

**AN APPRAISAL OF RECOGNITION AND ENFORCEMENT OF
ARBITRAL AWARDS BY THE INTERNATIONAL CENTER FOR
SETTLEMENT OF INVESTMENT DISPUTES (ICSID) IN NIGERIA**

BY

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**BEING A POSTGRADUATE DISSERTATION SUBMITTED TO
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ZARIA**

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DECLARATION

I hereby declare that this dissertation entitled, AN APPRAISAL OF RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS BY THE INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID) IN NIGERIA, has been written by me and it is a record of my own research. To the best of my knowledge it has not been presented or published anywhere at any time by anybody, institution or organisation.

All quotations and references are duly acknowledged.

.....
Umar Sani Bebeji

.....
Signature

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Date

CERTIFICATION

This research work entitled: “AN APPRAISAL OF RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS BY THE INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID) IN NIGERIA” by UMAR SANI BEBEJI, meets with the regulations governing the award of the degree of Master of Laws (LL.M) of Ahmadu Bello University Zaria, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This dissertation is dedicated to my parents, Alhaji Sani Bebeji and his dear wife, Hajiya Ummu-Kulthum Muhammad, for all that they are to us. Their courage, honesty and hard work inspired us through life more than they can ever imagine.

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Amin.

ABSTRACT

Nigeria is in a continuous quest to attract foreign direct investment (FDI) in order to support and sustain a decent economic growth. These foreign investors being invited are as much interested in the methods available for dispute resolution as they are in every available guarantee on their investments. This dissertation appraises the recognition and enforcement of the International Centre for the Settlement of Investment Disputes (ICSID) Arbitral Awards in Nigeria. The dissertation has the ultimate aim of proposing ways through which Nigeria can re-affirm its commitment to ICSID, as well as foreign investors. The research adopts doctrinal methodology depending on both local and foreign literature on ICSID jurisprudence. The importance of recognition and enforcement comes from the fact that arbitration is considered to be of no value if its award is not enforceable. Bearing this in mind, the work argues that the more recognition and enforcement of arbitral awards are observed with minimal procedural delay, the more the confidence of parties' increases. The dissertation examines the Centre from inception, to Nigeria's accession to the ICSID Convention, and the extent of commitment demonstrated so far. The research observed that arbitration under the ICSID is bedevilled by certain controversies resulting from conflicts of interest between the developed and the developing states as evidenced by the denunciation of the ICSID Convention by Bolivia, Ecuador and Venezuela. The analysis revealed the little consequences this has on the commitments of other states to the Convention. Disregarding these issues may be ultimately fatal to the future of the Centre and the commitment of other members, particularly from developing countries. Therefore, the need to embark on specific structural, procedural and functional reforms to give the developing nations more roles to play in running the centre is in emphasis. The dissertation revealed that the review mechanism of the Centre is inadequate, as annulment does not amount to appeal, thereby making it impossible to correct functional errors made by the tribunals. Leading to discontent and leaving the aggrieved parties with limited options; in the end lead to denunciation. Hence, there is the need to develop a system of appeal in order for parties to have recourse to a review mechanism in the light of the inconsistent decisions rendered by ICSID Tribunal. As the work further examines, arbitration under the ICSID is very expensive and complex. Parties are burdened with tribunal costs, professional and counsel fees, transportation, and so many other unforeseen costs. This is why the ICSID Schedule of Fees has to be reviewed to make tribunal charges proportionate to the amount involved in the claim. ICSID tribunals can also take advantage of the virtual world in filing of cases and exchange of pleadings. The work also bares a fundamental problem, that is, the inability of Nigeria to make rules of enforcement as prescribed by section 2 of ICSID (Enforcement of Awards) in order to give effect to the provisions of the Act. Nigeria must re-affirm its commitment to ICSID and the international investor-community, Nigeria must therefore, endeavour to make rules for the enforcement of ICSID award pursuant to section 2 of ICSID (Enforcement of Awards) Act.

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LIST OF ABBREVIATIONS

AF -	Additional Facility
ADR -	Alternative Dispute Resolution
BATNA -	Best Alternative to a Negotiated Agreement
BIT -	Bilateral Investment Treaty
FDI -	Foreign Direct Investment
IBRD -	International Bank for Reconstruction and Development
ICSID -	International Centre for the Settlement of Investment Dispute
ICC -	International Chamber of Commerce
IDA -	International Development Association
IFC -	International Finance Corporation
LFN -	Laws of the Federation of Nigeria
LCIA -	London court of international arbitration
MFN -	Most-Favoured Nation
MIGA -	Multilateral Investment Guarantee Agency
NBA -	Nigerian Bar Association
NAFTA -	North American Free Trade Agreement
OECD -	Organisation for Economic Co-operation and Development
PCA -	Permanent Court of Arbitration in The Hague
UNCITRAL -	United Nations Commission on International Trade Law
UNCTAD -	United Nations Conference on Trade and Development
CISG -	United Nations Conventions on Contracts for the International Sale of Goods
WIPO -	World Intellectual Property Organisation

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Research

Nigeria is blessed in terms of population¹ and material resources.² With a bristling economy that is twice the economy of many African countries put together. Nigeria remains number one destination for foreign direct investment (FDI) in Africa, with the highest inflow at \$7.03bn³ as at 2012, but dipped by 21.4% to \$5.5b in 2013.⁴ The size of the economy coupled with the scale of commercial, business and investment activities in various sectors including oil and gas, energy, banking and finance, development projects, construction, transportation, reconstruction of the railways, ports and airport concessions, aviation and international trade, and more recently the power sector, dictate the pace of growth and size of economic activities.

Since the return to democracy in 1999 it has been in the heart of the economic programs of successive administrations to encourage foreign direct investment (FDI). Nigerian business class is encouraged to also invest in other countries usually with direct support from the government. These investors compete for prime relevance in the Nigerian economy and are often faced with many obstacles in the conduct of their businesses. These obstacles include unforeseen change in

¹ Last collected in 2012 by the Nigeria National Bureau of Statistics, the total population of citizens in Nigeria was around 166.2 million people. Retrieved from: <http://worldpopulationreview.com/countries/nigeria-population/> on 11/7/2014. See also United Nations estimate on <http://esa.un.org/wpp/>.

² Nigeria has a land area of 923,773km², with varied vegetation and soil types that are suitable for a variety of agricultural purposes, with large reserves of solid minerals including bitumen, topaz, lignite, coal, tin, columbite, iron ore, gypsum, barite and talc, and metallic minerals are mostly found in the middle belt, coal is found in the South East and Middle Belt, and bitumen predominantly in the South West. Crude petroleum and natural gas are prevalent in the southern area of the country referred to as the Niger Delta region. The proven reserves of crude petroleum are well over 37 billion barrels, while reserves of natural gas stand at over 187 trillion standard cubic feet. Nigeria still remains a veritable source of raw materials for industries in Europe and other parts of the world. Retrieved from: <http://nigerianstat.gov.ng/pages/download/61> on 11/7/2014

³ Retrieved from: http://unctad.org/en/pages/DIAE/world%2520Report/World_Investment_Report.aspx on 15/7/2013

⁴ Retrieved from: http://unctad.org/en/Publicationslibrary/webdiaeia2013d10_en.pdf&sa=u&ei=41yn on 7/1/2014

government policies, delay in the execution of contracts, inevitable variation of terms of commercial agreements occasioned by inflation and lack of performance by the parties, and in recent times insecurity, among others. These factors often result in breach of the terms of commercial agreements between parties. The breach in turn leads to dispute between the parties and consequent invocation of arbitration clauses.

Arbitration has been in the Nigerian legal system for over a century.⁵ Its relationship with the courts has fluctuated from time to time ranging from suspicion and opposition to open support for same.⁶ This mechanism for settling commercial disputes is growing fast⁷ due to the fact that, one would, today, rarely find any contract between domestic or international parties without an arbitration clause or agreement of some sort, whether *ad hoc* or institutional, to be conducted under the auspices of the world's leading arbitration institutions.⁸

International investment arbitration is an alternative means (to court room litigation) of settling disputes arising from breach of foreign investment agreements. These kinds of disputes can be settled under different platforms. Such as the International Centre for the Settlement of Investment Dispute Rules (ICSID), United Nations Commission on International Trade Law (UNCITRAL) Arbitration, International Chamber of Commerce (ICC) Rules, or under any of the

⁵ Through Arbitration Ordinance of 1914

⁶ Akeredolu, A.E. "Attitude of the Nigerian Supreme Court to commercial arbitration in retrospect: 2001-2010". *Journal of Law and Conflict Resolution* Vol. 4(5), pp. 77-84, November 2012. Retrieved from: <http://www.academicjournals.org/JLCR> 14/2/2013

⁷ This trend is replicated all over the world, particularly in the developing countries. See Document No. 14 on "Alternative Dispute Resolution Methods" Paper written following a UNITAR Sub Regional Workshop on Arbitration and Dispute Resolution, Harare, Zimbabwe 11 to 15 September 2000. Retrieved from: <http://www.unitar.org/dfm>

⁸ Ufot, D.U. "Nigeria: Arbitration Practice Area Review", Retrieved from: <http://www.whoswholegal.com/news/features/article/29899/nigeria-arbitration-practice-area-review/> on 14/2/2013

international and regional rules contained or inserted by the parties in the Arbitration Agreement.⁹

ICSID, a multilateral treaty institution with a track record of adjudication and enforcement, has been a key mechanism for enforcing international investment law's substantive provisions.¹⁰ The great majority of countries around the world belong to ICSID, which serves as the forum for *ad hoc* arbitration panels that adjudicate treaty disputes between states and individual foreign investors. As at today, 159 countries are signatories to the ICSID Convention.¹¹ The ICSID Convention came into force on the 14th October 1966,¹² the same day Nigeria became a signatory to it.¹³

When a host country expropriates a factory, repudiates a utility concession agreement, gerrymanders regulations to shut down a business venture, or denies even-handed justice in its domestic court system, foreign investors can bring claims before an ICSID tribunal seeking redress for the violations of their rights under international law.¹⁴ Pursuant to the ICSID Convention, ICSID arbitration is an independent procedure not subject to control or supervision by a National Court.¹⁵ A National Court does not have jurisdiction to review or test an award

⁹ Nigeria has adopted the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

¹⁰ This is known as the "ICSID Convention" or the "Washington Convention". It is a multilateral treaty that created ICSID, or "the Centre," as a forum for resolving investment disputes. ICSID is popular for investor-state arbitration. Bilateral Investment Treaties ("BITs") usually provide for ICSID as a mechanism for investment dispute settlement. Nigeria has also signed a couple of Bilateral Investment Treaties with the following countries: France, United Kingdom, Netherlands, Taiwan Province of China, Turkey, China, Republic of Korea.

¹¹ Retrieved from: <http://www.worldbank.org/icsid/contractingstates> on 12/3/2013

¹² Delaume, G. R., *ICSID Arbitration in Practice*, 2 Int'l Tax & Bus. Law. 58, 1984. Retrieved from : <http://scholarship.law.berkeley.edu/bjil/vol2/iss1/3>

¹³ Nigeria is in fact the first State to sign the treaty. See Asouzu, A.A. *International Commercial Arbitration And African States: Practice, Participation And Institutional Development*. Cambridge University Press, Cambridge (2001), p.4

¹⁴ Mortenson, J.D. (2010) "The Meaning of "Investment": ICSID's *Travaux* and the Domain of International Investment Law". *Harvard International Law Journal* Vol. 51, No. 1, Winter.

¹⁵ This has been heavily criticised as going against the sovereignty of domestic courts. See Baldwin E, Kantor M. and Nolan M., Limits to Enforcement of ICSID Awards, *Journal of International Arbitration* 23(1): 1–24, 2006.

rendered in ICSID arbitration. This deals with the fear of the low confidence the investor might harbour in the host country's judicial system. The local courts cannot alter unjustly with the fruits of investors' arbitral awards.

The modest strides of ICSID nonetheless, the recent denunciation of the ICSID convention by three Latin American countries¹⁶ has raised many questions. This is a natural consequence considering the radical political and socio-economic gap between the mostly western investors, backed by their countries,¹⁷ and the third world countries at the receiving end. From this perspective, ICSID is seen to favour the foreign investors from inception.¹⁸ It is against this background that this dissertation seeks to appraise the recognition and enforcement of the ICSID arbitral awards in Nigeria.

1.2 Statement of the Research Problems

There is a growing dissatisfaction of many host-states with some of the outcomes of ICSID arbitral tribunals' decisions.¹⁹ In this context, existing shortcomings regarding the dispute settlement procedures of ICSID, for example, regarding the lack of transparency and lack of consistency of arbitral awards, add further weight to the growing call for alternative dispute settlement resolution tools.²⁰ Nigeria has been signatory to the ICSID Convention since 1966 but

¹⁶ These countries are Bolivia, Ecuador and Venezuela.

¹⁷ Furthermore, ICSID is seen as an appendage of the World Bank, in fact, it is one of the five Institutions forming the World Bank Group, perceived to be a tool in the hands of the modern drivers of capitalism in the West.

¹⁸ When Asouzu A.A. remarked, "international commercial arbitration highlights not only the existence of many controversies in international commercial transactions but also the conflicts of interest between the developed and the developing states" he was only lending credence to the inevitability of crisis as a result of this perception. See, Asouzu, A.A. *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*. Cambridge University Press, Cambridge, (2001), p.1

¹⁹ In particular, South American states such as Venezuela, Bolivia and Argentina have lost faith with this system because they feel it is biased towards investors coming from capital exporting countries.

²⁰ Lavranos, N. "Investment Protection: Bilateral Investment Treaties and EU Law". Being a paper presented at ESIL conference (2010). Retrieved from: <http://www.esil-law.cam.ac.uk/media/draft-papers/agora/lavranos.pdf> on 18/5/2013

only very few cases²¹ have been settled exploiting the ICSID mechanism. To what extent have these shortcomings reflected in these cases?

It is also contended that the costs involved for International Commercial Arbitration procedures are very high, while the proceedings typically drag on for several years.²² This is contrary to the impression that has been established. It is indeed the trend in Nigerian literature on commercial arbitration to conclude that the system is cheaper and way faster than reliance in Nigerian litigation system. This work will examine the truth in this assertion.

The Bilateral agreements are supposed to put the contracting parties at the same level, resulting in equal and determined benefits for both. But it has become clear by now that most bilateral investment treaties (BITs), in particular the older ones, are imbalanced by significantly favouring and protecting investors, while substantially restricting the policy space of host states. This imbalance is further amplified by the growing attention of host-states, Non Governmental Organisations (NGOs) and media for serious violations by investors of national and international binding standards for the protection of labour rights, fundamental rights, and the environment.²³

One of the problems that necessitated the resort to ICSID by foreign investors is that in adjudicating on bilateral investment treaties (BITs). That is to say, whether the judiciary cannot handle disputes arising from foreign investment disputes?

²¹ Three cases involving Nigerian party thus far made it to the Tribunal. The first is the celebrated case of **Guadalupe Gas Products Corporation v. Nigeria (ICSID Case No. ARB/78/1)** which settlement was reached by the parties and recorded at their request in the form of an award (Award embodying the parties' settlement agreement rendered on July 22, 1980, pursuant to Arbitration Rule 43(2)). The second case is **Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria (ICSID case No. ARB/07/18)** on which The Tribunal issues an order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1) on August 1, 2011. Thirdly there is the case of **Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal republic of Nigeria (ICSID case No. ARB/13/20)** which was registered in December 2013, and is pending before the Tribunal with a Notice of Preliminary Objection filed by the Respondent.

²² Lavranos, N., Op. Cit.

²³ Reference can be made for example to the situation in the Ogoni area in Nigeria caused by Shell and its local partner companies: 'Shell settlement with Ogoni people stops short of justice', The Guardian, 10 June 2009, available at: <http://www.guardian.co.uk/environment/cif-green/2009/jun/09/saro-wiwa-shell>.

In spite of the seeming popularity, ICSID²⁴ has come under serious attack recently, with several signatory-nations denouncing the ICSID Convention. Bolivia was the first country to notify ICSID of its denunciation in 2006, protesting the numerous arbitrations initiated by investors.²⁵ This was followed by the denunciation of the ICSID Convention by Ecuador²⁶ and the later calls for ICSID to be disbanded.²⁷ This was followed by Venezuela's withdrawal.²⁸ This led scholars to asking questions, whether the ICSID is not ideologically, structurally, procedurally, or functionally deficient.²⁹ Are these deficiencies ascribed to the ICSID justified or there are cogent reasons to the contrary? Is it high time that an alternative to ICSID arbitration is resorted as another international investment alternative, or should domestic courts be relied upon to resolve investment disputes previously submitted to the ICSID? How effective are ICSID Awards?

1.3 Aim and Objectives of the Research

The main objective of this dissertation to examine the recognition and enforcement of ICSID awards within the Nigerian legal context and to attempt to determine the attitude of foreign

²⁴ See the List of Contracting States and Other Signatories of the Convention <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx>

²⁵ Vincentelli, I. A. *The Uncertain Future of ICSID in Latin America*, 16 LAW and BUS. REV. AM. 409, 410 (2010), p.30.

²⁶ In May of that year, the President of Ecuador, Raphael Correa, denounced the ICSID. He proclaimed that his country's withdrawal from the ICSID was necessary for "the liberation of our countries because (it) signifies colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank." Vincentelli, I. A., Op. Cit. President Hugo Chavez announced also that, "we have to leave ICSID and I say it right away, we will not recognize ICSID decisions." Retrieved from: http://www.bbc.co.uk/mundo/ultimas_noticias/2012/01/120108_ulnot_venezuela_chavez_petroleo_exxon_fp.shtml. on 12/9/2013

²⁷ An instance is by the Presidents of Bolivia and Ecuador at a United Nations (UN) conference in June 2009. Retrieved from: <http://www.un.org/press/en/2009/ga10840.doc.htm> on 12/9/2014

²⁸ Venezuela withdrew from ICSID by giving notification on January 24, 2012. See *Venezuela Submits a Notice Under Article 71 of the ICSID Convention*, ICSID <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>.

²⁹ Trakman, L. E., *The ICSID Under Siege*. Cornell International Law Journal Vol. 45 p.604. Retrieved from: <http://www.lawschool.cornell.edu/research/ILJ/upload/Trakman-final.pdf> on 2/9/2013

investors as to the level of confidence built as a result of the enforcement of the awards. The specific objectives of this dissertation are:

1. The dissertation also seeks to examine the provisions of the ICSID Rules, allied provisions in domestic arbitration laws in Nigeria, and cases relating to recognition and enforcement of ICSID awards in the context of international investment arbitration jurisprudence, in order to determine the efficacy of the award.
2. To examine the question of enforcement of ICSID arbitral awards under the Convention, with the goal of analysing the prospects of bilateral investment treaties and challenges faced in invoking arbitration clauses in ICSID arbitration proceedings.
3. To attempt an analysis of the legal framework governing international commercial arbitration in Nigeria and the rules governing arbitral proceedings, with the goal of determining Nigeria's attitude towards the recognition of the outcomes of the proceedings.
4. To critically appraise the costs involved in international arbitration and the financial burden parties bear in ICSID arbitration, with a view to determining whether it is cost effective.
5. To propose ways through which Nigeria can re-affirm its commitment to ICSID and foreign investors.

1.4 Justification of the Research

International investors have recently focussed attention not only on tax rules and incentives, but also the entire legal infrastructure of the target country. The reason for this is not farfetched, the domestic government might improperly interfere with the investment, and this might cause losses. Hence, a prudent investor, when considering where to place the investment and where to

set up the structure for the foreign investment, should also consider whether the investment would be protected by an international investment arbitration treaty. As expected, ICSID, being an institution of the World Bank is a preferred choice by most investors.

The International Centre for the Settlement of Investment Disputes (ICSID) provides certain advantages to litigants. For example, the Centre has jurisdiction where a contracting state party and a national of another contracting state party (to the Convention) have a dispute, which the parties consent in writing to submit to the Centre. One of the advantages of ICSID arbitration is the structure for enforcement in Nigeria. The ICSID (Enforcement of Award) Act³⁰ provides that “where a copy of an award made by the ICSID is filed at the Supreme Court of Nigeria, such award will have effect as if it were an award contained in a final judgment of the Supreme Court and shall be enforced accordingly.”³¹ This will significantly obviate delays that could attend enforcement proceedings of regular arbitration awards at the High Court. At domestic level, the Nigerian Investments Promotion Commission Act³² allows settlement of investment disputes under the auspices of ICSID.

It is hoped that this modest contribution to the field of arbitration should help shed some light on this fast growing and exciting field of dispute resolution in Nigeria. It is also useful to scholars interested in conducting further researches and aid in the drive for reforming investment arbitration laws in Nigeria. The study will be useful to judges also, in the application of the provisions of various arbitration laws progressively. Lawyers and other professionals in the field of arbitration will also benefit from this research in advising and guiding clients especially in drafting arbitration agreements. It would be of particular interest to individuals who are new to

³⁰ ICSID Arbitral Awards are enforced in Nigeria pursuant to the International Center for Settlement of Investment Disputes (Enforcement of Awards) Act, CAP I 20, Laws of the Federation of Nigeria, 2004.

³¹ S. 1 Ibid.

³² CAP. 117, LFN 2004.

investor-State arbitration and foreign investors in Nigeria. Organisations such as multi door court houses, Lagos Regional Centre for International Commercial Arbitration (LRCICA), Inter-Ministerial Committee on Investment Promotion and Protection Agreements, the Ministries of Finance, Justice, Industry/Investment, Foreign Affairs, National Planning Commission, Central Bank of Nigeria and National Investment Promotion Commission, will also find this research useful.

1.5 Scope and Limitations of the Research

ICSID is an international institution with its Convention signed by 150 signatory-nations.³³ This research only concerns itself with the recognition and enforcement of the ICSID awards within Nigerian legal regime. The dissertation examines the recognition and enforcement of international commercial arbitration in the light of ICSID Convention at international level and its application in Nigeria.

It also focuses on the domestic legal regimes enacted to deal with recognition and enforcement of arbitral awards by ICSID in Nigeria. Where necessary, and in order to illustrate issues arising from recognition, application and enforcement, recourse is made to other jurisdictions outside Nigeria.

The major limitation to this work is the dearth of cases decided by the Center involving Nigerian parties. The details of these cases are largely not available due to the principle of

³³ There are currently 150 signatories with Canada as the 150th Member State, and the Republic of San Marino as the 159th signatory State to the ICSID Convention. See ICSID Annual Report 2014 on: https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID_AR14_ENG.pdf

confidentiality in arbitration.³⁴ This, the research will attempt to remedy by drawing from the experiences of other jurisdictions in like political and socio-economic contexts.

1.6 Research Methodology

This dissertation is doctrinal. This is chiefly because the work is to focus on the theoretical aspect of the recognition and enforcement of the ICSID awards in Nigeria based on both foreign and local literature. That is, the ICSID Convention and other allied treaties, the application of these Laws by ICSID as they relate to judicial interpretations in Nigeria; the theoretical viewpoint of various writers on solutions in books as well as researched articles.

The main sources for these materials are the primary and secondary sources of Law including statutory provisions and Case-Laws, written texts by scholars and reports from reputable institutions. In the process, the research has sought the aid of the Internet, particularly through the use of Google Scholar and other search engines. Reports as obtained from the data base of ICSID³⁵ are also heavily relied upon.

1.7 Literature Review

The growing relevance of arbitration as a reliable alternative to litigation has been met with equally corresponding surge in literary activities. Foreign literatures abound in this area. However, only about a decade ago Nigerian scholars started to give international investment

³⁴ Three cases involving Nigerian party thus far made it to the Tribunal. The first is the celebrated case of *Guadalupe Gas Products Corporation v. Nigeria* (ICSID Case No. ARB/78/1) which settlement was reached by the parties and recorded at their request in the form of an award (Award embodying the parties' settlement agreement rendered on July 22, 1980, pursuant to Arbitration Rule 43(2)). The second case is *Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria* (ICSID case No. ARB/07/18) on which The Tribunal issued an order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1) on August 1, 2011. Thirdly there is the case of *Interocean Oil Development Company and InterOcean Oil Exploration Company v. Federal republic of Nigeria* (ICSID case No. ARB/13/20) which was registered in December 2013, and is pending before the Tribunal with a Notice of Preliminary Objection filed by the Respondent.

³⁵ Can be accessed at: <http://icsid.worldbank.org/ICSID/FrontServlet>

arbitration the deserved attention. The following are the works of some scholars which proved invaluable to the substance of this research.

Asouzu's³⁶ book is a very insightful work. This book is one of the outstanding authorities on International Commercial Arbitration. Published in 2001: it focuses on whether arbitration as opposed to litigation in national courts in Africa, can contribute to the aspirations and needs of African states and their nationals, whilst satisfying the expectations of international investors and traders for profit, security and stability, and ensuring fairness and justice to both parties.

The learned author dealt with the experiences of the African states with arbitration under the ICSID convention. This analysis has been overtaken by time and events. He opined that “despite the advantages of ADR processes they are little developed in Africa”. This statement was very true in 2001. In spite of the huddles and difficulties, Nigeria in particular, is growing in its own way as a point of reference in the activities of ADR. Mostly, as the result of upsurge in commercial activities and growth in the number of professionals in the field of arbitration. So many cases have been decided by ICSID since 2001 and the decision by certain countries to denounce the Convention has radically influenced new debate as to the efficacy of the ICSID model. Volumes of literature have been written on this trend.³⁷ This research work will attempt to fill in this gap.

³⁶ Asouzu, A.A. (2001). *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*. Cambridge University Press, Cambridge.

³⁷ See Gillman E., *The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008*, 19 American Review of International Arbitration, 269, 280-84 (2008); see also Vincentelli I., *The Uncertain Future of ICSID in Latin America*, 16 LAW & BUS. REV. AM. 409, 410 (2010); and Diaz F. C., *Bolivia Expounds on Reasons for Withdrawing From ICSID Arbitration System*, Investment Treaty News (May 27, 2007), http://www.iisd.org/itn/wp-content/uploads/2010/10/itn_may27_2007.pdf, visited on 10/4/2014

Akeredolu in an article entitled: “Attitude of the Nigerian Supreme Court to Commercial Arbitration in Retrospect: 2001-2010”,³⁸ examined the attitude of the Nigerian Supreme Court to arbitration by reviewing four cases that came up on appeal from 2001 to 2010. The work provided an insight into the application of local legislation and principles, and the general attitude of the Nigerian courts to arbitral awards. It is however of limited contribution to this dissertation, in that, there is no in-depth discussion of arbitration having international dimension, nor was any of the considered cases from ICSID.

A leading foreign literature under review is the work of Mortenson.³⁹ This work is no doubt calling for a “paradigm shift and new thinking of the old”.⁴⁰ The contention of this learned author is that tribunals have sharply curtailed the categories of investments eligible for protection under international investment the ICSID Convention. He urges that the trend be reversed to recognize that ICSID has jurisdiction over any plausibly economic assets or activities.

He posits that tribunals and writers alike have proceeded under a mistaken premise, capitalising on ICSID’s omission of a definition for investment to adopt a case by case definition, thereby giving it a narrower and restrictive meaning. The work, therefore, suggests that international tribunals should respect the ICSID framework as it was originally established as “an adaptable vehicle with the capacity to satisfy many states’ preferences and the flexibility for individual states to change their investment policies over time”.⁴¹ With the rapid growth of

³⁸ Akeredolu, A.E. “Attitude of the Nigerian Supreme Court to commercial arbitration in retrospect: 2001-2010”. *Journal of Law and Conflict Resolution* Vol. 4(5), pp. 77-84, November 2012. Retrieved from: <http://www.academicjournals.org/JLCR> on 10/4/2014

³⁹ Mortenson, J.D. (2010). The Meaning of “Investment”: ICSID’s *Travaux* and the Domain of International Investment Law. *Harvard International Law Journal* Vol. 51, No. 1.

⁴⁰ Ibid

⁴¹ Ibid

bilateral investment treaties (BITs)⁴² between countries, it appears it is too late for ICSID to go back to its original philosophy because these BITs more or less shape up investment arbitration. The dissertation will analyse the role of BITs and how they have significantly influenced investment arbitration in the last three decades to prove the preceding point.

Ezejiofor's *Law of Arbitration in Nigeria*⁴³ is one of the early attempts by Nigerian scholars in the field of arbitration in Nigeria. The author dealt with the three types of arbitrations. As expected, so much water has passed under the bridge. The loads of changes that have taken place since this publication, no doubt alter some of the conclusions reached by the learned professor. For instance, he argued that "arbitration under the general law is yet to take its proper place in the country's growing economy as a dispute settlement mechanism".⁴⁴ As much as this is true, if he were to review his book today his position would be more generous.

Another useful article published in the *Annual Survey of International Comparative Law* is the work of Nmehielle.⁴⁵ This work was published in 2001. The author addresses the broad question of enforcement of ICSID arbitral awards, while analysing the attendant issues. It also analyses the various steps of enforcement, recognition and the execution of awards adjudged enforceable. The work went as far as examining the jurisprudence that has been developed in some ICSID cases before domestic courts of member states to the ICSID convention, and the practical effects of these cases and analysis of the impact of the annulment provision and process under the convention on the ICSID mechanism.

⁴² The number of BITs exploded during the 1990s and into the new century. There are now about 2,265 such treaties in existence. See UNCTAD, "Number of Bilateral Investment Treaties Quintupled During the 1990s," Media Release TAD/INF/2877, available at: <http://r0.unctad.org/en/press/pr2877en.pdf>; UNCTAD, *World Investment Report 2003*, p. 21. UNCTAD, *World Investment Report 2004: The Shift Towards Services*, 2004.

⁴³ Ezejiofor, G. (1997). *The Law of Arbitration in Nigeria*. Longman, Lagos.

⁴⁴ Ibid, p. 134

⁴⁵ Nmehielle, O.V. "Enforcing Arbitration Awards Under the ICSID Convention" *Annual Survey of International and Comparative Law*, vol. 7, Issue 2, Article 4. Retrieved from: <http://www.digitalcommons.laaw.ggu.edu/annlsurvey/vol7/iss1/4/&sa> on 10/4/2014

The work, for obvious reasons, is broad and does not analyse Nigerian cases and/or ICSID cases decided involving Nigeria. Indeed since 2001 such cases have been decided, and several legislations have come up, and appear to have varied some conclusions reached by the learned author. An attempt to examine these cases will put a cap on the jurisprudence examined by this great author.

