by Sea known as the Rotterdam Rules.

⁴⁴ For example, the clause may contain some illegal provision such as arbitration within six months that is arbitration before the one-year time limit under The Hague Rules or the time limit as extended beyond one year under the Hague/Visby.

⁴⁵ See the Travaux préparatoires of the Rotterdam Rules,

http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_travaux.html

The rules were signed in Rotterdam, the Netherlands on the 23rd day of September 2009. The provisions on arbitration are provided in Chapter 15. Article 75(2) provides that the arbitration proceedings shall at the option of the person asserting a claim against the carrier take place at any of the following places:-

“a)Any place designated for that purpose in the arbitration agreement; or

b) Any other place situated in a state where any of the following places is located:

i)The domicile of the carrier;

ii)The place of receipt agreed in the contract of carriage;

*iii)The place of delivery agreed in the contract of carriage;
or*

iv)The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.”

The Rotterdam Rules gave more options than the Hamburg Rules. Additional places stipulated were the place of receipt agreed in the contract of carriage and the place of delivery agreed in the contract of carriage. This represents a compromise between shipping nations and cargo nations though the cargo nation still has the option of the place of delivery. Thus irrespective of the foreign arbitral clause, an action can still be brought in the jurisdiction of the cargo claimant.

4. Jurisprudence of Nigerian Courts

4.1 Courts do not sit on appeal over Arbitral Awards

In Bellview Airlines Limited vs. Aluminium City Limited⁴⁶ the High Court and the Court of Appeal agreed that the arbitrator did not misconduct herself and refused the application to set aside the arbitral award. The appellant contended that the arbitrator acted beyond the scope of dispute submitted to her and failed to address all the issues brought before her for arbitration. The courts held that an arbitral award may be set aside if the party making the application furnishes proof that the award contains decision on matters which are beyond the scope of the submission to arbitration. The High Court found no merit in the appeal against the decision of the High Court and reasoned, on the consideration of section 29[2], 30[1] and 48 of the Arbitration and Conciliation Act, that the court is not authorized to sit on appeal over an arbitral award but confine itself to limits circumscribed by the law. The court was satisfied that there was nowhere shown that the arbitrator misconducted herself in any manner and held that the arbitrator remained focused and confined her determination to the sole issue presented to her for determination and did not exceed her brief or portfolio in any manner.

4.2 Courts must give effect to Parties' Agreement to Arbitrate.

⁴⁶ 2000 7CLR N H.C. 143.

In *USI Enterprises Limited vs. The Kogi State Government & Ors*⁴⁷ the Court of Appeal agreed with the decision of the High Court transferring a suit brought in breach of an arbitration agreement to the general cause list and ordering that the parties should in the first instance exhaust the remedy available to them in their agreement by referring the matter in dispute to an arbitrator. The respondents [as defendants at the lower court] filed a Memorandum of Appearance and a joint Notice of Intention to defend the suit brought under the undefended list. The notice indicated the defence of the defendants which was two pronged:-

- a.] a defence on the merit
- b.] a defence on an issue of law.

The learned trial judge ruled that the defence on the merit failed while the defence on the issue of law succeeded. The learned trial judge stated thus: -

“I would have proceeded to give judgment if this had been the only defence raised. However, the defendants have also pointed to the existence of an arbitration clause in the agreement between them. I have seen a copy of the agreement annexed to the plaintiff’s affidavit as annexure B2. Clause 6 of the said agreement specifically provides for the reference of any dispute arising from any disagreement on the contractor to an arbitrator. This seems to be a definite agreement by the parties to submit themselves to an alternate means of resolving a dispute other than the court. It is incumbent on a court to give effect to an agreement of this nature. It is expected that a party raises such a preliminary objection at the earliest opportunity. Since no previous documents have been filed by the defendants and it is not shown that any steps have been taken by the defendants before the present proceedings it would appear that they are in order in raising the issue in their affidavit at this stage. It constitutes a defence on the merit to the suit.

I am therefore transferring this case to the General Cause List and ordering that the parties in the first instance exhaust the remedy available to them in their agreement by referring the matter in dispute to an arbitrator whose decision shall be binding on both parties”.

