

10 YEARS OF MAAN-THE DEVELOPMENT OF MARITIME ARBITRATION IN NIGERIA: A LEGAL PERSPECTIVE

BY

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1. INTRODUCTION

The English verb “to arbitrate” comes from the Latin word “arbitrare” and literarily means to judge or decide.¹ In modern terminology, arbitration can be defined as a process through which disputes are resolved with binding effect by a person or persons acting in a judicial manner rather than by a court of competent jurisdiction. Arbitration is the traditional method of resolving African disputes and is regarded as the traditional method of resolving maritime disputes dating as far back as the voyages of ships owned by ancient Phoenicians carrying on the cargoes of Greek traders.²

It is easy to understand the popularity of arbitration as the favoured method of resolving maritime disputes. Maritime disputes usually span international borders. Parties to international contracts are reluctant to submit to foreign national courts. The option of arbitration in the maritime field thus offers a choice of private resolution of the dispute outside the National courts system. Arbitration also offers various advantages, dispute resolution by persons with specialized knowledge in the field, cost effectiveness particularly when the procedure is properly utilized and the benefits of confidentiality and privacy of the process. The doctrine of party autonomy which has gained acceptance in the field of Arbitration has been codified in various national laws and Arbitration rules. The doctrine enables the parties to retain control of the process unlike the court system which vests control in judicial officers. To the State the invisible earnings derived from arbitration activities offers valuable financial resources which can be utilized towards the State’s infrastructural plans and programs.

The field of maritime arbitration is very wide and constitutes a vital sector of the Nigerian economy. Given the spate of activities within the sector including that relating to incoming and outgoing cargo, maritime disputes are bound to arise. Apart from cargo related claims, there is the area of deep sea oil exploration activities. The billion dollar investments in free trade zones are also bound to increase the level of commercial interaction and potential for disputes. Maritime arbitration disputes include those relating to hire of a ship (time charter/voyage charter), contracts for sale of ships, contracts of air affreightment, ship building contracts and oil trading contracts.³

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¹ Bruce Harris, Maritime Arbitration in the US and the UK, Past, Present and Future: The View from London, delivered at Tulane Maritime Law Centre, William Tetley Maritime Law Lecture 2008 on Tuesday the 4th day of March 2008.

² See the Handbook of the Society of Maritime Arbitrators New York 4th Edition, See also William Tetley, Marine Cargo Claims, 4th Ed Vol. 1, Chapter 28

³ 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.

A discerning country appreciates the advantages of being recognized as a place for international arbitration activities and maritime nations have taken proactive steps to be recognised as leading regional and international maritime arbitration hubs. In these countries, specialized alternative dispute resolution institutions have played a key role in the development of the respective countries as recognised centres actively encouraging the development of expertise and capacity in the field and highlighting to relevant stakeholders including governmental bodies issues which need to be addressed in the interest of the overall goal of developing into a maritime arbitration hub.

The Maritime Arbitrators Association of Nigeria (MAAN) was founded in 2005, by professionals who have developed expertise in commercial and maritime arbitration and were deeply aware of the need to position Nigeria as an appropriate venue for maritime arbitration. Its mission is to enhance Nigeria as a maritime arbitration centre and ensure there is a high standard for practitioners and users in the specialised field of maritime arbitration. MAAN's priority includes building capacity in the specialized field of maritime arbitration dispute resolvers. MAAN has a panel comprising of Arbitrators, mediators and experts. MAAN has the capability of administering arbitration and acts as appointing authority. When called upon, MAAN makes its list of alternative dispute resolvers available to organisations or persons. MAAN has developed arbitration rules for short claims arbitration schemes as well as that relating to large claims.

MAAN was motivated by various factors including the high level of "Nigerian" disputes which were taken out of Nigerian shores for settlement oftentimes by non-Nigerian dispute resolvers and at huge financial costs invariably of disputes that could otherwise have been settled in Nigeria. MAAN's dream is to see in the very near future the establishment of a maritime dispute resolution centre in Nigeria with first class facilities.

Indeed, it is now a decade since the founding of MAAN and there is need to assess the extent to which the objectives of the founding members, and all members, who keyed into the vision have been achieved. Various factors could either negatively or positively impact on MAAN's ability to achieve its objectives, the supporting legal framework, the role of Nigerian courts, the availability of strong arbitral institutions and the calibre and support of legal professionals in the field. In this paper, I shall seek to examine the legal framework for arbitration in Nigeria, the extent to which Nigerian courts have supported the process, the expected role of lawyers in arbitral proceedings and the buy-in of our institutions with a view to determining the achievements thus far and proffer solutions on the way forward.

2. LEGAL FRAMEWORK

2.1 Arbitration Statutes

The concept of a country in which the rule of law operates within an up to date legislative framework is a *sine qua non* for the actualization of MAAN's objectives. The rule of law

helps to ensure a level playing field for all whilst up to date laws engenders confidence in the legal system. A mature legal system with up to date laws is respected by both international and domestic users. Users of the Arbitration system including foreign investors would consider of critical importance the extent to which the laws of a given place complies with modern international standards in its determination of an appropriate place for Arbitration. It is thus imperative that the legislative regime for Arbitration should be in line with the latest developments in the international arbitration legal framework.

There are three specific regimes of Arbitration laws in Nigeria, the archaic and outdated Ordinance-Based Arbitration Laws which are derived from the English Arbitration Act of 1899 but which still remains on the statute books of some states in Nigeria, the Federal Arbitration Act a modification of the 1985 United Nations Commission on International Trade Law [UNCITRAL] Model Law on International Commercial Arbitration⁴ and the recently promulgated Lagos State Arbitration Law 2009 which incorporates the recent 2006 revisions to the Model Law.⁵ The 1985 Model law adopted in Nigeria in 1988 was 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 arbitration has since been reviewed to take account of modern developments.⁶ The perception in the international business world is 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 1985 model law was revised by UNCITRAL in 2006 to take account of modern developments and ensure that the law continues to meet the needs and expectations of users.

Some states in Nigeria in a bid to update their laws adopted the Federal Arbitration Act as their respective arbitration law.⁷ Lagos, one of the states which hitherto had the Federal Law on its statute book passed the Lagos 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.⁸ The Law is the most up to date arbitration law in Nigeria.

An up to date legal framework and uniformity in Nigeria's arbitration laws is desirable if Nigeria is to develop into a place of Maritime Arbitration as visualized by MAAN. Unfortunately, some states continue to retain on their statute books the 1914 Arbitration Ordinance based on the English Arbitration Act of 1899.⁹ The Ordinance based arbitration law is not modern. One of the criticisms against the ordinance is the case stated procedure. The case stated procedure requires arbitrators to refer questions of law arising in the course

⁴ 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. The Federal Act, apart from being the first modern arbitration law in Nigeria domesticated Nigeria's treaty obligations arising under the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards 1958.

⁵ See United Nations General Assembly Resolution 61/33 of 18th December 2006, <http://www.uncitral.org/pdf/english/texts/arbitration/NY-convention/61-33-e.pdf> [Accessed 17th May 2015]

⁶ The Model law on International Commercial Arbitration was adopted by Nigeria in 1988 by Decree No. 11 of March 14, 1988.

⁷ E.g. Lagos, Rivers, Ogun states and Federal Capital Territory Abuja

⁸ Section 2 of the Lagos State Arbitration law No 10 of 2009

⁹ The EAA has since been repealed in England. The current arbitration Law in England is the 1996 English Arbitration Act

of arbitration to the courts. This procedure has been found to cause delay in arbitral proceedings. The modern practise is for Arbitrators to request for legal opinions by way of expert opinion if required.¹⁰

After two decades of applying the provisions of the Federal Act to Arbitral proceedings, the consensus amongst practitioners and users in Nigeria was that the Act needed to be reviewed to ensure its continuing efficacy and effectiveness. Delays had crept into the system and arbitration oftentimes had become in practice a first step to litigation. Time spent during court proceedings in support of the arbitral system contributed to the delay. Furthermore, modern means of communication resulted in outdated concepts and definitions under the Federal Act. UNCITRAL had also started the process of reviewing the 1985 Model Law in line with modern developments.

In 2005 Chief Bayo Ojo, SAN the then Attorney General of the Federal Republic of Nigeria motivated by the need to ensure that arbitration and ADR process continue to meet the needs of users constituted a National Committee with the mandate to submit proposals for the reform of Nigeria's Arbitration/ADR laws. The work of the Committee resulted in a Draft Federal Arbitration Act and a proposed Uniform States Arbitration and Conciliation Law to be recommended to States for adoption. The Committee also introduced an innovation, the Arbitration Claims and Appeals Procedure Rules to apply to court applications relating to arbitration matters.

The Rules are a set of specialized procedural rules aimed at enabling the expeditious determination of court applications in support of arbitration. Features of the Arbitration Claims and Appeals Procedure Rules include front loading of evidence and written submissions, fast tracking, case management mechanism and severe consequences for dilatory conduct or tactics which included cost penalties.

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

¹⁰ Section 22 of the Federal Arbitration Act and Section 42 Lagos State Arbitration Law. The Sections are modelled on Article 26 of the UNCITRAL Model Arbitration law 1985 and Article 26 of the UNCITRAL Model Arbitration law 1985 with amendments as adopted in 2006.

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.”

Despite the extensive work done by the Committee unfortunately till date the recommended Federal Draft Bill is yet to be enacted into law however the work of the Committee provided a template for the later work of a Committee setup to review the Arbitration law on the statute books of Lagos State.

In 2007, Mr. Supo Shasore SAN the then Attorney General of Lagos State vested the Lagos State Reform Committee with the task inter alia to review the Arbitration and Conciliation Act as contained in the laws of Lagos State and propose a new arbitration law for Lagos State. The State was visualized as developing into the arbitration hub of West Africa.¹¹ The Lagos State Reform Committee drew largely from the work of the National Arbitration Reform Committee. The work of the National Committee including the arbitration claims and appeals procedure rules and the draft uniform States law were used as “templates for the proposed Lagos State Arbitration Law.¹² The Lagos State law has consequently replaced the Federal Act on the statute books of the State, the commercial nerve centre of Nigeria and is the most up to date arbitration law in Nigeria incorporating the recent UNCITRAL review of the 1985 Model Law. However, the recommended provisions of the Federal draft bill in respect of Arbitration clauses in Bills of Lading contracts was not adopted in the Lagos State Arbitration law.

2.1.1 Lagos State Arbitration Law Reform and Arbitration Clauses in Bill of Lading Contracts

Recognising that Arbitration clauses in Bill of Lading contracts often work hardship on Nigerian parties at times defeating legitimate claims the National Committee had considered protectionism and incorporated in the draft bill prohibition against Arbitration clauses in Bills of Lading, way bill or like documents for the carriage of goods to a destination in Nigeria. Any person carrying on business in Nigeria and who is a consignee under or holder of any such document may bring an action in a competent court in Nigeria and any Arbitration clause which purports to limit or preclude the right shall be null and void¹³. The

¹¹ See page 5 of the Report of the Lagos State Committee dated February 2008

¹² See paragraph 2 [1] of the Report of the Lagos State Committee

¹³ See Section 5(3) and (4) of the draft Federal Bill

draft Bill further goes on to provide that the prohibition does not apply where the Arbitration Agreement provides for Arbitration in Nigeria under the provisions of the Act or the Rules of the Nigerian Arbitration Institution.