Mustapha's work⁴⁶ proceeds under the premise of inadequacies of the national courts in Nigeria which include the adversarial nature of litigation, unnecessary delays and lack of confidentiality, which have led disputing parties to seek alternative means of dispute resolution. The work also delved into the misfortune that the potential advantages claimed for arbitration over litigation, are often not achieved in practice. Hence, the primary focus of the work is the identification and examination of some problems and challenges hindering the law, practice, institution and growth of domestic commercial arbitration in Nigeria. The book, however, does not take into account the overwhelming influence international arbitration has brought upon domestic arbitration, which is one of the focus areas of this research.

Commercial Arbitration and Conciliation in Nigeria: Law, Practice and Procedure,⁴⁷ is a combined efforts of three Nigerian authors published in 2012. This book attempted to demystify the law on commercial arbitration both at domestic and international contexts. The discussion centres on the decisions of the Nigerian Courts and the relevant judicial decisions of the English Courts under the Arbitration Act, 1996 which derives its source from the United Nations Commission on International Trade Law (UNCITRAL) Model Law on international commercial arbitration.

⁴⁶ Mustapha, A.M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges*. Lambert Academic Publishing, (2012), retrieved from: <http://www.iqrabooks.com.ng/details.php?code=1332261995>

⁴⁷ Ashaolu et. al. *Commercial Arbitration and Conciliation in Nigeria: Law , Practice and Procedure*. Velma Publishers, Abuja (2012), pp 325-335.

The authors also discussed in some detail arbitration under the Convention on the Settlement of Investment Disputes under the ICSID. The scope of the ICSID was, however, not discussed in detail as it could not be done in one chapter. Thus, in chapter 15 only an overview of the subject matter was attempted with regard to its various aspects. Another limitation to this work is that no real issues were raised, nor any conclusions arrived at. It is more a guide than a critical scholarly work.

One reactionary work in this area is “The Counter-Productivity of ICSID Denunciation and Proposals for Change”, by Wick.⁴⁸ Against the backdrop of the withdrawals of Bolivia, Venezuela and Ecuador in 2012 from ICSID, the author critically examined the whole of ICSID. The article argued that denunciation will not change the current international investment regime because most states’ bilateral investment treaties (BITs) provide for alternative investor-state arbitration mechanisms. The work further examined the benefits and drawbacks to the investor and to the state under different *fora*.

However, the richness of this work is limited by the author’s pro-World Bank-ICSID stand, barely taking into consideration the valid reasons for the discontent leading to ICSID’s denunciation by certain signatories. This thesis will attempt an examination of some of the reasons behind the exit of the three South American nations from ICSID. Further, the research will argue, from Nigeria’s experiences, it may not be in the best interest of Nigeria to uncritically take a position against ICSID in the circumstance.

⁴⁸ Wick, D.M. “The Counter-Productivity of ICSID Denunciation and Proposals for Change”, retrieved from: http://www.lawarchive.hofstra.edu/pdf/academics/journals/jibl/jibl_volxii_icsid_wick.pdf

Parra,⁴⁹ in a paper titled “The Enforcement of ICSID Arbitral Awards” examined the regime for the enforcement of arbitral awards rendered under the auspices of the ICSID pursuant to its treaty, the convention on the settlement of investment disputes between states and nationals and other states - the ICSID convention. This, he accomplished by a cursory consideration of some articles of the convention and the application of such articles in the enforcement of such awards in certain jurisdictions. The work further extensively discussed the question of sovereign immunity. None of the jurisdictions considered is Nigeria. Therefore the thesis will attempt to fill this gap by drawing from the experiences in the jurisdictions covered by the author to see how far they can apply in the Nigerian context.

This brings us to the work of Gillies and Moems.⁵⁰ These Australian professors exhausted a whole chapter on international commercial arbitration. Although, they did not comprehensively deal with the issue of arbitration infrastructure which involves the courts, their discussion was limited to three key aspects of arbitration. First, they dealt with the recognition and enforcement of arbitration agreements such that parties are not permitted to litigate in violation of such agreements. This is applicable in Australia and revolves at international level. The application of this conclusion in Nigeria will undoubtedly reveal that the trend is radically different. Secondly, they examined the limited judicial review of arbitral decisions which encourages the finality of arbitral awards while providing recourse against illegal decisions. Thirdly, the enforcement of arbitral awards.

⁴⁹ Parra, A.P. (2007) “The Enforcement of ICSID Arbitral Awards” A paper Presented at the 24th Joint Colloquium on International Arbitration, Paris, November.

⁵⁰ Gillies, P. and Moems, G.(2000) *International Trade and Business: Law, Policy and Ethics*. Cavendish publishing, Sydney.

Idornigie⁵¹ traced the origins of bilateral investment treaties (BITs) and gave historical overview of investment treaty arbitration. He also analysed the origin of the so-called Carlos-Doctrine, which fought for the newly independent states of South America, to the reforms and creation of the ICSID which ultimately led to investment laws enacted in various jurisdictions.

In this work, the qualitative use of data and statistics is commendable. It produced explicitly the geographical distribution of ICSID cases as well as BITs Nigeria has ratified. This work will no doubt be of great influence to this dissertation by providing a graphical analysis of the effect of arbitration clauses inserted in BITs on ICSID jurisprudence.

Burke-White and von-Starden⁵² attempted to substantiate the contention that elements of many contemporary investor-state disputes are best seen in the context of public law rather than private law. Further, the work addresses the shortcomings in the standards of review employed by many investment arbitral tribunals, especially in the context of arbitrations against Argentina relating to the country's economic and political crisis in 2001 to 2002, the growing perception of a legitimacy gap in investor-state arbitration, and the need for alternative standards for reviewing state public law regulation. The limitation of this work is that the authors adopt an overly restrictive approach to when deference to the standard of review may be appropriate.

Egli, in his article, "Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions,"⁵³ examined the potential effects and problems associated with this set of most-favoured nation (MFN) decisions. He further discusses the importance and historical development of international investment law and practice, paying

⁵¹Idornigie, P.O. (2011) "Investment Treaty Arbitration and Emerging Markets: Issues, Prospects and Challenges" NIALS Press, Abuja.

⁵² Burke-White, W.W. and von-Starden, A. (2010) "The Standard of Review in Investor-State Arbitrations". *The Yale Journal of International Law*, vol.5.

⁵³ Egli, G. "Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions," *Pepperdine Law Review* vol. 34, issue 4, Art. 12 (2007). Retrieved from: <http://digitalcommons.pepperdine.edu/plr/vol34/iss4/12> on 12/4/2013

particular attention to the rise of the bilateral investment treaty (BIT) and its effect on foreign direct investment. The work also discusses the effect of ICSID on international investment; after describing the reasons for creating ICSID, it explains its structure and emphasizes its ever-increasing importance. Part IV of the article discusses ICSID's divergent approaches toward the effect of MFN clauses on dispute resolution provisions in BITs, while addressing the problems associated with these inconsistent approaches.

The above reviewed works are to be complemented with reports, cases and other materials in order to achieve the modest objectives the thesis sets out to achieve.

1.8 Organisational Layout

This work is conveniently segmented into five chapters. The chapters are interrelated.

The first chapter provided a springboard upon which the research work is launched. It deals with the background of the subject matter, the aims and objectives of the research, statement of the research problems, justification, scope and limitations of the research, the methodology employed in the research work, the volumes of preceding literature reviewed and the organisational layout of the work.

The second chapter deals with the nature and scope of commercial arbitration in Nigeria. It provided for the opportunity to discuss other alternatives to arbitration and the various local legislations providing for commercial arbitration in Nigeria. The attitude of the Nigerian courts to arbitration is also in focus.

The theory and principles of the recognition and enforcement of international commercial arbitral awards is analysed in the third chapter, while also baring the legal regime of international arbitration in Nigeria. Chapter four focuses on the modes of recognition and enforcement of International Center for Settlement of Investment Disputes (ICSID) awards in Nigeria as the

main thrust of the research work. The analysis of Bilateral Investment Treaties (BITs) as the basis for arbitration under the ICSID was also delved into.

Finally, chapter five draws the curtain on the discussion. It determines the work with summary, findings and recommendations.

CHAPTER TWO

CONCEPTUAL CLARIFICATION AND NATURE OF COMMERCIAL ARBITRATION IN NIGERIA

2.1 Introduction

This chapter attempts a conceptual clarification of certain key terms and the examination of the nature of commercial arbitration in Nigeria. Within this context some provisions of the Arbitration and Conciliation Act¹ are analysed along with some provisions of the Lagos State Arbitration Law of 2009.² Here, we also explore arbitration and its other major siblings in the Alternative Dispute Resolution (ADR) family, with a view to contrasting them both in theory and practice.

2.2 CONCEPTUAL CLARIFICATION OF KEY TERMS

The structure of the research makes conceptual clarification of terms even more imperative. International Centre for Settlement of Investment Disputes (ICSID) deals with a specific category of arbitration – investor-state arbitration. Hence, the concepts deserving such clarification are: investment arbitration, arbitral award, arbitration agreement, arbitration clause, and recognition and enforcement and arbitral award. Similarly, investor and investment will be conceptualized within the context of their applications under the ICSID jurisprudence.

2. 2. 1 Investor

The definition of investor is key to the scope of application of rights and obligations of investment agreements and to the establishment of the jurisdiction of investment treaty-based

¹ Cap A19, Laws of the Federation of Nigeria, 2004; initially Arbitration and Conciliation Decree No. 11 of 1988.

² No. 10 , Lagos State Arbitration Law Laws of Lagos State, 2009.

arbitral tribunals.³ Certainly, the protections offered by international investment treaties are limited to “investors” and their “investments”.⁴

The simplest definition of investor is that he is “a buyer of a security or other property who seeks to profit from it without exhausting the principal.”⁵ However, under the investment treaty arbitration, investment agreements define those who qualify as investors.⁶ The definition of the term is critical to determining the scope of an investment agreement. Thus, in defining the term two issues arise. What types of persons or entities may be considered investors and the criteria determining that a person is covered by an agreement?⁷

Although the ICSID Convention does not define the term investment, two types of persons may be included within the definition of investor: natural persons or individuals and legal persons, also referred to as legal or juristic persons. Sometimes, the term investor is not used. Instead, agreements refer to “nationals” and “companies”, with the former defined to include natural persons and the latter defined to include a range of legal entities.⁸

Investment agreements generally base nationality exclusively on the law of the state of claimed nationality. The issues related to the nationality of legal persons are more complicated. Companies today operate in ways that can make it very difficult to determine nationality.⁹

³ Definition of Investor and Investment in International Investment Agreements. In: *International Investment Law: Understanding Concepts and Tracking Innovations*, OECD 2008. Retrieved from: <http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf> on 14/3/2014

⁴ Stephenson, A. and Carroll, L. *Protecting Foreign Investments by using Bilateral Investment Treaties*, 2012, p.7. Retrieved from: www.claytonutz.com on 12/12/2014.

⁵ Garner, B. A. (ed.) *Black’s Law Dictionary* (8th edition). West Publishing, Minnesota (2004), p. 846.

⁶ United Nations Conference on Trade and Development Scope and Definition UNCTAD Series on Issues in International Investment Agreements II United Nations New York and Geneva, 2011, p. 13. (Unctad II).

⁷ Ibid, see also Definition of Investor and Investment in International Investment Agreements, *International Investment Law: Understanding Concepts and Tracking Innovations*, OECD 2008. Retrieved from: <http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf> on 14/3/2014.

⁸ UNCTAD II, p. 13-14.

⁹ Ibid.

It is a firmly established principle in international law that the nationality of the investor as a natural person is determined by the national law of the state whose nationality is claimed.¹⁰ However, some investment agreements introduce alternative criteria such as a requirement of residency or domicile.¹¹ The challenging aspect of this is when an individual bears dual-citizenship. In other words, an issue may arise in the situations of dual nationality.¹²

The category of legal entities, by contrast, can be defined to include or exclude a number of different types of entities. Entities may be excluded on the basis of their legal form, their purpose or their ownership.¹³ Differences in the legal form of an entity may be important to a host country in a variety of circumstances. The form of the entity determines, for example, which assets may be reached by creditors of the entity to satisfy debts and perhaps the extent to which the entity can be sued in its own name in the courts.¹⁴

Only a national of one of the two contracting states may bring a claim under the investment treaty. Whether a claimant, either a natural or a legal person, is a national of a contracting state will be determined by the laws of the contracting state and any particular requirements of the relevant treaty.¹⁵ Where an issue arises involving a national of a country not having an active investment treaty with the host country, the investment would not be afforded the protections provided by international investment treaties.¹⁶

2.2.2 Investment

¹⁰ UNCTAD II, p.14.

¹¹ Ibid.

¹² Idornigie, P.O. "Investment Treaty Arbitration and Emerging Markets: Issues, Prospects and Challenges" NIALS Press, Abuja, 2011.p.35. See also, Schlemmer, E. C. The Oxford Handbook of International Investment Law. Muchlinski P., et al (eds.) (2012) pp. 69–70. DOI:10.1093/oxfordhb/9780199231386.013.00.

¹³ UNCTAD, p.14.

¹⁴ Ibid, p.15.

¹⁵ Ibid, p.5.

¹⁶ Ibid.

The outcomes of many arbitral decisions have depended on a tribunal's interpretation of whether a particular transaction or asset qualified as a protected investment under a bilateral investment treaty (BIT). Arbitral decisions have revealed a wealth of implications that particular definitional approaches or particular treaty wording may have.¹⁷

A narrow approach was followed by earlier agreements which were aiming at the gradual liberalisation of capital movements and preferred to enumerate the transactions covered by these agreements. Today, most international investment instruments, in particular investment protection treaties, adopt a broad definition of investment.¹⁸ The reason for this is captured in the following words:

Investment treaties are premised on two elemental propositions: foreign investment tends to spur economic development, and fundamental legal protections tend to encourage and promote foreign investment. It is equally elemental that capital is fungible and investment of capital takes a multitude of forms in the world today. In recognition of this reality, the definitions of investment in contemporary treaties tend to be broad and open-ended, with a list of specific types of covered investments that is indicative rather than definitive.¹⁹

These broad definitions appear to reflect an effort to accommodate the endless creativity of the capital markets. Put in slightly different terms, the broad definition of investment reflects a desire to encourage foreign investment in all its forms, present and future.²⁰ Perhaps the most comprehensive definition of investment is given by the North American Free Trade Agreement

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Legum, B., "Defining Investment and Investor: Who Is Entitled to Claim?" Being a paper presented at a Symposium Co-organised by ICSID, OECD and UNCTAD, themed: *Making the most of International Investment Agreements: A common agenda* at Room 1, OECD Headquarters, Paris, 12th, December 2005. See also Hodgson, M., (2014). *Costs in Investment Treaty Arbitration: The Case for Reform*. Allen & Overy LLP Issue 1, vol. 11, p.1. Retrieved from: <http://www.allenoverly.com/SiteCollectionDocuments/Costs%20in%20Investment%20Treaty%20Arbitration.pdf> on 7/5/2014

²⁰ Barton, Op. Cit., p.3.

(NAFTA).²¹ However, there is no such thing as the best definition of investment; it is simply a reflection of each country's preferences and policies.²²

In the attempt to define investment we are confronted with two problems. The first is the failure of the ICSID Convention to define Investment.²³ Almost all investment treaties contain a definition of the nature of the investment and it is important to look at the terms of the treaty in question. Generally, investment includes movable and immovable property, shares and other interests in companies, claims to performance under a contract having an economic value, and intellectual property rights.²⁴ Investment has been held to encompass the control and management of bauxite mining facilities²⁵ promissory notes issued by Venezuela,²⁶ a joint-venture agreement to develop farmland²⁷ and a concession agreement to explore for oil and gas.²⁸

The investment need not be fully owned by the investor to qualify as an investment. For example, a minority shareholding in a company was found to constitute an investment.²⁹ The investment must be in accordance with law.³⁰ Recent United Kingdom treaties define investment as every kind of asset.³¹

The second problem is the problems arising in the case of complex group enterprises as investors. Broad definitions of investment recognize both direct and indirect shareholding as

²¹ Article 1139, North American Free Trade Agreement, NAFTA.

²² UNCTAD II, p. 14.

²³ McLachlan, C., et al. *International Investment Arbitration*. Oxford University Press, Oxford (2007), p.164.

²⁴ Stephenson, A., *Op. Cit.*, p. 6.

²⁵ *Kaiser Bauxite Co. v. Jamaica ICSID Case No. ARB/74/3*.

²⁶ *Fedax N.V. v. Venezuela ICSID Case No. ARB/96/3*.

²⁷ *Tradex Hellas S.A. v. Albania ICSID Case No. ARB/94/2*.

²⁸ *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH (FR Germ.) v. State of R'as Al Khaimah (UAE) ICC Case No. 3572 of 1982*.

²⁹ *CMS v Argentine Republic (ICSID Case No ARB/01/8)*.

³⁰ *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines ICSID Case No. ARB/03/25*.

³¹ See for instance, the Agreement for the Promotion and Protection of Investments, Oct. 2, 2002, Bosnia & Herzegovina and United Kingdom K., Article 1, available at http://www.unctad.org/sections/dite/ia/docs/bits/uk_bosnia.pdf.

protected assets which can lead to multiple claims. That is, a parent company can structure its investment in the host State through one or more intermediate holding companies established in various countries. Each of these companies will potentially have a right to bring a claim, provided that the relevant country has a bilateral investment treaty (BIT) with the host State. Claims made by intermediate holding companies arising out of their investments in subsidiaries are not uncommon. They are seen by tribunals as within the jurisdiction of BITs containing references to interests in companies as a category of protected investment.³² This has led to the use of holding or shell companies, incorporated in jurisdictions enjoying investment treaty relations with host countries, as a means of enhancing protection under international investment agreements, especially where the home country of the parent company has no treaty in place with a given host country. This practice is often referred to as “treaty shopping”.³³

A liberal approach to defining investments can give greater flexibility in the protection of investments as they acquire more sophisticated forms. In this regard, investments can be seen often as bundles of transactions, some of which may be pure commercial contracts, but which together form an investment process. It is not always easy to unbundle such processes and to highlight the contractual nature of the transaction from which the claim arises and to ignore the context in which it occurs. As the ICSID tribunal in *Ceskoslovenka Obchodni Banka v. Slovak Republic*³⁴ stated:

A dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an

³² Dolzer, R. and Schreuer, C. *Principles of International Investment Law*. Oxford University Press, Oxford (2008), pp. 54–55.

³³ UNCTAD II, p.12-13

³⁴ *ICSID Case No. ARB/97/4*.

integral part of an overall operation that qualifies as an investment.³⁵

Article 1(a) of the Nigeria-Netherlands BIT³⁶ defines investments as,

every kind of asset and more particularly, though not exclusively (i) movable and immovable property as well as any other rights *in rem* in respect of every kind of asset; (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures; (iii) claims to money, to other assets or to any performance having an economic value; (iv) rights in the field of intellectual property, technical processes, goodwill and know-how; and (v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

This definition will be adopted for the purpose of this dissertation.

2.2.3 Investment Arbitration

Investment arbitration is the resolution of disputes between clients and brokers. At an international level, it is the resolution between institutional investors and national governments. Vast numbers of investment transactions take place globally on a daily basis, and of these transactions, a small number become subject to arbitration. International investment arbitration involves a way of settling disputes when institutional investors are not satisfied with their treatment as foreign investors in a given country.³⁷

In Nigeria, investment arbitration is essentially statute derived, as it involves the State or Government agencies and an investor unlike commercial arbitration which essentially involves private parties. The relevant statute on investment arbitration is the Nigerian Investment Promotion Commission Act (NIPCA),³⁸ which was first enacted in 1995.³⁹ While the Arbitration

³⁵ Ibid.

³⁶ Of 1992

³⁷ "What Is Investment Arbitration?" Retrieved from: <http://m.wisegeek.com/what-is-investment-arbitration.htm> on 13/09/2014

³⁸ Cap. N 117, Laws of the Federation of Nigeria, 2004.

³⁹ As Decree no. 16 of 1995.

and Conciliation Act⁴⁰ deals with arbitration in general without any specific provision for investment arbitration, the NIPCA deals essentially with the promotion of investments in Nigeria with a specific provision for the resolution of disputes arising between an investor (Nigerian or foreign) and any Government of the Federation of Nigeria in respect of an enterprise.

Investment arbitration has a history of its own that intertwines with that of general international commercial arbitration. Disputes in regard to foreign investment raise particularly sensitive issues. On the one hand the foreign investor commits a significant amount of money for a long period of time in a country in which it may not have complete confidence in the system of government, including the courts, or in its political stability. It is understandable that the investor may wish guarantees of one form or another that it would not consider necessary in its home country.⁴¹ On the other hand the investment may have important consequences for the host country of an economic, social or even political nature. The investment will often be in the form of a company organized under the laws of the host country. The host country may not wish the foreign investment to be treated any differently than a domestic investment.⁴² It is these contending aspirations that arbitration treaties seek to balance.

For the purpose of this dissertation, Van Harten gave a comprehensive definition of investment arbitration as,

a uniquely internationalized arm of the governing apparatus of states, one that employs arbitration to review and control the exercise of public authority, resulting in a unique form of public law adjudication which is used to resolve regulatory disputes between individuals and the state as opposed to reciprocal disputes between private parties or between states.⁴³

⁴⁰ Cap. A 19, Laws of the Federation of Nigeria, 2004.

⁴¹ UNCTAD, p. 25

⁴² Ibid.

⁴³ Van Harten, G. & Loughlin, M., Investment Treaty Arbitration as a Species of Global Administrative Law, 17 EUR. J. INT'L L. 121 (2006), p.33.

The arbitral award is final and binding on the parties and may be filed by the parties with a court seeking an order confirming the award. The confirmation of the award has the same force and effect as a judgment, and claim preclusion (*res judicata*) and issue preclusion (collateral estoppels) are as applicable to orders for confirmation of the award as to judgments.⁴⁴

Generally, arbitration agreements are in two different forms. The first is agreements which provide that, in the event of any dispute arising from the contractual relationship it should be resolved through arbitration. This is usually contained in an arbitration clause. Two, agreements signed after a dispute has arisen, agreeing that the dispute should be resolved by arbitration, sometimes referred to as “submission clause”.⁴⁵

2.2.4 Arbitration Clause

Domestic and international commercial contracts, of necessity, contain arbitration clauses. Arbitration clauses are, therefore, a *sine qua non* and an integral part of most contracts entered into by parties in Nigeria, either domestic or international⁴⁶.

It is the arbitration clauses that stipulate what steps to be taken, how they should be taken and by whom, in the event of a dispute arising in the course of executing the contracts or commercial agreements between parties. Arbitration clauses come in different ways, depending mostly, on the arbitration rules to be applied.⁴⁷ It refers to a contract between two parties that they will submit any dispute between them to arbitration before taking any court action. The clause is especially valuable when the contract involves complicated business relationships that would be difficult to explain to a judge or jury. An arbitrator that

⁴⁴ Kazutake, O., Op. Cit., p. 2.

⁴⁵ Boulle, L. A "A History of Alternative Dispute Resolution," *ADR Bulletin*: Vol. 7: No. 7, Article 3. Retrieved from: <http://epublications.bond.edu.au/adr/vol7/iss7/3> on 7/5/2013. See also, www.vakilno1.com/forms/arbitration/arb7.doc for different forms of arbitration clauses.

⁴⁶ Ibid.

⁴⁷ Ibid .

has a clear understanding can provide a fair answer quickly. This is also known as “Avery Clause”.⁴⁸ These clauses are typically inserted in BITs, specifying the procedure to be followed and the institution and rules to guide the settlement of disputes.

2.2.5 Recognition and Enforcement

It has been observed that “if businessmen are not reasonably sure of enforcement of foreign arbitral awards, there will be little or no arbitration”.⁴⁹ Thus, the recognition and the enforcement of arbitral awards is an extremely important issue in arbitration relating to international commercial disputes. If it was not possible to recognise and enforce the arbitral award, arbitration would be pointless, meaningless,⁵⁰ and valueless.⁵¹ In other words, the continued use of arbitration as a means of dispute resolution will not be maintained without the availability of a reliable, fair and effective means of carrying out the arbitral award.⁵²

Before a foreign award is enforced in any jurisdiction, it must first be recognised as such. The terms “recognition and enforcement” are used often interchangeably but they have different meanings and each can be used for different purposes.⁵³ Recognition is defined as the “confirmation that an act done by another person was authorised... [by] acknowledging

⁴⁸ *Scott v Avery* 10 ER 1121 (1856); or 25 LJ Ex 308; or 5 HLC 811

⁴⁹ Holtzmann, H. M., *International Arbitration 60 Years of ICC Arbitration a Look at the Future*, ICC Publishing, Paris(1984), pp. 361- 362.

⁵⁰ Carr, I, *International Trade Law*. Cavendish Publishing, London (1996), p. 214.

⁵¹ Asouzu, A. “The Adoption of the UNICITRAL Model Law In Nigeria: Implications on the Recognition and Enforcement of Arbitral awards” (1999) *Journal of Business Law*, p.185.

⁵² Ibid.

⁵³ Soo, G. “International Enforcement of Arbitral Awards” (2000) 11(7) *International Company and Commercial Law Review* p.253.

expressly, or by implication”⁵⁴ while enforcement is seen as “the act or process of compelling compliance with the law, mandate, command, decree or agreement”.⁵⁵

The source of their inextricability is the New York Convention⁵⁶ and the Model Law.⁵⁷ Indeed, foreign award cannot be enforced without first being recognised by a domestic court.⁵⁸ In this regard, recognition and enforcement cannot be separated. However, these terms can be used separately⁵⁹ because recognition of a foreign award may be sought alone without enforcement. Thus, the terms may be used separately by providing special conditions for each one. Consequently, some arbitration rules in one part speak about recognition and enforcement as one term, while in another part they speak about recognition and enforcement as two terms.⁶⁰

The basis is that the winning party may seek recognition as a proof that the dispute has been determined by arbitration and is no longer subject to litigation, or he may seek enforcement to obtain the amount awarded by the arbitral award.⁶¹ The meaning of recognition comes from the application made by the winning party to the competent court in order to obtain proof to the effect that the dispute has been determined by arbitration. This proof activates as a defence to prevent any allegation that may be made by the losing party relating to the same dispute.⁶²

The purpose of recognition is a defensive process which acts as a shield to prevent the losing party from bringing a second allegation before the local court. If one party were to bring a

⁵⁴ Garner, B. A. (ed.) *Black's Law Dictionary* (8th edition). West Publishing, Minnesota (2004), p. 1299.

⁵⁵ Ibid, p. 569.

⁵⁶ Articles 4 and 5 New York Convention.

⁵⁷ Article 58 Model Law.

⁵⁸ Redfern, A., Hunter, et al. *Law and Practice of International Commercial Arbitration*, 3rd ed. Sweet & Maxwell, London(1999), p.515.

⁵⁹ Pietro, D. D., and Platte, M. *Enforcement of International Arbitration Awards: The New York Convention of 1958* (1st edition). Cameron Publishing, London (2001), p. 23.

⁶⁰ As stated above under the New York Convention articles 4 and 5, recognition and enforcement are seen as one term, while it speaks about them in Article 3 as two terms.

⁶¹ Daradkeh, L. M. M. (2005) *Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law)*(Unpublished PhD Dissertation). University of Leeds, England, p.15.

⁶² Ibid.

court action against the other in regard to the subject matter of the arbitration, based on the same cause of action, the court would dismiss the action on the basis that the issues had been disposed of and were *res judicata*.⁶³

On the other hand, enforcement entails taking a step further after recognition to force the losing party to carry out the award. In this regard, the role of the court is positive, in that it is required to take an action against the assets of the losing party by way of seizure, expropriation, or any other means in the place where the enforcement is sought. Enforcement, therefore, takes an attacking action against the assets of the losing party, as a sword. Enforcement will be sought after the losing party has refused to enforce the award voluntarily. Thus, to force the losing party to carry out the award, the winning party applies to the competent court to take a positive action against the assets of the losing party. This action normally takes the form of different sanctions, the aim of which is to make the losing party carry out the award. These sanctions differ from one State to another depending on where the enforcement is sought. Such a sanction may take the form of seizure or attachment of the losing party's assets and sometimes includes imprisonment.

The party in whose favour the award is made in an international commercial dispute expects it to be carried out without delay. It follows that the losing party will carry out this award voluntarily. In international commerce, the majority of arbitral awards are carried out voluntarily.⁶⁴ Where however, the losing party refuses to voluntarily carry out the arbitral award, the winning party will resort to the means of recognition and enforcement. Thus, the creation of recognition and enforcement methods is to enable the winning party to enjoy the fruits granted by the award.

⁶³ Ibid, p. 16.

⁶⁴ Ibid.

Finally, without effective methods of recognition and enforcement, international arbitration cannot function effectively. The terms can either be used separably or inseparably, but for our purposes the latter course will be taken.

2.2.6 Arbitral Award

An arbitral award is analogous to a court judgement. In the course, and end of the proceedings the arbitral tribunal has the power to issue many types of arbitral awards. It has the power to issue an “interim” or a “partial arbitral award” to resolve certain aspects of its jurisdiction, and to resolve questions of liability or other issues. It has also the power to issue “consent” or “agreed arbitral awards” if the parties reach a settlement during the arbitration process. Also, where one party (usually the defendant) fails or refuses to take part in the proceedings, it has the power to issue a “default arbitral award”. Furthermore, it has the power to issue an “additional arbitral award” when one or more issues of the dispute are omitted from the final award.⁶⁵ An arbitral award need not be monetary in nature. It is of non-monetary nature, for instance, where the entire claimant's claims fail and no money needs to be paid by either party.⁶⁶

An arbitral award or arbitration award refers to a decision made by an arbitration tribunal in an arbitration proceeding. The Supreme Court defined arbitral award in *Ras Pal Gazi Construction Co. v. Federal Capital Development Authority*⁶⁷ as “an award made pursuant to arbitration proceedings which constitutes a final judgment on all matters referred to the arbitrator. It has a binding effect and it shall upon application in writing to the court, be enforced by the court.” In other words, if an award is not challenged then it becomes and is a final and

⁶⁵ Daradkeh, L. M. M., Op. Cit. p.42. See also “Arbitral Award”, retrieved from <http://definitions.uslegal.com/a/arbitral-award> on 23/9/2014

⁶⁶ “Arbitral Award”, retrieved from <http://definitions.uslegal.com/a/arbitral-award> on 23/9/2014

⁶⁷ (2001) 10 NWLR (Pt 722) 559 at 571

binding determination of the matters between the parties. An arbitral award can therefore be defined as any decision of the arbitral tribunal on the substance of the dispute submitted to it.