4.3 In the Absence of misconduct decisions of Arbitral Tribunal must be taken for better or for worse.

In ***Chevron Nigeria Limited vs. Max-Miller International Limited***⁴⁸ the appellant brought an application before the court to set aside an award on the ground of misconduct by the arbitrators. The court relied on

⁴⁷ CA/A/146/M/2002.

⁴⁸ 2009 3 CLRN 347.

the definition of misconduct in Taylor Woodrow [Nig] v Saddeutsche **Etna-Werk** GMBH⁴⁹ and affirmed that the list of possible acts of misconduct as stated therein is not exhaustive, that each case will be decided on its merit. The court was unable to find any act constituting misconduct on the part of the arbitrators. The court restated the position of the law that once parties have submitted themselves to arbitration, the decision of the arbitral tribunal ought to be taken for better or for worse and that the court asked to set aside the arbitral award is not to act as a court of appeal nor is the arbitral award amendable to judicial review ordinarily.

4.4 Arbitral Tribunal raising a point suo moto should put same to the parties and give them the opportunity to address it on the point.

In *Total Engineering Services Team Inc vs. Chevron Nigeria Limited*⁵⁰ The respondent brought an application to **set aside an arbitral award in part** and remit the part set aside back to the arbitrator on the basis that the arbitrator went outside the agreed issue before him, raised a point suo motu and arrived at a decision on the point without reference to the parties. The lower Court concluded that the arbitrator in doing this was clearly guilty of misconduct; set aside the part of the award complained about and remitted the award in part to the arbitrator. The decision was upheld by the Court of Appeal. The Court of Appeal referred to sections 14 and 15 of the Arbitration Act which obliges an arbitral tribunal to give the parties full opportunity of presenting their case and ensure fair hearing. The Court decided that the arbitrator as rightly found by the lower court did flagrantly flaunt the provisions by raising a point suo moto without putting same to parties and allowing them address him on the point thereon.

4.5 An error appearing on the face of an Award constitutes misconduct by the Arbitral Tribunal.

In *Baker Marine Nigeria Limited vs. Chevron Nigeria Limited*⁵¹ the High Court, the Court of Appeal and the Supreme Court agreed that an error of law appeared on the face of the award justifying it being set aside. The arbitral tribunal had found in its award that the appellant was only entitled to nominal damages and the tribunal also recognized in the award that the agreement of the parties clearly excluded the award of punitive damages. However the arbitrators went to award the sum of USD750, 000 as damages.

The learned Justices were of the view that:-

“...by no stretch of imagination can the award of the arbitrators of USD750, 000 by Nigerian standard or even in law be treated or be regarded as nominal damages”.

Thus an error was found to appear on the face of the award justifying it being set aside.

4 Maritime Arbitral Institutions

4.1 Overview of Domestic Institutions

Worldwide, maritime arbitral institutions have played significant roles in the development of maritime arbitration. The arbitral institution mostly used is the London Maritime Arbitrators Association. Various

⁴⁹ [1993] 4 NWLR [pt286] 127 at 142

⁵⁰ Unreported Judgment delivered on the 23rd day of February 2010 at the Court of Appeal.

⁵¹ 2000 12NWLR prt. 681 pg 393.

countries including Nigeria have formed national arbitration associations. Other national maritime arbitral organizations include:-

- i. The Mediterranean Maritime Arbitration Association
- ii. Maritime Arbitration Association of the United States (MAA)
- iii. Society of Maritime Arbitrators New York (SMA New York)
- iv. Singapore Maritime Arbitrators Association (SMAA)
- v. German Maritime Arbitration Association (GMAA)
- vi. Vancouver Maritime Arbitrators Association (VMAA)
- vii. China Maritime Arbitration Commission (CMAC)
- viii. Association of Maritime Arbitrators Canada
- ix. Spanish Maritime Arbitration Association
- x. Transport and Maritime Rotterdam-Amsterdam (TAMARA)

4.2 Maritime Arbitrators Association of Nigeria

The Maritime Arbitrators Association of Nigeria (MAAN), a not for profit organization was established in 2005 under Part C of the Companies and Allied Matters Act⁵². MAAN was set up to promote maritime arbitration in Nigeria and its aims are, amongst others, to enlighten the general public and stakeholders in the maritime industry about arbitration and ADR as a viable alternative to litigation and to promote the choice of MAAN in the Nigerian maritime industry and the international maritime community as the alternative dispute resolver. Its vision is to become a worldwide recognized leader in commercial maritime dispute resolution by supporting and facilitating domestic and international arbitration and promoting international arbitration and promoting Nigeria as a venue for the settlement of maritime disputes through arbitration and ADR. MAAN administers arbitration and has listed on its panel, arbitrators who are trained to international standards. MAAN has high quality private facilities and services for coordinating arbitration. Ethics is of major concern to MAAN and thus its arbitrators and mediators are obliged to strictly comply with its code of ethics. To achieve its aims MAAN developed rules for the arbitration of small and large claim disputes.