The non-inclusion of the provision in the Lagos State Arbitration Law needs to be considered within the parameters of balancing the need to protect the sanctity of Arbitration Agreements and affording some form of protection to persons carrying on business in Nigeria as well as attracting Arbitration business to Nigeria. This question has come up in other jurisdictions. The South Africa's Carriage of Goods by Sea Act 1986¹⁴ 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 1994¹⁵ 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.¹⁶ In China under the provisions of the Civil Procedure Law 2012¹⁷ 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.

There is no uniform practice worldwide. 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 Tetley¹⁸ suggests that a court faced with a challenge on an arbitration clause should consider nine steps he identified as follows:

- 1) Decision on jurisdiction.
- 2) Provision of law.
- 3) Prohibition of arbitration in the forum which the clause invokes.

¹⁴ Section 3(1) and (2), Carriage of Goods by Sea Act 1986, Act 1 of 1986 [As amended by the Shipping General Amendment Act, 1997]. 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.

¹⁵ No. 104 of 1994, section 210 (1).

¹⁶ *Ibid.*, at sect. 210(2)

¹⁷ Article 271, Civil Procedure Law of the People's Republic Of China (2012). This Law reflects China's accession in 1987 to the New York Convention 1958.

¹⁸ William Tetley, *Marine Cargo Claims*, 4th Ed. Vol. 1, 2008 page 1428.

- 4) Scrutiny of the arbitration clause to determine whether it validly calls for the arbitration of the claim at hand.¹⁹
- 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.

2.2 Comparative review of the Federal Arbitration Act and the Lagos State Arbitration Law

A comparison between the provisions of the Federal Arbitration Act and the Lagos State Arbitration Law illustrates the need for necessary action towards the review of the Federal Act and the urgent repeal of all obsolete ordinance based State Arbitration Laws.

2.2.1. GENERAL PROVISIONS OF THE LAW

a. Guiding Principles

Unlike the Federal Act section 1[a] and [b] of the Lagos law states the principles on which the law is based and upon which it is to be construed.

Section 1[a] states thus:

“The object of arbitration is to obtain the fair resolution of disputes by an impartial Tribunal without unnecessary delay or expense.”²⁰

¹⁹ 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.

The section further provides that parties should be free to agree on how their disputes are resolved subject only to such safeguards as are necessary in the public interest.²¹ Section 1[c] and [d] reiterate the binding nature of arbitration agreements and stipulates that the agreement is binding and enforceable against each of the parties unless the parties agree otherwise at any time or the agreement is invalid, non-existence, ineffective or otherwise unenforceable. Parties, arbitral tribunals, arbitral institutions, appointing authorities and the Court are mandated to do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

These provisions are essential in the construction of the provisions of the law. They clearly set out the expectations required of an arbitral tribunal and the courts in the quest for proper and expeditious dispute resolution by arbitration.

b. Applicability/Constitutional Questions

The Lagos law applies to all arbitrations within the state except where the parties have expressly agreed that another arbitration law shall apply.²² Thus party autonomy, parties' freedom to contract and fundamental tenets in arbitration are accorded respect.

Questions have been raised with respect to the tier of government with constitutional competence to legislate on arbitration. Arbitration is not listed in either the exclusive or concurrent legislative lists of the Second Schedule of the 1999 constitution thus supporting the argument that arbitration is a residual matter within the legislative competence of the states. The National Committee considered the contents of items 62[a] and 68 of the exclusive legislative list in the constitution. Item 62[a] lists thus:-

“[a] Trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria, and trade and commerce between the States.”

Item 68 lists thus-

“Any matter incidental or supplementary to any matter mentioned elsewhere in this list”.

The National Committee came to the conclusion that the federal government has constitutional power and competence to legislate on arbitration which are international or interstate whilst arbitration outside this purview is within the state's legislative competence. The National Committee interpreted item 68 of the 1999 constitution to bring arbitration

²⁰ Appears adopted from section 1[a] of the English 1996 Arbitration Act.

²¹ See section 1[b] of the English 1996 Arbitration Act. See also Article 19[1] of the Model Law.

²² Section 2 of the Lagos State Arbitration Law 2009. The preamble to the Federal Act inter alia provides that the decree is to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation.

arising from international / interstate trade and commerce within the purview of section 62[a] and within the legislative competence of the Federal Government. The work of the National Committee thus resulted in a Federal Arbitration Act and a Uniform States Arbitration Law to be recommended to the states for adoption. The Lagos State Committee thought otherwise and took a position that arbitration is a residual matter within the legislative competence of the states. The Lagos State Committee argued that dispute resolution and the regulation of contracts is a matter which the constitution “expressly or by irresistible implication confers exclusively on states.”²³ The Lagos State Committee argues that the subject matter of arbitration is contractual and not an issue of trade and commerce itself.²⁴ The Committee also relied on the doctrine of Pith and Substance, a method adopted by Canadian Courts for dividing and balancing powers between the Federal and Provincial Governments in the Canadian Federation as the basis of the validity of the Lagos State Arbitration Law.

Dr Wale Olawoyin considers the arguments of both committees as flawed. To the eminent scholar, the argument of the National Committee was flawed being hinged on a supposition arising from an unjustified implication of Arbitration into item 62 of the Exclusive Legislative list in Schedule 2 to the 1999 Constitution.²⁵ Neither does Dr Olawoyin accept the proposition of the Pith and Substance doctrine which he considers as having no place in the interpretation of the 1999 Constitution of Nigeria. To Dr. Olawoyin, the preferred view is that as arbitration is neither listed in the Exclusive or Concurrent Legislative Lists, the subject in all its facets (international or domestic) is a residual matter within the legislative competence of the States under section 4(7) of the 1999 Constitution.²⁶

In reality the State and Federal Arbitration statutes have remained on Nigeria’s statute books for decades. The recently enacted Lagos Law recognized the applicability of the principle of party autonomy to the choice of arbitration law and makes the law applicable to all arbitration in Lagos State except where the parties have expressly agreed that another arbitration law shall apply.²⁷ Only the Supreme Court can eventually finally determine the constitutional issues related to the co-existence or otherwise of the Federal and States legislation.

²³ See page 24 paragraph 9 of the report of the Lagos State Committee, February 2008. The Committee refers also to the doctrine of Pith and Substance a method adopted by Canadian Court for dividing and balancing powers between the Federal and Provincial governments in the Canadian federation.

²⁴ See the Report of the Lagos State Committee.

²⁵ See Adewale A. Olawoyin, *Constructing the Road to Arbitral Prevalence: The Arbitration Law of Lagos State 2009 in Perspective*, [2015] International Arbitration Law Review, pp 36-38

²⁶ Ibid @ pp 39-40

²⁷ Section 2 of the Lagos State Arbitration Law.

2.2.2 OVERVIEW OF THE LAGOS LAW

The Lagos Arbitration Law is composed of sixty-four [64] sections with an attached schedule, the Arbitration Application Rules 2009. Generally the language of the law was modified thus dispensing with words regarded as archaic in the Federal Act and replacing

such words with modern terminology.²⁸ Some phrases were simplified.²⁹ The Lagos law retained some provisions of the Federal Act, modified others and included some entirely new provisions.

A. Retained Provisions

The retained provisions are as follows: -

- i. Grounds for challenge.³⁰
- ii. Jurisdiction.³¹
- iii. Tribunal's power to determine the admissibility, relevance, materiality and weight of any evidence placed before it.³²
- iv. Arbitral meetings.³³
- v. Points of claim and defence.³⁴
- vi. Hearing and writing proceedings.³⁵
- vii. Default of a party.³⁶
- viii. Power to appoint expert.³⁷

²⁸ e.g. The word "null and void" in section 12[2] of the Federal Arbitration Act were replaced with the words "invalid, non existent or ineffective" as appears in section 19[2] of the Lagos State Arbitration Law. The words "ipso jure" was replaced with the words "shall not invalidate the arbitration clause". Words "ex aequo et bono" and amiable compositeur replaced with "in justice and in good faith".

²⁹ The phraseology "may determine" was replaced with "free to agree". See section 9[1] of the Federal Arbitration Act and 11[1] of the Lagos State Arbitration Law.

³⁰ Sections 8[1][2] of the Federal Arbitration Act. Sections 10[1][2] of the Lagos State Arbitration Law. Other provisions of section 8 were modified by sections 10[3][c][d] of the Lagos State Arbitration Law.

³¹ Section 12 of the Federal Arbitration Act. Section 19 of the Lagos State Arbitration Law replaced some words with terminology considered more modern.

³² Section 15[3] of the Federal Arbitration Act and Section 31[3] of the Lagos State Arbitration Law.

³³ Section 16[2] of the Federal Arbitration Act and Section 33[2] of the Lagos State Arbitration Law.

³⁴ Section 19 of the Federal Arbitration Act and Section 37 of the Lagos State Arbitration Law.

³⁵ Section 20 of the Federal Arbitration Act and Section 39[3] of the Lagos State Arbitration Law . Section 20[3] was slightly modified in section

³⁶ Section 21 of the Federal Arbitration Act and section 41 of the Lagos State Arbitration Law . Sections 41[2][3][4][5][6] and [7] of the Lagos Law are however new provisions. Section 41[1][a] of the Lagos Arbitration Law also includes the words "unless the respondent desires to present a claim".

³⁷ Section 22 of the Federal Arbitration Act and section 42 of the Lagos State Arbitration Law. Slight modifications in section 42[1][b] with the section commencing with the added words "subject to any legal privilege that a party may assert". The relevant information the arbitral tribunal may require a party to give to the expert was expressly qualified to be that in the party's possession, custody or control. The Lagos law also adds the word "reproduction"

- ix. Power of court to order attendance of witness.³⁸
- x. Decision making by the arbitral tribunal³⁹
- xi. Settlement⁴⁰.
- xii. Form and contents of Award⁴¹.
- xiii. Correction and interpretation of an Award.⁴²
- xiv. Costs/deposits.⁴³
- xv. Recognition and enforcement of Awards.⁴⁴
- xvi. Waiver of right to object.⁴⁵
- xvii. Extent of court intervention.⁴⁶
- xviii. Extent of the application of the decree to arbitration.⁴⁷
- xix. Extension of time.⁴⁸

³⁸ Section 23 of the Federal Arbitration Act and Section 43 of the Lagos State Arbitration Law .

³⁹ Section 24[1] of the Federal Act and section 44[1] of the Lagos State Arbitration Law 2009. The words “subject to any applicable mandatory provisions” were added to section 44[2] thus expressly curtailing the Presiding Arbitrator’s power to decide questions relating to procedure by subjecting same to the mandatory provisions of the law. **This is a** slight variation of the wordings of section 24[2] of the Federal Arbitration Act.

⁴⁰ Section 25 of the Federal Arbitration Act and Section 45 of the Lagos State Arbitration Law .