An award may be final, interim, partial, agreed, additional, and interlocutory and default. Just like a distinction is drawn between final and interim or interlocutory order in civil litigation, so it is in arbitration. An award is final if it has resolved or determined the issues in dispute. The final award therefore disposes all claims in the matter; such matter becomes *res judicata*.

An interim award, therefore, is one which deals with a preliminary question such as the issues of jurisdiction of the arbitral tribunal or the law applicable. In some jurisdictions, this is known as provisional order.⁶⁸ The importance of an interim arbitral award is that it directs the interim preservation of property and ensures security for the costs of the arbitration, or that it orders any money in dispute to be secured. This kind of order is made by the national court alone, the arbitral tribunal alone or by concurrent jurisdiction issued either by the court or the arbitral tribunal.⁶⁹

A partial award is similar to interim awards, in that, both of them are not generally final. A partial award is one which disposes of a part of monetary or other issues in dispute leaving the rest to be dealt with subsequently. It can be used to order payment on account in respect of a particular claim or claims. To that extent therefore, a partial award is final in respect of the issues so decided and may be enforced.⁷⁰ Thus, this concerns only determination of parts or part of claims or issues brought before the tribunal.

An interlocutory award is a decision on a procedural question. It is not a final decision and cannot be enforced as an award. Strictly speaking, this is not an award but a procedural

⁶⁸ See for instance section 39 of the UK Arbitration Act, 1996.

⁶⁹ Daradkeh, L. M. M., Op. Cit. p.62.

⁷⁰ Ezejiofor, G., Op. Cit., p. 94

order. Similarly, just as we have default judgment in civil proceedings, we have default award in arbitral proceedings. This will arise where the arbitral tribunal proceeds *ex parte* to conclusion and make an award.⁷¹

There is a distinction between a domestic award and a foreign award. This distinction is fundamental for the purposes of recognition and enforcement. An award is said to be domestic where it is rendered within the territory it is sought to be enforced, while a foreign award is rendered outside such a jurisdiction with an international element.⁷² Thus, an award rendered within Nigeria is a domestic award, and any award with foreign or international element rendered elsewhere is foreign.

Clearly, not all awards are final. But when award is said to be final what does it entail? The finality of an arbitral award has two meanings in respect of the role of the arbitral tribunal and the role of the local court. On the one hand, the normal use of a “final award” refers to cases where a tribunal has disposed all the issues submitted to arbitration, and has not left any matter to be disposed by a third party, unless the parties have otherwise agreed.⁷³ This determination is binding on the parties. At this stage, the tribunal ceases to continue its jurisdiction on the disposed dispute. On the other hand, finality means that an arbitral award is final and binding since it was rendered by the tribunal and cannot be challenged by any means provided by the local law for local judgements.⁷⁴ It also means that an award is not subject to any challenge by the local court, if there is an agreement between the parties not to challenge the award.⁷⁵ In other

⁷¹ Idornigie, P. O., Op. Cit. pp.169-172.

⁷² Daradkeh, L. M. M., Op. Cit. p. 202.

⁷³ *Chiswell Shipping Ltd v State Bank of India, the World Symphony (No 2)*[1987] 1Lloyd's Rep 157.

⁷⁴ This is typical of ICSID Awards, where the decision of the tribunal is final and enforceable in the Supreme Court; not open to any form of review, except in exceptional circumstances.

⁷⁵ S 69 of Arbitration Act 1996.

words, it can be said that an award will not become final until it has resisted an appeal or unless no appeal has been lodged within a certain period.⁷⁶

2.3 DOMESTIC COMMERCIAL ARBITRATION PROCEEDINGS

Parties in transactions often desire fast resolution of their disputes, but are not willing to submit to courts. Commercial arbitration is perceived as a quicker means of dispute resolution. The inadequacies of the courts in Nigeria which include: the adversarial nature of litigation, unnecessary delays, lack of confidentiality, among others, has led disputing parties to seek alternative means of dispute resolution, one of which is commercial arbitration.⁷⁷

Arbitration is seen as,

the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in judicial manner, by a person or persons other than a court of competent jurisdiction. Although an arbitration agreement may relate to present or future differences, arbitration is the reference of actual matters in controversy.⁷⁸

It is evidently a procedure for settlement of disputes under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties.⁷⁹ The case of *MISR (Nig) Ltd. v. Oyedele*⁸⁰ referring to Halsbury's Laws of England defined arbitration as "the reference of a dispute between not less than two parties for determination, after hearing both sides in a judicial manner by a person(s) other than a court of competent jurisdiction." Arbitration can, therefore, be described as a private, voluntary

⁷⁶ See Article I (d) of the Geneva Convention and Article 5(1)(e) of the New York Convention.

⁷⁷ Agarwal, V., "Alternative Dispute Resolution Methods" A paper written following a UNITAR sub-regional workshop on Arbitration And Dispute Resolution, Harare, Zimbabwe, from 10-15 September, 2000 Retrieved from: <http://www.unitar.org/dfm> on 12/3/2013

⁷⁸ *Kano State Urban Development Board v Fanz Construction Co Ltd* (1990) 4 NWLR (part 142) 1 and 33

⁷⁹ Orojo, J.O. and Ajomo, M. A. *Law and Practice of Arbitration and Conciliation in Nigeria*. Mbeyi and Associates, Lagos (1999), p.37.

⁸⁰ (1966) 2 ALR (Comm.) 157.

procedure which two or more parties agree to use to resolve their dispute, wherein the arbiter is neutral, the decision is based on the merits and it is final and binding between the parties.⁸¹

To qualify as arbitration, the proceedings must be conducted in a judicial manner. This means that the arbitrator adjudicates upon the dispute in an impartial manner, by receiving evidence from the parties and their witnesses, carefully considering same and coming to a decision on the basis of such evidence. Where parties have agreed to submit their dispute to arbitration, the courts will generally uphold the arbitration agreement and prevent any court proceedings until an award is first made.⁸²

“Commercial” referred to in Article 1 of the Model Law “applies to international commercial arbitration, subject to any agreement in force between this state and any other state or states”. The footnote therein provided that:

The term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

The Arbitration and Conciliation Act (ACA)⁸³ is the federal law governing both domestic and international arbitrations.⁸⁴ In view of its relevance as the principal law governing arbitration in Nigeria, a cursory analysis of some of its provisions is imperative. Part one comprises sections

⁸¹ In *NNPC v. Lutin Investments Ltd* (2006) 1SCM 46 at 72) the Supreme Court per Ogbuagu, JSC also adopted this definition.

⁸² See the case of *Scott v. Avery* (*supra*).

⁸³ Cap A19, Laws of the Federation of Nigeria, 2004; initially Arbitration and Conciliation Decree No. 11 of 1988.

⁸⁴ On the 18th day of May 2009, the Lagos State Arbitration Law No. 10 came into force to provide for the resolution of disputes by arbitration in Lagos State.

1 – 36. These deal with domestic arbitration in general. It also includes arbitration agreement, composition and jurisdiction of arbitral tribunals, challenge to the appointment of arbitrator(s), conduct of arbitral proceedings, recourse against awards and recognition and enforcement of awards.⁸⁵

One of the unique features of the Act is the wide range of freedom granted to parties based on freedom of contract to insert clauses favourable to them. Most of the provisions are subject to what the parties have agreed upon. It is where the parties fail to contemplate certain eventualities that the Act regulates. Thus, party autonomy and parties' freedom to contract; and fundamental tenets of arbitration are accorded sanctity.

In this analysis, some provisions of the Lagos State Arbitration Law will be referred to. This is because, being an emergent arbitration hub in Africa, Lagos has moved to fill in some of the gaps left by the ACA, thus incorporating some of the proposed amendments forming part of the Bill for amendment of ACA currently before the National Assembly.⁸⁶ The importance of the above proposal is captured by a seasoned arbitrator in the following words:

After two decades of applying the provisions of the Federal Act the consensus amongst practitioners 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. Modern means of communication resulted in outdated concepts and definitions under the Federal Act.⁸⁷

⁸⁵ Akinbote, A. Arbitration in Africa - the State of Arbitration in Nigeria. A Paper Presented at the 2008 Colloquium of the Association for the Promotion of Arbitration in Africa Held at Djeuga Palace Hotel, Yaounde from 14th – 15th January, 2008 p. 3.

⁸⁶ Both the Lagos State Arbitration Law of 2009 and the Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004 are modelled after the UNCITRAL Model Law, but the Lagos State law incorporates recent proposed amendments to the Model Law.

⁸⁷ Rhodes-Vivour, A. Recent Arbitration Related Developments in Nigeria. Published in the Journal of the Chartered Institute of Arbitrators (CIARB) Arbitration (2010), 76 Arbitration, pp. 130-135. See the report of the national committee on the reform and harmonisation of arbitration adr laws, inaugurated by Chief Bayo Ojo S.A.N. on the 23rd September, 2005.

Essentially the ACA and its rules⁸⁸ apply to any arbitration whose seat is Nigeria or which parties have agreed will be governed by it.⁸⁹ Section 53 of ACA provides:

Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rule acceptable to the parties.⁹⁰

Complex and high value commercial disputes are often resolved by both institutional and *ad hoc* international arbitration. Either the Arbitration Rules in Schedule 1 of the Act, the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties will apply to *ad hoc* international arbitrations taking place in Nigeria.

The basic legal requirement of an arbitration agreement under this law is that an arbitration agreement must be in writing or must be contained in a written document signed by the parties⁹¹ or in an exchange of letters, telex, telegram or other means of communication.⁹² An arbitration agreement can cover future disputes. Accordingly, the courts will not only enforce arbitration awards, arbitration agreements will generally be enforced, such that even loose and brief expressions such as arbitration to be settled in a (named place) or suitable arbitration clause will often be given sufficiently precise meaning to ensure arbitration.⁹³ However, clearly worded and well thought out arbitration clauses are preferable.

⁸⁸ Contained in the 1st Schedule of the Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

⁸⁹ See Section 15 and the Long title of the Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004; this is also be the position in the Lagos law.

⁹⁰ S. 53, Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

⁹¹ S. 1 Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004, and Section 3(3) of the Lagos State Arbitration Law, 2010.

⁹² S. 1(1) Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

⁹³ *Kano State Urban Development Board v. Fanz Construction Co. LTD (supra)*

It is not clear under ACA what the position of the law is in reference to the exchange of documents through the internet with appended e-signatures. But the Lagos law is clear on the position of modern means of communication. Section 3(4) defines “writing” to include, data that provides a record of the arbitration agreement or is otherwise accessible so as to be usable for subsequent reference. The next sub-section defines data to mean information generated, sent, received or stored by electronic, optical or similar means, such as but not limited to electronic data interchange, electronic mail, telegram, telex or telecopy.⁹⁴

While we await the amendment of ACA or a judicial pronouncement on this, it appears however, that electronic signatures can be accommodated under Section 1(2),⁹⁵ which states that “Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract”.⁹⁶

The effect of this is that arbitration must be consensual and that an arbitration agreement may either be an express clause in a contract whereby parties agree to refer future disputes to arbitration or in a separate document⁹⁷ whereby parties agree to submit their existing dispute to arbitration. An arbitration agreement may also be inferred from written correspondence or pleadings exchanged between parties.⁹⁸

Agreements to arbitrate disputes that are not borne out of commercial transactions are not enforceable. Where a party to an arbitration agreement commences an action in the High Court in breach of an arbitration agreement, the other party to the arbitration agreement can apply for

⁹⁴ Section 3(5), Lagos State Arbitration Law, 2009.

⁹⁵ Arbitration and Conciliation Act, or through the aid of the *ejusdem generis* rule to cover all kinds of medium of communication.

⁹⁶ Ibid

⁹⁷ S. 1 (2) Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

⁹⁸ Idigbe, A. and Foy-Yamah O., “Arbitration Agreements” ICLG TO: International Arbitration 2010 www.punuka.com/uploads/arbitration_agreements.pdf

proceedings in the High Court to be stayed.⁹⁹ However, to obtain the stay of proceedings, the party making the application must be seen not to have taken any steps to defend the matter in court other than entering an appearance.¹⁰⁰ Thus, where a party takes a step to defend the action at the High Court by filing a defence, he cannot seek to enforce the arbitration agreement. The Lagos Arbitration Law, unlike ACA, provides 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 necessary.¹⁰¹

2.3.1 Commencement

Arbitral proceedings may be commenced with the claimant serving on the respondent a written notice of arbitration. This notice shall clearly state the demand that the dispute be referred to arbitration, the names and addresses of the parties; a reference to the clause invoked and to the contract in relation to the dispute, the claim(s) involved and the remedy or relief sought. It must also contain a proposal as to the number of arbitrators if the parties have not previously agreed thereon.¹⁰²

By this, arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.¹⁰³ However, under the Lagos law the date of commencement is when the request to refer the dispute is delivered to the other party.¹⁰⁴

2.3.2 Confidentiality

One of the attractive features of arbitration is its confidentiality. Under the ACA, unless otherwise agreed by the parties, arbitral proceedings are conducted in camera.¹⁰⁵ Arbitration

⁹⁹ S. 5 (1) Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

¹⁰⁰ As provided for in sections 4 and 5 of the Arbitration and Conciliation Act.

¹⁰¹ Section 6(3), Lagos State Arbitration Law, 2009.

¹⁰² Section 17, Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004. Article 3 of the Arbitration Rules in Schedule 1 of the Act.

¹⁰³ Article 3(2) of the Arbitration Rules in Schedule 1 of the Arbitration and Conciliation Act.

¹⁰⁴ Section 32, Lagos State Arbitration Law. 2009.

hearings are private and the award may be made public by the arbitrators only with the consent of both parties. There is an implied duty of confidentiality imposed on the parties although the arbitration rules refer only to privacy of the hearings, and not confidentiality of the whole proceedings.

2.3.3 Place and Time of Arbitration

The convenience of the parties generally determines the place of arbitration by the tribunal, having regard to other circumstances.¹⁰⁶ This is important because it does not only determine the place where the proceedings will take place, but also the procedural law, and it is one of the factors considered in determining the proper law of the substantive contract. The seat of the arbitration is also important in the context of the recognition and enforcement of any award especially under the 1958 New York Convention. This is so because the grounds for challenging or resisting enforcement of an award under the Convention are limited.¹⁰⁷

Different criteria influence the choice of the place of arbitration. These include the place where the dispute has arisen, the place where the subject matter is located, the place where the arbitral institution is located, legal considerations, convenience of the parties, and ease of enforcement.¹⁰⁸ Unless otherwise agreed, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.¹⁰⁹ Under the Lagos Law the convenience of the parties is shelved and the power to determine the time and place of arbitration

¹⁰⁵ Article 25(4) of the Rules of Arbitration in Schedule 1 of the Arbitration and Conciliation Act.

¹⁰⁶ Section 16, Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004

¹⁰⁷ See Article 5 (1)(d) of the Convention and Idornigie, P. O., Op Cit., p. 157.

¹⁰⁸ Idornigie, P.O. (2002). The Legal Regime of International Commercial Arbitration (Unpublished PhD dissertation). University of Jos, Nigeria, p. 158.

¹⁰⁹ See Section 16(2) of the Act. See also Article 16(2) and (3) ID

is vested in the tribunal, also with circumstances in view.¹¹⁰ Thus, the tribunal has a wide discretion in these matters. It must again be pointed out, however, that to ensure that the award will be enforceable at Law, the mandatory rules of national law applicable to international arbitrations in the country where the arbitration takes place must be observed, even if other rules of procedure are chosen by the parties or by the arbitrator.¹¹¹ It is submitted, therefore, that the discretion of the arbitral tribunal in this regard should be exercised in a manner that is most efficient and economical to the parties.

2.3.4 Substantive Law to Regulate Proceedings

As it is consistent with parties' freedom to determining preliminary issues on arbitration, the law to guide the tribunal is the chosen law of the parties. Where the parties failed to expressly state the law to govern the dispute the substantive law of the country chosen by the parties will be adopted. Thus, the tribunal shall decide the dispute in accordance with the rules in force in the country whose laws the parties have chosen as applicable to the substance of their dispute.¹¹²

In a similar vein, where the venue of the arbitration is in Lagos State and the arbitration agreement does not expressly refer to any other law, the Lagos State Arbitration Law of 2009 will govern the proceedings. Where the substantive law is unclear or not determined by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.¹¹³

2.3.5 Language of the Proceedings

¹¹⁰ Section 33, Lagos State Arbitration Law, 2009.

¹¹¹ Akpata, Op. Cit. at 51 as quoted in Idornigie, P. O., Op. Cit. p. 157.

¹¹² Section 47(1), Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004

¹¹³ Section 47(3), Ibid.

The language of the proceedings is to be English language. But where the parties fail to include in the agreement the language to be used in the proceedings under the Lagos state law,¹¹⁴ the Arbitration and Conciliation Act leaves room for other factors to be taken into consideration.

Section 18(1)¹¹⁵ provides that “the parties may by agreement determine the language or languages to be used in the arbitral proceedings. 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”.¹¹⁶

The chosen language of the parties is “to be used in any written statement by the parties, in any hearing, award, decision or any other communication in the course of the arbitration”¹¹⁷ and also the tribunal may order that documentary evidences be also accompanied with translations.¹¹⁸ The parties are therefore empowered to determine the language to be used in the proceedings and whether any documentary evidence should be accompanied by a translation into that language. If the parties fail to do this, then the arbitral tribunal shall, promptly after its appointment determine this. In taking this decision, the language of the contract and the language of the parties and their counsel should be taken into account.¹¹⁹

The services of transcribers and interpreters could also significantly affect the cost of arbitration proceedings. Thus, it is advisable to decide whether any or all of the costs are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs.

2.3.6 Composition of Arbitral Tribunal

¹¹⁴ Section 36, Lagos State Arbitration Law, 2009.

¹¹⁵ Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004

¹¹⁶ Ibid

¹¹⁷ Section 18 (2), Ibid.

¹¹⁸ Section 18 (3), Ibid.

¹¹⁹ Idornigie, P.O. Op. Cit. p.160.

The arbitrators are required to be independent and impartial. The Law does not require from them any special qualifications unless where the parties have agreed that certain criteria should form part of the qualifications of the arbitrators. There are no restrictions on the parties' choice of arbitrators.¹²⁰ Similarly, the parties are at liberty to determine the number of arbitrators to be appointed under the agreement, but where no such determination is made, the number of arbitrators shall be deemed to be three.

This provision shuts the door to sole arbitrators where the agreement fails to specify the number of arbitrators. This is unlike the Lagos law which provides for sole arbitrator. By the provision of section 7(3)¹²¹ in the absence of determination by the parties, the tribunal will consist of a sole arbitrator. The combine effect of sections 6 and 7 is that there is no room for the appointment of an even numbered panel which the Lagos law expressly renders invalid unless otherwise agreed by the parties.¹²²

If three arbitrators are to be appointed and one party defaults in appointing an arbitrator within 30 days after the receipt of the other party's notification of appointment of an arbitrator, or if within 30 days after the appointment of the second arbitrator, the two arbitrators have not agreed on the choice of the presiding arbitrator, the appointing authority shall appoint either the second arbitrator or the presiding arbitrator as the case may be, upon the request by any of the parties.¹²³ In Lagos the appointing authority is Lagos Court of Arbitration.¹²⁴

¹²⁰ Section 7(5), Ibid.

¹²¹ Lagos State Arbitration Law, 2009.

¹²² Section 7(2), Ibid.

¹²³ Sections 44(5), (6), & (7) Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

¹²⁴ Section 8(4) and (b) of the Lagos State Arbitration Law. The specialized Court of Arbitration was established under this provision.

The Act is also emphatic that the nationality of an arbitrator cannot be a ground for his disqualification unless where the parties agreed to exempt foreigners from forming part of the tribunal.¹²⁵ The appointment of a non-national as an arbitrator is however subject to other laws.¹²⁶

2.3.7 Costs in Domestic Arbitration

The cost of bringing or defending a claim before an arbitral tribunal is likely to be considerably higher than that of bringing or defending the same claim before a national court. This is because, in addition to the usual expenses of litigation, it is necessary for the parties to pay the fees and expenses of the arbitral tribunal and the cost of hiring suitable accommodation for hearings. Unlike litigation, which is purely institutional and funded by the state, arbitral tribunal has to fund itself in some way. The arbitral tribunal has power to decide on its own costs.¹²⁷ In order to obviate any abuse on the side of the tribunal, or overburdening the parties, the Arbitration and Conciliation Act defines “cost” to include:

- (a) the fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself;
- (b) the travel and other expenses incurred by the arbitrators;
- (c) the cost of expert advice and of other assistance required by the arbitral tribunal;
- (d) the travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal;
- (e) the cost for legal representation and assistance of the successful party if such cost were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such cost is reasonable.¹²⁸

¹²⁵ Section 44(10), Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004

¹²⁶ For instance, the Nigerian Immigration Law requirement of an entry visa into Nigeria.

¹²⁷ Section 49, Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

¹²⁸ Section 49 (1) (a)- (e), Ibid.

It further provides that fees shall be reasonable, taking account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.¹²⁹

Unless the parties have agreed otherwise, the unsuccessful party bears the costs of the arbitration. However, the arbitral tribunal may apportion such costs between the parties, if it determines that apportionment is reasonable, taking into account the circumstances of the case.¹³⁰ The Lagos Law, however, makes provision for joint liability of the parties. Section 54 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.¹³¹

It is the reasoned view of this research that the law as obtained under the Lagos rules is a step ahead of the federal law. Parties to arbitration, who have entered into contracts freely, and agreed to insert arbitration clauses, should be encouraged to fairly share the cost of arbitration unless where a party clearly is undeserving of such magnanimity. The danger in this is that it will discourage arbitration; especially if the defendant is clearly cheated but still unsure of his claim.

There is no question of negotiation of fees where arbitration is conducted under the auspices of an arbitral institution. These are generally fixed by the institution, sometimes acting independently, sometimes after consultation with sole or presiding arbitrators. However, in an *ad hoc* arbitration, it is important for the parties to make arrangements with the arbitrators as to their fees.

2.3.8 Security for Costs

¹²⁹ 49 (2), Ibid.

¹³⁰ Article 40 (1) & (2) of the Rules of Arbitration, A.C.A.

¹³¹ Lagos State Arbitration Law, 2009.

In order to discourage frivolous claims under the Nigerian civil procedure laws the claimant is required to make monetary deposits upon the order of the court known as “security for costs”. This principle has been re-introduced in the Lagos law but the Arbitration and Conciliation Act (ACA) is silent about it. Section 53 of the Lagos law makes provision for the arbitral tribunal to order security for costs. It provides that,

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 security.¹³²

This may discourage parties from going to arbitral tribunals. The provision did not stop there, it goes ahead to prescribe the steps to be taken against the party claiming or counterclaiming where such a party refuses to comply with the order for providing security for cost. Thus “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 award”.¹³³

2.3.9 Evidence

The Evidence Act is not applicable to arbitral proceedings.¹³⁴ This is not to say that the arbitrator is not bound to observe the rules of evidence.¹³⁵ Where the Arbitration Rules make no provisions in regard to any matter in the arbitral proceedings, the arbitral tribunal shall conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing.

¹³² Section 53(1), Ibid.

¹³³ Section 53(3), Ibid.

¹³⁴ Section 256 (1) (a), Evidence Act, Cap. E 14, L.F.N., 2011.

¹³⁵ Idornigie, P. O., Op. Cit. p. 159.

Thus, the tribunal determines the admissibility, relevance, materiality and weight of any evidence placed before it.¹³⁶ By the compelling words of Professor Idornigie, which we cannot agree less, it is submitted that,

Although, the arbitral tribunal is not bound by the strict rules of evidence, it is submitted that the tribunal should only act on the evidence before it and that where non-observance of the strict rules of evidence leads to substantial miscarriage of justice, the court should not hesitate to set aside such awards or refuse recognition.¹³⁷

The general practice is the admission by the arbitral tribunal of oral and documentary evidence presented by fact and expert witnesses. This is however, without prejudice to the applicability of the more fundamental and wider rules of evidence to arbitration. The arbitral tribunal therefore ultimately has the power to determine the relevance, admissibility, materiality and the weight of any evidence placed before it.¹³⁸

Notwithstanding any agreement of the parties to the contrary, the Court may, upon application by any party, order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue to compel the attendance before any arbitral tribunal of a witness wherever he may be in Nigeria.¹³⁹ The Court may equally order that a writ of *habeas corpus ad testificandum* to bring up a prisoner for testimony before any arbitral tribunal.¹⁴⁰ The parties may submit with their statements all the documents, other evidence they consider to be relevant at the arbitral proceedings.¹⁴¹

As regards the question whether the tribunal may proceed *ex parte*, it depends on the fact of the particular case. If a hearing is adjourned with the knowledge of both parties and one of the

¹³⁶ 15(2) and (3) of the Act which is *in pari materia* Article 25(6) Arbitration Rules

¹³⁷ Idornigie, P. O., Op. Cit.

¹³⁸ Section 15(3), Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

¹³⁹ Section 23 (1), Ibid.

¹⁴⁰ Section 23 (2), Ibid.

¹⁴¹ Section 19(2), Ibid.

parties is absent on the adjourned date without reason, the arbitrator can proceed with the hearing.¹⁴² In *Lagos State Development and Property Corporation v. Adold/Stamm International (Nigeria) Ltd*,¹⁴³ the Supreme Court held that an arbitrator may proceed with a reference in the absence of one of the parties if he does not choose to attend. The party ought to have notice that the arbitrator will proceed *ex parte* in the case if he does not attend.

Unless otherwise agreed, the tribunal has powers to determine the extent of documents production. In practice, the parties generally produce those documents upon which they rely, and if necessary, request the production of certain documents from the opposing party. If one party has made a request to the other for the production of documents specified with particularity, and that party has refused to produce them, the arbitral tribunal will make it clear that it is likely to draw an adverse inference from the refusal to disclose the documents, unless a reasonable excuse is given.¹⁴⁴ The Court may also compel a party to produce documents in his custody. Every statement, document, or other information supplied to the arbitral tribunal shall be communicated to the other party by the party supplying it. Similarly every such information supplied by the arbitral tribunal to one party shall be supplied to the other. This includes any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision.¹⁴⁵

Expert testimony could be presented orally or by way of a written report. Unless dispensed with, expert witnesses must be available for cross-examination. An expert is expected to be impartial and independent.

¹⁴² Idornigie, P. O., Op. Cit. pp. 160-163

¹⁴³ (1994) 7 – 8 SCNJ 625 at 644

¹⁴⁴ See Mbadugha, J.N., International Commercial Arbitration: Choice Of Law/Venue –Issues To consider. *The Arbitrator (Nigerian Branch) Vol. 3 No. 1 January – March, 2006*. Available at: <http://www.mccarthymbadugha.com/article2.html>

¹⁴⁵ Section 20(3) and (4) of the ACA

2.3.10 Awards

An award may be final, interim, partial, agreed, additional, and interlocutory or default.¹⁴⁶

Both the arbitral tribunal and the courts have the power to grant interim relief. The interim relief available from the tribunal is in respect of measures for the conservation of the goods forming the subject matter of the dispute, such as ordering their deposit with a third person or the sale of perishable goods. Such interim measures may be established in the form of an interim award and the tribunal is entitled to require security for the costs of such measures. A request for interim measures addressed by any party to the Court shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.¹⁴⁷

The Act does not provide for anti-suit injunctions where proceedings are brought elsewhere in breach of an arbitration agreement. However, as provided in Sections 4 and 5,¹⁴⁸ upon the application of any party to an arbitration agreement, the Nigerian Courts will stay proceedings pending arbitration in a foreign forum. In *Owners of M.V. Lupex v. Nigerian Overseas Chartering and Shipping LTD*,¹⁴⁹ where clause 7 of the Charter Party provided for arbitration in London under English Law, a dispute arose and arbitration was commenced in London. In the course of the arbitration proceedings, the Respondent commenced proceedings at the Federal High Court, Lagos. The Appellant's application for stay of proceedings pending arbitration in London was refused. Its appeal to the Court of Appeal was dismissed, necessitating a further appeal to the Supreme Court. In granting the application for stay of proceedings pending the London arbitration, the Supreme Court held that so long as an arbitration clause is

¹⁴⁶ Idornigie, P. O., Op. Cit. pp.169-172.

¹⁴⁷ Section 13, and Article 26 of the Rules of Arbitration in Schedule 1 of the Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004 .

¹⁴⁸ Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004 .

¹⁴⁹ (2003) 15 NWLR (part 844) 469

retained in a valid contract and the dispute is within the contemplation of the arbitration clause, the court ought to enforce the arbitration agreement.

As regards the form of the award, ACA stipulates that an award must be in writing; it must be signed by all the arbitrators or a majority of them. It must detail the reasons for the decision, except where otherwise agreed by the parties. It must state the date and place of the award must be stated.¹⁵⁰

The Act does not specify the relief and remedies which the arbitrator can give in his award. However, in practice, the arbitrator can make awards for payment of money, of specific performance, of an injunction (where a third-party will not be affected), or of a declaration for the rights of one or both of the parties.¹⁵¹

2.3.11 Discontinuation of Arbitral Proceeding

Parties may decide to settle dispute on their own during the arbitral proceedings. Where this happens the arbitration proceedings are terminated by the issuance of the consent award. The tribunal may also terminate the proceedings if the claimant withdraws his claim and the respondent does not object to the withdrawal, or there is no legitimate reason for the proceedings to continue until a final settlement of the dispute. Parties may also agree on the termination of the proceedings. The Tribunal by itself, may also find that continuation of the proceedings has for other reason become unnecessary or impossible.