The Small Claims Dispute Scheme covers disputes in respect of which the monetary amount does not exceed N2, 000, 000 (Two Million Naira Only). Disputes exceeding this amount would be arbitrated under the Large Claims Scheme. The object of the rules is expeditious and cost effective dispute resolution by specialized persons in the field.

4.3 International Maritime Conciliation and Mediation Panel

The International Maritime Conciliation and Mediation Panel [IMCAM] is composed of capable and well known professionals from 26 countries of 5 continents. The IMCAM Panel was founded in London on the 13th of October 2006. The goal of IMCAM is the settlement of shipping disputes through cost effective and expeditious means. Conciliation or its variant mediation is the recommended way forward. Advantages of mediation/conciliation include providing an opportunity for parties to settle their disputes instead of being involved in adversarial proceedings such as arbitration or litigation. Mediation/conciliation creates, builds and preserves business relationship.

IMCAM has drafted a set of maritime conciliation/mediation rules largely based on the UNCITRAL Conciliation Rules. IMCAM aims to provide service to Marine and P&I Insurers, Shipowners, Operators and Charterers, Salvors and supply contractors, Shipbuilders and Class Societies, Governmental bodies, Port Authorities and Shipping Law firms.

⁵² Cap C20 LFN 2004.

4.4 The International Maritime Arbitration Organization (IMAO)

The International Chamber of Commerce (ICC) and the Comité Maritime International (CMI) in response to the need for a viable alternative to litigation jointly produced a set of appropriate rules for maritime arbitration. The rules prepared by experts from the ICC and the CMI were adopted in 1978. The administration of arbitration cases submitted under the ICC/CMI Arbitration Rules is entrusted to an organization common to the two institutions, the International Maritime Arbitration Organization (IMAO). The Rules of IMAO are designed for the conduct of arbitration disputes relating to maritime affairs including inter alia charter parties, contracts of carriage of goods by sea or combined transport, contracts of marine insurance, salvage and general average, shipbuilding and ship repairing contracts, contracts of sale of vessels and other contracts creating rights in vessels.

5. Conclusion

Nigerian legislation is supportive of arbitration. Nigerian courts over time have shown a tendency to set a high bar for interfering with the findings of an arbitral tribunal. Nigeria has a viable maritime arbitrators association. Nigeria has built up capacity in the field with the availability of highly trained and skilled arbitrators and/or counsel who appreciate the nature of arbitration proceedings.

Recognition as a favourable seat for international maritime arbitration has immense benefits. Nigeria's goal should be to ensure its perception as a friendly seat for arbitration activities. Any country that desires to be so recognized must have an internationally acceptable framework and a favourable environment. Nigeria largely has a favourable legal framework in particular the Federal Act and the recent Lagos State Law. Nigeria is a party to the New York Convention. The Courts must strive to uphold arbitration agreements and enforce awards in line with Nigeria's treaty obligations under the New York Convention. Steps should be taken to review the Federal Act in line with the recent 2006 UNCITRAL amendments and requirements of the decade. The various States should also take steps to ensure that their laws are modern and up to date.

The Federal High Court Rules recognize and provide for arbitration. Court connected ADR systems have provided the opportunity for cost effective and expeditious dispute resolution by providing other windows for dispute resolution within the court system with the Judge playing a proactive role. The Federal High Court in appreciation of its role is enjoined to put initiatives aimed at establishing a multi-door courthouse within the Federal High Court.

Our collective vision should be to promote domestic and international arbitration within the maritime community. The courts, arbitrators and maritime arbitration institutions are obliged to work together to position Nigeria as a neutral and favourable forum for maritime arbitration nationally and internationally. Our Government has a duty to share in this vision by providing a secure environment, with first rate infrastructure and thus position our country as an attractive place for international arbitration activities.

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