⁴¹ Section 26 of the Federal Arbitration Act and section 47 of the Lagos State Arbitration Law . The Lagos Law modified 26[4] of the Federal Arbitration Act by the inclusion of the words “subject to the provisions of section 49 **of this law**”. Section 49 relates to the notification of an award/lien on award by arbitrators for unpaid fees.

⁴² Section 28 of the Federal Arbitration Act and section 50 of the Lagos State Arbitration Law . Section 28[6] of the Federal Act was slightly modified by the deletion of the words “may if he considers it necessary” and replacing **with the words** “the arbitral tribunal may for good cause” in section 50[6] of the Lagos State Arbitration Law.

⁴³ Section 49[1][2] of the Federal Arbitration Act and section 51 and 52 of the Lagos State Arbitration Law 2009.

⁴⁴ Section 51 of the Federal Arbitration Act and section 56 of the Lagos State Arbitration Law. Slight modification in Lagos Law by specifying that application to the court must be by a party. Section 56[3] a new provision also states that the award may by leave of the court or a judge be enforced in the same manner as a judgment or order with the same effect.

⁴⁵ Section 33 of the Federal Arbitration Act and section 58 of the Lagos State Arbitration Law .

⁴⁶ Section 34 of the Federal Arbitration Act and section 59 of the Lagos State Arbitration Law . Section 59[2] of the Lagos State Arbitration Law is a new provision and states that all applications to the court are to be accordance with the rules set out in section 3 of the Schedule i.e. The Arbitration Application Rules 2009.

⁴⁷ Section 35 of the Federal Arbitration Act and section 60 of the Lagos State Arbitration Law.

⁴⁸ Section 36 of the Federal Arbitration Act and section 61 of the Lagos State Arbitration Law. Section 36 of the Federal Act was modified by Section 61 of the Lagos State Arbitration Law by substituting the words “may if it considers it necessary” with the words “for good cause”.

B. MODIFIED PROVISIONS

Arbitration Agreement Irrevocable

Section 2 of the Federal Act provides that unless a contrary intention is expressed therein an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the court or judge. Section 4 of the Lagos law deleted the reference to the judicial system and its officials and simply provides that unless a contrary intention is expressed, an arbitration agreement shall be irrevocable except by the express or written agreement of the parties.

Death of a Party

Section 3 of the Federal Act provides that an arbitration agreement shall not be invalidated by reason of the death of any party thereto but shall in such an event be enforceable by or against the personal representative of the deceased. Section 5[1] of the Lagos law replaced the word “invalidated” with “invalid” and states thus:-

“An arbitration agreement shall not be invalid by reason of the death of any party to the agreement”.

The Federal Act stipulation as regards the enforceability of the agreement by or against the personal representative of the deceased was deleted. Sections 5 and 6 of the Lagos law however provides thus: -

“The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed”⁴⁹.

“Nothing in this section shall be taken to affect the operation of any law by virtue of which any right of action is extinguished by the death of a person”⁵⁰.

The Lagos Law stipulates that for the purposes of the section the term death includes the meaning ascribed to it in section 63[1] which defined death thus: -

“death, includes in the case of a non natural person, dissolution or other extinction by process of law”

The term death is not defined in the Federal Act.

⁴⁹ Section 5[2] of the Lagos State Arbitration Law.

⁵⁰ Section 5[3] of the Lagos State Arbitration Law.

Court's Power to Stay Proceedings

Section 4 and 5 of the Federal Act provides for stay of court proceedings of actions brought in violation of arbitration agreements. Section 4 imposes a mandatory obligation on the court to stay proceedings. The application under section 4 is to be brought not later than when the first statement or the substance of the dispute is brought. The arbitration proceedings may be commenced or continued and an award made by the tribunal when the matter is pending in court⁵¹. In contradistinction, section 5 stipulates that an application may be made to the court by a party at any time after appearance and before delivering any pleading or taking any other step in the proceedings. The court upon being satisfied may make an order staying the proceedings. The provision of Section 5 would appear to allow the court a discretion on the matter and unlike Section 4 no pleading must have been delivered nor any step taken in the proceedings.

Section 6 of the Lagos law adopts the provisions of section 4 of the Federal Act, thus incorporating the mandatory obligation to stay proceedings. Section 5 of the Federal Act was abandoned. Section 6[2] of the Lagos law is in parimateria with section 4[2] of the Federal Act. Thus whilst an action in violation of an arbitration agreement is pending in court, arbitral proceedings may nevertheless be commenced and/or continued and an award made by the arbitral tribunal whilst the matter is pending before the court. The section however further provides unlike the Federal Act that, where an order for stay of proceedings is brought, the court may for the purpose of preserving the rights of the parties make such interim or supplementary orders as may be necessary⁵².

Number of Arbitrators

Section 6 of the Federal Act provides that parties may determine the number of arbitrators. Where the parties have not determined, the number shall be three⁵³. By provision of section 7[3] of the Lagos law in the absence of determination by the parties, the tribunal will consist of a sole arbitrator⁵⁴. The decision to opt for a sole arbitrator is likely hinged on the cost of three arbitrators which often is three times the burden of employing one. The Lagos law also rendered invalid even numbered arbitral tribunals unless otherwise agreed by the parties⁵⁵.

Procedure for Appointment of Arbitrators

The Federal Act establishes two regimes for appointment of arbitrators. Section 7 is applicable to domestic proceedings and Section 44 to international commercial arbitration proceedings. The default appointment mechanism under the domestic provisions of the

⁵¹ Section 4[2] of the Lagos State Arbitration Law.

⁵² Section 6[3] of the Lagos State Arbitration Law.

⁵³ Section 6 of the Federal Arbitration Act.

⁵⁴ Section 7[3] of the Lagos State Arbitration Law.

⁵⁵ Section 7[2] of the Lagos State Arbitration Law.

Federal Act vests responsibility for appointment on the courts in the absence of the parties' agreement or a party's failure to act⁵⁶. The international regime under the Federal Act provides for the appointment to be made by the appointing authority. The appointing authority is either agreed by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague⁵⁷.

The Lagos law establishes only one regime and provides that the appointment be made by an appointing authority [where so designated]. In the event that there is no designated appointing authority if two arbitrators fail to agree on a third or presiding arbitrator within thirty days of their appointments, the appointment shall be made by the Lagos Court of Arbitration on the application of any party to the arbitration agreement⁵⁸. In the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the appointment shall be made by the Lagos Court of Arbitration on the application of any party to the arbitration agreement within thirty days of such disagreement⁵⁹. Any party or arbitrator may request the Lagos Court of Arbitration to take the necessary measure [unless the appointment procedure agreed upon by the parties provides other means for the appointment] in the following circumstances:-

- “i. A party fails to act as required under the procedure.
- ii. The parties or two arbitrators are unable to reach an agreement as required under the procedure or
- iii. A third party, including an institution fails to perform any duty imposed on it under the procedure⁶⁰”.

Thus in Lagos State a specialized court of arbitration has assumed the powers exercised by the courts under the Federal Act.

The specialized Court of Arbitration was established under the provisions of the Lagos Court of Arbitration Law No. 17 of 18th day of May 2009. The establishment of the court was borne out of the desire to promote and establish Lagos as a regional and ultimately, international arbitration centre.⁶¹

Challenge of Arbitrator

Section 7[2] of the Federal Act provides that the court is required to appoint an arbitrator upon failure of a party to appoint an arbitrator. Section 8[4][a][i] of the Lagos law however provides that in such circumstances the other party may give notice in writing to the party in

⁵⁶ Section 7[2] and [3] of the Federal Arbitration Act.

⁵⁷ Section 49[3] of the Federal Arbitration Act.

⁵⁸ Section 8[4][a][iii] of the Lagos State Arbitration Law.

⁵⁹ Section 8[4][b] of the Lagos State Arbitration Law.

⁶⁰ Section 8[4][c][i-iii] of the Lagos State Arbitration Law.

⁶¹ See The Lagos State Arbitration Reform Committee Report, February 2008 at page 68.

default proposing the appointment of its arbitrator⁶² to act as the sole arbitrator. In the event that the party in default does not within seven [7] clear days of the notice make the required appointment and notify the other party of the name of its arbitrator, the other party may appoint its arbitrator as sole arbitrator whose award shall be binding on the parties as if the sole arbitrator had been so appointed by agreement⁶³.

The Federal Act establishes two regimes for the procedure for challenge of an arbitrator. Section 9 applies to domestic arbitration whilst section 45 applies to international arbitration. Under the domestic regime, in the absence of the parties' agreement the arbitral tribunal shall decide on the challenge if the challenged arbitrator does not withdraw from office or the other party does not agree to the challenge. The provision of section 45[9] applicable to international proceedings however vests the responsibility to decide on the challenge on an appointing authority⁶⁴. In instances when the initial appointment was made by an appointing authority, by that authority⁶⁵. When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority⁶⁶ and in all cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in section 44 of the Decree⁶⁷.

Under the provisions of the Lagos law the parties are free to agree on the procedure or may designate or agree to designate an appointing authority of their choice for the purpose of challenging an arbitrator⁶⁸.

The domestic regime of the Federal Act provides that an arbitrator may be challenged in circumstances where there exists justifiable doubts as to his impartiality or independence or if he does not possess the qualifications agreed by the parties.⁶⁹ The regime applicable to international commercial arbitration stipulates however the ground pertaining to doubts as to the arbitrator's impartiality or independence or omits the ground relating to qualifications agreed by the parties.

The grounds of challenge under the Lagos law include doubts as to the arbitrator's impartiality and independence and the lack of qualifications agreed by the parties. The Lagos law however included two additional grounds for challenge of an arbitrator. An arbitrator may be challenged if physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to the arbitrator's capacity to do so⁷⁰. An arbitrator who refuses or fails to use all reasonable despatch in conducting the proceedings or making an award may

⁶² In reality as recognized under the law the arbitrator is independent of the parties and though appointed by a party it's a misconception to term such an arbitrator as "its" arbitrator.

⁶³ Section 8[4][a][ii] of the Lagos State Arbitration Law

⁶⁴ Section 45[9][a][b][c] of the Federal Arbitration Act

⁶⁵ Section 45[9][a] of the Federal Arbitration Act

⁶⁶ Section 45[9][b] of the Federal Arbitration Act

⁶⁷ Section 45[9][c] of the Federal Arbitration Act

⁶⁸ Section 11[1] of the Lagos State Arbitration Law

⁶⁹ Section 8[3][a][b] of the Federal Arbitration Act

⁷⁰ Section 8[3][a][b] of the Federal Arbitration Act

⁷⁰ Section 10[3][c] of the Lagos State Arbitration Law

be challenged in circumstances where substantial injustice has been or will be caused to the applicant.⁷¹

The arbitrator being challenged in court is entitled to appear and be heard by the court with or without legal representation prior to a court order being made⁷². The court concerned before removing an arbitrator may make such order as it thinks fit with respect to the arbitrator's entitlement (if any) to fees and expenses including indemnity for legal expenses or the refund of any fees or expenses already paid⁷³.