2.3.12 Challenging the Awards

Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.¹⁵² Other grounds for challenging an arbitrator

¹⁵⁰ Section 26 of the Act and Article 32 of the Rules provide for formal requirements of an award.

¹⁵¹ Ibid.

¹⁵² Section 45(3), Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004 .

are mental and physical incapacity, refusal or failure to properly conduct the proceedings or making the award.¹⁵³ The parties may determine the procedure to be followed in challenging an arbitrator's appointment. Where no procedure is determined by the parties, a party who intends to challenge an arbitrator shall send his notice of challenge within 15 days after the appointment of the arbitrator.

If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be made by the appointing authority.¹⁵⁴ 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 arbitration¹⁵⁵. Section 30¹⁵⁶ 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.¹⁵⁷

Under the Lagos law, there are also several grounds for setting aside an award.¹⁵⁸ The section incorporates the provision of section 48 of the Federal Act with some modifications and additions. The court may set aside an arbitral award if it finds that:

the dispute arises under an agreement that is invalid, nonexistent or ineffective; or the subject matter of the dispute is otherwise not capable of settlement by arbitration under the Laws of Nigeria; or the arbitrators or any of them received some improper payment, benefit or other consideration; the arbitrators do not possess the qualifications required by the Arbitration Agreement; the arbitrator

¹⁵³ Section 52(2), Ibid, contains an exhaustive list of the grounds for challenging an award.

¹⁵⁴ Section 45(9), Ibid.

¹⁵⁵ Section 29, Ibid.

¹⁵⁶ Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004 .

¹⁵⁷ Section 30(2), Ibid.

¹⁵⁸ Section 55 of the Lagos Arbitration Law lists the grounds for setting aside an arbitral award.

or arbitrators are guilty of any misconduct in the course of the proceedings; and the award is contrary to public policy”¹⁵⁹.

Thus, section 55 of the Lagos State Arbitration law essentially incorporates the grounds for setting aside under Part I and III of the Arbitration and Conciliation Act. The competence of the arbitrator, therefore, is tied to the integrity of the award.

2.3.13 Recognition and Enforcement of Domestic Arbitral Awards

The attitude of the Nigerian courts has been positive and encouraging to the recognition and enforcement of arbitration agreements. In *C.N. Onuselogu Ent. Ltd. v. Afribank (Nig.) Ltd*¹⁶⁰ the Court held that arbitral proceedings are a recognised means of resolving disputes and should not be taken lightly by both counsel and parties. However, there must be an agreement to arbitrate, which is a voluntary submission to arbitration.

Where there is an arbitration clause in a contract that is the subject matter of Court proceedings and a party to the Court proceedings promptly raises the issue of an arbitration clause, the Courts will order a stay of proceedings and refer the parties to arbitration. The Act 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.¹⁶¹

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.¹⁶²

The party seeking to enforce the award will apply to High Court within the jurisdiction where it wishes to enforce for recognition and enforcement of the award.¹⁶³ The application must exhibit

¹⁵⁹ Section 55(2)(viii)-(xii) of the Lagos State Arbitration Law, 2009.

¹⁶⁰ (2005) 1 NWLR Part 940 577

¹⁶¹ Section 31, Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004 .

¹⁶² Ibid.

¹⁶³ Ibid.

the original or a certified true copy of the arbitration agreement and the award. The other party must be put on notice and may then request the court to refuse recognition or enforcement of the award.

Grounds for refusal include incapacity of a party, there was an invalid arbitration agreement, there was lack of notice of the proceedings, there was lack of jurisdiction by the arbitral tribunal, there was improper composition of the arbitral tribunal, the subject matter was not proper for arbitration, that the award is not binding, was set aside or was suspended at origin, or dictates of public policy. Where an application for the refusal to recognize an award is before the court, the court may upon application stay execution of the award pending the determination of the application.

Although, the act is fraught with criticisms it has still been able to achieve some modest objectives, and the applications of the provisions have given arbitration practitioners a more understanding of the next steps to take in order to take arbitration to the next level in Nigeria. This is why the amendment of the flaws in the Act would not have come at a better time.¹⁶⁴

2.4 OTHER FORMS OF COMMERCIAL DISPUTE RESOLUTION MECHANISMS

There are several methods available for resolving disputes between two parties. The first and most important method is through litigation.¹⁶⁵ Since the coinage of the phrase-Alternative Dispute Resolution (ADR)¹⁶⁶ there has been a surge in the alternative dispute mechanisms to court. As a means of non adversarial system, alternative dispute resolution (ADR) is a phrase and

¹⁶⁴ There is currently a Bill before the National Assembly for the amendment of the Act.

¹⁶⁵ Agarwal, V., "Alternative Dispute Resolution Methods" A paper written following a UNITAR sub-regional workshop on Arbitration And Dispute Resolution, Harare, Zimbabwe, from 10-15 September, 2000
[:http://www.unitar.org/dfm](http://www.unitar.org/dfm)

¹⁶⁶ In 1976 by Professor Frank E.A. Sander, professor of law at Harvard University.

much talked about mechanism at almost every legal system varying from adversarial to inquisitorial one.¹⁶⁷

Arbitration is a form of alternative dispute resolution mechanism or simply Dispute Resolution (DR)¹⁶⁸ a range of processes which serve as alternatives to arbitration and litigation for the resolution of disputes. More often than not, disputants involve a neutral and impartial third party who assists them to reach a settlement. Generally, arbitration is distinguished by the fact that the arbitration decides the dispute, whereas conciliation and mediation only aim to assist the parties to reach a settlement of the dispute.¹⁶⁹ Negotiation, conciliation and mediation are the other methods of resolving disputes as discussed below.

2.4.1 Arbitration and Litigation

Arbitration is an adjudicative dispute settlement process, and the decision binding, just as litigation in the law court. Litigation is a process which takes place in court rooms, which are open to public. Any member of the public can enter a court room and can watch court proceedings of any case. Arbitration proceedings take place in private. They are not public proceedings in order to ensure confidentiality.

While litigation is an adversarial, formal and inflexible process, arbitration is less adversarial, less formal and a more flexible process. Parties have wide range of options in line with parties' freedom to contract. In litigation, rules of evidence and procedure have to be strictly

¹⁶⁷ Joachim, K. "Pros and Cons of Adversarial v. Inquisitorial Adjudication" retrieved from: <http://www.ajia.org.au/online/docs/mason.doc> on 13/10/2014

¹⁶⁸ In an interaction with Professor Humphrey Nwosu the researcher got convinced that it is better to see these dispute(s) resolution mechanisms as independent of each other rather than see them as alternative to litigation. In this sense, litigation is put at the same level with other dispute resolution mechanisms. Indeed there are disputes requiring the employment more than one method to be dealt with.

¹⁶⁹ Retrieved from: http://sixthformlaw.info/01_modules/mod1/1_1_civil_courts_adr/1_1_2_alternatives/01_introduction.htm on 15/06/2013

followed. While in arbitration the arbitrators determine the rules to be adopted in admitting evidence.

Similarly, in litigation, the parties have no voice in the process of selection of judges. They are appointed and paid by the State. Such judges are not usually specialists in any particular branch of law or subject. They deal with all kinds of cases. However, the arbitrators and other persons helping in the resolution of disputes through alternative means are selected and paid by the parties. The parties have a choice to prescribe their technical and other qualifications and experience or they can insist that the person having expertise in any particular discipline may alone be appointed.

2.4.2 Negotiation

This is a voluntary and informal process by which the parties to a dispute reach a mutually acceptable agreement. As the name implies parties seek out the best options for each other which culminates in an agreement. At their option, the process may be private. In this process, they may or may not use counsel and there is no limit to the argument, evidence and interests, which may be canvassed.¹⁷⁰

It is the simplest form of ADR, and is usually the first step in resolving any conflict. With negotiation, the two parties sit down together and discuss the issue(s) in dispute, in trying to come up with a solution that both see as beneficial to them. Here, there is no third party who facilitates the resolution process or imposes a resolution.¹⁷¹ The process involves

¹⁷⁰ Owasanoye, B., "Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa" A paper written following a UNITAR sub-regional workshop on Arbitration And Dispute Resolution, Harare, Zimbabwe, from 10-15 September, 2000 :<http://www.unitar.org/dfm>

¹⁷¹ See Helping People Help Themselves, in Negotiation Journal July 1990, pp. 239–248.

“communication for the purpose of persuasion.” Parties exchange proposals and demands, make arguments, and continue the discussion until a solution is reached, or an impasse declared.¹⁷²

The approaches, procedures and techniques vary with each negotiation, depending on the nature of the issues being negotiated, the parties to the negotiation together with their skill, knowledge and experience. There are basically three approaches to resolving dispute in negotiation, each with a different orientation and focus – interest-based, rights-based, and power-based – and they can result in different outcomes.¹⁷³

2.4.2.1 Interest-Based Negotiation

In interest based negotiation, the approach shifts the focus of the discussion from positions to interests. Because there are many interests underlying any position, a discussion based on interests opens up a range of possibilities and creative options, whereas positions very often cannot be reconciled and may therefore lead to a dead end. The dialogue on interest should be transparent, in order for the parties to arrive at an agreement that will satisfy the needs and interests of the parties. While interest-based negotiations have the potential of leading to the best outcomes, the parties may not adopt it, and therefore we often find that negotiations are “rights-based” or “power-based”.¹⁷⁴

2.4.2.2 Rights-Based Negotiation

When negotiations between parties fail, the parties may then attempt to resort to what they consider to be their rights. This means appealing to the court (local, national, or international) and will result in a legal process in which the law is the dominant

¹⁷² Goldberg S. B.; Sander, F. E. A.; and Rogers, N. H. (1995), *Dispute Resolution: Negotiation, Mediation, and other Processes*. Little Brown, Boston, p.13.

¹⁷³ Ury W., Brett J. and Goldberg S. (1993), *Getting Dispute Resolved*. PON, Harvard University Press, Boston, p. 34.

¹⁷⁴ Ibid

feature.¹⁷⁵ Resorting to threat or even violence as a way of communication for the purpose of persuasion is called power-base. Rights-based and power-based approaches are used at times when parties cannot or are not willing to resolve their issues through interest-based negotiation.¹⁷⁶

Negotiations are also characterized by polarity between two extremes: competition – cooperation and opposing interests – common interests. Competition and opposing interests lead to a requirement by the parties to divide the assets or resources under dispute. They lead to “dividing the pie” or “claiming value”. In other words, a “zero-sum game”.¹⁷⁷ On the other hand, when negotiations are based on cooperation and identification of common interests, this can lead to seeking opportunities for “increasing the pie” (which is also called “creating value”). When negotiations are based on common interests, cooperation, and joint problem solving, this is called the “integrative or collaborative model”.¹⁷⁸

It is useful for parties to negotiate over a number of issues or resources, since they can try to create value and maximize benefits by tradeoffs between them. This is because the order of priority among these issues for one party may differ from that of the other and provide an opportunity for exchanges. Therefore, the parties often find ways to increase gains through creativity, originality, and linkage between issues to enlarge the overall pie, thereby creating value.¹⁷⁹

Negotiation based on “rights” or “power” fall under the “adversarial, distributive, or competitive model,” where the parties try to get the best deal for themselves at a cost to the

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Goldberg S. B., Op. Cit.

¹⁷⁸ This model was developed at PON (the Project on Negotiation) at Harvard University in the early 1980s. See Ury W., Brett J., and Goldberg S. *Getting Dispute Resolved*. PON, Harvard University Press, Boston (1993), p. 34

¹⁷⁹ Goldberg S. B., Op. Cit.

others. A gain for one side means a loss for the other. Living in a society in which competition is part of the daily experience, we tend to think of competition as the only way to reach our goals. Competition is almost always at the expense of someone else. In the “conventional way,” a negotiation is “zero sum game” – whatever one side wins the other side loses. Both of the parties assume that it would be best to ensure that they end the negotiation at the positive side of the

The reason to negotiate is to produce something better than the results that you can obtain without negotiation. The goal is to reach an agreement that is acceptable to all parties, to which they remain committed, and which they can indeed implement. This is the essence of interest-based negotiations, which has the following principles. The first is interests and needs, which include food, shelter, security; desires, aspirations, fears, hopes, and concerns. Positions are what we want and demand. The interests are the reasons behind the position. In negotiating on the basis of interests, parties will need to: distinguish between positions and interests; move from positions to interests; list all the interests according to priority; think of positions as only one of many solutions to the problem.¹⁸⁰

Secondly, the alternative that yields the best outcome is called the Best Alternative to a Negotiated Agreement (BATNA). If any of the alternatives without negotiation is better than the deal on the negotiating table, you will obviously go to the best alternative. If however the deal on the table is better than any of your alternatives, it will be your BATNA. It is important to make sure that the alternatives are indeed realistic, and try to improve your BATNA, because the BATNA influences the way in which you conduct the negotiations.¹⁸¹

2.4.3 Conciliation

¹⁸⁰ Fisher, R., Ury, W., and Patton, B. (1991). *Getting to Yes*. Penguin, London.

¹⁸¹ Fisher, R., Ury, W.; and Patton, B. (1991), *Getting to Yes*. Penguin, London, pp 7-10. See also Faure, G. and Rubin, J. (1993), *Culture and Negotiation*. Sage Publications. London, p. 45.

Conciliation is an effective means of alternative dispute resolution and can be usefully deployed for both international as well as domestic disputes, except that in the conciliation of an international dispute, certain facts assume greater importance than they would in a domestic conciliation. It is defined as,

...a process by which one or more independent person(s) selected by the parties to an agreement generally by mutual consent, either at the time of making the agreement or subsequently when a dispute has arisen between them, to bring about a settlement of their dispute through consensus between the parties by employing various persuasive and other similar techniques.¹⁸²

It is essentially the process by which one or more independent person(s) selected by the parties to an agreement generally by mutual consent, either at the time of making the agreement or subsequently when a dispute has arisen between them, to bring about a settlement of their dispute through consensus between the parties by employing various persuasive and other similar techniques.¹⁸³ It is also seen as a “mechanism used to discover whether there is room for the parties to a dispute to make up”.¹⁸⁴

Conciliation is a less formal form of arbitration.¹⁸⁵ Essentially, the conciliator discusses the dispute with the parties and then prepares a solution based on what he or she as the conciliator considers being a just compromise. The solution presented to the parties is reviewed with all relevant documents after which the conciliator meets with the parties separately for oral presentation of their cases. The conciliator may consult the parties privately as often as necessary to reach a solution. The proceedings are therefore flexible enough to accommodate this process.

¹⁸² Agarwal, V.K. “Alternative Dispute Resolution Methods” Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution, Harare, Zimbabwe 11 to 15 September, (2000), p.9. Available at: www.unitar.org/dfm

¹⁸³ Owasanoye, B., op. cit., p.14.

¹⁸⁴ Ibid, p.16.

¹⁸⁵ Goodluck, O.O., *Alternative Dispute Resolution and Some Contemporary Issues: Legal Essays In Honour of Hon. Justice Ibrahim Tanko Muhammad CON.* Aliyu, A.A., et al. (Ed.) M.O. Press and Publishers, Kaduna, 2010, p. 256.

The conciliator tries to satisfy both parties. In doing this he or she looks for a consensus and while not dictating a solution to the parties, nevertheless crafts one for them. In effect, the conciliator may be regarded as designer of the solution. This may be contrasted with mediation where the parties are guided to design their own solution.¹⁸⁶

Conciliation is also governed by the Arbitration and Conciliation Act. It is a process of confidence and faith. This process does not require an existence of any prior agreement¹⁸⁷ and conciliation process can be commenced by either party to the dispute.¹⁸⁸ When one party invites the other party for resolution of their dispute through conciliation, the conciliation proceedings are said to have been initiated. When the other party accepts the invitation, the conciliation proceedings commence. If the other party rejects the invitation, there are no conciliation proceedings for the resolution of that dispute.¹⁸⁹ As provided by the act, “the conciliation proceedings shall commence on the date the request to conciliate is accepted by the subject of the dispute”.¹⁹⁰

The sole conciliator is appointed by the parties by mutual consent. If the parties fail to arrive at a mutual agreement, they can enlist the support of any international or national institution for the appointment of a conciliator. There is no bar to the appointment of two or more conciliators. In conciliation proceedings with three conciliators, each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent.¹⁹¹

Any party can request the other party to appoint a conciliator. One conciliator is preferred but two or three are also allowed. In case of multiple conciliators, all must act jointly. The act

¹⁸⁶ Owasanoye, B., Op. Cit., p. 17

¹⁸⁷ Section 37, Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

¹⁸⁸ Section 38 (1), Ibid.

¹⁸⁹ Agarwal, V.K., Op. Cit., p.10.

¹⁹⁰ Section 39, Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

¹⁹¹ Agarwal, V.K., Op. Cit., p.10.

only allows for one or three conciliators. Where the request to conciliate under section 38 has been accepted, the parties shall refer the dispute to a conciliation body consisting of one or three conciliators to be appointed- (a) in the case of one conciliator, jointly by the parties; (b) in the case of three conciliators- (i) one conciliator by each party, and (ii) the third conciliator jointly by the parties.¹⁹²

Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not termed as presiding conciliator. He is just the third conciliator. The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner. He is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

Parties may submit statements to the conciliator describing the general nature of the dispute and the points at issue. Each party sends a copy of the statement to the other.¹⁹³ The conciliator may request further details, may ask to meet the parties, or communicate with the parties orally or in writing. The conciliation body shall acquaint itself with the details of the case and procure such other information it may require for the purpose of settling the dispute. The parties may also appear in person before the conciliation body and may have legal representation.¹⁹⁴

The conciliator is not bound by the rules of procedure and evidence. The conciliator does not give any award or order. He tries to bring an acceptable agreement as to the dispute between the parties by mutual consent. The agreement so arrived at is signed by the parties and

¹⁹² Section 40, Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

¹⁹³ Section 38(2), Ibid.

¹⁹⁴ Section 41, Ibid.

authenticated by the conciliator. In some legal systems, the agreement so arrived at between the parties resolving their dispute has been given the status of an arbitral award.¹⁹⁵ When it appears to the conciliator that elements of settlement exist, he may draw up the terms of settlement and send it to the parties for their acceptance. If both the parties sign the settlement document, it shall be final and binding on both¹⁹⁶.

If no consensus could be arrived at between the parties and the conciliation proceedings fail, the parties can resort to arbitration.¹⁹⁷ A conciliator is not expected to act, after the conciliation proceedings are over, as an arbitrator unless the parties expressly agree that the conciliator can act as arbitrator. Similarly, the conciliation proceedings are confidential in nature. Rules of Conciliation of most of the international institutions provide that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, (a) the views expressed or suggestions made for a possible settlement during the conciliation proceedings; (b) admissions made by any party during the course of the conciliation proceedings; (c) proposals made by the conciliator for the consideration of the parties; (d) the fact that any party had indicated its willingness to accept a proposal for settlement made by the conciliator; and that the conciliator shall not be produced or presented as a witness in any such arbitral or judicial proceedings.¹⁹⁸

2.4.4 Mediation

Mediation is a voluntary, non-binding, private dispute resolution process in which a neutral person, the mediator, helps the parties to reach their own negotiated agreement. A third party, the mediator assists the parties to negotiate their own settlement. In some cases, mediators

¹⁹⁵ Ibid

¹⁹⁶ Goodluck, O.O., op. cit. p. 271. Note that in USA, this process is similar to Mediation. However, in a lot of common law jurisdictions, Mediation is different from Conciliation and is a completely informal type of ADR mechanism

¹⁹⁷ Section 42(3)(a), Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004.

¹⁹⁸ Agarwal, V.K., Op. Cit., p.10.

may express a view on what might be a fair or reasonable settlement, generally where all the parties agree that the mediator may do so¹⁹⁹. The mediator is not given any power to impose a settlement. His role is to try to break any impasse.²⁰⁰ The mediator may act as a shuttle diplomat or one who acts as a channel for communication between the two parties and help filter out the emotional elements to allow the parties to focus on their main objectives.²⁰¹

Mediation has a structure, timetable and dynamics that ordinary negotiation lacks. The process is private and confidential. The presence of a mediator is the key distinguishing feature of the process. There may be no obligation to go to mediation, but in some cases, any settlement agreement signed by the parties to a dispute will be binding on them.

Parties to a dispute may seek mediation when they are ready to discuss a dispute openly and honestly. Usually in a dispute, there are varying degrees of interests and concerns. Therefore, it is usual that a trade off may be made in a creative manner which a court may not consider. The underlying factor in mediation is that the parties have bargaining power and that a continuing relationship is essential after the dispute. Therefore trial is to be avoided.²⁰²

In view of the factors recounted above, a neutral party, the mediator, is brought in to help the parties find a solution to a dispute. The person controls the process, while the parties control the outcome. A mediator cannot impose a decision on the parties. In a typical mediation session, the mediator opens the session by declaring how the session will run, who will speak, when, for how long and the length of the session. The parties are requested to confirm their good faith and trust in the process and to agree that all that will be said will be confidential and therefore inadmissible in any subsequent proceeding. After this, parties take turn to state their views of the

¹⁹⁹ Boulle, L., op. cit.

²⁰⁰ Ibid.

²⁰¹ Retrieved from: http://www.hkiac.org/show_content.php?sec=1 on 16/3/2014.

²⁰² Ibid

dispute. The mediator asks for clarification as may be necessary. If necessary, the mediator may meet with the parties separately in a confidential caucus to assess position, identify real interest, consider alternatives or help generate a possible solution. This is called shuttle mediation. The process may involve several sessions before a solution is arrived at. Mediation may be of different types but three popular variations are the rights based mediation which focuses on legal rights of the parties, the interest based mediation which focuses on the interests and compelling issues of the dispute and therapeutic mediation which focuses on the problem solving ability of the parties or the emotional aspects of the dispute.²⁰³

A successful mediation affords the parties an opportunity to generate a creative solution to their dispute in a manner that focuses on the future and not the past. Its major benefits include that they control the process, choose their mediator and avoid trial.²⁰⁴ Conciliation and Mediation are two terms which are frequently used interchangeably. Both involve the appointment of a third party to help disputing parties reach a settlement.²⁰⁵

²⁰³ Asuozu A.A, op. cit. p.26

²⁰⁴ Owasanoye, B., op. cit. p.17

²⁰⁵ Retrieved from: http://www.hkiac.org/show_content.php?sec=1on16/3/2014. The Arbitration and Conciliation Act considers it to be a stepping stone to arbitration. S. 42(3)(a) states that where the parties do not agree with the terms of settlement drawn up by the conciliator they may submit the dispute to arbitration in accordance with any agreement between them.

CHAPTER THREE

AN ANALYSIS OF THE LEGAL FRAMEWORK GOVERNING INTERNATIONAL COMMERCIAL ARBITRATION IN NIGERIA

3.1 Introduction

The history of the legal regulatory framework for arbitration in Nigeria can be traced back to Arbitration Ordinance of 1914,¹ which modelled after the English Arbitration Act of 1889.² In 1965, Nigeria ratified the ICSID Convention.³ In 1970, Nigeria acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1970,⁴ adopting the commercial and reciprocal reservations. This remained the situation, until 1988 when the Arbitration and Conciliation Act⁵ was enacted as the primary legislation governing the enforcement of arbitration agreements in Nigeria. It governs international⁶ arbitration proceedings and applies throughout the Federation of Nigeria. The ACA is modelled on the 1985, United Nations Model Law on International Commercial Arbitration. The combination of these laws ensures a level of uniformity for international practice, and to give effect to Nigeria's commitment in the international arbitration forum, particularly, the New York Convention.

International commercial disputes can be resolved through various methods of dispute resolution. The first is usually through litigation in conventional courts. But for so many reasons the process in national courts has proved antithetical to quick and satisfactory resolution of

¹ Of 31st December 1914.

² It was re-enacted as arbitration ordinance of 1958, Cap 13, LFN, 1958. See Akinbote, A. Arbitration in Africa - the State of Arbitration in Nigeria. A Paper Presented at the 2008 Colloquium of the Association for the Promotion of Arbitration in Africa Held at Djeuga Palace Hotel, Yaounde from 14th – 15th January, 2008.

³ Convention on the Settlement of Investment Disputes Between States and Nationals of other States, 1965 (ICSID Convention) on 23rd August, 1965.

⁴ Of 1958 on 17 March, 1970.

⁵ Cap A19, Laws of the Federation of Nigeria, 2004; formally Arbitration and Conciliation Decree No. 11 of 1988. Passed into law on the 4th March, 1988.

⁶ Part III relates to international commercial arbitration.

international commercial disputes, especially in Nigeria.⁷ This led to the development and adoption of other alternative means⁸ of resolving such usually complex disputes. More often, two or more of these methods are employed in order to effectively resolve such conflicts arising from international commercial transactions.

International commercial arbitration has evolved over time, with different trends suggesting improved patronage. As Lord Hoffman remarked,

people engaged in commerce choose arbitration in order to be outside the procedures of any national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers.⁹

International commercial arbitration is a daily occurrence around the world. Many of such arbitrations take place in different venues across the Globe, even where the subject matter of the disputes and the parties thereto have no connection with the venue.¹⁰

International commercial arbitration refers to the resolution of cross-border transaction disputes. Where the parties have their places of business in different states; or where the place of arbitration, or the substantial part of performance of the contract, or the place of the subject matter of the dispute is most closely connected, is in another state¹¹, then such form of commercial arbitration is “international”. International commercial arbitration conventions and rules are identical in many respects.¹² A relatively simple and straightforward international

⁷ See generally Igbanugo, A.H., “Managing Alternative Dispute Resolution and International Commercial Litigation within the Microcosm of Sub-Saharan Africa’s Business and Legal Culture”. Retrieved from: http://www.igbanugolaw.com/News_Articles/Sub-Saharan-Africa-News-Articles-/Managing-ADR-Litigation-in-SSA.pdf on 07/06/2014

⁸ The prominent types being arbitration, conciliation, mediation and negotiation.

⁹ *West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà SPA (2007) UHHL 4 at 17*

¹⁰ Ogundipe, B. O. “Developing Nigeria into an International Arbitration Centre” Paper delivered at the Second Business Law Conference of the NBA, Section on Business Law on March 13, 2007.

¹¹ Article 1(3), UNCITRAL Model Law on International Commercial Arbitration, 1985.

¹² Idonigie, P.O (2002). The Legal Regime of International Commercial Arbitration (Unpublished PhD dissertation). University of Jos, Nigeria, p. 96.

commercial arbitration may require reference to as many as four different systems or rules of law. There will be the law that governs the recognition and enforcement of the arbitral agreement. Second, there is the law that regulates the actual proceedings themselves. Third, there is the law or set of rules that the arbitral tribunal must apply to the substantive matters in dispute. Finally, the law that governs recognition of the award may also be different.¹³

How friendly are the Nigerian arbitration laws so as to set it up as a hub for international commercial arbitration? In the recent past, there have been growing concerns about the satisfactory outcome of international commercial arbitrations in Nigeria, ranging from the enforceability of arbitration clauses in commercial agreements, to the perceived sluggishness of the national courts in dealing with interim applications, enforcement of the final award and other matters.¹⁴ This chapter therefore attempts an analysis of the legal infrastructure for the recognition and enforcement of foreign arbitral awards in Nigeria. This is done with emphasis on appointment of arbitrators, substantive and procedural laws governing the arbitration, procedure and grounds for the setting aside foreign arbitral award and the implication of costs in international arbitrations.

3.2 LEGAL FRAMEWORK FOR INTERNATIONAL ARBITRATION IN NIGERIA

International commercial arbitration can only work effectively where it is supported by appropriate systems of laws and legal systems. This form of arbitration started without arbitral conventions and rules. However, with the growth of arbitral institutions, there was reciprocal growth in arbitral conventions¹⁵ and institutions with their own rules.¹⁶ Geneva Protocol on

¹³ Ogundipe, B. O., Op. Cit.

¹⁴ Mayomi, K. Arbitrating in Nigeria? *Global Arbitration Review*, 2010 Vol. 5, Issue 5, p.3.

¹⁵ They are: Geneva Protocol of 1923, Geneva Convention of 1927, New York Convention of 1958, Geneva Convention of 1961, Paris Agreement of 1962 and the Washington Convention of 1965.

Arbitration Clauses and Geneva Convention on the Execution of Foreign Arbitral Awards were the earliest attempts at regulating the administration of international commercial arbitration. We will now examine the various laws applicable to international commercial arbitration in Nigeria.

3.2.1 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).¹⁷

The growing importance of international arbitration as a means of settling international commercial disputes demanded a legal platform for the provision of common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards; hence, the enactment of the New York Convention. The Convention is open to accession by any Member State of the United Nations, any other State which is a member of any specialized agency of the United Nations, or is a Party to the Statute of the International Court of Justice.¹⁸ This Convention is adopted as the Second Schedule of the Arbitration and Conciliation Act.¹⁹ It was ratified in accordance with section 12 of the Nigerian Constitution.

(1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

¹⁶ The popular ones include, International Chamber of Commerce (ICC) Rules (1998), UNCITRAL Arbitration Rules (1976), London Court of International Arbitration Rules (1998), the American Arbitration Association Rules (1), German Institution of Arbitration Rules (1992), the Geneva Chamber of Commerce and Industry Arbitration Rules (1992), Japan Commercial Arbitration Association: Commercial Arbitration Rules (1992), Milan Chambers of National and International Arbitration: International Arbitration Rules (1996), Permanent Court of Arbitration (The Hague) Optional Rules for Arbitrating Disputes between two parties of which one is a State (1993), WIPO Arbitration Rules (1994), International Commercial Arbitration Court (Moscow) (1995) and China International Economic Trade and Arbitration Commission Rules (1995).

¹⁷ Available at: <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>

¹⁸ See Articles 8 and 9 of the New York Convention

¹⁹ CAP. A19, Laws of the Federation of Nigeria, 2004.

(3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.²⁰

In further giving effect to the above constitutional provision, Section 54 of ACA,²¹ provides as follows:

(1) Without prejudice to section 51 and 52 of this Act, where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the Convention on the Recognition and Enforcement of Foreign Awards (hereafter referred to as "the Convention") set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any contracting state:

(a) provided that such contracting state has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention;

(b) that the Convention shall apply only to differences arising out of legal relationship which is contractual.²²

Therefore, as the name suggests the Convention is not concerned with the formulation of legal rules regulating international commercial arbitration, but with the recognition and enforcement of foreign arbitral awards. Under the Convention, an arbitration award rendered in any of the contracting states can be enforced in other contracting states²³ on the basis of reciprocity.²⁴ Nigeria has made the reciprocity reservation so that only awards made in a contracting state, which undertake to recognise and enforce awards made in other contracting states, including Nigeria, will be recognised and enforced in Nigeria. The reciprocity reservation apparently

²⁰ Section 12, Constitution of the Federal Republic of Nigeria, 1999, CAP. C23 L.F.N. 2004 (as amended).

²¹ Cap A19, Laws of the Federation of Nigeria, 2004. When the Convention came into effect on 10 June, 1958, Nigeria was not a subject of international law but an object. Nigeria being a colony of Britain then could not have acceded to it. However, Nigeria acceded to it on 17th March, 1970 and with the promulgation of the Arbitration and Conciliation Act in 1988, the Convention was made the Second Schedule to the Act. See Idornigie P. O., Op. Cit., p. 96

²² See article 1(1) of the New York Convention and *IPCO (Nigeria) Ltd. V. NNPC (2008) EWHC 797*, Per Tomlinson J.

²³ As at June 2014, 148 Of the 193 UN members have adopted the New York Convention. See more at: <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>

²⁴ See article 1(3) of New York Convention.

narrows the scope of the New York Convention.²⁵ A novel implication of adoption of the Convention is that where,

the court of a contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.²⁶

Based on this provision, the Court of Appeal held that a lower court should not, in the exercise of its jurisdiction, subvert the submission of the parties to arbitration for the resolution of a dispute.²⁷ The Convention is the foundation stone on which the entire edifice of international commercial arbitration is built. As at today, 156 states have ratified the Convention,²⁸ thereby committing themselves to recognizing arbitral agreements and awards. The implication is that where one of the parties requests it, referring the parties to arbitration, even when the arbitration is to take place in a foreign country, domestic courts will not exercise jurisdiction over the substance of the dispute so long as either party insists upon the arbitration clause.²⁹

In the same vein, parties to the New York Convention have agreed that they will “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure”³⁰ in force in the State. Those rules may not contain “substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies, than are imposed on the recognition or enforcement of domestic arbitral awards”.³¹ The requirements for the enforcement of an award are limited to (a) the duly

²⁵ Ezejiofor, G. *The Law of Arbitration in Nigeria*. Longman, Lagos, (1997), p. 178.

²⁶ Article 2 (3) - New York Convention

²⁷ *Owena Bank Ltd. v. Vit Construction Ltd., Niger Consultants (2000) FWLR (pt. 24) 1439*

²⁸ Retrieved from: www.newyorkconvention.org/countries. on 21/2/2015

²⁹ UNCTAD, *Dispute Settlement*, Op. Cit., p. 29.

³⁰ Article 3 New York Convention.

³¹ Ibid

authenticated original award or a duly certified copy thereof and (b) the original agreement referred to or a duly certified copy thereof. If either the award or the agreement is not in an official language of the State where the award is relied upon, a certified translation into the appropriate language must be submitted.³²

The convention recognises any previous agreements entered into under the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, and at the same states that the two “shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention”.³³ Article 10 of the Convention states that accession shall be open to all states, which shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations. In a similar manner, it provides for denunciation by a written notification to the Secretary-General of the United Nations.³⁴

Under the convention foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. Similarly, pursuant to the convention parties are required to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

3.2.2 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration³⁵

³² Article 4, *ibid.* see also UNCTAD, *Dispute Settlement*, p. 29.

³³ Article 7(2)

³⁴ Article 8, *ibid.*

³⁵ Adopted on the 21st of June, 1985, and amended on 7th July, 2006.³⁵ Adopted by Nigeria in 1990, and has influenced gravely the provisions of the Arbitration and Conciliation Act.

National Laws on arbitral procedure differed widely. Frustration, uncertainty, unexpected and undesired consequences flowed from the disparity between National Laws.³⁶ The cure lies in meeting the special needs of modern international arbitration practice by a good and comprehensive legal climate for international commercial arbitration and as a basis for harmonization of the presently disparate National Laws.³⁷

The Model Law, therefore, provided a basis for the harmonization and improvement of the National Laws. It covers all stages of arbitration from the arbitration agreement to the recognition and enforcement of the arbitral award. The provisions aim at reducing or eliminating the identified frustrations and difficulties. The legal regime presented by the Model Law is geared towards international commercial arbitration without affecting any relevant treaty in force in any state adopting the Model Law.³⁸

It has to be underscored that the Model Law is a “model” and not a convention/treaty. Adopting the Model Law gives the various states the flexibility whereas a convention would have meant either ratification or rejection with limited flexibility built in by way of reservation clauses. The beauty of the Model Law lies in its attractiveness.³⁹ The Model Law is an international formulation with global representation. This is so because representatives from all regions, economic blocks and legal systems participated in the work of the Commission.⁴⁰ Bulk of the national law⁴¹ regulating arbitral proceedings in Nigeria is a copious adoption of the model law provisions.

³⁶ Idornigie, P. O., Op. Cit., p. 90.

³⁷ Sarcevic, P. (ed.) (1989), *Essays on International Commercial Arbitration*, Graham & Trotman, London, p.9.

³⁸ Ibid, p. 91.

³⁹ Ibid, p. 93.

⁴⁰ Ibid, p. 94.

⁴¹ Arbitration and Conciliation Act.

There have been significant changes since the promulgation of the Model Law by UNCITRAL in 1985. The Model Law grants of authority to the parties and to the arbitral tribunal to design and blend the procedure to their peculiarities. In doing so however, there must be adherence to the principle that, “parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”⁴² The model law further restricts the involvement of the national courts. Thus, “in matters governed by this Law, no court shall intervene except where so provided in this Law.”⁴³ Today, even those states yet to adopt the model laws of arbitration have often been heavily influenced by it.⁴⁴ The consequence is that there is a growing harmonization of the law governing international commercial arbitration with all the positive consequences for parties, their representatives and the arbitrators that follow.

3.2.3 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules⁴⁵

The most significant aspect of the UNCITRAL Arbitration Rules is that they are just rules, but no secretariat or other institutional backup. Arbitration under the UNCITRAL Rules is essentially a bilateral process. The rules were primarily developed for use in *ad hoc* arbitrations but have been broadly accepted in both *ad hoc* and institutional arbitrations. They have also been widely used in investor-state and state-state arbitration.⁴⁶

The law of the state of the place of arbitration governs the possible review of arbitral awards rendered in that state by its national courts. This is contemplated by the UNCITRAL Rules, which provide that “These Rules shall govern the arbitration except that were any of these

⁴² Article 18 Model Law.

⁴³ Article 5 Model Law .

⁴⁴ Sarcevic, P., Op. Cit., p. 31. See also UNCTAD, Dispute Settlement, Op. Cit., p. 30

⁴⁵ Arbitration Rules which were adopted by the Commission in April, 1976 and unanimously approved by the United Nations General Assembly in December, 1976.319. see UN General Assembly Resolution No. 31/98 of 15 December, 1976

⁴⁶ Jones, D. , Op. Cit.

Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.”⁴⁷

In Nigeria, the Rules find application under the Arbitration Rules set out in the First Schedule of Arbitration and Conciliation Act. Thus, Section 53 provides that:

Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rule acceptable to the parties.⁴⁸

Essentially, there are minor differences between them. Where parties to arbitral proceedings have submitted their disputes to arbitration under the auspices of one of the established arbitral institutions, the UNCITRAL Arbitration Rules do not apply because older institutions in the developed countries have their own rules. Ordinarily they will not resort to the UNCITRAL Arbitration Rules. However, the UNCITRAL Arbitration Rules are generally used for *ad hoc* arbitration in contradistinction to other institutional arbitrations. This is not to say that the other institutions do not use them but that the third world countries are the main beneficiaries. Quite unlike other institutional rules with either professional or regional representation, the UNCITRAL Rules had global representation in their formulation and this involvement ensures global acceptability⁴⁹

In 2010⁵⁰ new rules were adopted, modifying some of the provisions to reflect, some major changes regarding the evolution of arbitration procedure in line with technological advancements in the last three decades, particularly the drafting process of arbitration clauses. Secondly, to also reflect the suggestion of the designation of the Permanent Court of Arbitration

⁴⁷ Article 1(1) UNCITRAL Arbitration Rules

⁴⁸ Cap A19, Laws of the Federation of Nigeria, 2004.

⁴⁹ Idornigie, P. O., Op. Cit., p.103.

⁵⁰ 15th August.

in The Hague (PCA) and it is extended powers as an appointing authority under the rules. Thirdly, to effect a number of changes concerning the arbitral procedure with a view to increasing efficiency and some further general changes.⁵¹

3.2.4 Arbitration and Conciliation Act

The Arbitration and Conciliation Act (ACA)⁵² was enacted as the primary legislation governing the enforcement of arbitration agreements in Nigeria. It governs both domestic⁵³ and international⁵⁴ arbitration proceedings with separate provisions for each. Arbitration and Conciliation Act (ACA) applies throughout the Federation of Nigeria. The ACA is modelled on the 1985, United Nations Model Law on International Commercial Arbitration.

With the implementation⁵⁵ of the convention by the Arbitration and Conciliation Act, 1988;⁵⁶ specifically, sections 51 and 52 of the ACA deal with the same subject as Articles 4 and 5 of the New York Convention in respect of the recognition and enforcement of foreign arbitral awards as well as the grounds for the refusal of recognition and enforcement of foreign awards.

Part III of the ACA, comprising of Sections 43 – 55, deals solely with International Commercial Arbitration in addition to the other provisions therein.⁵⁷ It includes Appointment

⁵¹ Jones, D. and Zahara, T., Op. Cit. p35.

⁵² Cap A19, Laws of the Federation of Nigeria, 2004; formally Arbitration and Conciliation Decree No. 11 of 1988.

⁵³ The First Schedule to the ACA contains arbitral rules that govern the procedure of arbitration proceedings. Whereas these rules are binding and must be applied in domestic arbitrations, they only apply by default to international arbitrations, where parties to an arbitration agreement have not expressly agreed a different set of rules such as the ICC, LCIA or UNCITRAL rules for example).

⁵⁴ Part III relates to international commercial arbitration

⁵⁵ The New York Convention has been domesticated in Nigeria and the convention forms part of the Arbitration and Conciliation Act as Schedule II.

⁵⁶ Nigeria: Arbitration Practice Area Review SEPTEMBER 2012 Dorothy Udeme Ufot. Retrieved from: <http://www.whoswholegal.com/news/features/article/29899/nigeria-arbitration-practice-area-review/> on 23/4/2013

⁵⁷ As stated in section 43, that “the provision of this Part of this Act shall apply solely to cases relating to international commercial arbitration and conciliation in addition to the other provisions of this Act”.

and Challenge of arbitrators, rules applicable to the substance of dispute, *lex arbitri*, setting aside of arbitral award, costs, recognition and enforcement of awards.⁵⁸

3.2.5 Convention on the Settlement of Investment Disputes Between States and Nationals of other States, 1965 (ICSID Convention).

Nigeria acceded⁵⁹ to the World Bank Convention for the Settlement of Investment Disputes, 1965. This was done by domestication pursuant to Section 12, Constitution of the Federal Republic of Nigeria.⁶⁰ Nigeria further enacted the International Centre for the Settlement of Investment Disputes (Enforcement of Awards) Act,⁶¹ to provide for the enforcement ICSID awards in Nigeria.

By virtue of Article 1 (2)⁶² the purpose of the Centre is to provide facilities for arbitration of investment disputes between contracting states and nationals of other contracting states in accordance with the provisions of this Convention. The Centre has its own rules for arbitration.⁶³ Arbitration under this facility is available only with respect to disputes to which a state is a party. However, a state may designate one of its agencies as being sufficiently identified with the state as to qualify as the state for the purpose of the convention.⁶⁴ As provided by Article 25 (1) of the ICSID convention,

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When

⁵⁸ See Akinbote, A. Arbitration in Africa - the State of Arbitration in Nigeria. A Paper Presented at the 2008 Colloquium of the Association for the Promotion of Arbitration in Africa Held at Djeuga Palace Hotel, Yaounde from 14th – 15th January, 2008, p.4.

⁵⁹ Nigeria deposited instruments on 23rd august, 1965 came into force on 14, October, 1966.

⁶⁰ 1999, CAP. C23 L.F.N. 2004 (as amended).

⁶¹ ICSID (Enforcement of Awards) Act Cap I 20, L.F.N., 2004.

⁶² ICSID Convention.

⁶³ The latest Rules of Procedure for Arbitration Proceedings (Arbitration Rules) is that of 26 September, 1984.

⁶⁴ Ezejiogor, G., Op. Cit., p.150.

the parties have given their consent, no party may withdraw its consent unilaterally.

Under Article 52 of the Convention, although ICSID awards may not be challenged before national courts, disappointed parties have a right to ask the Chairman of ICSID's Administrative Council to appoint a three-member committee to review an award. Such reviews can lead to annulment. Finally, submission to ICSID has a special attraction for developing countries. This is so because the Centre creates and indeed confers credibility of investment protection on such countries. With the protection, foreign investors generally do not have any hesitation in investing in such countries.⁶⁵

3.2.6 Nigerian Investment Promotion Commission (NIPC) Act

Specifically, Section 26⁶⁶ provides for the application of ICSID Rules in the arbitration of investment disputes between the Federal Government and a foreign investor. In effect, all disputes between the Federal Government of Nigeria and any foreign investor are to be settled by arbitration under the auspices of the ICSID, while domestic investment disputes are to be settled by arbitration under the Arbitration and Conciliation Act.

3.2.7 Foreign Judgments (Reciprocal Enforcement) Act.⁶⁷

There is also the Foreign Judgments (Reciprocal Enforcement) Act, which provides in its sections 2 and 4 that a foreign arbitral award may be registered in a High Court within six years after the grant of the award. If the award has not been wholly satisfied and if at the date of the application for registration the award could be enforced by execution in the country of the award.

3.2.8 Bilateral Investment Treaty (BIT)

⁶⁵ Chapter 4 of this research work is dedicated to recognition and enforcement of ICSID awards in Nigeria. The provisions of the convention are extensively dealt with.

⁶⁶ Nigerian Investment Promotion Commission (NIPC) Act, Cap NI17, L.F.N. 2004.

⁶⁷ Cap F. 35, L.F.N., 2004.

Bilateral investment treaties have been negotiated since the late 1950s. The first bilateral investment treaty was agreed in 1959 between Pakistan and Germany.⁶⁸ Generally, treaty provisions will only apply to investments once they have been established in the host state. The arbitration rules of the International Center for the Settlement of Investment Disputes (ICSID) are most commonly referenced in BITs.⁶⁹

A bilateral Investment Treaty (BIT) is seen as “an agreement establishing the terms and conditions for private investment by nationals and companies of one state in the state of the other”.⁷⁰ Thus, a bilateral investment treaty is a binding agreement between two states in which each assumes obligations with respect to investments made in its country by the other's investors. These obligations are directly enforceable by the investors by way of international arbitration often before ICSID⁷¹ or a tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).⁷²

BITs provide protection to foreign investors who are nationals of the states which are party to the BIT. The nature of protection provided pursuant to a BIT between countries is such that if an investor from a contracting state makes an investment in the other contracting state, the

⁶⁸ Retrieved from: http://www.bilaterals.org/article-print.php3?id_article=717 on 15/3/2014. Nigeria has 22 BITs, only four have been ratified and, therefore, in force. Some of the countries include: Egypt (not in force); Finland (not yet in force); France (August 1991); Germany (not yet in force); Korea (February 1 1999); Netherlands (February 1 1994); Spain (not yet in force); Switzerland (April 2003); Turkey (not yet in force); and the United Kingdom (December 11 1990). See also Idornigie, Op. Cit., p.15

⁶⁹ These are the ICSID rules and the so-called ICSID Additional Facility rules. See Parra, A. “ICSID and Bilateral Investment Treaties,” ICSID News, Volume 17, No. 1., Spring 2000.

⁷⁰ Idornigie, P.O. (2011) “Investment Treaty Arbitration and Emerging Markets: Issues, Prospects and Challenges” NIALS Press, Abuja, p.21.

⁷¹ The International Centre for the Settlement of Investment Disputes (ICSID) are most commonly referenced in BITs. These are the ICSID rules and the so-called ICSID Additional Facility rules. See Antonio Parra, “ICSID and Bilateral Investment Treaties,” ICSID News, Spring 2000, Volume 17, No. 1. Retrieved from: <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/News%20from%20ICSID%20Vol%2017%20No%201.pdf> on 12/9/2013

⁷² Ibid, p.3

first country guarantees, pursuant to the BIT, certain levels of protection.⁷³ The wording of these treaties is largely in a standard form, although there are subtle and important differences between treaties. The very general language adopted by these treaties can give rise to significant interpretation difficulties when trying to establish the limits of the protection provided.⁷⁴

These treaties are signed between two states in which each contracting party undertakes to behave in a particular way and to refrain from certain practices prejudicial to investors who are nationals of the other contracting party. Although interstate in nature, they are intended to benefit investors who are private individuals and not signatories.⁷⁵ Furthermore, these investors are direct beneficiaries, as BIT allows them direct access to international arbitration. This means that they have the right to bring a claim against the host State of their investment on the grounds that the State has failed to fulfil its obligations under the BIT.

The international arbitration mechanism can only be activated by investors. This is a peculiarity of BITs. They confer on investors the extraordinary prerogative of claiming their rights before an international arbitration tribunal.⁷⁶

According to a scholar,⁷⁷ most BITs take four basic definitional dimensions into consideration. Firstly, the form of the investment. Secondly, the area of the investment's economic activity. Thirdly, the time when the investment is made. Fourthly, the investor's

⁷³ Ibid. See also Ufot, D. U., [Commercial Arbitration](http://www.globalarbitrationreview.com/know-how/topics/61/jurisdictions/18/nigeria/). Retrieved from: <http://www.globalarbitrationreview.com/know-how/topics/61/jurisdictions/18/nigeria/> on 16/3/2014

⁷⁴ Stephenson, A. and Carroll, L. Protecting Foreign Investments by using Bilateral Investment Treaties, 2012, p.2. Retrieved from: www.claytonutz.com on 12/12/2014.

⁷⁵ Investment Arbitration the Role of Bilateral Investment Treaties International arbitration - volume 2, p. 13. Retrieved from: [http://www.academia.edu/1151368/The Evolution of Bilateral Investment Treaties Investment Treaty Arbitration and International Investment Law](http://www.academia.edu/1151368/The_Evolution_of_Bilateral_Investment_Treaties_Investment_Treaty_Arbitration_and_International_Investment_Law) on 12/9/2013

⁷⁶ Nikièma, S. H. *Best Practices: Definition of Investor*. Published by the International Institute for Sustainable Development, March 2012. Retrieved from: http://www.iisd.org/pdf/2012/best_practices_definition_of_investor.pdf on 2/1/2014

⁷⁷ Salacuse, J.W. and Sullivan, N.P. "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain", Harvard International Law Journal, Boston (2005), p.67.

connection with the other contracting state.⁷⁸ Basically, the purpose of BITs is to promote foreign investments between the two countries and to offer protection to investors from one country investing in the other. For that, a BIT contains binding rules on the treatment of investments originating from one country and made in the other. The treaties are always reciprocal. Parts of a typical BIT include a preamble, definitions, admission, substantive rights – fair and equitable treatment, national treatment, most favoured nation (MFN) treatment, full protection and security, protection from expropriation and other umbrella clauses, compensation for losses, free transfer of payments, settlement of disputes and duration.⁷⁹

The lifelines of BITs vary. While others continue indefinitely until denunciation from either or both parties mutually, others are for a definite period during which the BIT will be in force, often a period of ten years.⁸⁰ Even after denunciation some BITs with survival clauses give continuing effect to the substantive provisions on dispute resolution mechanisms within the range of 10 to 15 years. Thus, investments made during this period will be accorded the protections provided by the BIT for the time period specified in the survival clause.⁸¹

The development of BITs and ICSID are intertwined. Investor-state arbitration, as a mechanism to enforce the substance of BITs, was one of the most important innovations in BITs. Essentially, the operation of BITs is hollow without a neutral forum for resolving disputes and giving effect to the provisions therein. This made the establishment of ICSID even more imperative. The World Bank initially made attempts at settling such kinds of disputes, but it

⁷⁸ Ibid.

⁷⁹ Idornigie, P. A., Op. Cit., p.23.

⁸⁰ Vila, A. M., Legal Aspects of Foreign Direct Investments in the United States. *The International Lawyer*, Vol. 16, No. 1 (Winter 1982), p. 14. Published by [American Bar Association](http://www.americanbar.org). Retrieved from: <http://www.jstor.org/stable/40691125> on 12/9/2013

⁸¹ For example, the U.S.-Ecuador BIT article 12 provides that if the BIT is terminated, “all existing investment would continue to be protected under the Treaty for ten years thereafter.” Retrieved from: <http://www.state.gov/documents/organization/43558.pdf> on 2/1/2014

proved to be in conflict with its role as an international institution that provides loans to its member countries in order to foster greater production and development. Thus, this attempt was not only inadequate and in direct conflict with the Bank's purpose but also a way of compounding the challenges. In 1961 the proposal for the feasibility of creating an arbitration mechanism that could suit the needs of both investors and governments was made, which birthed the ICSID under the International Convention for the Settlement of Investment Disputes (ICSID Convention) in 1966.⁸²

In Nigeria, BIT negotiations are conducted by the Inter-Ministerial Committee on Investment Promotion and Protection Agreements made up of representatives of the Ministries of Finance, Justice, Industry/Investment, Foreign Affairs, National Planning Commission, Central Bank of Nigeria and National Investment Promotion Commission. Unfortunately, out of the 22 BITs signed only 5 have been ratified and, therefore, in force.⁸³ Arbitration is based on the consent of the parties. Such consent was usually given through the enactment of some domestic legislation as Nigeria has done with the NIPCA.⁸⁴ However, such consent is also now usually given through BITs.⁸⁵

Since its emergence BITs have become highly important in international investment landscape, providing investors not just specific substantive rights but also direct remedies. This

⁸² For general information on the ICSID and investment treaties, see generally Dolzer, R. and Schreuer, C. (2008), *Principles of International Investment Law*, Oxford University Press, Oxford. Schreuer, C. H., et al. (2009), *The ICSID Convention: A Commentary 2d edition*. Cambridge University Press, Cambridge.

⁸³ Dolzer, R., Op. Cit., p. 21.

⁸⁴ Section 26(2)(b) NIPCA provides that disputes between foreign investors in Nigeria and the Federal Government of Nigeria should be settled by arbitration within the framework of any bilateral or multilateral agreement on investment protection having Nigeria and the investor's home country as parties.

⁸⁵ Nigeria's BITs contain self-executing ICSID arbitration clauses. An example is Article 9 of the Netherlands-Nigeria BIT which provides for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes (ICSID) between States and Nationals of other States opened for signature at Washington on 18 March, 1965

is further underscored by the growing number of BITs⁸⁶ and the dramatic increase in foreign direct investments.⁸⁷ BITs remain a vital part of the investment landscape and are likely to continue to do so. Well-advised investors will seek to ensure they can enjoy the protection those treaties offer, and well-advised governments should be equally alive to the obligations they generate and the potential liabilities that may arise.⁸⁸

3.3 INTERNATIONAL COMMERCIAL ARBITRATION PROCEEDINGS

International commercial arbitration is the most prominent of the procedures for resolving commercial disputes in international commerce.⁸⁹ International arbitration refers to the resolution of cross border transaction disputes. Arbitration is international if; (a) the parties which have their places of business in different states; or b) the places of arbitration, or substantial part of performance of the contract, or the place the subject matter of the dispute is most closely connected, are in another state.”⁹⁰

The modern law governing international commercial arbitration began only in the decade of the 1920s with the adoption of the Protocol on Arbitration Clauses,⁹¹ the Convention for the Execution of Foreign Arbitral Awards⁹² and the organization of the ICC Court of International Arbitration.⁹³ There was no substantial further development until the adoption of the New York

⁸⁶ Egli, G. “Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions,” *Pepperdine Law Review* vol. 34, issue 4, Art. 12 (2007), p.1054. Retrieved from: <http://digitalcommons.pepperdine.edu/plr/vol34/iss4/12> on 2/9/2014.

⁸⁷ This is not generally true with every nation. Brazil is generally seen as an investment-friendly destination without having ratified a single BIT. It is difficult in this case to pin down the correlation between BITs and success in attracting foreign investment. Perhaps it is the case that where the rewards are clear or the political risks are fairly low investors can live without them, but where there is less stability or particularly higher risks, investors will insist upon the protection they offer.

⁸⁸ Dunn, G., Op. Cit. p.5.

⁸⁹ UNCTAD, Dispute Settlement, Op. Cit., p.36.

⁹⁰ Article 1(3), UNCITRAL Model Law on International Arbitration, 1985.

⁹¹ Signed at Geneva on 24th September, 1923; commonly known as “Geneva protocol”.

⁹² Came into force on 26th September, 1927.

⁹³ 1922 the International Chamber of Commerce (ICC) adopted its first rules of arbitration and in 1923 established the Court of Arbitration with its headquarters in Paris,

Convention in 1958.⁹⁴ The subsequent years have been ones of rapid progress. 135 States have become party to the New York Convention. In 1961, three years after the adoption of the New York Convention, the European Convention on International Commercial Arbitration was adopted. The Convention is noteworthy as being the first international instrument to have the words “international commercial arbitration” in its title. The harmonization of arbitration procedure followed in quick succession. The UNCITRAL Arbitration Rules of 1976⁹⁵ have been widely used and have become the model on which many institutional arbitration rules are based. The Model Law of 1985 has been the basis of most arbitration statutes adopted since then.⁹⁶

Nigeria became a signatory to the New York Convention on 17 March, 1970 adopting both the reciprocal and commercial reservations. The Convention came into force on 15 June, 1970. The Nigerian Courts will therefore enforce awards made in a state which is also a party to the New York Convention. This is captured in the recital of the Act as,

An Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration⁹⁷

The modern view is that arbitration is governed by the law of the place in which it takes place.⁹⁸

The Substantive Law governs the validity, interpretation, performance, breach and termination of

⁹⁴ 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

⁹⁵ UNCITRAL Arbitration Rules after they were adopted by the United Nations Commission on International Trade Law in April 1976. The Rules were specifically designed for use in *ad hoc* common law/civil law arbitrations.

⁹⁶ See *Dispute Settlement: International Commercial Arbitration*, published by United Nations Conference on Trade and Development (UNCTAD), UNCTAD/EDM/Misc.232/Add. Retrieved from: http://unctad.org/en/Docs/edmmics232add38_en.pdf on 3/7/2014.

⁹⁷ The recital of the Arbitration and Conciliation Act, Cap. N 117, Laws of the Federation of Nigeria, 2004.

⁹⁸ At the same time the parties are free to choose the place of arbitration, thereby choosing the applicable law of arbitration. The New York Convention recognizes the possibility that the law of arbitration might be other than that of the place of arbitration. See New York Convention, Article 5 (1) (e). Recognition and enforcement of the award may be refused if: “The award ... 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.” Modern arbitration laws do not accept that possibility

the underlying contract; the rights and obligations of the parties therein and the level of damages. The substantive law could be a national law, that is a law of a country; or international law.⁹⁹ Any national law chosen by parties shall be the substantive law of that nation and not its conflict of law rules unless the parties agreed otherwise.¹⁰⁰

Where parties fail to indicate the substantive law to govern the arbitration, the tribunal will, in order to determine the applicable substantive law, first ascertain the applicable conflict of laws rule which is applicable in the circumstance and use the conflict of law rule to determine the applicable law.¹⁰¹ The conflict of law rule must be that of a country. The tribunal may determine this by choosing that of the country that has the most significant connection with the arbitration or the seat of the arbitration; or the proper law of the contract; or by applying the general principles of private international as stated in international conventions. The tribunal in determining the substantive law may engage an expert and the tribunal's decision on this may be appealed against.

In that sense, every form of arbitration taking place within a state is a domestic arbitration in that State. However, many States draw a distinction between arbitrations that are considered to be domestic and those that are considered to be international. One of the consequences may be that the types of disputes that may be submitted to arbitration are different in an international arbitration. For example, in some States claims of anti-trust violation may be submitted in an

⁹⁹ Like United Nations Conventions on Contracts for the International Sale of Goods (CISG). --the *lex mercatoria*—this is the general principles of international law, the UNIDROIT principles of international law or the transnational commercial law, trade usages developed in international trade (this is usually chosen in contracts between states or between states and private parties).

¹⁰⁰ See Article 28(1) UNCITRAL Model Law, 2006. This need not necessarily be in the arbitration agreement rather in the underlying contract but there is no harm if included in arbitration clause.

¹⁰¹ See Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration.

international arbitration but not in a domestic arbitration.¹⁰² Similarly, some States permit the State or State entities to enter into valid arbitration agreements only if the arbitration would be international. Finally, following the lead of the Model Law, many States have different laws governing domestic and international arbitrations.¹⁰³ It follows that the distinction between domestic and international arbitrations is a matter of national law. There is no generally accepted distinction and there does not need to be since the New York Convention applies to “foreign” awards.

3.3.1 Appointment of International Arbitrators

The most significant feature which differentiates arbitration from litigation is the parties’ control over who sits on the panel or tribunal to determine an arbitral award. Although parties may select arbitrators of their own choice, determine the number of arbitrators, under various rules, they cannot exert control over what the arbitrators do. The rules of arbitration adopted guide the arbitrators.