Joint Liability of the Parties [Arbitrators Fees]

The Federal Act recognizes that the costs of the arbitration includes the fees of the arbitral tribunal but does not specifically state the joint liability of the parties in respect of the payment⁷⁴. Section 54 of the Lagos law provides that the parties are jointly and severally liable to pay the arbitrators such reasonable fees and expenses if any as are appropriate in the circumstances. Section 54[2] further provides that references to arbitrators includes an arbitrator who has ceased to act and an umpire who has not replaced the arbitrators.

Security for Costs

The Federal Act does not contain provisions on security for costs. Section 53 of the Lagos law makes provision for the arbitral tribunal to order security for costs. The provision appears to be an adoption of the London Court of International Arbitration [LCIA] Rules of Arbitration⁷⁵. The arbitral tribunal shall have the power [upon application of a party] to order any claiming or counterclaiming party to provide security for the legal or other costs to any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the arbitral tribunal considers appropriate including the provision by that other party of a cross-indemnity, secured in such manner as the arbitral tribunal considers appropriate for any costs and losses incurred by such claimant or counterclaimant in providing security⁷⁶. The amount of any costs and losses payable under a cross-indemnity under subsection [1] of this section may be determined by the arbitral tribunal in one award or more awards⁷⁷. In the event that a claiming or counterclaiming party does not comply with any order to provide security under this section, the arbitral tribunal may stay that party's claim or counterclaim or dismiss them in an award⁷⁸.

Cessation of Office

The Federal Act does not contain provisions on the effect of the cessation of an office of arbitrator on any appointment made by the arbitrator [alone or jointly]. Section 16 of the

⁷¹ Section 10[3][d] of the Lagos State Arbitration Law

⁷² Section 12[4] of the Lagos State Arbitration Law

⁷³ Section 12[5] of the Lagos State Arbitration Law

⁷⁴ Section 49[1] of the Federal Arbitration Act and Article 38 and 39 of the Arbitration Rules in the First Schedule.

⁷⁵ Article 25.2 of the LCIA Arbitration Rules

⁷⁶ Section 53[1] of the Lagos State Arbitration Law

⁷⁷ Section 53[2] of the Lagos State Arbitration Law

⁷⁸ Section 53[3] of the Lagos State Arbitration Law

Lagos law expressly stipulates that where an arbitrator ceases to hold office by challenge, termination, resignation or death the parties are free to agree on the effect [if any], that such cessation of office may have on any appointment made by the arbitrator [alone or jointly]. Where there is no such agreement the arbitral tribunal when reconstituted shall determine to what extent the previous proceedings stand. The arbitrator ceasing to hold office shall not affect any appointment made by the arbitrator [alone or jointly of another arbitrator and in particular any appointment of a presiding arbitrator or umpire].⁷⁹

Section 17 of the Lagos law further stipulates that unless otherwise agreed by the parties where the mandate of an arbitrator ceases, a substitute shall be appointed in accordance with the same rules and procedure that applied to the appointment of the arbitrator who is being replaced.⁸⁰ This provision is in pari materia with section 11 of the Federal Act.

Commencement of Arbitral Proceedings

Section 17 of the Federal Act stipulates that unless otherwise agreed by the parties arbitral proceedings commence on the date the request to refer the dispute to arbitration is received by the other party⁸¹. Section 32 of the Lagos law puts the date of commencement as when the request to refer the dispute is delivered to the other party.

Place and Time of Arbitration

Section 16 of the Federal Act stipulates that the place of the arbitral proceedings is to be determined by the arbitral tribunal having regard to the circumstances of the case including the convenience of the parties. Section 33 of the Lagos law specifically states that the tribunal determines not only the place of the arbitration but the date and time of the proceedings having regard to the circumstances of the case. The Lagos law deleted the reference to the convenience of the parties.

Language of the Proceedings

Section 18[1] of the Federal Act provides that the parties may by agreement determine the language or languages to be used in the arbitral proceedings.⁸² Where there is no determination the tribunal is vested with power to determine the language or languages to be used bearing in mind the relevant circumstances of the case. Section 36 of the Lagos law however stipulates that in the absence of the parties' agreement the language shall be English.⁸³

⁷⁹ Section 16[2] [b] of the Lagos State Arbitration Law

⁸⁰ Section 17[1] of the Lagos State Arbitration Law

⁸¹ Section 17 of the Federal Arbitration Act

⁸² Section 18[1] of the Federal Arbitration Act

⁸³ Section 36 of the Lagos State Arbitration Law

Setting Aside of Awards

Sections 29 and 30 of the Federal Act pertains to setting aside of domestic awards. Section 29 provides that the court may set aside an award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration.⁸⁴ Section 30 provides that an award may be set aside where the arbitrator misconducts himself or where the proceedings or award has been improperly procured. The section further stipulates that an arbitrator who misconducts himself may on the application of any party be removed by the court.⁸⁵ Part III of the Federal Act applies to international commercial arbitration.

Section 43 Part III of the Federal Act provides that the provisions of Part III shall apply solely to cases relating to international commercial arbitration and conciliation in addition to other provisions of the Act. Section 48 Part III provides that an international award may be set aside for the following reasons:-

“[a] if the party making the application furnishes proof; or

[i] That a party to the arbitration agreement was under some incapacity; or

[ii] That the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication that the arbitration agreement is not valid under the laws of Nigeria; or

[iii] That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case; or

[iv] That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or

[v] That the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that if

⁸⁴ The award may be set aside in part only if the decision on matters submitted to arbitrator can be separated from those not submitted. Thus only that part of the award which contains decisions on matters not submitted may be set aside.

⁸⁵ Section 30[2] of the Federal Arbitration Act.

the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

[vi] That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate; and

[vii] Where there is no agreement between the parties under subparagraph [vi] of this paragraph that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act.”⁸⁶ or

The Act further provides that:

[i] The subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; and

[ii] That the award is against public policy of Nigeria.”⁸⁷

Section 55 of the Lagos law lists the grounds for setting aside an arbitral award. The section incorporates the provision of section 48 of the Federal Act with some modifications and additions. The provisions of section 48 [a][i][ii][iv][v][vi][vii] were however adopted.

Some provisions were modified. Section 48[a][iii] of the Federal Act was modified by deleting the reference to inability of the party to present its case by qualifying the opportunity to be given as “fair opportunity”.

Section 48[b][ii] of the Federal Act was modified by deleting the reference to the award being against the public policy of Nigeria as a ground for setting aside. The Lagos law provision merely states that the award is against public policy, deleting the reference to the public policy of Nigeria.

The Lagos law added the following grounds:-

⁸⁶ Section 48[j-vii] of the Federal Arbitration Act

⁸⁷ Section 48 [b][i-ii] of the Federal Arbitration Act

Section 55[2] the court may set aside an arbitral award if it finds that:-

[viii] the dispute arises under an agreement that is invalid, non-existent or ineffective; or

[ix] the subject matter of the dispute is otherwise not capable of settlement by arbitration under the Laws of Nigeria; or

[x] the arbitrators or any of them received some improper payment, benefit or other consideration;

[xi] the arbitrators do not possess the qualifications required by the Arbitration Agreement;

[xii] the arbitrator or arbitrators are guilty of any misconduct in the course of the proceedings; and

[xiii] the award is contrary to public policy.⁸⁸

Thus section 55 of the Lagos State Arbitration law essentially incorporates the grounds for setting aside under Part I and III of the Federal Act. Provisions were also made for setting aside on the basis of lack of qualifications required by the arbitration agreement. Furthermore, under the Lagos law in order to succeed in setting aside an award the applicant must in addition to proving one or more of the stated grounds satisfy the court that the ground relied upon has caused or will cause it substantial injustice. Section 55[3] further provides that where one or more of the grounds have been proved and such has caused or will cause substantial injustice to the applicant the court may adopt any of the following three options: -

- a. remit the award to the Tribunal in whole or in part for reconsideration;
- b. set the award aside in whole or in part; or
- c. render the award to be of no effect, in whole or in part.

The court is not to exercise its power to set aside or to declare an award to be of no effect in whole or in part unless it is satisfied that it would be inappropriate to remit the matter in question to the arbitral tribunal for consideration.⁸⁹

⁸⁸ Section 55[2][viii-xii] of the Lagos State Arbitration Law

⁸⁹ Section 55[4] of the Federal Arbitration Act. See also section 68[3] of the English Arbitration Act 1996.

The additional provisions would no doubt safeguard the validity and enforceability of arbitral tribunal awards in appropriate circumstances.

Recognition and Enforcement of Awards

Section 31 as contained in Part I of the Federal Act pertains to the recognition and enforcement of awards. Section 31 provides that an arbitral award shall be recognized as binding subject to the right of a party to request the court to refuse recognition and enforcement of the award. The award shall upon application in writing to the court be enforced by the court.

A party relying on an award or applying for its enforcement is to supply: -

1. the duly authenticated original award of a duly certified copy thereof.
2. the original arbitration agreement or a duly certified copy.

An award may by leave of the court or judge be enforced in the same manner as a judgment or order to the same effect.

Section 51 Part III applicable to international awards provides that arbitral awards shall, irrespective of the country in which it is made, be recognized as binding and subject to the section and section 32 of the Act, shall, upon application in writing to court be enforced by the court. Section 32 provides that any of the parties to an arbitration agreement may request the court to refuse the recognition or enforcement of the award. The party applying for its enforcement is to supply the same documents as required under the domestic provisions as well as a duly certified translation into English where the award or arbitration agreement is not made in English language.

Section 56 of the Lagos law is in pari materia with section 51 of the Federal Act. Thus the Lagos law adopted the Federal provisions applicable to enforcement of international awards.

Refusal of Recognition or Enforcement of Awards

Section 32 of the Federal Act provides that any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award. Section 52 of the Federal Act states grounds for refusing recognition and enforcement of an award. The grounds are as follows:-

“2[a] If the party against whom it is invoked furnishes the court proof:

- [i] That a party to the arbitration agreement was under some incapacity; or

[ii] That the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made; or

[iii] That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case; or

[iv] That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or

[v] That the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

[vi] That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties; or

[vii] Where there is no agreement between the parties under subparagraph [vi] of this 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] That the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.⁹⁰,

⁹⁰ Section 52[a][i-viii] of the Federal Arbitration Act

The Federal Act further provides that if the court finds: -

b[i] That the subject matter of the dispute 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.”⁹¹

The corresponding provision is section 57 of the Lagos law. Section 57[2] states the grounds for the court to refuse the recognition or enforcement of an award. Subsections 2[a][b][d][e][f][g] and [h] of the Lagos law are in parimateria with the corresponding provisions of the Federal Act subsections 52[2], 1[ii][iv][v][vii][viii].

A slight modification occurs to section 52[2][a][iii] and section 52[2][b] of the Federal Act. Section 52[2][a][iii] was modified by deleting the reference to inability of the party to present its case by qualifying the opportunity to be given as “fair opportunity.”⁹² Section 52[2][b] was modified by deleting the reference to the award being against the public policy of Nigeria as a ground for setting aside.⁹³ The Lagos law merely states as a ground for refusal recognition and enforcement that the award is against public policy deleting the specific reference to the public policy of Nigeria.

Correction and Interpretation of an Award

Section 28 of the Federal Act states the circumstances upon which an arbitral tribunal may correct or interpret an award or make an additional award. Section 28 [6] of the section stipulates that the arbitral tribunal may also if considered necessary extend the time limit within which it shall make a correction, give an interpretation or make an additional award. The provisions of section 50 of the Lagos law is in pari materia with section 28 save for a slight modification in section 28[6]. Section 28[6] of the Federal Act states that the arbitral tribunal may, if it considers necessary, extend the time limit within which it shall make a correction, give an interpretation or make an additional award.⁹⁴ Section 50[6] of the Lagos law qualifies the basis upon which an extension of time may be granted by deleting reference to the tribunal considering the extension “necessary” and stating that the tribunal “may for good cause” extend the time limit.

Costs

Sections 49 and 50 of Part III of the Federal Act contains provisions dealing with international commercial arbitration. These provisions are in pari materia with Articles 35 – 41 of the Arbitration Rules contained in the First Schedule to the Act, a modification of the UNCITRAL Arbitration Rules. Section 49 and Article 38 of the Arbitration Rules lists the

⁹¹ Section 52[b][i][iii] of the Federal Arbitration Act

⁹² Section 57[2][c] of the Lagos State Arbitration Law

⁹³ Section 57[2][j] of the Lagos State Arbitration Law

⁹⁴ Section 28[6] of the Federal Arbitration Act

term costs to include only the fees of the arbitral tribunal, the travel and other expenses incurred by the arbitrators, the cost of expert advice and of other assistance required by the arbitral tribunal, the travel and other expenses of witnesses and the cost for legal representation and assistance to the successful party if such costs were claimed during the arbitral proceedings.⁹⁵

Section 51 of the Lagos law is a slight modification of the provisions of the Federal Act. The Federal Act does not include the expenses of the parties in the term costs. The Act refers only to the travel and other expenses of the witnesses. In reality expenses would also be incurred by party representatives who may not be witnesses. Thus section 51[d] of the Lagos law inter alia specifically provides for the travel and other expenses of the parties and states thus: -

“[d] The travel and other expenses of parties, witnesses and other experts consulted by the parties to the extent that such expenses are approved by the Arbitral Tribunal having regard to what is reasonable in the circumstances”⁹⁶.

The Lagos law also took cognizance of the customary practice in arbitral proceedings for costs to include the administrative costs such as cost of venue, sitting and correspondence. The Federal Act does not specifically refer to these items of cost. However, the Lagos law does with section 51[f] specifically providing for the administrative costs such as cost of venue, sitting and correspondence.⁹⁷

Sections 52[1] and [2] of the Lagos law incorporates in pari materia the provisions of Sections 50 [1] and [2] of the Federal Act on deposit of costs. The provisions provide that the arbitral tribunal may request deposit on account of costs from the parties.

C. NEW PROVISIONS

Form of Arbitration Agreement

Section 1 of the Federal Act prescribes the requirements arbitration agreements must fulfill as precondition for its validity. The agreement must be in writing contained in a document signed by the parties,⁹⁸ in an exchange of letters, telex, telegram or other means of communication which provide a record of the arbitration agreement⁹⁹ or in an exchange of points of claim and of defence in which the existence of an arbitration is alleged by one party

⁹⁵ Section 49[i][a-e] of the Federal Arbitration Act. The travel and other expenses of witnesses are only to the extent that such expenses are approved by the arbitral tribunal.

⁹⁶ Section 51[d] of the Lagos State Arbitration Law

⁹⁷ Section 51[1][f] of the Lagos State Arbitration Law

⁹⁸ Section 1[1][a] of the Federal Arbitration Act

⁹⁹ Section 1[1][b] of the Federal Arbitration Act

and not denied by another.¹⁰⁰ In reality modern forms of communication rendered obsolete the form of arbitration agreement as envisaged and captured in the writing requirements stated in section 1 of the Federal Act. Arbitration agreements which may be invalidated under the provisions of the Federal Act include those concluded through electronic means of communication.¹⁰¹ The revised model law 2006 expatiated the writing requirement to incorporate modern means of communication. Section 3[3][4] and [5] of the Lagos law incorporated the revision and the law states thus:

“[3]An Arbitration Agreement shall be in writing.

[4] “Writing” includes, data that provides a record of the Arbitration Agreement or is otherwise accessible so as to be usable for subsequent reference.

[5] “Data” includes information generated, sent, received or stored by electronic, optical or similar means, such as but not limited to Electronic Data Interchange [EDI], electronic mail, telegram , telex or telecopy”.

Thus unlike the Federal Act, arbitration agreements concluded in modern formats such as emails and other means of communication are valid, binding and enforceable.

Interim Measures / Preliminary Orders

Section 13 of the Federal Act confers power on the arbitral tribunal to order interim measures of protection in respect of the subject matter of the dispute before or during an arbitral tribunal. The arbitral tribunal may also require any party to provide appropriate security in connection with any measure taken in respect of an interim measure of protection. The provision of Section 13 is modeled on section 17 of the UNCITRAL Model Law 1985. The grant and enforcement of interim measures are increasingly being relied on in the practice of international commercial arbitration and the 1985 Model law provisions proved inadequate to deal with the need of current arbitration. Thus the revised Model Law 2006 includes detailed provisions on interim measures and preliminary orders.¹⁰²

The Lagos law incorporates detailed provisions on the grant, recognition and enforcement of interim measures and preliminary orders based on the Model Law 2006 revisions. Section 21 of the Lagos Law stipulates the power of the High Court to issue interim measures for the purposes of and in relation to arbitration proceedings as it has for the purposes and in relation to proceedings in the Court. The Courts are to exercise the power in accordance with

¹⁰⁰ Section 1[1][c] of the Federal Arbitration Act. See also Article 11[1] of the New York Convention. The 1985 Model Law followed Article 2] of the New York Convention on other forms of arbitration agreements which may be invalidated under the provision of the Federal Act.

¹⁰¹ See a proposal for the reform of Nigeria’s Arbitration Laws as prepared by Aluko & Oyeboode.

¹⁰² See sections 17, 17[a] 17[b], 17[c], 17[d], 17[e], 17[f], 17[h], 17[i], 17[j] of the 2006 Revised Model Law.

the Arbitration Application Rules 2009, a Schedule to the law. The rules contain provisions on the procedure for applying for interim measures of protection, the recognition or enforcement of such measures made by arbitral tribunals and the refusal of recognition or enforcement¹⁰³.

Section 21[3] defines an interim measure thus:

“.....any temporary measure whether in the form of an award or in another form, prior to the issuance of the award by which the dispute is finally decided, the Arbitral Tribunal may order a party to:

- (a) maintain or restore the status quo pending the determination of the dispute;
- (b) take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the subject matter of the dispute or the arbitral process itself;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) preserve evidence that may be relevant and material to the resolution of the dispute”.

The law contains provisions on the conditions for grant of interim measures, application for preliminary orders, procedures for preliminary orders and security for preliminary orders.¹⁰⁴ Preliminary orders enable the arbitral tribunal preserve the status quo pending the issuance of an interim measures either adopting or modifying the tribunal’s preliminary order.

Parties may stipulate in their arbitration agreement that a party may without notice to any other party apply to the arbitral tribunal for a preliminary order directing a party not to frustrate the purpose of the interim measures requested. This provision is without prejudice to any law in force in Nigeria guiding the grant of interim measures.¹⁰⁵ The application may be made by a party at the same time as it makes a request for the interim measure.¹⁰⁶ In circumstances where parties had stipulated this in their arbitration agreement the tribunal may grant a preliminary order provided it considers that prior disclosure of the request for

¹⁰³ See section 1[c], 1[d], and 7 of the Arbitration Applications Rules 2009.

¹⁰⁴ Section 22[1], section 24 of the law.

¹⁰⁵ Section 23[1] of the Lagos State Arbitration Law

¹⁰⁶ Section 23[1] of the Lagos State Arbitration Law

the interim measure to the party against whom it was directed risks frustrating the purpose of the measure.¹⁰⁷

Section 25 stipulates that the tribunal may extend, modify, suspend or terminate an interim measures or a preliminary order it has granted in the following circumstances:

“[a] important facts were concealed from the Tribunal;

[b] the interim measures or Preliminary Order was obtained by fraudulent representation;

[c] facts come to the knowledge of the Tribunal, which if the Tribunal had known, it would not have granted the Order; and

[d] it is just and equitable in the circumstance to extend, modify or suspend the Order.”¹⁰⁸

Section 26 stipulates that the arbitral tribunal unless it considers it inappropriate or unnecessary shall require the party applying for preliminary order to provide security in connection with the order where:

“[a] important facts were concealed from the Tribunal

[b] the interim measures or Preliminary Order was obtained by fraudulent representation;

[c] facts come to the knowledge of the Tribunal which if the Tribunal had known, it would not have granted the Order; and

[d] it is just and equitable in the circumstance to extend, modify or suspend the Order.”¹⁰⁹

¹⁰⁷ Section 23[2] of the Lagos State Arbitration Law

¹⁰⁸ Section 25 of the Lagos State Arbitration. This power may be used upon the application of any party or in exceptional circumstances and upon prior notice to the parties on the arbitral tribunal’s own initiative.

¹⁰⁹ Section 26 of the Lagos State Arbitration Law

Section 27 provides that the party applying for a preliminary order is obliged to disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant the order. The obligation continues until the arbitral tribunal has made a determination on the request for an interim measure.¹¹⁰ The party who desires to maintain a preliminary order shall disclose all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to maintain the order.¹¹¹ The party applying for an interim measures is also obliged to promptly disclose any material change in the circumstance on the basis of which the measure was requested or granted.¹¹² Section 28 goes on to provides that the party applying for a preliminary order or requesting any measure shall be liable for costs and damages caused by the measure or the order to the party to whom it is directed if the tribunal later determines that in the circumstances the measure of order should not have been granted. The tribunal may award such costs and damages at any point during the proceedings.¹¹³ Section 29 provides that an interim measure issued by an arbitral tribunal shall be binding unless otherwise provided by the arbitral tribunal recognized and enforced upon application to the High Court irrespective of the jurisdiction or territory in which it was granted subject to the provisions of subsections [2] and [3] of the section. The relevant subsections provide that the party seeking or who has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure. Furthermore, the Court to which a request for recognition and enforcement of an interim measure is presented may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.¹¹⁴

The law contains detailed provisions of circumstances in which the recognition or enforcement of an interim measure may be refused upon the satisfaction of the Court.¹¹⁵

Specific Powers of the Arbitral Tribunal on Remedies

The Federal Act does not specifically state the power of an arbitral tribunal with respect to remedies. Section 38 of the Lagos law specifies that the parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.¹¹⁶ Section 38[2] goes on to state that unless or otherwise agreed by the parties the arbitral tribunal has the following powers: -

“[a] May make a declaration as to any matter to be determined in the proceedings;

[b] May order the payment of a sum of money, in any

¹¹⁰ Section 27[1] of the Lagos State Arbitration Law

¹¹¹ Section 27[2] of the Lagos State Arbitration Law

¹¹² Section 27[3] of the Lagos State Arbitration Law

¹¹³ Section 28 of the Lagos State Arbitration Law

¹¹⁴ Section 29[1][2][3] of the Lagos State Arbitration Law

¹¹⁵ Section 30[1] and [2] of the Lagos State Arbitration Law

¹¹⁶ Section 38[1] of the Lagos State Arbitration Law

currency; and

- [c] The same powers as the Court;
 - i) to order a party to do or refrain from doing anything;
 - ii) to order specific performance of a contract (other than a contract relating to land); and
 - iii) to order the rectification, setting aside or cancellation of a deed or other document.¹¹⁷

Appointment of Umpire

The Federal Act does not contain provisions on the appointment of umpires in arbitration proceedings.