Generally, parties to an arbitration agreement have the choice of determining the number of arbitrators. However, where the parties failed to include this clause in their agreement¹⁰⁴ and are subsequently¹⁰⁵ deadlocked in agreeing on the number, the substantive provisions of the Arbitration Rules they chose will determine the number of arbitrators. The Act¹⁰⁶ provides that, “parties to an arbitration agreement may determine the number of arbitrators to be appointed

¹⁰² See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (U.S. Supreme Court 1985) in which the Supreme Court of the United States held that anti-trust claims could be submitted to arbitration when they arose in an international dispute, “even assuming that a contrary result would be forthcoming in a domestic context.”

¹⁰³ In Nigeria, primarily, the Arbitration and Conciliation Act, Cap A. 19, LFN, 2004 governs both domestic and international arbitrations.

¹⁰⁴ Known as “arbitration agreement”.

¹⁰⁵ Any such subsequent agreement is referred to as a “submission agreement”.

¹⁰⁶ Section 6 Arbitration Conciliation Act

under the agreement, but where no such determination is made, the number of arbitrators shall be deemed to be three”.¹⁰⁷

Thus, there are several ways through which arbitration tribunal could be appointed. The first is appointment by the parties themselves, appointment by a third party, and appointment by a court or any appointing authority. Section 44 (1)¹⁰⁸ makes provision for the appointment of a sole arbitrator. Either party may propose to the other the names of one or more persons, one of whom will serve as the sole arbitrator.¹⁰⁹ If, however, within thirty days after receipt of such proposal¹¹⁰ the parties fail to reach an agreement on the choice of a sole arbitrator shall be appointed by the appointing authority.¹¹¹ In a similar vein, where more than a sole arbitrator is agreed by the parties and for whatever differences the parties fail to agree on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority designated by the parties to make the appointment.¹¹²

Several factors are to be considered in appointing arbitrators. Section 7 of the Arbitration and Conciliation Act¹¹³ states that where an application is made to the Court¹¹⁴ for the appointment of arbitrators, the fundamental parameters within which the court is enjoined to exercise its discretion are defined by the following three factors:

(a) whether there is an arbitration agreement;

¹⁰⁷ See also the provision in Article 5 of the UNCITRAL Rules which states that where “the parties have not previously agreed on the number of arbitrators and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed”.

¹⁰⁸ Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004;

¹⁰⁹ Ibid

¹¹⁰ By a party of the proposal made in accordance with subsection 44 (1) of Arbitration Conciliation Act

¹¹¹ 44 (2) Arbitration Conciliation Act

¹¹² See generally S.44 Arbitration Conciliation Act and Article 6(1) and 6(2) of the Arbitration Rules

¹¹³ Arbitration Conciliation Act

¹¹⁴ By virtue of section 57(1) ACA, the “court” means the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court.

(b) whether the dispute alleged by the applicant falls within the nature of disputes contemplated in the agreement; and

(c) whether the parties have failed or neglected to appoint arbitrators to wade into the dispute.¹¹⁵

The court is not cloaked with any jurisdiction or duty to inquire into the sustainability or otherwise of the alleged dispute between the parties. Their function on considering the application for appointment of arbitrators is restricted to the construction of the arbitration clause in the agreement with a view to ascertaining whether the alleged dispute is within the contemplation of the agreement¹¹⁶ and such decision is not subject to appeal.¹¹⁷ Thus, if the appointment procedure agreed upon by the parties does not provide any other means of securing the appointment, any of the parties to the arbitration may request the court to make the appointment and such appointment is final.

It is also noteworthy that before section 44 there was no reference to an appointing authority anywhere else in the Act and, therefore, there is no provision on the agreement to appoint one. For this reason, recourse must be made to the provision in Section 54(2)¹¹⁸ which defines the appointing authority as the Secretary-General of the Permanent Court of Arbitration at The Hague.¹¹⁹

3.3.2 Nationality of Arbitrator

As regards the nationality of an arbitrator, Article 6 (4) of the Arbitration Rules states that “in making the appointment, the court shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as

¹¹⁵ Section 7, Arbitration and Conciliation Act

¹¹⁶ *Bendex Engineering Corporation & Anor v Efficient Petroleum Nigeria Ltd*(2001) 8 NWLR (pt 715) 333 at 337

¹¹⁷ Ibid

¹¹⁸ Arbitration and Conciliation Act.

¹¹⁹ Akinbote, A., Op. Cit.

well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties”.¹²⁰ This provision has thrown to the court the challenge of appointing an arbitrator who is not only independent and impartial, but under advisability. But where the parties have agreed that certain nationalities should be excluded, it will be binding on the tribunal. Consequently, unless there is such an agreement, no person shall be disqualified from being appointed by reason of his nationality.¹²¹

The arbitrators are not at liberty to act without limitations, there is room for challenging them. Under various rules¹²² of international commercial arbitration grounds are provided for challenging the arbitrators. First of all, the arbitrator is bound to act judicially,¹²³ with due care, diligence and compliance with the terms of submission. Above all, in making an award, the dispute must be decided according to the applicable law.¹²⁴

3.3.3 Challenging the Arbitration Tribunal

Parties are at liberty to make provisions for challenging an arbitrator in their agreement,¹²⁵ and the procedure must be followed. Section 9 (2) Arbitration and Conciliation Act provides that,

Where no procedure is determined under subsection (1) of this section, a party who intends to challenge an arbitrator shall, within fifteen days of becoming aware of the constitution of the arbitral tribunal or becoming aware of any circumstances referred to in section 8 of this Act, send the arbitral tribunal a written statement of the reasons for the challenge.

¹²⁰ This provision is similar to section 44 (4) Arbitration Conciliation Act.

¹²¹ 44 (10) Arbitration Conciliation Act. See also Model Law Article 11.

¹²² See, for instance, Articles 9 – 12 of the UNCITRAL Arbitration Rules, which similar provisions (especially Articles 9 and 10) have been adopted in S. 45 Arbitration and Conciliation Act.

¹²³ See also section 45(5) to (9) and Articles 11 to 12 of the UNCITRAL Arbitration Rules.

¹²⁴ *Fox, Annie and Others v Wellfair (PG) Ltd (in Liquidation) and Philip Fisher and Anor v Wellfair (Pg) Ltd (in Liquidation) (19881) 2 Lloyd's Rep 514*

¹²⁵ Article 9(1) Arbitration and Conciliation Act.

Unless the arbitrator who has been challenged withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.¹²⁶ But where the parties fail to determine the procedure, the following is to be adhered to:

(5) A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after circumstances mentioned in subsection (1) to (4) of this section become known to that party.

(6) The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal and the notification shall be in writing and shall state the reason for the challenge.

(7) When an arbitrator has been challenged by one party, the other party may agree to the challenge and the challenged arbitrator may also, after the challenge, withdraw from his office; but the fact that the other party agrees to the challenge or that the arbitrator withdraws does not imply acceptance of the validity of the grounds for the challenge.

(8) Where the other parties agree to the challenge or the challenged arbitrators withdraws, the procedure provided in section 44 of this Act shall be used in full for the appointment of the substitute arbitrator, even during the process of appointing the challenged arbitrator a party had failed to exercise to appoint or to participate in the appointment.¹²⁷

However, Article 13(3) of the Model Law from which the above provisions derived provides that if the challenge is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority¹²⁸ to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be made when the initial appointment was made by

¹²⁶ See generally Section 9 Ibid which is similar the provisions of Article 13(1) and (2) of the Model Law

¹²⁷ Section 9 Arbitration and Conciliation Act.

¹²⁸ Specified in Article 6

an appointing authority¹²⁹ as designated.¹³⁰ The Arbitration and Conciliation Act provides for two grounds on which the appointment of an arbitrator can be challenged, namely, where circumstances exist that give rise to justifiable doubts as to his impartiality or independence,¹³¹ and if the arbitrator does not possess the qualifications agreed by the parties.¹³²

There is generally no fear of an arbitrator being biased in favour of his appointer because that is the purpose of arbitration – parties should exercise control over the process and endeavour to arrive at a mutually acceptable outcome. Besides, the presiding arbitrator is appointed by the other arbitrators or an appointing authority where they fail to agree on one.

3.3.4 Setting Aside the Award

As soon as a decision by the tribunal is reached in form of an award, and the tribunal becomes *functus officio*, the winning party is expected to take steps to enforcing the award. The losing party, on the other hand, may not be satisfied with the award. He reserves the right to take necessary steps to demand that the award be set aside. Section 29(1) of ACA states that,

A party who is aggrieved by an arbitral award may within three months – (a) from the date of the award; or (b) in a case falling within section 28 of this Act, from the date the request for additional award is disposed of by the arbitral tribunal, by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section.

Thus, the dissatisfied party who intends to challenge an award must act timeously to benefit from the above provision. If the application is not made within three months, the right is lost and

¹²⁹ Section 45(9) ACA see also Section 9 (8), (9) and (10) containing similar provisions.

¹³⁰ In accordance with the procedure for designating an appointing authority as provided for in section 44 of this Act.

¹³¹ This appears to be an attempt to capture the principle of natural justice, *nemo judex in causa sua*. For, bias, no matter how remote, taints the fruit of the labour of any tribunal.

¹³² Section 45 of ACA

barred.¹³³ The application can be made in the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court.¹³⁴

The Arbitration and Conciliation Act provides extensive grounds upon which the court may rely to set aside an award. Particularly, section 48 provides that:

The court may set aside an arbitral award-

(a) If the party making the application furnishes proof-

(i) that a party to the arbitration agreement was under some incapacity,

(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,

(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 submission to arbitration, so however that the if decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decision 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, 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 this Act; or

(b) if the court finds-

(i) that the subject-matter of the dispute is not capable of settlement by arbitration under laws of Nigeria; or

(ii) that the award is against public policy of Nigeria.¹³⁵

¹³³ *United Nigeria Insurance Co. Ltd. v Leandro Stocco*(1973) 3 S.C. 6

¹³⁴ See section 57 of the ACA

¹³⁵ Section 48 of the Arbitration and Conciliation Act and also Article 5 of the Convention.

An award can be set aside if 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;¹³⁶ or if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, or that the award is against public policy of Nigeria.¹³⁷ In addition, any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award under the same grounds and where 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.¹³⁸

Similarly, international arbitration awards can be challenged on the grounds for refusing enforcement set out in the New York Convention.¹³⁹ Article 34 of the Model Law¹⁴⁰ also provides that a court of a country that has adopted the Model Law may set aside an arbitral award rendered under that law on grounds that are virtually identical to the grounds for refusal of enforcement listed in Article 5 of the New York Convention.¹⁴¹ Consequently, where the nationality of the award is not determined, it could be a ground for invalidation of the award. The criteria for determining this is set out in Article 1(2) of the Model Law, which provides that the place of arbitration is instrumental for the application of the Law itself.¹⁴²

3.3.4.1 Scope of Submission

A tribunal is confined to its scope of submission. Therefore, the court may be approached to set aside an arbitral award if the party making the application furnishes proof that

¹³⁶ Section 48(a)(ii) of the Arbitration and Conciliation Act.

¹³⁷ Section 48(b) (ii) Ibid.

¹³⁸ Section 52 of the Act particularly subsections (2)(a)(ii), (viii) and (b) of the Act.

¹³⁹ Article 5 enumerates the grounds.

¹⁴⁰ UNCITRAL Model Law on International Commercial Arbitration of 1985.

¹⁴¹ Except for ground (1)(e).

¹⁴² See also Article 20(1) of the Model Law and Article 16 of the Arbitration Rules.

the award contains decisions on matters which are beyond the scope of the submission to arbitration.¹⁴³ However, if 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 may be set aside. The Supreme Court of Nigeria held that “if the arbitrator makes an award on a matter which the parties have not asked him to arbitrate upon, the arbitrator would be acting beyond his powers and his decision may be set aside”.¹⁴⁴

Another ground is where the arbitrator misconducts himself or where the award was improperly procured, the court may also set aside the award. Section 30(1)¹⁴⁵ provides that, “where an arbitrator has mis-conducted himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on the application of a party set aside the award”.¹⁴⁶ The problem here is that the Act fell short of defining misconduct. The Supreme Court, in remedying this situation, adopted the reasoning of the learned authors of Halsbury’s Laws of England¹⁴⁷ in *Taylor Woodrow (Nig) Ltd v S.E. GMBH Ltd*;¹⁴⁸ where misconduct “includes on the one hand, that which is misconduct by any standard, such as being bribed or corrupted, and on the other hand mere technical misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement or reference”. The court further gave specific examples of misconduct to include, exceeding authority, inconsistent or ambiguous awards, irregularity in the proceedings, and infraction of the right to fair hearing, acquisition of interest in the subject matter and delegation of authority to a stranger.¹⁴⁹

¹⁴³ See section 29(2) Model Law.

¹⁴⁴ In *Kano State Urban Dev. Board v. Fanz Construction Co. Ltd* (1990) 4 NWLR (Pt. 142) 1 SC,

¹⁴⁵ Arbitration and Conciliation Act.

¹⁴⁶ Ibid.

¹⁴⁷ 4th Ed, Vol. 2, para 22, at 330-331 194

¹⁴⁸ (1993) 4 NWLR (Pt. 286) 127 SC at 141 – 143.

¹⁴⁹ Ibid

Section 29 (1) further provides that “a party who is aggrieved by an arbitral award may within three months from the date of the award” apply that it be set aside.¹⁵⁰ The three months prescribed under which to make application to set aside an arbitral award under section 29 was extended to cover the provision under section 30 in the case of *Araka v Ejeagwu*.¹⁵¹ What happened in this case was that an application was made to the High Court on 25 April, 1995 under section 29 of the Act to set aside an arbitral award made on 8th September, 1994, seven months after the award had been made. The Supreme Court, per Katsina-Alu, JSC held that “the prescribed time within which to make an application to set aside an arbitral award under the Arbitration and Conciliation Act, 1988 is three months from the date of the award irrespective of whether the application is predicated under section 29 or section 30 of the Act”.

When an award is set aside in whole or in part, the effect is that it deprives the award or part of it of any legal effect and therefore becomes unenforceable. Indeed where an award is set aside in the country in which it was made, this is one of the grounds for refusal of recognition and enforcement under the New York Convention¹⁵² and the Model Law.¹⁵³

According to Article II (3),¹⁵⁴ a court can also refuse to refer the parties to arbitration if it finds that the arbitration agreement is “null and void, inoperative or incapable of being performed”. Unfortunately, neither the Convention nor its legislative history gives much guidance as to how these words should be interpreted. Several courts have held that, having

¹⁵⁰ Section 29 (1) (a) Arbitration and Conciliation Act.

¹⁵¹ (2001) 5 WRN 1 SC.

¹⁵² Article 5 (1)(e) of the New York Convention

¹⁵³ See Article 36(1)(a)(v) of the Model Law and Section 52(2)(viii) of the Arbitration and Conciliation Act.

¹⁵⁴ Of the New York Convention, which is in pari-material with Article 8(1) of UNCITRAL Model Law.

regard to the “pro-enforcement-bias” of the Convention, the words should be construed narrowly and the invalidity of the arbitration agreement should be accepted in manifest cases only.¹⁵⁵

The words *null and void* may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity, right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence.¹⁵⁶ Inoperative as used in the convention can cover those cases where the arbitration agreement has ceased to have effect, such as revocation by the parties. It will also be inoperative where, for example, the arbitration agreement has been repudiated or abandoned or it contains such an inherent contradiction that it cannot be given effect.¹⁵⁷ An arbitration clause is inoperative where it has ceased to have effect as a result of a failure by the parties to comply with a time-limit, or where the parties have by their conduct impliedly revoked the arbitration agreement.¹⁵⁸

Awards can be said to be incapable of being performed where the arbitration cannot be effectively set into motion. This may happen where the arbitration clause is too vaguely worded, or other terms of the contract contradict the parties’ intention to arbitrate, as in the case of the so-called co-equal forum selection clauses. Even in these cases, the courts interpret the contract provisions in favour of arbitration.¹⁵⁹

From the forgoing, it is clear that the fact that an award that has been set aside in the country of origin is a ground for refusal of enforcement.¹⁶⁰ The New York Convention has influenced the action for setting aside the award on the generally accepted rule that the setting

¹⁵⁵ Albert Jan van den, B. (2008) *The New York Convention of 1958: An Overview*. Cameron May, London, p. 12

¹⁵⁶ Ibid.

¹⁵⁷ Sutton, D., Gill, J. Et al.(2003) *Russell on Arbitration*, 22nd ed. Sweet & Maxwell, London, p.7 - 9.

¹⁵⁸ Redfern, Hunter, et al. (1999) *Law and Practice of International Commercial Arbitration*, 3rd ed. Sweet & Maxwell, London, p.3.

¹⁵⁹ Ibid.

¹⁶⁰ Article 5 (1) (e) of the New York Convention.

aside of an arbitral award pertains to the exclusive jurisdiction of the courts in the country of origin and is to be adjudicated on the basis of the arbitration law of that country. The courts in the other contracting states may only decide under the Convention whether or not to grant enforcement of the award within their jurisdiction. The consequence is that setting aside of an award in the country of origin has extra-territorial effect as it precludes enforcement in the other contracting states.¹⁶¹

3.4 Costs in International Commercial Arbitration

Resolving commercial disputes through international commercial arbitration could be expensive for several reasons. Being a private means of resolving disputes means parties have to pay the fees of the arbitrators, the administrative charges by the institution, the cost of hiring facilities, the cost of transcription and interpreters where required and other expenses that may be incurred in the arbitration. In the end, the amount tends to be substantial compared to the amount in dispute.¹⁶² The question is who pays what for what? It is impossible to predict with any satisfactory degree how the costs will be awarded. For, even costs rendered under the same arbitration rules sometimes vary fundamentally without any apparent reason. Generally, the loser pays, but ultimately the power to determine who pays what and amount to offset the cost is determined by the tribunal under most rules.¹⁶³

The term cost has been defined to include 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 to the extent that such expenses are approved by the arbitral tribunal; and the cost for legal representation and assistance of the successful party if

¹⁶¹ Ibid.

¹⁶² Buhler, M.(2004) Awarding Costs in International Commercial Arbitration: an Overview. ASA Bulletin, 2/2004, p. 249.

¹⁶³ Ibid.

such cost were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such cost is reasonable.¹⁶⁴

Sections 49 and 50 of Arbitration and Conciliation Act cover costs for international arbitration.¹⁶⁵ These include the fees of the arbitral tribunal, travel and other expenses incurred by the arbitrators, costs of expert advice and of other assistance required by the arbitral tribunal and the costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings. The fees of the arbitral tribunal shall be reasonable in amount, taking into the account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.¹⁶⁶

In Apportioning costs there are two guiding philosophies. There is the “pay your own way”¹⁶⁷ principle which suggests that a party should bear its own costs. This is in contrast to the “costs follow the event” or “loser pays” principle where the successful party should ordinarily recover its reasonable costs.¹⁶⁸ It is usual for a losing party to make at least some contribution to the costs of the winner in the national courts of many jurisdictions.¹⁶⁹

There is still a third and more nuanced approach, which is basically a variation on the “costs follow the event” principle. This principle seeks to apportion costs based on the relative success of the different issues in the arbitration.¹⁷⁰ It found application in the case of *Eastern*

¹⁶⁴ Section 49 (1) b-e Arbitration and Conciliation Act.

¹⁶⁵ See also Articles 38 to 41 of the Arbitration Rules. The lacuna in the law can be taken care of by Article 38 of the Arbitration Rules gives the arbitral tribunal power to fix the costs and provides for permissible costs.

¹⁶⁶ Section 49(1) and (2) Arbitration and Conciliation Act and Article 39 of the Arbitration Rules.

¹⁶⁷ Also known as the “American Rule”, this is the default position in US litigation and also in cases before the International Court of Justice. A number of investment treaty tribunals have endorsed this approach, for example, *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6 and *Alasdair Ross Anderson v. Republic of Costa Rica*, ICSID Case No. ARB (AF)07/3

¹⁶⁸ See *Gemplus v Mexico* ICSID Case No. ARB(AF) 04/3.

¹⁶⁹ Including England and Wales, France, Germany, Hong Kong, Italy, the Netherlands, Poland, Russia, Singapore, Spain and Thailand.

¹⁷⁰ See *Helnan v Egypt* ICSID Case No. ARB 05/19 for instance.

Sugar v. Czech Republic,¹⁷¹ where the tribunal required the successful investor to pay part of the respondent's share of tribunal costs (that is, ultimately winner pays), apparently on the basis that the claimant had submitted a large claim, of which it was awarded only around 25% in damages.¹⁷²

Some arbitration rules¹⁷³ expressly confer on the arbitrators the authority to decide the costs as between the parties.¹⁷⁴ The cost of arbitration should be borne by the party which loses the arbitration.¹⁷⁵ The UNCITRAL Rules conveniently adopts cost must follow event principle, but this is not absolute. Article 40 (2)¹⁷⁶ expressly states that the tribunal is free to decide on such costs as it sees fit. This would suggest that, as far as legal costs are concerned, the outcome on the merits does not serve as the prevailing yardstick in determining costs. In the case of *Waste Management Inc. v. Mexico*¹⁷⁷ a private party was ordered to bear procedural costs, because it lost its case. The cost of legal representation is recoverable provided it is reasonable. Here too, the arbitrators decide what amount is reasonable by exercising their discretion based on objective criteria. In the exercise of this discretion, costs claimed should be computed in relation to the complexity of the case, the scope and duration of the pleadings, the amount in dispute and importance of the case to the party.

In practice, there are three methods of fixing arbitrators' fees, namely, *ad valorem* (payable according to value), *per diem* (fees payable per day) and the fixed fee, irrespective of

¹⁷¹ *SCC Case No. 088/2004*.

¹⁷² Hodgson, M. Counting the costs of investment treaty Arbitration, *Global Arbitration Review*, 24 March 2014. Retrieved from: www.globalarbitrationreview.com on 15/9/2014.

¹⁷³ Article 38 UNCITRAL Rules for example.

¹⁷⁴ See Buhler, M., *Op. Cit.*, p.257.

¹⁷⁵ See Article 40(1) UNCITRAL Rules provides that "costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case".

¹⁷⁶ Of the UNCITRAL Rules

¹⁷⁷ (2002) 121 *I.L.R.* 30

the amount in dispute. The Arbitration and Conciliation Act has adopted the *ad valorem*. This means that the fees to be paid are proportionate to the amount in dispute. Generally, the arbitral institutions have schedule of fees which also serve as guidelines to arbitrators in fixing their fees in *ad hoc* arbitrations. If an appointing authority is used and the authority has issued a schedule of fees, the arbitral tribunal in fixing its own fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case. However, if the appointing authority has not issued such a schedule, any party may request the appointing authority to furnish statement setting forth the basis for establishing fees which is customarily followed in international cases. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account.¹⁷⁸

As have been seen earlier, the cost of arbitration is generally borne by the unsuccessful party.¹⁷⁹ Although the tribunal may apportion each of such cost between the parties, cost can be determined by the arbitral tribunal,¹⁸⁰ such fees must “be reasonable in amount taken account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case”¹⁸¹ except the cost of legal representation.¹⁸²

Upon agreeing on its fees, the tribunal reserves the right to request the parties to pay the fees and to demand for further fees, if the one agreed is exceeded in the course of the proceedings. Consequently, the tribunal may request each party to deposit an equal amount as an advance for the costs.¹⁸³ This means that the Tribunal may request supplementary deposits from the parties during the proceedings. Where deposits are made and the balance is requested for by

¹⁷⁸ Section 49(3) and (4) of the Arbitration and Conciliation Act.

¹⁷⁹ Article 40(1) of the Arbitration Rules.

¹⁸⁰ Section 49 (1) Arbitration and Conciliation Act; Article 38, Arbitration Rules.

¹⁸¹ Section 49 (2) Arbitration and Conciliation Act; Article 39, Arbitration Rules.

¹⁸² Article 40 (2) Arbitration Rules.

¹⁸³ Referred to in Article 38, paragraphs (a), (b) and (c).

the tribunal and not paid in full within thirty days after the receipt of the request for payment, the tribunal may order the suspension or termination of the arbitral proceedings. Just as the tribunal has the right to demand payment for the services rendered, it is also obligated to render full account to the parties of the deposits received and return any unexpended balance to the parties.¹⁸⁴

Clearly, the decision of the tribunal regarding deposit for cost is final. There is no room for appeal. However, the 2010¹⁸⁵ UNCITRAL rules now give the parties a right to appeal the tribunal's fees to the appointing authority. The appointing authority has the power of adjustment of fees and expenses, which is binding on the tribunal.¹⁸⁶ But it remains to be seen whether these changes will reduce the discrepancy between tribunal costs under UNCITRAL rules.¹⁸⁷

Costs are of great importance in international commercial arbitration. Since most laws and rules give little guidance to the arbitrators for reaching their decision on costs, the rules and practices as prevailing in national jurisdictions may have a decisive, but unwarranted influence. As a consequence, international arbitration practice has not yet managed to establish a uniform approach to costs and these results in considerable uncertainty for parties. The likely costs of a proceeding, and how these costs may be adjusted by a tribunal, are a part of the risk and reward assessment an investor makes before commencing an arbitration proceeding. It is also relevant to a state considering its approach to settlement discussions. As it stands, and notwithstanding the discernible shift towards "costs follow the event" approach in recent years, it is extremely

¹⁸⁴ See generally Article 41 which is *pari pasu* with 50. (1) ACA. The 1976 UNCITRAL rules contain similar, albeit more limited, provisions: article 40 (1), which applies only to tribunal costs, and article 40 (2), which expressly gives the tribunal discretion as to the party costs.

¹⁸⁵ Jones, D. and Zahara, T. Highlights of the new 2010 UNCITRAL Arbitration Rules, retrieved from: http://www.claytonutz.com/publications/edition/27_october_2011/20111027/highlights_of_the_new_2010_uncitral_arbitration_rules.page on 09/09/14

¹⁸⁶ Article 41 (4)

¹⁸⁷ Hodgson, M., Op. Cit.

difficult for parties to predict the approach a tribunal will take to costs. The UNCITRAL Rules at least provide guidance and a default position in this regard.

3.5 Recognition and Enforcement of Foreign Award

Arbitration agreement is the basis of arbitration¹⁸⁸ and only parties to an arbitration agreement can challenge or nullify the arbitral agreement.¹⁸⁹ The New York Convention¹⁹⁰ reduced and simplified the requirements with which the party seeking recognition or enforcement of an award had to comply.¹⁹¹ Any award rendered by another contracting state binds Nigeria. By virtue of section 51 of the Arbitration and Conciliation Act,

(1) An arbitral award shall, irrespective of the country in which it is made, be recognised as binding and subject to this section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.

(2) The party relying on an award or applying for its enforcement shall supply

(a) the duly authenticated original award or a duly certified copy thereof; (b) the original arbitration agreement or a duly certified copy thereof; and (c) where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language.¹⁹²

The above provision must be read in the light of Section 54(1) (a) of the ACA,¹⁹³ which

states:

Without prejudice to sections 51 and 52 of this Act, where the recognition and enforcement of any award arising out of an international commercial arbitration are sought the Convention on the Recognition and Enforcement of Foreign Awards (hereinafter referred to as “the Convention”) set out in the Second Schedule to

¹⁸⁸ Albert Jan van den, B., Op. Cit. pp. 144-145.

¹⁸⁹ Article 11(3) New York Convention. See also *African Development Inc. Co. Ltd v. Nigeria LNG Ltd (2000)FWLR (pt.3) 431*.

¹⁹⁰ Nigeria is a contracting state to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed at New York on 10th June, 1958 (New York Convention), having acceded in 1970.

¹⁹¹ Agarwal, V., “Alternative Dispute Resolution Methods” A paper written following a UNITAR sub-regional workshop on Arbitration And Dispute Resolution, Harare, Zimbabwe, from 10-15 September, 2000 Retrieved from: <http://www.unitar.org/dfm> on 12/3/2013

¹⁹² These provisions were adopted from Article 35 the UNCITRAL Rules.

¹⁹³ It constitutes the Second Schedule of the Act and has been applicable in Nigeria since 14th March, 1988.

this Act shall apply to any award made in Nigeria or in any contracting State – a. provided that, such contracting State has reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention. b. That the Convention shall apply only to difference arising out of a legal relationship which is contractual.¹⁹⁴

Where such an award conforms to the above provisions and is not challenged by the other party, the Nigerian courts can go ahead to recognise and enforce it. But where an award was not made by a New York convention state there seem to be a contention. A viable option is to seek the enforcement of the award of the award as a foreign judgment under the Foreign Judgment (Reciprocal Enforcement) Act.¹⁹⁵ This provides that monetary judgments of Commonwealth courts, or countries with which Nigeria has relevant reciprocal arrangements, may be enforced in Nigeria within 12 months of being delivered. Although the Convention was not adopted before 1988 and the country enacted no law relating to international commercial arbitration, a foreign arbitral award in an international commercial arbitration made outside the country could be enforced in Nigeria by the combined effect of sections 2(1) and 4(2) of the Foreign Judgment (Reciprocal Enforcement) Act,¹⁹⁶ if it was registered in the High Court in this country.

The above view may be right in certain circumstances, for instance, where the award or decision is by law, in the country where it was made, a judgment of a court. However, the view is faulted on the ground that the Foreign Judgment (Reciprocal Enforcement) Act relates to “judgment of a foreign court” and not “arbitral award” or decision made outside Nigeria.¹⁹⁷ The inevitable conclusion one can therefore reach, is that, prior to ACA 1988, an arbitral award or

¹⁹⁴ Section 54 Arbitration and Conciliation Act, see the analysis in Akinbote, A., Op. Cit., pp.7-8

¹⁹⁵ Cap F. 35, L.F.N., 2004

¹⁹⁶ Ibid.