Section 9 of the Lagos law appears to have adopted the applicable provisions of section 21 of the English Arbitration Act. Parties are free to agree on the functions of the umpire and in particular whether the umpire is to attend the proceedings and when the umpire may replace the other arbitrators with powers to make decision, orders and awards.¹¹⁸ In the event that there is no agreement between the parties the law stipulates the functions of the umpire.¹¹⁹ The umpire shall attend the proceedings and be supplied with the same documents and other materials as are supplied to other arbitrators.¹²⁰ The decisions, orders and awards shall be made by other arbitrators unless they cannot agree on a matter relating to the arbitration. In that event, they shall immediately give notice in writing to the parties and the umpire, whereupon the umpire shall replace them as the arbitral tribunal with power to make decisions, orders and awards as if the umpire was the sole arbitrator.¹²¹ If the arbitrators cannot agree but fail to give notice of that fact or if any of them fails to join in the giving of notice, any party to the arbitral tribunal may [upon notice to the other parties and to the arbitral tribunal] apply to the Lagos Court of Arbitration which shall give the required notice in writing to the parties and the umpire that the umpire shall replace the arbitrators as the arbitral tribunal. The umpire shall then have the power to make decisions, orders and awards as a sole arbitrator.¹²²

Consequence of Resignation of an Arbitrator

The Federal Act does not contain specific provisions in respect of the resignation of arbitrators. Section 14 of the Lagos law contains specific provisions as regard the

¹¹⁷ Section 38[2] of the Lagos State Arbitration Law

¹¹⁸ Section 9[1] [a] and [b] of the Lagos State Arbitration Law

¹¹⁹ See section 9[2] [a-d] of the State Arbitration Law

¹²⁰ Section 9[2][a] of the Lagos State Arbitration Law

¹²¹ Section 9[2][b] of the Lagos State Arbitration Law

¹²² Section 9[2][c] of the Lagos State Arbitration Law . The English Arbitration Act section 21[5] simply refers to the court.

consequence of the termination of an arbitrator's appointment. The Lagos law provides that the parties are free to agree with an arbitrator as regards the consequences of his resignation as regards his entitlement to fees or expenses and any liability incurred by the arbitrator.¹²³ Where there is no such agreement an arbitrator who resigns may [upon notice to the parties] apply to the court to grant relief from any liability incurred and to make such order it thinks fit with respect to the arbitrator's entitlement [if any] to fees or expenses or the repayment of any fees or expenses already paid. Should the Court be satisfied that in all the circumstances it was reasonable for the arbitrator to resign it may grant such relief or such terms as it thinks fit.¹²⁴

Immunity of Arbitrators

The Federal Act does not confer immunity on arbitrators. In the case of *NNPC v Lutin Investment Ltd and Hon Justice Uche Omo, (Learned Arbitrator)* Hon. Justice Uche Omo learned arbitrator was named as a party in a judicial proceedings for action taken as an arbitrator.¹²⁵ Section 18 of the Lagos law confers immunity on arbitrators and hence under the framework in Lagos State an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of the arbitrator's functions as arbitrator unless the act of omission is determined to have been in bad faith. The immunity extends to an employee or agent of the arbitrator as it applies to the arbitrator but does not affect any liability incurred by an arbitrator by reason of resignation.¹²⁶

Applicable Arbitration Rules

The Federal Act contains as its First Schedule the UNCITRAL Arbitration Rules. Article 1 of the First Schedule provides that the rules shall govern any arbitration proceedings. In international proceedings parties may adopt the Arbitration Rules set out in the First Schedule, UNCITRAL arbitration rules or any other arbitration rules acceptable to the parties.¹²⁷ Section 31 of the Lagos law however stipulates that except as otherwise agreed by the parties the proceedings shall be conducted in accordance with the procedure contained in the Arbitration Rules in the Lagos Court of Arbitration in force from time to time. The Lagos Court of Arbitration has drawn up Arbitration Rules which are modern and include recent international innovations such as the 'emergency arbitrator' or 'special measures arbitrator' provisions.¹²⁸

Applicability of Limitation Laws

The Federal Act is silent on the applicability of limitation laws to arbitral proceedings. Section 35 of the Lagos law provides that limitation laws shall apply to arbitral proceedings

¹²³ Section 14[1][a] and [b] of the Lagos State Arbitration Law

¹²⁴ Section 14[2][a] and [b] of the Lagos State Arbitration Law

¹²⁵ [2006] 2 CLRN 1 at 16. See also *Associate Quantity Surveyor v Maritime Academy Oron* [2006] 4 CLRN, 138

¹²⁶ Section 18[2] and [3] of the Lagos State Arbitration Law

¹²⁷ See section 53 of the Federal Act and Article 1 of the First Schedule. See also the definition section of the Federal Act on the definition of international commercial arbitration.

¹²⁸ See Article 11 Lagos Court of Arbitration Rules, 2011 (as amended in 2013). See <http://lagosarbitration.org/> [accessed 18th May 2015]

as they apply to judicial proceedings. In *City Engineering Nigeria Ltd v FHA*¹²⁹ the court held that the period of limitation for the enforcement of an award runs from the breach that gave rise to the arbitration. The court was considering the issue of when the statutory period of limitation starts to run for the purpose of enforcement of arbitration awards i.e. does time start to run from the date of the accrual of the original cause of action or is it at the date of the arbitral award. Disputes arising from arbitral proceedings are being locked in the court system. The effect of the decision is that the limitation period for the enforcement of an award may lapse before the successful claimant is able to enforce such an award.¹³⁰ The Lagos law specifically provides in computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded.¹³¹

Consolidation, Concurrent Hearing and Joinder of Parties

The Federal Act does not contain provision on consolidation, concurrent hearings and joinder of parties. Section 40 of the Lagos law provides that parties are free to agree that arbitral proceedings shall be consolidated with other proceedings or that concurrent hearings be held on such terms as may be agreed.¹³² Where the parties have so agreed the arbitral tribunal shall give effect to the agreement unless it is of the view that it is not in the interest of justice to do so.¹³³ A party may by application and with the consent of the parties be joined to arbitral proceedings.¹³⁴

Interest

The Federal Act does not contain provisions on interest. Arbitrators award interest in proceedings governed by the Act on the basis of the parties' express agreement or the common law principle of interest. The Lagos law specifically provides that parties are free to agree on the power of the arbitral tribunal as regard the award of interest. The provisions, as adopted from the English Arbitration Act 1996 sets out the powers of the arbitral tribunal unless otherwise agreed by the parties.¹³⁵ The provisions vests the arbitral tribunal with power to award simple or compound interest as it considers just up to the date of the award or any later date until payment.¹³⁶

Notification of Award /Arbitrator's Lien on Award

The Federal Act does not contain specific provisions on notification of award to the parties nor for an arbitrator to exercise a lien on award for unpaid fees and expenses. Section 49 of

¹²⁹ [1997] 9 NWLR, Part 520, 224

¹³⁰ To avoid the time running out an application may be brought under the relevant laws suspending the running of the limitation statute pending court proceedings e.g. section 64 of the limitation law of Lagos State.

¹³¹ Section 35[5] of the Lagos State Arbitration Law

¹³² Section 40[1][a][b] of the Lagos State Arbitration Law

¹³³ Section 40[2] of the Lagos State Arbitration Law

¹³⁴ Section 40[3] of the Lagos State Arbitration Law

¹³⁵ See section 49 of the 1996 English Arbitration Act.

¹³⁶ Section 46 of the Lagos State Arbitration Law

the Lagos law specifically provides that the award is to be notified to the parties without delay after the award is made.¹³⁷ The law stipulates that the arbitrators have a lien on the award for unpaid fees and expenses.¹³⁸ The Lagos law also states in the event that there is a dispute on fees and expenses where not agreed and the arbitral tribunal refused to deliver the award, an application may be made to the court.¹³⁹ In determining the fees properly payable the court is to have regard to section 51[2] of the law. Section 51 [2] provides that the fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other circumstances of the case. Section 51[2] is in pari materia with the provisions of section 49 of the Federal Act [applicable to international arbitration] and Article 39 of the Arbitration Rules in the First Schedule usually applicable in domestic proceedings. Furthermore the Lagos law specifically provides that no application to the court is to be made where there is any available arbitral process for appeal or review of the amount of the fees or expenses.¹⁴⁰

Definition Section

The definition section contains definitions not stated in the appropriate section of the Federal Act. Thus section 63 of the Lagos law unlike the Federal Act defines ad hoc arbitration¹⁴¹, appointing authority,¹⁴² arbitration,¹⁴³ arbitration agreement,¹⁴⁴ award,¹⁴⁵ death¹⁴⁶ and the place of arbitration¹⁴⁷.

Arbitration is defined in both enactments albeit differently. The Federal Act defined arbitration as a commercial arbitration whether or not administered by a permanent arbitral institution. The Lagos law however defines arbitration as a reference of an existing or future dispute between two or more parties to an independent person(s) chosen by them [the arbitrator] to adjudicate upon. The definition section also defines the Lagos Court of Arbitration and modified the definition of court to restrict same to the High Court of Lagos State.

The Lagos State Arbitration Law was motivated by the need to ensure that the legal framework for the conduct of arbitral proceedings remains responsive to the needs and requirements of the users, is modern, suitable and relevant to the socio-economic circumstances of the state, and meets contemporary international standards.

¹³⁷ Section 49 [1] of the Lagos State Arbitration Law

¹³⁸ Section 49 [2] of the Lagos State Arbitration Law

¹³⁹ Section 49 [3] [a] [b] [c] of the Lagos State Arbitration Law

¹⁴⁰ Section 49 [5] of the Lagos State Arbitration Law

¹⁴¹ Ad-hoc arbitration means a proceeding that is not administered by an institution or other body and which requires the parties themselves to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support.

¹⁴² Appointing authority means a body or institution designated to appoint an arbitrator or arbitrators under the Arbitration Agreement.

¹⁴³ Arbitration means the reference of an existing or future dispute between two or more parties to an independent person[s] chosen by them [the arbitrator] to adjudicate upon.

¹⁴⁴ Arbitration agreement has the meaning given to it in section 3.

¹⁴⁵ Award means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders, measures or directions made by the arbitral tribunal.

¹⁴⁶ Death includes, in the case of a non-natural person, dissolution or other extinction by process of Law.

¹⁴⁷ The place of arbitration means the juridical seat of the arbitration designated by the parties to the arbitration or any arbitral or other institution or person authorized by the parties for that purpose or the arbitral tribunal as authorized by the parties.

The text of the Lagos law contains the most recent review of the UNCITRAL Model Law, the international parameter upon which arbitration laws are assessed. Other innovations in the light of the country's specific experience have also been incorporated. This includes the Arbitration Applications Rules 2009, rules aimed at avoiding delays in the conclusion of arbitration related matters before the court.

It is imperative that the Federal Arbitration law be reviewed whilst all States of the Federation should take steps to promulgate modern and up to date arbitration legislation.

3 National Maritime Legislation and Arbitration

3.1 The Admiralty Jurisdiction Act 1991

The Admiralty Jurisdiction Act 1991 (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.¹⁴⁸ Section 20 of the AJA has generated debate on the nature of Arbitration Agreements and whether they seek to oust the jurisdiction of the court and are thereby invalid under the provisions of the Act. Section 20 deals with the subject of the jurisdiction of the court/ouster clauses and renders null and void agreements which seek to oust the jurisdiction of the court. The section 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

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

¹⁴⁸ 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.

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 *Owners of M.V Lupex v. Nigerian Overseas Chartering and Shipping Ltd*¹⁴⁹ the respondent instituted an action at the Federal High Court Lagos claiming damages for loss allegedly suffered as a charterer of the appellant's ship LUPEX under a charter-party dated 11th April 1991 following an alleged breach by the appellant. After filing the suit the respondent applied *ex parte* for the arrest of the vessel M.V Lupex and the application was granted.

On becoming aware of the order for the arrest of the vessel the appellant applied to the court inter-alia asking that the order of the court for the arrest of the vessel be set aside, the ship be released and the matter be adjourned sine die. The appellant contended that there was an arbitration clause providing for arbitration in London under English law in the event of a dispute. The appellant canvassed the arbitration agreement in the charterparty and argued that when the order was made not all the relevant facts were known to the court especially the existence of proceedings which had commenced before an arbitral tribunal in London.

The trial court declined to grant the appellant's prayers. The appellant appealed to the Court of Appeal which likewise refused to grant the prayer. The respondent argued that the arbitration agreement was invalid as it ousts the court's jurisdiction. The respondent placed reliance on section 20 of AJA 91. The Court of Appeal pronounced that if an arbitration agreement seeks to oust the courts' jurisdiction it would be unenforceable as contrary to public policy. The court however found that the arbitration agreement in that case did not seek to oust the courts' jurisdiction and rejected the argument that the section nullifies both domestic and foreign arbitration clauses. The court refused to grant a stay of proceedings in deference to the arbitration agreement not on the basis of section 20 but inter alia on the application of the Brandon Tests as set out in *The Eleftheria*¹⁵⁰ and approved by the Supreme

¹⁴⁹(2003) 15 NWLR pt 844, 469.

¹⁵⁰(1969) 1 Lloyds L.R 237 at 242

Court of Nigeria in the *Nordwind*¹⁵¹ The Court of Appeal found that Nigeria was the place with the closest connection.

The appellant appealed to the Supreme Court. The Supreme Court disagreed with the lower court and unanimously allowed the appeal. The Supreme Court adjourned the litigation sine die to enable the continuation of arbitration proceedings in London. The Hon. Justice Utham Mohammed JSC reading the lead judgment stated thus: -

“These uncontroverted facts explain clearly that by submitting to arbitration the respondent had compromised its right to resort to litigation in court.....¹⁵²Where parties have chosen to determine for themselves that they would refer any of their dispute to arbitration instead of resorting to regular courts a prima facie duty is cast upon the courts to act upon their agreement. See Willesford v. Watson (1873) 8 Ch. App.473¹⁵³

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

¹⁵¹(1987) 1 ANLR 548

¹⁵²(2003) 15 NWLR pt 844, 486 – 487 paras A - A

¹⁵³Ibid at page 488

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.

The issue as to whether or not an arbitration agreement ousts the court’s jurisdiction was not canvassed by the parties before the Supreme Court. The Supreme Court therefore did not come to a decision on this point.

However, in the case of *MV Parnomous Bay Vs Olam Nig Plc*¹⁵⁴ 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. It would appear that the attitude of the Court appears to have been influenced by the perception that arbitration clauses in standard form contracts are unfair and oppressive.

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”*¹⁵⁵

In *Lignes Aeriennes Congolaises v. Air Atlantic Nigeria Limited*¹⁵⁶ the lower court has disagreed with the defendant applicant and held that it had jurisdiction to entertain the suit despite the provisions as to Arbitration and governing law contained in the agreement. On

¹⁵⁴ [2004] 5 NWLR pt. 865, pg 1.

¹⁵⁵ 407 US 1 (1971).

¹⁵⁶ [2006] 2 NWLR (Pt. 963) 49 at 71-74 (CA)

appeal the court found that section 20 of the AJA was applicable in that the following limbs of the section were satisfied:

- 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.

The Court agreed despite the Arbitration Agreement that the lower court has and possess the requisite statutory jurisdiction to entertain the suit. The Court found that the real and combined effect of Article 7 and 8 of the Aircraft Lease agreement entered *into by the parties was and remains to oust the jurisdiction of the court, in the respect* of the disputes arising from the said agreements. The court thus found that the agreement of the parties was within the contemplation of the provisions of Section 20 of the AJA and was thereby rendered null and void.

It is significant to note that in that case, the court accepted that Arbitration clauses do not oust the court's jurisdiction. The Court stated thus,

“... though the appellant had made heavy weather about the Arbitration clause contained in the Lease Agreement between the parties in his brief of argument, the lower court did not make any finding or pronouncement on it. In any event, the Arbitration Clause did not seek to oust the jurisdiction of the Court, as all it did was to allow parties avenues and possibility of settling disputes amicably out of court. The position of the Law is that an Arbitration Clause in Agreements generally does not oust the jurisdiction of court or prevent the parties from having recourse to the court in respect of disputes arising there from. A party to an Arbitration with an Arbitration clause has the option to either submit to Arbitration or to have the dispute decided by the court.”

In ***Onward Enterprises Ltd v. MV “Matrix”***¹⁵⁷ the Court held that an arbitration agreement does not generate the heat of ouster of jurisdiction of the court, rather it merely postpones the right of either of the contracting parties to result to litigation in court whenever the other contracting party elects to submit the dispute under their contract to arbitration. It made reference to the *MV Lupex's* case where the Supreme Court granted a stay of proceeding on the basis that where parties have agreed to refer their dispute to arbitration in a contract, it behoves the court to lean towards ordering a stay of proceedings.

¹⁵⁷[2010] 2 NWLR (Pt. 1179) 530 at 552 (CA)

Nigerian courts therefore, despite the interpretation given to Section 20 of the AJA in the *MV Parnomous Bay* case, understand the nature of Arbitration Agreements and the need to respect such Agreements. It is however debatable whether Arbitration clauses in standard form contracts are indeed freely entered into and whether a form of protectionism policy is desirable.

3.2 The Federal High Court Act/Rules

Section 17 of the Federal High Court Act refers to Alternative Dispute Resolution (ADR) but not arbitration in particular.¹⁵⁸ 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 2009 contains extensive provisions on arbitration including the court's power to appoint arbitrators,¹⁵⁹ findings of the arbitral tribunal,¹⁶⁰ stating the award in the form of a special case for the opinion of the court,¹⁶¹ setting aside¹⁶² enforcement of arbitral awards¹⁶³ and registration of foreign arbitral awards.¹⁶⁴ Order 52 Rule 17 on registration of foreign arbitral awards provides for enforcement of awards under the Foreign Judgment [Reciprocal Enforcement Act].¹⁶⁵ 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.

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

¹⁵⁸ Arbitration is not generally classed as an ADR mechanism due to its binding nature.

¹⁵⁹ Order 52 Rule 2 of the Federal High Court Rules 2009.

¹⁶⁰ Order 52 Rule 8 of the Federal High Court Rules 2009.

¹⁶¹ Order 52 Rule 9 of the Federal high Court Rules 2009.

¹⁶² Order 52 Rule 13 of the Federal High Court Rules 2009.

¹⁶³ Order 52 Rule 16 of the Federal High Court Rules 2009.

¹⁶⁴ Order 52 Rule 17 of the Federal High Court Rules 2009.

¹⁶⁵ Cap F35 Laws of the Federation of Nigeria 2004

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 Convention.¹⁶⁶

The Federal High Court Rules makes no reference to enforcement under the provisions of the domesticated New York Convention an International Treaty which has been enacted into Law in Nigeria. Irrespective of this, Nigerian Courts are obliged to apply the provisions of the New York Convention, an international treaty freely entered into by Nigeria and which was domesticated in the Federal Arbitration Act.

4 International Framework

4.1 Arbitration and Treaties on the Carriage of Goods by Sea

The Hague Rules¹⁶⁷ and the Hague/Visby Rules¹⁶⁸ 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 Rules¹⁶⁹ 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

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

¹⁶⁶ 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.

¹⁶⁷ 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.

¹⁶⁸ 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.

¹⁶⁹ The United Nations Convention on the Carriage of Goods by Sea, 1978.

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 Rules¹⁷⁰ 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 1980¹⁷¹ 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:

¹⁷⁰ United Nations Convention for the Carriage of Goods by Sea, 1978

¹⁷¹ United Nations Convention on International Multimodal Transport of Goods, adopted at Geneva, May 24 1980, not in force.

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 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.

4.2 Rotterdam Rules

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 Rules¹⁷².

¹⁷² See the Travaux préparatoires of the Rotterdam Rules, http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_travaux.html

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.

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. The Rotterdam Rules also extend the time that legal claims can be filed to two years following the day the goods were delivered or should have been delivered.

The Rotterdam Rules will enter into effect upon ratification by 20 Countries.¹⁷³ As of the 19th May 2015, there are 25 signatories to the treaty.¹⁷⁴ Nigeria signed the treaty on the 23rd day of September 2009. Three Countries Congo, Spain and Togo have ratified the treaty.

¹⁷³ Article 94, United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York, 11 December 2008

¹⁷⁴ See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-8&chapter=11&lang=en [Accessed May 19, 2015]

4.3 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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 155 countries worldwide¹⁷⁵. 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 law¹⁷⁶. 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 instances.¹⁷⁷ 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 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*

¹⁷⁵ See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

¹⁷⁶ 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.

¹⁷⁷ 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.

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.”*

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 Clarke¹⁷⁸ 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. In arriving at its decision the court considered the implications of the New York Convention. 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.

¹⁷⁸ See <http://caselaw.findlaw.com/us-5th-circuit/1117248.html> [accessed 19th May 2015]

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.

Nigeria is a party to the New York Convention as domesticated in the Federal Arbitration Act. Considerations of the ease of enforcement of Arbitral awards and Arbitral agreements play a vital determinant in the potential of a country to be recognised as a favourable place for Arbitration. In this respect, the support of Nigerian courts in the application of the New York Convention is a vital determinant of MAAN’s ability to actualize its vision.