¹⁹⁷ Ibe, C.E., The Machinery for Enforcement of Domestic Arbitral Awards in Nigeria - Prospects for Stay of Execution of Non-Monetary Awards: Another View. Retrieved from: <http://www.ajol.info/index.php/aujilj/article/download/82414/72568> on 12/3/2013

decision made outside Nigeria is neither registerable nor enforceable in Nigeria.¹⁹⁸ A way around this is by registering and enforcing such awards in countries where the Award is a judgment of a court in that country. Having been clothed with judicial cloak of a judgment of a court, it becomes registerable under the Foreign Judgment (Reciprocal Enforcement) Act, provided the judgment is from a country with reciprocal agreements or treaties with Nigeria.¹⁹⁹

Where, however, the award does not come within the ambit of the Foreign Judgment Act, enforcement may still be possible under residual common law principles. By treating the award sum as a debt, these may permit the award creditor to bring an action for the recovery of the sum by way of summary judgment procedure.²⁰⁰

In conclusion, we have analysed some of the provisions governing recognition and enforcement of arbitral awards in Nigeria. Particularly, the Arbitration and Conciliation Act,²⁰¹ which incorporated the provisions of the 1958 UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dealing with awards made outside Nigeria. These provisions are also based upon the UNCITRAL Model Law, both products of a United Nations agency²⁰², and enjoy broad international acceptance. This does not mean there is a set of rules which guarantees a completely satisfactory outcome to any arbitration proceeding in any jurisdiction. The best way to achieve the desired result, be it in Nigeria or abroad, is to adopt, from the outset, a thoughtful and detailed planning approach that adequately factors in known issues, leaves room for dealing with unforeseeable hurdles, and realistically evaluates the

¹⁹⁸ Ibid

¹⁹⁹ Ibid

²⁰⁰ Mayomi, K. Op. Cit. p.10.

²⁰¹ Cap. A19, Laws of the Federation of Nigeria 2004

²⁰² United Nations Commission on International Trade Law

commercial utility of the options deployable in different situations.²⁰³ In essence, much depends on the background of the parties, their representatives and the arbitrators.

For Nigeria to take that great leap to being a giant in arbitration a number of issues need to be addressed. Nigeria's infrastructure must be significantly improved, so as to make the country an attractive place to station arbitration centres by various World arbitration bodies. The security challenges that are presently threatening the corporate existence of Nigeria and, of course, commercial and investment activities must be tackled headlong to restore confidence.

In addition, the training and retraining of arbitrators must move along with the growing demand for resolution of disputes through international commercial arbitration. Appointing authorities need to be convinced of the availability of qualified arbitrators available within the jurisdiction. The Arbitration and Conciliation Act needs to be updated in line with modern trends. The 2010 review of the UNCITRAL Rules which largely influenced part III of the Arbitration and Conciliation Act dealing with international commercial arbitration further underscores the need for harmonisation and amendment.

²⁰³ Mayomi, K., Op. Cit.

CHAPTER FOUR

RECOGNITION AND ENFORCEMENT

4.1 Introduction

Investor-state arbitration developed from public international law and international commercial arbitration. It contains features of both commercial arbitration and interstate arbitration dispute settlement clauses.¹ International investment arbitration highlights not only the existence of many controversies in international investments, but also the conflicts of interest between the developed and developing nations. Third world countries, desperately in need of foreign investments to boost their economies, literally bend over backwards² to demonstrate to prospective foreign investors that their investments are safe.³

Most of these investors from capital exporting countries consider third world capital importing countries high-risk investments climates and seek to protect their investments by ensuring that the determination of disputes relating to such investments do not take place in the perceived high risk capital importing host country where the investments exist, but in *fora* outside the influence of such countries.⁴

The permanent nature of these investments affects the economy in a wide scale. Foreign capital is injected; technology is transferred and technical and management expertise is also added.⁵ Thus, arbitration, by which disputes are settled, not in the host third world countries' courts, but outside them, is typically stipulated in contracts as the method of dispute settlement.

¹ Wick, D. M., The Counter-Productivity of ICSID Denunciation and Proposals for Change. 243 *Yale Journal of Business Law*. Retrieved from: <http://www.law.yale.edu/documents/pdf/11JIntlBusL239.pdf> on 12/7/2013

² This can be seen in the general liberal and investor friendly nature of the Nigerian Investment Promotion Commission Act (NIPCA) Cap. N 117, Laws of the Federation of Nigeria, 2004.

³ Retrieved from : http://www.babalakinandco.com/documents/new/appraising_the_legal_value_of_mandatory_arbitration_provis.pdf on 3/4/2013

⁴ Ibid.

⁵ Ibid.

But host governments go a step further by prescribing arbitration in investment laws, as the method of dispute settlement. For instance, section 26(2) (b) of the NIPC Act refers disputes between foreign investors and Nigerian government to ICSID.⁶

The most popular international mechanism of settling such disputes is arbitration under the auspices of the ICSID.⁷ The Centre was established under the Washington Convention on the Settlement of Investment Disputes between states and nationals of other states.⁸ It was created as a mechanism to resolve investment disputes within the structure of the World Bank.⁹ ICSID settles investment disputes between States and nationals of other States that are parties to the Convention. Since its establishment, the growth of arbitration under ICSID has been on the rise.¹⁰

In spite of the seeming popularity, ICSID¹¹ has come under serious attack recently, with several signatory-nations denouncing the ICSID Convention. Bolivia was the first country to notify ICSID of its denunciation in 2006, protesting the numerous arbitrations initiated by investors.¹² This was followed by the denunciation of the ICSID Convention by Ecuador¹³ and the later calls for ICSID to be disbanded,¹⁴ peaked by Venezuela's withdrawal.¹⁵

⁶ Nigerian Investment Promotion Commission Act Cap. N 117, Laws of the Federation of Nigeria, 2004. See Babalakin, W. Op. Cit.

⁷ Nigeria ratified the ICSID Convention as far back as back as 23rd August, 1965. There are currently 150 signatories with Canada as the 150th Member State, and the Republic of San Marino as the 159th signatory State to the ICSID Convention. See ICSID ANNUAL REPORT 2014 on: https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID_AR14_ENG.pdf

⁸ Also called the Washington Convention.

⁹ The International Bank for Reconstruction and Development, now called the World Bank, developed ICSID as a forum for arbitration specifically between investors and states.

¹⁰ McLachlan C. Shore L. and Weiniger M. (2008): International Investment Arbitration: Substantive Principles Oxford University Press, p 5.

¹¹ See the List of Contracting States and Other Signatories of the Convention <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx>

¹² Vincentelli, I. A. *The Uncertain Future of ICSID in Latin America*, 16 LAW and BUS. REV. AM. 409, 410 (2010), p.30.

¹³ In May of that year, the President of Ecuador, Raphael Correa, denounced the ICSID. He proclaimed that his country's withdrawal from the ICSID was necessary for "the liberation of our countries because (it) signifies

Historically, investment arbitration excised out of general commercial arbitration. Investment arbitration addresses certain concerns and issues which commercial arbitration does not. Usually, investors are very shrewd and concerned about the destination and guarantee over their investments. It, therefore, means that foreign investor commits a significant amount of money for a long period of time in a country in which it may not have complete confidence in the system of government, including the courts, or in its political stability. To this end, he looks out for guarantees which ordinarily he does not have in his home country.¹⁶

To the host country, the investment may have far reaching economic, social or even political consequences. Understandably, it may want to treat the foreign investor not differently from its local investors, subjecting them to the same laws.¹⁷ It is this dilemma that forced the investment arbitration to chart a course of its own.

The year 1965 marked a new beginning for investment arbitration when the World Bank introduced an alternative, when the ICSID Convention¹⁸ was adopted. From then on, investment disputes could be submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). However, in its first 30 years of existence only very few cases were brought before it. Although, ICSID is not the only platform for the settlement of

colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank.” Vincentelli, I. A., Op. Cit. President Hugo Chavez announced also that, “we have to leave ICSID and I say it right away, we will not recognize ICSID decisions.” Retrieved from: http://www.bbc.co.uk/mundo/ultimas_noticias/2012/01/120108_ultnot_venezuela_chavez_petroleo_exxon_fp.shtml. on 12/9/2013

¹⁴ An instance is by the Presidents of Bolivia and Ecuador at a United Nations (UN) conference in June 2009. Retrieved from: <http://www.un.org/press/en/2009/ga10840.doc.htm> on 12/9/2014

¹⁵ Venezuela withdrew from ICSID by giving notification on January 24, 2012. See *Venezuela Submits a Notice Under Article 71 of the ICSID Convention*, ICSID <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>.

¹⁶ Gantz, D. A., *Investor-State Arbitration Under ICSID, the ICSID Additional Facility and the UNCTAD Arbitral Rules*, p. 3. Retrieved from: http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf on 2/9/2014

¹⁷ UNCTAD, *Dispute Settlement*, p. 25 http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf

¹⁸ Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965. Popularly called the “Washington Convention”.

investment disputes, it is by far the most resorted to for the settlement of investor-state arbitration.¹⁹

The procedure of Arbitration under ICSID is governed by two legal instruments: the ICSID Convention and the ICSID Arbitral Rules. These rules are normally read together in accordance with the BIT or other investment agreements that constitute the agreement by the government subject to arbitration investment disputes under the circumstances set out in the agreement.

4.2 International Center for Settlement of Investment Disputes (ICSID)

International Centre for Settlement of Investment Disputes (ICSID) is a component of the World Bank Group which administers arbitrations based on the 1966 Convention on the Settlement of Investment Disputes and Nationals of other States, ICSID Rules and ICSID Additional Facility Rules.²⁰ Where a foreign party has an investment claim against a government, like any other dispute, they may decide to resolve differences through arbitration, under the auspices of ICSID. Thus, ICSID provides the institutional and procedural framework for arbitration of international investment disputes.²¹

Perhaps the most important aspect of ICSID arbitration is the high degree of structure. It is not only governed by the provisions of the ICSID Convention, but carefully managed by the ICSID secretariat. The ICSID Convention provides for the creation of an Administrative Council, a Secretariat, a Panel of Arbitrators, and a Panel of Conciliators. Although these four organs play an important role in facilitating the arbitration process, the actual work of hearing

¹⁹ Trakman, L. E., *The ICSID Under Siege*. Cornell International Law Journal Vol. 45 p.604. Retrieved from: <http://www.lawschool.cornell.edu/research/ILJ/upload/Trakman-final.pdf> on 2/9/2013

²⁰ Rules, Introduction, retrieved from: <http://www.worldbank.org/icsid/facility/facility-en.htm> on 2/1/2014

²¹ ICSID database can be assessed on: <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>

disputes and ruling on the merits is the task of individual arbitral panels assembled under the auspices and according to the rules of ICSID.

4.2.1 Administrative Council

The Administrative Council serves as the governing body of ICSID. It is composed of one representative from each state that is a party to the ICSID Convention with the President of the World Bank as the Chairman of the Council. Although, he is merely an *ex officio*, and Chairman of the ICSID Administrative Council, he has no right to vote. The Council convenes annually in conjunction with the joint World Bank/International Monetary Fund annual meetings. All representatives have equal voting powers.²²

As the governing body of ICSID, it has a range of duties and is responsible for exercising whatever powers are necessary to implement the provisions of the ICSID Convention. The principal functions of the Council include the election of the Secretary-General and the Deputy Secretary-General, the adoption of regulations and rules for the institution and conduct of ICSID proceedings, the adoption of the ICSID budget, and the approval of the annual report on the operation of ICSID.

4.2.2 The Secretariat

The Secretariat is led by the Secretary-General,²³ with at least one Deputy Secretary-General,²⁴ and approximately 50 staff.²⁵ As the principal administrative organ of ICSID, the Secretariat is responsible for the day-to-day running of the Centre.

²² Retrieved from: <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Administrative-Council.aspx>
On 13/1/2015

²³ Who is the legal representative of ICSID, the registrar of ICSID proceedings, and the principal officer of the Centre. He also has the power to authenticate awards arising from the ICSID process.

²⁴ Both elected by the administrative council

²⁵ In contrast to the members of the Administrative Council, the officers of the Secretariat are non-political.

Principal functions of the Secretariat include providing institutional support for the initiation and conduct of ICSID proceedings; assistance in the constitution of conciliation commissions, arbitral tribunals and *ad hoc* committees and supporting their operations; and administering the proceedings and finances²⁶ of each case. The Secretariat also provides support to the Administrative Council and ensures the functioning of ICSID as an international institution and a centre for publication of information and scholarship.²⁷

It is also the duty of The Secretariat to maintain the ICSID Panels of Conciliators and of Arbitrators to which each Contracting State may designate four persons and the Chairman of the Administrative Council may designate 10 persons. The ICSID Panels provide a source from which the parties to ICSID proceedings may select arbitrators. Further, in the event the Chairman of the Administrative Council is called upon to appoint conciliators, arbitrators or *ad hoc* committee members in ICSID proceedings, his appointees must be drawn from the Panels.²⁸

ICSID is considered to be the leading international arbitration institution devoted to investor-State dispute settlement. As an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States with over one hundred and forty member States. In the Convention, ICSID's mandate, organization and core functions are enshrined, with two sets of procedural rules²⁹ that govern the initiation and conduct of proceedings under its auspices.

²⁶ The Secretariat's administrative costs are financed out of the World Bank's budget; the costs of ICSID proceedings are borne by the disputing parties.

²⁷ Retrieved from: <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Sekretariat.aspx> On 13/1/2015

²⁸ Retrieved from: <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Panels-of-Arbitrators-and-Conciliators.aspx> On 13/1/2015

²⁹ Known as, (i) the ICSID Convention, Regulations and Rules; and (ii) the ICSID Additional Facility Rules. The later was adopted by the Administrative Council authorizing the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention.

The Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through arbitration procedures. Recourse to the ICSID facilities is always subject to the parties' consent.³⁰

If a dispute is submitted to ICSID, it must qualify for coverage not only under the investment treaty, but also under the ICSID Convention. That means that each party must be either an ICSID Convention contracting state or a national of another contracting state, and that their dispute must be a legal dispute arising directly out of an investment under both the ICSID Convention and the investment treaty in question.³¹

Thus, the ICSID Convention provides the basic procedural framework for arbitration of investment disputes arising between member countries and investors that qualify as nationals of other member countries. This framework is supplemented by detailed regulations and rules adopted by the ICSID Administrative Council pursuant to the Convention.³²

4.2.3 ICSID Additional Facility

Not all nations have ratified the ICSID Convention. Naturally, economic relations cannot be hampered by the fact that an investor from an ICSID signatory state is desirous of investing in a non-signatory state and vice-versa. This led to the creation of ICSID Additional Facility for use of the extensive ICSID facilities in situations where either the host state or the foreign investor's

³⁰ Article 25 of the Washington Convention on the Settlement of Investment Disputes between States and the Nationals of the other States, March 18, 1965. Hereinafter the ICSID Convention.

³¹ Definition of Investor and Investment in International Investment Agreements. *In: International Investment Law: Understanding Concepts and Tracking Innovations*, OECD 2008. Retrieved from: <http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf> on 14/3/2014

³² Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

state is not an ICSID party. The Centre had since 1978³³ provided set of Additional Facility Rules authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention. In other words, the ICSID Additional Facility is an option if only one party to an investment agreement is a party to the ICSID Convention,³⁴ but the other is not.³⁵

Basically, the Additional Facility serves the purpose of filling a “jurisdictional gap”, when either the host state or the investor’s home state is not a party to the ICSID Convention.³⁶ The reason for designing the Additional Facility Rules is to accommodate situations where ICSID’s jurisdictional requirements are not met.³⁷ They are a set of self contained rules and generally broader than the ICSID Arbitration Rules.³⁸ Thus, matters that do not meet the jurisdictional requirements of ICSID may in some circumstances be arbitrable under the Additional Facility Rules. For instance, Apotex Holdings Inc., a Canadian³⁹ national, dragged the United States of America under the Additional Facility.⁴⁰

The Additional Facility is useful because arbitration in this forum receives “institutional support from ICSID in a similar way as proceedings under the ICSID Convention.”⁴¹ One key distinction between ICSID and the Additional Facility is that “Additional Facility awards are not

³³ The Additional Facility was not created by the ICSID Convention. Rather, the Administrative Council of the Centre adopted the Additional Facility Rules on September 27, 1978.

³⁴ Schreuer, C. H., et al. (2009), *The ICSID Convention: A Commentary 2nd edition*. Cambridge University Press, Cambridge,

³⁵ Article 2 of the Additional Facility Rules authorizes the Secretariat of the Centre to administer arbitration proceedings between a state and a national of another state when only one state involved is an ICSID contracting state

³⁶ Schreuer, C. H., et al. p. 147.

³⁷ Ibid, p. 84.

³⁸ It must be stated categorically however that if both affected nations—the investor’s and the host-- are parties to the ICSID Convention, and the dispute is within the jurisdiction of the Convention, the Additional Facility Rules will not avail the parties.

³⁹ Canada was not a signatory when this case was decided.

⁴⁰ *Apotex Holdings Inc. and Apotex Inc. v. United States of America (ICSID Case No. ARB(AF)/12/1)*

⁴¹ Wick, D. M., Op. Cit., p.259.

enforceable under the Convention, but require an independent basis for enforcement.” “For this reason, Additional Facility Rules require that arbitral proceedings be held in a state that is a party to the New York Convention.” The ICSID Additional Facility Rules require arbitration to take place in a New York Convention state party because the New York Convention⁴² is relied on to enforce the award, as opposed to the ICSID Convention.⁴³

4.4 Arbitration Proceedings under ICSID

The arbitral tribunals assembled under ICSID essentially act as international investment courts. Given this role and the increasingly frequent use of ICSID to resolve investment dispute that arises under Bilateral Investment Treaties (BITs), it is important to examine the arbitral process itself.

As a general rule, ICSID proceedings are held at the Centre’s headquarters in Washington, D.C. However, parties may agree to hold their proceeding at any other place, subject to certain conditions.⁴⁴ The ICSID Convention contains provisions that facilitate advanced stipulations for such other venues when the place chosen is the seat of an institution with which the Centre has an arrangement for this purpose.

ICSID arbitration may be initiated by a state that is party to the ICSID Convention, or by a national of a state that is a party to the Convention by the submission of a request for

⁴² The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

⁴³ Wick, D. M., Op. Cit., p.279.

⁴⁴ Provided under Article 63 ICSID Convention, “Conciliation and arbitration proceedings may be held, if the parties so agree, (a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or (b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General”.

To this end, there is collaboration between the Lagos Regional Centre for International Commercial Arbitration and the International Centre for Settlement of Investment Disputes (ICSID). This means parties can take advantage of this collaboration and hold sessions in Lagos. Retrieved from: <https://icsid.worldbank.org/apps/ICSIDWEB/layouts/mobile/dispsform.aspx?List=55947ab4-4786-48b9-803c-40abd126dbd5&View=918f21b0-91dc-4b7b-88df-b8291b7c6282&ID=31> on 4/1/2015

arbitration to the Secretary-General.⁴⁵ The request is filed by the potential claimant and outlines the basic facts and legal issues to be addressed. The Request must be registered unless the dispute is manifestly outside the jurisdiction of ICSID.⁴⁶

An ICSID tribunal must have jurisdiction to hear a dispute. Article 25(1) of the ICSID Convention provides the basic understanding of ICSID's jurisdiction:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

A state party is not compelled to accept jurisdiction of the Centre in investment disputes without further consent⁴⁷ which are often contained in BITs. In essence, the host state and the investor's home state must give this consent⁴⁸ in order for the foreign investor to initiate arbitration under ICSID with the host state in the event that there is dispute. This means that a disputing investor does not have to enter into an agreement with the government to submit their dispute to ICSID⁴⁹.

Issues regarding jurisdiction are fundamental even in arbitration under ICSID. Whenever challenges to jurisdiction are raised, and they seem to be becoming more and more frequent,⁵⁰ the arbitrator may be requested to consider issuing an Interim Award.⁵¹

⁴⁵ Article 36 ICSID Convention.

⁴⁶ Article 36 (3) Ibid, See also Egli, G., Op. Cit.

⁴⁷ The Preamble of the ICSID Convention states: "Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration".

⁴⁸ Article 26 further provides that, "consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention".

⁴⁹ Gantz, D. A., Op. Cit., p. 3.

⁵⁰ See *Emilio Agustín Maffezini v. Spain (Case No. ARB/97/7)* and *Tradex v. Albania (Case No. ARB/99/14)*

The question of nationality may be a strong ground for objection to jurisdiction that a State may raise.⁵² Where the dispute is purely domestic in nature as a result of the investor being a national of the host State, such objection may also be valid. Another related ground is where the claimant is a national of a State that is not a party to the ICSID Convention, or has not ratified a particular BIT. In all the above instances the ICSID cannot assume jurisdiction because the Convention is exclusively established for the purpose of settling investment disputes between States and nationals of other States.⁵³

There must also be an “investment” as defined by the BIT between the two states, the absence is also a valid ground for the defendant to validly raise jurisdictional objection.⁵⁴ The provisions of most BITs on the settlement of investment disputes urge that such disputes be resolved amicably.⁵⁵ Consequently, the tribunal may be stopped from assuming jurisdiction in the absence of prior amicable consultations or negotiations. For instance, section 26(1) of NIPC Act states, “where a dispute arises between an investor and any government of the federation in respect of an enterprise all efforts shall be made through mutual discussion to reach an amicable settlement” first. Failure of the parties to so comply may be fatal.

⁵¹ Lalive, P. *Some objections to Jurisdiction in Investor – State Arbitration*, p.8. Retrieved from: http://www.arbitration-icca.org/media/0/12319105289900/objection_jurisdiction_investor_state_arbitration.pdf on 26/6.2013

⁵² The republic of Zaire raised such objection in the case in its case against American Manufacturing and Trading, in 1997. See *American Manufacturing & Trading Inc. v. Republic of Zaire*. ICSID Case No. ARB/93/1

⁵³ See the case *Banro American Resource and SAKIMA v. Democratic Republic of the Congo* (ARB-98-7, Sept. 1, 2000), where Congo objected to jurisdiction on the fact that Canada, the country of nationality of Banro Resource Corp., had not ratified the ICSID Convention. This case was decided before Canada ratified the ICSID convention. Canada is now a signatory to the Convention, having ratified it in 2014.

⁵⁴ See the case of *Tradex v. Albania*, (of 1996, 14 ICSID Review 1999,161) where after carefully considering objections on the above ground, the tribunal decided to assume jurisdiction.

⁵⁵ See ICSID Review 12, No 2, 90-97, p. 322. More examples can be found in the 1994 India v. UK. BIT and the 1992 Romania v. US BIT

The next procedural step is the constitution of the arbitral tribunal according to the agreement of the parties.⁵⁶ The ICSID Arbitration Rules allow significant flexibility regarding the number of arbitrators and the method of their appointment.⁵⁷ In the absence of an agreement, the tribunal will be composed of three arbitrators.⁵⁸

Each party to the dispute will select one arbitrator, and the third⁵⁹ is selected by agreement of the parties. The parties may ask the Centre to assist with the appointment of arbitrators, either in accordance with a previous agreement or pursuant to the default provisions in the ICSID Rules. However, where the parties cannot agree on the appointment of the arbitrators, the Chairman of the Administrative Council, after consulting with the parties, will appoint the remaining arbitrators.⁶⁰

Proceedings are deemed to have begun once the tribunal is constituted. The tribunal holds a first session within 60 days of its constitution. Preliminary questions of procedure are dealt with at the first session. Subsequently, the proceeding usually comprises two distinct phases: a written procedure followed by hearings. After the parties present their case, the tribunal deliberates and renders its award.⁶¹

Arbitration under the ICSID Additional Facility is similar in process to ICSID Convention arbitration with some notable differences. In particular, parties must obtain approval of access to the Additional Facility prior to instituting proceedings, and post-award remedies

⁵⁶ Article 37 (2) (a), ICSID Convention.

⁵⁷ ICSID 2012 report on: <http://documents.worldbank.org/curated/en/2012/01/18403001/icsid-annual-report-2012-cirdi-rapport-annuel-2012>

⁵⁸ Article 37 (2) (b), ICSID Convention.

⁵⁹ The presiding arbitrator.

⁶⁰ However, by virtue of Article 38 Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

⁶¹ See Articles 41-47 of the Convention on the Powers and Functions of the Tribunal.

under the Additional Facility Rules are limited to interpretation, correction, and supplementary decision by the original tribunal.⁶²

Under the Additional Facility rules, the Secretary-General must still determine if the request for arbitration meets the requirements of the Rules, although the “manifestly outside the jurisdiction” language of the ICSID Convention does not exist.⁶³ The Secretary-General is also responsible for appointment of arbitrators if the parties fail to agree. Each party is to nominate two arbitrators, one as a party arbitrator and the other as chairperson and the Secretary-General selects from those nominated if possible.⁶⁴ Where parties fail to agree on a chairman either of them may request the Secretary-General to make the nomination, who then does so in consultation with the parties.⁶⁵

Once an ICSID award is rendered, it is binding and not subject to any appeal or other remedy except those provided by the Convention. The Convention allows the parties to request a supplementary decision or rectification of the award, or to seek the post-award remedies of annulment, interpretation or revision.⁶⁶ There is no recourse to the ICSID Annulment Committee for awards rendered under the Additional Facility Rules. However, in most instances, recourse may nevertheless be had to the courts of the seat of the arbitration under applicable provisions of the law of that jurisdiction.⁶⁷

Thus, Under ICSID, annulment can only be done internally, through a request to an Annulment Committee. There is no recourse to domestic courts in the seat of the arbitration, as

⁶² See ICSID 2012 report, Ibid.

⁶³ See Article 3, ICSID Additional Facility Rules.

⁶⁴ Article 9, Ibid.

⁶⁵ Article 10, Ibid.

⁶⁶ Articles 50-55 ICSID Convention.

⁶⁷ The Additional Facility Rules are not a treaty, and thus do not supersede national law in the place of arbitration. See Gantz, D. A., Op. Cit., p. 10.

under the Additional Facility or UNCITRAL rules. It is submitted that annulment is not a sufficient review mechanism, because sometimes all that is needed is for the award to be varied slightly.

4.5 Costs of Arbitration under ICSID

One of the traditional arguments in favour of arbitration compared to litigation is its low costs. However, recently doubts have been raised as to whether arbitration really costs less than litigation.⁶⁸ Nevertheless, the parties can have a relatively speedy arbitration at lower costs if that is what they want.⁶⁹ Particularly, one of the criticisms⁷⁰ against investor-state arbitration under ICSID is the high cost involved⁷¹ and that it is not cost effective.⁷²

The actual cost of ICSID arbitration is sometimes hard to fathom with accuracy because there are too many variables to be considered. Some costs are known. However, the length and complexity of ICSID hearings that have cost implications are usually not known in advance, other than as macro statistics.⁷³ Similarly, the fees of party representatives, primarily lawyers that may include contingency fees, are also often not known.⁷⁴ For example, the charge for an eight-hour work day amounts to \$3,000⁷⁵ per day.⁷⁶ This means that the average cost of hiring three

⁶⁸ See Hodgson, M., Costs in Investment Treaty Arbitration: The Case for Reform Allen & Overy LLP. p. 1. Retrieved from: <http://www.allenoverly.com/SiteCollectionDocuments/Costs%20in%20Investment%20Treaty%20Arbitration.pdf> on 15/9/2014

⁶⁹ International Commercial Arbitration (2005). UNCTAD/EDM/Misc.232/Add.38. Retrieved from: http://unctad.org/en/Docs/edmmisc232add38_en.pdf on 16/11/2013

⁷⁰ This criticism is majorly centred on the cost of legal counsel and not the administrative expenses because the administrative costs of ICSID arbitration are actually covered almost entirely by the World Bank so that parties do not bear the cost to that extent

⁷¹ Vincentelli, I. A., Op. Cit., p.12.

⁷² Peterson, L. E., Bilateral Investment Treaties and Development Policy-Making. *International Institute for Sustainable Development*, November 2004. Retrieved from: http://www.iisd.org/pdf/2004/trade_bits.pdf on

⁷³ Ibid.

⁷⁴ Perezcano, H., (2005) ICSID Arbitrator Fees: Some Practical Considerations, 618 *Cornell International Law Journal* Vol. 45 Transnational Dispute Management. Retrieved from: http://www.transnational-dispute_management.com/article.asp?key=674 on 15/3/2012.

⁷⁵ Estimated N540, 000 Nigerian Naira.

arbitrators for ICSID arbitration can be close to US\$500,000,⁷⁷ a staggering sum amounting to about N97, 500,000 (ninety million naira)! Making the sustenance of ICSID arbitration not only expensive but punitive. This financial strain makes it difficult for developing countries to compete with some claimant investors, such as large multinational corporations.⁷⁸

These concerns about the high costs of investor-state arbitration are real. They are not just limited to developing states and their investors.⁷⁹ It is remarked that the financial amounts at stake in investor-State disputes are often very high. Resulting from these unique attributes, the disadvantages of international trade and investment arbitration are found to be the large costs involved.⁸⁰

The remedy sought by investors is almost invariably monetary compensation with a view to restoring them to the financial position that would have pertained, if there had been no breach.⁸¹ Considering that the average amount awarded to successful claimants is around USD 76 million, costs may represent a substantial part of the financial outcome.⁸²

⁷⁶ See Memorandum on the Fees and Expenses of ICSID Arbitrators. The new Schedule of ICSID fees came into effect on January 1, 2013.

⁷⁷ Gustavo Carvajal, presentation to workshop on investment, Americas Trade and Sustainable Development Forum, November 18, 2003, Miami; Shihata and Parra 1999, put the average figure at US\$220,000 in 1999 (excluding lawyer's fees). In 2002, ICSID's daily fee payable to ICSID arbitrators was increased from \$1,100 to \$2,000. On this schedule, the average cost would appear to rise to some \$585,000. See Schedule of Fees at <http://www.worldbank.org/icsid/schedule/schedule.htm> on 15/3/2012.

⁷⁸ Perezcano, H., Op., Cit.

⁷⁹ Trakman, L. E., Op. Cit.

⁸⁰ UNCTAD *Latest Developments in Investor-State Dispute Settlement*, IIA ISSUES NOTE UNCTAD/WEB/DIAE/IA/2010/3 (March 2011). Retrieved from: http://www.unctad.org/en/docs/webdiaeia20113_en.pdf.

⁸¹ Hodgson, M., Op. Cit., p. 1.