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.”¹⁷⁹

5. Court Support

An independent supportive and up to date judiciary is essential to the efficacy of the Arbitral system. The nature of the arbitral system was succinctly put by Nnaemeka Agu Justice of the Supreme Court (JSC) in the case of Agu vs. Ikweibe where the eminent jurist stated thus:-

“It must be borne in mind that arbitrators are not a court. They are not cloaked by the constitution with any judicial authority as such.”¹⁸⁰

The need for judicial support to the arbitral process is imperative in view of the nature of the arbitral system, a consensual process in which arbitrators derive their authority from the agreement of the parties. The power of an arbitrator is usually limited to the parties to the Arbitration Agreement unlike the Courts whose source of power and jurisdiction is derived from the Constitution and other applicable statutes.¹⁸¹ An Arbitral tribunal does not possess enforcement powers nor can it effectively assume jurisdiction over a third party to the arbitration agreement.¹⁸² Consequently Arbitral Tribunals require the assistance and support of the courts for their effectiveness. In recognition of the fundamental nature of the arbitral system and its limitations domestic legislation in most jurisdictions provide for the courts assistance and support to the arbitral process. The courts also play a supervisory role over the conduct of arbitral proceedings.¹⁸³

Despite the necessity for court assistance and support the need to maintain an appropriate balance between rendering assistance and the avoidance of conduct bordering on encroachment of the powers of the arbitral tribunal and / or that rendering it ineffective cannot be overemphasized. The applicable domestic legislation and its application by the court will determine the extent of the maintenance of the balance.

¹⁷⁹ Neil Kaplan, The Good, Bad and the Ugly, Journal of the Chartered Institute of Arbitrators, August 2004.

¹⁸⁰ (1991) 3 NWLR (part 180) 385 at 420.

¹⁸¹ See Section 6 of the Nigerian Constitution 1999.

¹⁸² An arbitrator is unable to enforce its order against a recalcitrant party who refuses to comply. Nor can it order the issuance of writs of subpoena. Courts do not have this limitation as they derive their enforcement powers from the state as an attribute of the sovereign nature of the state system.

¹⁸³ The applicable national legislation will determine the role of the court in arbitral proceedings.

The Model law limits judicial intervention in arbitral proceedings generally referred to as the principle of non intervention in 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.”*¹⁸⁴

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

Section 34 of the Federal Act and section 59(1) of the Lagos State Arbitration Law as modelled on section 5 of the UNCITRAL model law prohibits the court from interfering in any matter governed by the statute except as provided under the respective Statutes.¹⁸⁵

Several judicial decisions confirm that Nigerian Courts appreciate the nature of arbitral proceedings, uphold the inviolability of arbitration agreements and the final status of the resultant decision of the arbitrator.¹⁸⁶

In the case of *Owners of the M.V Lupex v. NOCS Ltd*¹⁸⁷ the Supreme Court affirmed the duty of courts to enforce Arbitration Agreements entered into by parties.

In *Frontier Oil Ltd v Mai Expo Manu Oil Nigeria Ltd*¹⁸⁸ the court rightly held that where parties have by their own agreement opted for arbitration, the Court will always respect such agreements and decline jurisdiction. In *Statoil (Nig) Ltd & Anor v NNPC & 3 Ors*¹⁸⁹ the Court of Appeal vacated an injunction restraining arbitration proceedings granted by the lower court on the basis that the grant of the ex parte injunction was not an intervention permitted by the Arbitration Act.

In *Calais Shipholding Co. v. Bronwen Energy Trading Limited (of the Commonwealth of Dominica) (Charterer of the MT “Amor”)*,¹⁹⁰ the court held that subject to sections 32¹⁹¹

¹⁸⁴ 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.

¹⁸⁵ Section 34 of the Arbitration and Conciliation Act CAP A18 LFN 2004, Section 59(1) Lagos State Arbitration Law 2009

¹⁸⁶ In *Ras Pal Gazi Construction Company Ltd vs FCDA (2001) 10 NWLR Pt 722, 559*, the Court of Appeal had converted an award into its own judgment. The Supreme Court declared that an award is at par with a judgment of the court, has the same force and effect and cannot be interfered with except as provided in the Act. This position was restated in *Statoil (Nig.) Ltd & Anor. v. NNPC & 3 Ors (2013) 7 CLRN* at 74 where the court of Appeal held that Section 34 of the Arbitration and Conciliation Act is to be interpreted strictly as prohibiting the intervention of the courts in arbitral proceedings.

¹⁸⁷ (2003) 15 NWLR Pt 844 p 469

¹⁸⁸ [2005] 2 CLRN 148,

¹⁸⁹ (2013) 7 CLRN pg 90

¹⁹⁰ Suit No. CA/L/53/2011 Unreported delivered on the 6th day of May, 2014. See also *Tulip Nigeria Ltd. v. Noleggioe Transport Maritime S.A.S* [2011] 4 NWLR [Part 1237] page 254 [2011] 1 CLRN 375 (C.A)

¹⁹¹ Section 32 ACA provides that any party to an arbitration agreement may request the court to refuse recognition or enforcement of an award

and 51 (2)¹⁹² of the Arbitration and Conciliation Act, an arbitral award obtained anywhere in the world can be registered and recognized by any court in Nigeria without recourse to a foreign court to first adopt same as its judgment.

Indeed our courts largely understand the nature of arbitral proceedings and support the arbitral system. In *Ras Pal Gazi Construction Company Limited v FCDA*¹⁹³ the Supreme Court of Nigeria declared that an Arbitration Award is at par with a judgement of the court has the same force and effect and cannot be tampered with except as provided in the Act. However delays in the court system continue to impact on the timely conclusion of arbitration proceedings when brought to the court either for enforcement or setting aside or appointment of arbitrators. The Lagos Arbitration Rules seeks to remedy these delays by including the Arbitration Applications Rules 2009, aimed at avoiding delays in the conclusion of arbitration related matters before the court.¹⁹⁴ The National Committee on the Reform and Harmonization had earlier included in the Federal Arbitration Bill, the Arbitration Claims and Appeals Procedure Rules to apply to court applications relating to arbitration matters.¹⁹⁵ Sadly, the Bill is yet to be enacted into law.

6. Role of Lawyers

Merchants and traders considered arbitration the preferred means of resolving their mercantile dispute in an effective, economic and commercially sensitive manner rather than through the rigors and rigidity of the litigation system. Thus expediency was generally regarded as the hallmark and benefit of arbitration. Unfortunately there is growing evidence of users' dissatisfaction with the speed, cost and efficiency of the arbitral process. In majority of arbitration cases, parties are being represented by lawyers. This development can be attributed to counsel's conduct in arbitral proceedings. Lawyers appear to have imported into the arbitral system their negative practices in the litigation system. The tendency of some lawyers to engage in lengthy discovery processes, filing of irrelevant and cumbersome documents, adding grounds which have little or no chance of succeeding, putting forward inflated claims, discourteous behavior, and dilatory practices before arbitral tribunals lengthens the time and increases the cost of arbitration.

Lawyers need to understand that the 'modern' tendencies of fighting every point procedural or substantive, meritorious or not, particularly before arbitral tribunals only illustrates inadequate training and lack of good judgment. Negative conduct by lawyers in arbitral proceedings keeps client out of substantial funds and expenses and cost of the proceedings apart from lengthening the time spent in the proceeding.

¹⁹²Section 51(2) provides that a party seeking to enforce an award shall supply a duly authenticated original award and arbitration agreement or their certified true copy.

¹⁹³2001 10 NWLR PT 722 at 559 at 572 Paras D-F

¹⁹⁴ Schedule to the Lagos State Arbitration Laws 2009

¹⁹⁵ The rules are a set of specialized procedural rules aimed at enabling the expeditious determination of court applications in support of arbitration. The features of the rules include front loading of evidence and written submission, severe consequences for dilatory conduct or tactics, fast-tracking and case management mechanism applicable at both trial and appellate state. The rules provide that a court may order that an arbitration claim be heard either in public or in private.

Lawyers involved in arbitration should be guided by the highest forms of ethical conduct to avoid bringing the process into disrepute.

Rule 35 of the Rules of Professional Conduct at the Bar 2007 provides that a lawyer appearing before a judicial tribunal shall accord due respect to the tribunal and treat the tribunal with courtesy and dignity. Rule 36(e) mandates lawyers not to engage in undignified or discourteous conduct which is degrading to a court or tribunal. Unfortunately in recent times, arbitral tribunals have witnessed discourteous behavior, unbecoming of members our legal profession, from counsel.

To ensure the continuous efficacy of arbitration, lawyers should ensure due compliance with all ethical rules including code of ethics drawn up by various arbitral institutions.¹⁹⁶ The International Bar Association (IBA) has also drawn up various guidelines to guide counsel conduct whilst engaging in arbitration. These include the IBA Guidelines on Party Representation in International Arbitration 2013.¹⁹⁷ The IBA Guidelines on Party Representation are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay and expense including tactics aimed at obstructing the arbitration proceedings.¹⁹⁸

Lawyers have a crucial role in ensuring the continued efficacy of arbitration and are enjoined to play an active role in the actualization of MAAN's vision by ensuring the reputation of Nigeria as having a good number of qualities professionals in the field of arbitration in general and maritime arbitration in particular. It cannot be overemphasized that a successful place of arbitration requires the active participation of a good number of quality persons (including those providing service as counsel) in all aspects of the shipping business.

7. Conclusion

The legal framework on arbitration in Nigeria is up to date and complies with International Standards considering the enactment of the Lagos State Arbitration Law. MAAN must continue to support the efforts of stakeholders in the arbitration field including other arbitral organizations to ensure that the Federal Arbitration Act and all other State Arbitration Laws are amended in line with the latest UNCITRAL revisions.

The country's legislative houses should take appropriate steps without delay to domesticate all international conventions which the country has entered into that favour Nigeria as a preferred place of arbitration.

Nigerian courts largely play a supportive role. The delays in the court system no doubt due to the dockets of our Judges need to be addressed to avoid the negative perception of arbitration being a first step to lengthy litigation. Reform of our Court system either through

¹⁹⁶ See MAAN Code of Ethics, <http://gpc2excel.com/maan/code-of-professional-and-ethical-conduct/> [accessed 19th May 2015]. See also Chartered Institute of Arbitrators Code of Professional and Ethical Conduct 2009 <https://www.ciarb.org/guidelines-and-ethics/ethics> [Accessed 19th May 2015].

¹⁹⁷ See http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx [Accessed 19th May 2015]

¹⁹⁸ Ibid . See also The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, 2014.

the establishment of specialized courts or dedicated Judges whose dockets are devoted to arbitration matters should be considered. Legal practitioners and other professionals engaged in the field should comply with the highest standards of ethical conduct and adopt procedures tailored to the overriding objective of expeditious and cost effective dispute resolution.

The setting up of a specialised maritime dispute resolution centre is long overdue. Maritime is a matter within the exclusive legislative list of the Federal Republic of Nigeria and the Federal government should take a cue from Lagos state whose initiative led to the setting up of Lagos Court of Arbitration a resounding pioneer step towards the evolution of Lagos state as an arbitration hub in West Africa. The efforts of the Lagos Chamber of Commerce have also led to the establishment of the Lagos Chamber of Commerce International Arbitration Centre.

All maritime organisations should key into MAAN's vision of the development of Nigeria, a maritime nation into the maritime dispute resolution hub of West Africa.

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