⁸² Hodgson, M., Counting the Costs of Investment Treaty Arbitration. *The International Journal of Commercial and Treaty Arbitration*. 24 March 2014 GAR, first published in the *Global Arbitration Review* online news, 24 March 2014: www.globalarbitrationreview.com Retrieved from: <http://www.allenoverly.com/SiteCollectionDocuments/Costs%20in%20Investment%20Treaty%20Arbitration.pdf> on 15/5/2014

Cost of arbitration under ICSID is categorised into two broad categories. The first called tribunal costs, covers the fees and expenses of the arbitral tribunal itself, together with those of the institution and appointing authority.⁸³

The second category is lumped under “party costs” covering the fees and expenses of legal counsel as well as any expert or factual witnesses.⁸⁴ The average party costs for claimants and respondents are in the region of USD 4.4 million and USD 4.5 million respectively.⁸⁵ A study revealed that the average party costs were quite similar, at US\$4,437,000 for claimants and US\$4,559,000 for respondents.⁸⁶

The ICSID Convention⁸⁷ leaves costs to the broad discretion of the tribunal, without offering an indication of the factors a tribunal may take into account in reaching its decision. An earlier draft of the Convention established a default “pay your own way” approach, except in the event of claims commenced “frivolously” or in “bad faith”. Ultimately, the question of costs was left entirely to the tribunal’s discretion.⁸⁸

In exercising its discretion on the apportionment of costs, a tribunal has two main options. The “pay your own way” on the one hand and “loser pays” approach on the other. Each approach finds considerable support in case law.

⁸³ This consists of the following: 1. US\$25,000 non-refundable fee is payable to the Centre by the party requesting arbitration proceedings under the Convention. 2. non-refundable fee of US\$10,000 payable to the Centre by any party: (a) requesting a supplementary decision to, or the rectification, interpretation or revision of, an arbitral award rendered pursuant to the Convention; (b) requesting a supplementary decision to, or the correction or interpretation of, an arbitral award rendered pursuant to the Additional Facility Rules; or (c) requesting the resubmission of a dispute to a new Tribunal after the annulment of an arbitral award rendered pursuant to the Convention. 3. Arbitrators, commissioners and *ad hoc* Committee members are entitled to receive a fee of US\$3,000 per day of meetings or other work performed in connection with the proceedings, as well as subsistence allowances and reimbursement of travel expenses. 4. US\$32,000 is levied by the Centre upon the constitution of the Conciliation Commission, Arbitral Tribunal. See International Centre for Settlement of Investment Disputes (ICSID) Schedule of fees, Effective January 1, 2013. See *Ibid*, p. 2

⁸⁴ Hodgson, M., *Op. Cit.*, p. 1.

⁸⁵ *Ibid*, p. 2.

⁸⁶ *Ibid*.

⁸⁷ Article 61(2) ICSID Convention.

⁸⁸ Hodgson, M., *Op. Cit.*, p.6.

The “pay your own way” principle suggests that a party should bear its own costs. The pay your own way approach is the traditional position in inter-State disputes under international law,⁸⁹ as reflected in the Statute of the International Court of Justice (ICJ). It is also the usual position in litigation in the US,⁹⁰ China and Japan.⁹¹ The ICSID tribunals appear to have adopted this approach in numerous cases.⁹²

It is usual for a losing party to make at least some contribution to the costs of the winner in the national courts of many jurisdictions.⁹³ And recently, ICSID tribunals have made recourse to this basic principle tagged “loser-pays-rule” or “costs follow the event”.⁹⁴ According to which the cost of the arbitration should be borne by the unsuccessful party. The outcome of the case becomes the most significant factor in determining the allocation of costs.⁹⁵ Thus, the successful party should ordinarily recover its reasonable costs.⁹⁶ Investment tribunals are increasingly favouring the “cost follows the event” approach.⁹⁷ The obvious explanation for this is ICSID’s cap on arbitrators’ fees.⁹⁸

⁸⁹ Statute of the International Court of Justice, 24 October 1945, Article 64: “Unless otherwise decided by the Court, each party shall bear its own costs”, Retrieved from: <http://www.icjij.org/documents/index.php?p1=4&p2=2&p3=0> on 15/5/2014

⁹⁰ Hence, often called the American Rule.

⁹¹ In the case of *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic ICSID Case No. ARB/02/1*, Award dated 25 July 2007, paragraph 112: “The Tribunal notes that Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules grant discretion to ICSID tribunals with regard to the award of costs. The Tribunal further notes that there is no uniform practice in treaty arbitration with regard to this matter.

⁹² See *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6 and *Alasdair Ross Anderson v. Republic of Costa Rica*, ICSID Case No. ARB (AF)07/3

⁹³ Including England & Wales, France, Germany, Hong Kong, Italy, the Netherlands, Poland, Russia, Singapore, Spain and Thailand.

⁹⁴ This has found support, for example, in the decision of *Gemplus & Talsud v. United Mexican States (ICSID Cases Nos. ARB (AF)04/3 & ARB (AF)04/4)*

⁹⁵ *International Thunderbird Gaming, Methanex, CSOB (ICSID Case No. ARB/97/4)*

⁹⁶ Hodgson, M., Op. Cit., pp 5-6.

⁹⁷ In awards decided before 2006, tribunals adjusted costs in just one-third of cases (35 per cent). However, in cases decided after 2006, this number has risen sharply and tribunals made some adjustment in around half (49 per cent) of awards). See Ibid, p.8.

⁹⁸ Ibid, p. 3.

In view of the high cost of arbitration under this platform, prospective parties have to think twice before taking their matter to ICSID. There is no certainty that party who complains will win or lose. If he loses, he faces double punishments. Therefore, it will not be easy for parties from the developing countries such as Nigeria to quickly decide to take matters to international tribunals such as ICSID. This ultimately militates against justice. Prospective parties will languish in stack injustice because they do not have the resources to seek redress in this forum.

Finally, the expense of bringing a treaty claim is a major concern for investors but the final allocation of costs in a case can be hard to predict. There is the need for more transparency in the costs incurred by parties in ICSID arbitration. As investor claims proliferate, the cost of defending against such claims is coming into focus. Nigeria being a developing economy ought to be cognizant of the financial implications when offering an open consent to arbitration under a given investment treaty, because as have been examined, these costs can be substantial.

4.6 Recognition and Enforcement of Award Rendered by ICSID

The effectiveness of arbitration ultimately depends on whether the winning party can enforce its claim against the losing party. The process will amount to an exercise in futility if the fruits of award obtained by the winning party cannot be executed. Awards issued by ICSID tribunals have been perceived to be easily enforceable, which is a key factor in ICSID's efficacy. A Contracting State, however, may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitrate. Although, execution of ICSID awards is the norm,⁹⁹ it should not be taken for granted.

⁹⁹ Egli, G. Op. Cit., p.1055.

An award for damages is the most typical of arbitral award, and the only realistic type of award.¹⁰⁰ An award for damages can more realistically be enforced than an award for specific performance or a mere declaratory award.¹⁰¹ Once the award is duly recognised it becomes a valid title on which measures of execution can be taken. ICSID awards must be recognized with speed and without judicial interference,¹⁰² making such awards preferable to the procedures available under domestic laws or other international conventions for the recognition and enforcement of foreign judgments or awards.¹⁰³

Article 54(1) ¹⁰⁴specifically states,

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.¹⁰⁵

Nigeria has given full effect to this provision by making the award to have effect as award in final judgement of the Supreme Court of the Federal Republic of Nigeria.¹⁰⁶ Thus,

1. (1) Where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for Settlement of Investment Disputes, a copy of the award duly certified by the Secretary-General of the Centre: aforesaid, if filed in the Supreme Court by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it

¹⁰⁰ Sornarajah, M, (2004) *International Law on Foreign Investment*.(2ed.),Cambridge University Press, Cambridge, p.438.

¹⁰¹ Ibid, p.282.

¹⁰² Dunn, G. Will Africa Be Lit By “BITs”? p.2. Retrieved from: <http://www.gibsondunn.com/publications/pages/Will-Africa-Be-Lit-By-BITs.aspx> on 15/5/2013

¹⁰³ Delaume, G. R., *ICSID Arbitration in Practice*, 2 International Tax & Business Law. 58, 1984. Berkeley Law Scholarship Repository. Retrieved from : <http://scholarship.law.berkeley.edu/bjil/vol2/iss1/3> on 23/12/2012

See also Dunn, G., Op. Cit., p.1.

¹⁰⁴ ICSID Convention

¹⁰⁵ Ibid

¹⁰⁶ Section 1 of International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, Cap 120 LFN 2004.

were an award contained in a final judgment of the Supreme Court, and the award shall be enforceable accordingly.

(2) The Chief Justice of Nigeria may make rules of court or may adapt any rule of court necessary to give effect to this section.

This is further domesticated in accordance with section 12 of the Nigerian Constitution.¹⁰⁷

Parties are generally bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention.¹⁰⁸ In addition, a party may ask a tribunal which omitted to decide any question submitted to it, to supplement its award¹⁰⁹ and may request interpretation of the award.¹¹⁰

The Convention does not impose or even prescribe any particular method to be followed by domestic courts. It merely requires each contracting state to meet the requirements of the Article in accordance with its own legal system. This is because it is practically impossible to impose the same method as different legal techniques exist in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary States.

As required by the Convention, Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It is often asked whether Article 54 is in conflict with the doctrine of sovereign immunity, or that if it derogates the sovereignty of domestic courts.¹¹¹ This may even be compounded where a state's domestic law prevents execution of the award because of its provisions providing for sovereign immunity. The Convention provides an answer to this concern: "nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of

¹⁰⁷ Section 12, Constitution of the Federal Republic of Nigeria, 1999, CAP. C23 L.F.N. 2004 (as amended).

¹⁰⁸ Revision and annulment provided for in Articles 51 and 52 of the Convention respectively.

¹⁰⁹ Article 49(2) Ibid.

¹¹⁰ Article 50 Ibid.

¹¹¹ Delaume, G. R., Op. Cit.

any foreign State from execution.¹¹² It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed.¹¹³ Unfortunately, this language leaves a loophole in favour of states party to a dispute. For instance, it was stated in the case of *Maritime International Nominees Establishment v. Republic of Guinea*¹¹⁴ that,

It should be clearly understood...that State immunity may well afford a legal defence to forcible execution, but it provides neither argument nor excuse for failing to comply with an award. In fact, the issue of State immunity from forcible execution of an award will typically arise if the State party refuses to comply with its treaty obligations. Non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions.

Again, despite this loophole, execution of awards remains the rule rather than the exception.¹¹⁵ In practice however, a waiver of immunity is sought, though it depends on the situation.¹¹⁶

An ICSID award is final and binding upon the parties¹¹⁷ and the execution of an award may be stayed in the event the award requires interpretation or needs revision due to the discovery of new facts, or if one party requests annulment of the award on specific grounds. Apart from these remedies an ICSID award is not open to attack on any ground in the courts of a contracting state. Not even on the ground of public policy may such awards be reviewed in the

¹¹² Article 55 ICSID Convention. See Schreuer, C. H. *The ICSID Convention: A Commentary*, Op. Cit.

¹¹³ Jan van den Berg, A. *The New York Convention of 1958: An Overview*. Retrieved from: http://www.arbitrationicca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf on 15/12/2013

¹¹⁴ Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award, 12 August 1988, *ICSID Case 4/115/6*.

¹¹⁵ Ibid. See also Egli, G., Op. Cit.

¹¹⁶ Confirmation, Annulment, Recognition and Enforcement of Arbitral Awards. *The Seinan Law Review*, Vol. 37, No. 4(2005).

¹¹⁷ Article 53 ICSID Convention

domestic courts.¹¹⁸ This rule is a vivid illustration of the autonomously effective character of an ICSID arbitral award.¹¹⁹

As regards Annulment the Convention provides,

Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.¹²⁰

This is clearly a unique and self sufficient scheme for annulment of an award.¹²¹ The Chairman of the Administrative Council of ICSID shall forthwith appoint from the Panel of Arbitrators an *ad hoc* committee of three persons, who are not members of the Tribunal which rendered the award, upon receipt of a request for annulment of an award.¹²²

Parties are expected to spring to action towards recognising and enforcing a validly rendered award without delay, except where such award is challenged. However, as it is not unusual for the losing party to go to sleep after the proceeding is finalised.¹²³ If a party fails to comply with an ICSID arbitral award, the Convention provides that any party to an ICSID award may obtain recognition and enforcement by furnishing a certified copy of the award to the competent court or other authority designated for that purpose by each contracting state.¹²⁴ In Nigeria the International Centre for Settlement of Investment Disputes (Enforcement of Awards)

¹¹⁸ Egli, G., Op. Cit., p. 1056.

¹¹⁹ This recognition and enforcement is “a distinctive feature of ICSID arbitration, as other international arbitration regimes leave enforcement to domestic laws” or treaties such as the New York Convention. See Articles 53 and 54 ICSID Convention.

¹²⁰ Article 52 Ibid.

¹²¹ Ibid

¹²² See Kazutake, O., Op. Cit.

¹²³ Due to the large number of awards that have been rendered against Argentina after its 2001 financial crisis, there has been some concern regarding the enforcement of awards against Argentina.

¹²⁴ Under article 54(2) ICSID Convention.

Act in 1967¹²⁵ was enacted to give domestic effect to the ICSID Award. Section 1(1) provides that,

Where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for the Settlement of Investment Disputes, a copy of the award duly certified by the Secretary-General of the Centre aforesaid, if filed in the Supreme Court by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgement of the Supreme Court, and the award shall be enforceable accordingly.

The existence of an award itself creates a moral pressure on the part of the state party to conform to the award.¹²⁶ States compete to attract foreign investment, and a state will not be attractive to foreign investors if it does not abide by an arbitral award.¹²⁷ Failure to comply with the terms of award might have serious consequence on the investment climate in the state. The other party might seek not only political remedies, but may also go as far as taking its case to the International Court of Justice in the event of non-cooperation.

Since the accession to ICSID Convention¹²⁸ Nigeria had taken steps towards giving teeth to the Convention in order to compliment the ratification.¹²⁹ Furthermore, the Nigerian Investment Promotion Commission Act¹³⁰ had since given recognition to ICSID arbitration.

It is, however, important to note that the provisions of Arbitration and Conciliation Act¹³¹ do not apply in anyway under ICSID Arbitration.¹³² Under the ICSID Rules, parties are free

¹²⁵ Now Cap. 120 L.F.N. 2004.

¹²⁶ **Sornarajah, M**, Op. Cit., p.134.

¹²⁷ Ibid

¹²⁸ The convention was ratified and domesticated thereby becoming part of the national laws of Nigeria on 23rd August, 1965.

¹²⁹ Pursuant to Section 12 of the Constitution of the Federal Republic of Nigeria, 1999.

¹³⁰ Section 26 (3), Nigerian Investment Promotion Commission Act (NIPCA) Cap. N 117, Laws of the Federation of Nigeria, 2004.

¹³¹ Cap. A19 L.F.N. 2004.

¹³² Section 8 International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, Cap 120 LFN 2004.

before the determination of the arbitral process to settle on their terms and thereafter discontinue the case. Rule 43¹³³ is emphatic on this:

- (1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.
- (2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.

The only two cases involving Nigeria have thus far been terminated under this rule. The first is the celebrated case of *Guadalupe Gas Products Corporation v. Nigeria*¹³⁴ concerning production and marketing of liquefied natural gas. A dispute arose over the marketing and distribution of liquefied natural gas between the gas corporation and the Nigerian government. A settlement was reached by the parties and recorded at their request in the form of an award.¹³⁵

The second case is *Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria*¹³⁶ over a dispute concerning hydrocarbon concession, on which the Tribunal also issued an order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1).¹³⁷

Considering the confidentiality in arbitration under the ICSID, there are not much details available regarding such cases. Perhaps if the cases had gone through to conclusion the details of the proceedings and enforcement might have been available. A recently filed case involving *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal*

¹³³ Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

¹³⁴ (ICSID Case No. ARB/78/1)

¹³⁵ Award embodying the parties' settlement agreement rendered on July 22, 1980, pursuant to Arbitration Rule 43(2).

¹³⁶ (ICSID case No. ARB/07/18)

¹³⁷ On August 1, 2011.

*Republic of Nigeria*¹³⁸ was registered in December 2013, and is pending before the Tribunal with a Notice of Preliminary Objection filed by the Respondent. How the case is determined will go a long way in highlighting the State of the recognition and enforcement of ICSID Awards in Nigeria. African countries have generally been accused of showing reluctance to submitting arbitration of disputes to ICSID.¹³⁹ This cannot be said to be true with Nigeria, because Nigeria has demonstrated its commitment to obligations under ICSID.

4.7 The Challenges Confronting ICSID Arbitration

Several criticisms have been levelled against ICSID arbitration. Some of these criticisms levelled at the ICSID would be evaluated in the light of the challenges it faces. The perception that ICSID was established by the developed economies in the West to protect the interest of investors abroad is the basis of most of the concerns from developing nations.¹⁴⁰ That ICSID arbitration has done more to protect capital exporter states and the equitable interests¹⁴¹ of their investors than address the economic and social interests of capital importing states in Africa, Asia, and Latin America that historically were economically exploited by colonial powers and their investors.¹⁴² According to Sornarajah,

The fact that the choice of bilateral investment agreements and investor- state arbitration is strategic still does not contradict some developing states' argument that they lack the array of strategic options that are available to powerful developed states. From this

¹³⁸ (*ICSID case No. ARB/13/20*). The Tribunal issues a decision on preliminary objections on October 29, 2014) whilst the tribunal rejected emphatically some of the respondent's objections to jurisdiction it joined several of them to the merits stage of the proceedings. See case details: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?caseno=ARB/13/20>

¹³⁹ Agyemang, A.A., African states and ICSID arbitration. *The comparative and international law journal of Southern Africa*. 1988 Retrieved from: <http://www.econbiz.de/Record/african-states-and-icsid-arbitration-agyemang-augustus/10001051426> on 10/1/2015

¹⁴⁰ ICSID in crisis Strait-jacket or investment protection? Bretton Woods Project 10 July, 2009. Retrieved from: <http://www.brettonwoodsproject.org/2009/07/art-564878/> on 2/1/2015

¹⁴¹ Ibid.

¹⁴² For the extensive history of this division between capital exporter and importer states, see M. Sornarajah, M., Op. Cit., pp.142– 45.

perspective, the ICSID is a vehicle by which wealthy developed states have manicured investment law, and through it investor-state arbitration, into a self-serving *ius cogens* to suit themselves and their investors abroad.¹⁴³

ICSID arbitration is seen to have done more to protect capital exporter states and the interests of their citizen-investors.¹⁴⁴ This concern was most vividly expressed in 2009 by President Raphael Correa of Ecuador, that the ICSID was established by, and arguably in the interest of, wealthy countries and their investors abroad.¹⁴⁵

The perception that ICSID's bias for the developing nations is strengthened by the fact that it is part of the World Bank Group,¹⁴⁶ party to a world order dominated by institutions and processes that are directed at wealth enhancement, not wealth sharing.¹⁴⁷ It acts as a proxy from investors from the West, who in the long term, can afford its services.¹⁴⁸

It must be emphasised here that these criticisms do not only root in ideological differences or come from developing economies but even from International Institutions. The United Nations Conference on Trade and Development observed:

[T]he financial amounts at stake in investor-State disputes are often very high. Resulting from these unique attributes, the disadvantages of international trade and investment arbitration are found to be the large costs involved, the increase in the time frame for claims to be settled, the fact that ICSID cases are increasingly difficult to manage, the fears about frivolous and vexatious claims,

¹⁴³ See Trakman, L., Op. Cit.

¹⁴⁴ Sornarajah, M., Op.Cit.

¹⁴⁵ Also quoted in Trakman, L. E., Op. Cit.

¹⁴⁶ The World Bank is the name that has come to be used for the International Bank for Reconstruction and Development (IBRD) founded at Bretton Woods. As the World Bank expanded beyond its initial scope and purpose of rebuilding Europe after the Second World War, the World Bank grew through the creation of four additional organizations. Together, these five financial organizations comprise the World Bank Group, namely the IBRD, the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Center for Settlement of Investment Disputes (ICSID).

¹⁴⁷ Trakman, L. E., Op. Cit., p.612.

¹⁴⁸ While the ICSID's homepage presents the ICSID as an "autonomous international institution," member countries are members of the World Bank. The Governor of the Bank is an *ex officio* member of the ICSID's governing body, the Administrative Council. The chairman of the Administrative Council is the President of the World Bank. The annual meeting of the World Bank and its Fund coincides with the annual meeting of the Administrative Council of the ICSID. Not insignificantly, the World Bank funds the ICSID Secretariat.

the general concerns about the legitimacy of the system of investment arbitration as it affects measures of a sovereign State, and the fact that arbitration is focused entirely on the payment of compensation and not on maintaining a working relationship between the parties.¹⁴⁹

From the high cost of arbitration, to time consumption, questions on legitimacy are also arising. The ICSID Arbitration is perceived as biased towards wealthy Western States and their investors as an ideological and normative proposition.¹⁵⁰ In doing this, the World Bank is also protecting itself. This is largely because most of these investors have the monetary support of the Bank.

Furthermore, there appears to be a shift in which powerful countries in the West have invoked customary law and treaty defences, such as the defence of necessity to foreign investors from developing states, even though those same Western states denounced those defences when they were capital exporters.¹⁵¹ The Secretary General of the ICSID has the authority to appoint arbitrators to resolve investment disputes and, given the limited number of qualified candidates, the balance of the appointment process allegedly favours developed countries. This in itself renders the arbitrators, who are trained predominantly as civil and common law lawyers, to likely to construe that treaties textually in favour of that capital exporter.¹⁵²

In a similar vein, ICSID arbitrators mostly commercial and not public lawyers, with the tendency of paying less attention to the public policy consequences of their awards for developing states than to the plain words of treaties devised by dominant treaty parties.¹⁵³ Thus,

¹⁴⁹ UNCTAD *Latest Developments in Investor-State Dispute Settlement*, IIA ISSUES NOTE UNCTAD/WEB/DIAE/IA/2010/3 (March 2011). Retrieved from: http://www.unctad.org/en/docs/webdiaeia20113_en.pdf.

¹⁵⁰ Trakman, L. E., Op. Cit., p. 605.

¹⁵¹ Ibid, p.608. See also Peterson, L. E., OP. Cit., p. 21.

¹⁵² Trakman, L. E., Op. Cit., p.609.

¹⁵³ See Gus Van Harten, G. (2007), *Investment Treaty Arbitration and Public Law*. Oxford University Press, Oxford, p. 122.

by their backgrounds, the ICSID Arbitrators are programmed to be on the side of mostly investors from developed economies as against whatever defence of “public interests” the Developing Nation may put forward. This concern is however confronted by the supporters of ICSID. That ICSID is not to blame, because it merely facilitates the resolution of investment disputes through the ICSID Convention and Rules, by independent arbitration panels.¹⁵⁴ Thus, the ICSID only provides the institutional and procedural framework for independent arbitral tribunals constituted in each case to resolve the dispute. However, this defense does not respond to the underlying assault on the ICSID, based on the perception that institutionalized arbitration, exemplified by the ICSID, protects the interests of developed states and their investors systemically, structurally, and, ultimately, functionally.¹⁵⁵

The venue of the hearings is also one challenge further grounding the ideological bias of ICSID in favour of investors from wealthy nations. ICSID hearings are often held in Washington, also in expensive cities like London, and Paris; these locations are convenient for and affordable to wealthy investors, but not the more distant and poorer developing states, their investors, and civic groups in their countries.¹⁵⁶ This problem the Convention remedies by setting conditions for parties to collaborate with regional arbitral institutions like the Lagos Regional Centre for International Commercial Arbitration.¹⁵⁷ This might seem idealistic

¹⁵⁴ Trakman, L. E., Op. Cit., p611.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ ICSID entered into a renewed cooperation agreement with the Lagos Regional Centre for International Commercial Arbitration. ICSID has 13 such agreements in place, including agreements with: the Australian Centre for International Commercial Arbitration in Melbourne; the Australian Commercial Disputes Centre in Sydney; the Centre for Arbitration and Conciliation at the Chamber of Commerce in Bogota; the China International Economic and Trade Arbitration Commission; the German Institution of Arbitration; the Gulf Cooperation Council Commercial Arbitration Centre in Bahrain; the Hong Kong International Arbitration Centre; Maxwell Chambers in Singapore; the Permanent Court of Arbitration in The Hague; the Regional Arbitration Centres of the Asian-African Legal Consultative Committee in Cairo, Kuala Lumpur and Lagos; and the Singapore International Arbitration Centre. See ICSID Annual Report 2014 on:

considering the fact that the investors do not generally have confidence in centres located in the developing nations. The only practical thing to do is to agree on a neutral venue, usually another city in a developed country.

Lastly, there is the raging question as to whether investor-state arbitration belongs to public or private law sphere. This is as a result of the inconsistent jurisprudential approach of the tribunals, failing to recognise the public nature of many ICSID arbitrations.¹⁵⁸ It is thought that investor-state arbitration is under private law sphere, like commercial arbitrations. This question is rooted in the need for a standard of review in investment arbitration under ICSID.¹⁵⁹ It is maintained that annulment is not enough, that there is the need to create an appellate mechanism to give room for correcting errors in order to develop a system with consistent precedents.¹⁶⁰

In conclusion, the story of ICSID can be said to be from neglect to pre-eminence. Although ICSID was established in 1966, it did not assemble its first arbitral tribunal until 1972.¹⁶¹ The pace of cases brought before the Centre remained slow for decades, and it is only recently that the number of cases has increased.¹⁶² While the reasons for this explosion are unclear, it may be tied to the recent growth in foreign direct investment and the increasingly large network of BITs.

In the same vein, the importance of ICSID in international investment arbitration is also demonstrated by the number of states¹⁶³ that are party to the ICSID Convention and the number of instruments that provide for it as a dispute resolution mechanism. Even with such popularity

https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID_AR14_ENG.pdf

¹⁵⁸ Burke-White, W.W. and von-Starden, A. "The Standard of Review in Investor-State Arbitrations". *The Yale Journal of International Law*, vol.5, (2010).

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ See ICSID list of concluded cases on: <http://www.worldbank.org/icsid/cases/conclude.htm>

¹⁶² The number of cases registered in fiscal year 2014 remained steady, with 40 new ICSID cases and 8 new cases for administration under the UNCITRAL Arbitration Rules. See ICSID report 2014, Op. Cit.

¹⁶³ 150 States. See ICSID 2014 Report, Op. Cit.

the major economies and destinations for foreign investment in Asia, varying from Vietnam to India, never acceded to the ICSID. Brazil too has stayed away despite thriving economy¹⁶⁴ with Australia announcing that it would not include investor-state arbitration in future trade agreements. Even with these investors are likely not to leave Brazil and Australia.

As observed, Bolivia, Ecuador and Venezuela have all pulled out of the ICSID system in recent years, clearly with the aim to avoid the enforcement of arbitral awards under the ICSID Convention. The denunciation has not prevented investors from initiating arbitrations against them because most BITs provide for alternatives to ICSID for settlement of investment disputes.¹⁶⁵ Therefore, investors from states that have BITs in force can still initiate arbitration through alternative mechanisms, such as *ad hoc* arbitration under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).¹⁶⁶

International investment arbitrations highlight not only the existence of many controversies involved in international commercial transactions, but also the conflicts of interest between the developed and the developing states. Acceding to investment treaties has the effect of internationalising disputes between the host state and its agencies and regulators, and foreign investors in sensitive sectors.

Nigeria acceded to the ICSID convention in order to submit to a credible platform for the settlement of investment conflicts arising from investments by foreign investors within its

¹⁶⁴ On the other hand, Brazil is generally seen as an investment-friendly destination without having ratified a single BIT. See [Gibson Dunn](#), Op. Cit.

¹⁶⁵ Investors can still initiate arbitration against these states when BITs that contain arbitration provisions remain in force. See Wick, D. M., Op. Cit. For example, the U.S.-Ecuador BIT provides for dispute settlement through ICSID, the Additional Facility, or *ad hoc* UNCITRAL arbitration. Therefore, many investors from states that have BITs in force can still initiate non-ICSID investor-state arbitration.

¹⁶⁶ Yalkin, T., *Ecuador Denounces ICSID: Much Ado About Nothing?* July 30, 2009. Retrieved from: <http://www.ejiltalk.org/ecuador-denounces-icsid-much-adoabout-nothing/on> 13/12/2014

territory. The story of ICSID can be said to be from neglect to pre-eminence.¹⁶⁷ This is as a result of the recent growth in Foreign Direct Investment (FDI) and the increasingly large network of BITs. Even with such popularity the major economies and destinations for foreign investment in Asia and Africa, varying from Vietnam to India and South Africa, never acceded to the ICSID. Brazil too has stayed away despite a thriving economy;¹⁶⁸ with Australia announcing that it would not include investor-state arbitration in future trade agreements. Bolivia, Ecuador and Venezuela have all pulled out of the ICSID, with the aim to avoid the enforcement of arbitral awards under the ICSID Convention.

A country may risk isolation by sending the wrong message to the international investment community, which would ultimately affect investor confidence in the country, where it fails to comply with the terms of an award rendered by ICSID. Nigeria has so far demonstrated its commitment to the Recognition and Enforcement of ICSID Awards. It was the first nation to sign the ICSID Convention, and also went ahead to enact a domestic legislation¹⁶⁹ putting ICSID award at the same level with the judgment of the Supreme Court. It did not stop there; in 1995 the NIPCA¹⁷⁰ was enacted making provision for foreign investors to initiate arbitration under the auspices of the ICSID. To further underscore this commitment, the settlement terms of the two cases¹⁷¹ settled under ICSID involving Nigeria were quietly complied with.

Nigeria's ability to attract foreign investors in the face of security, economic, social and political challenges is not unconnected with its positive attitude towards amicable settlement of

¹⁶⁷ The number of cases registered in fiscal year 2014 remained steady, with 40 new ICSID cases and 8 new cases for administration under the UNCITRAL Arbitration Rules. See ICSID Report 2014, Op. Cit.

¹⁶⁸ Brazil is generally seen as an investment-friendly destination without having ratified a single BIT. See Dunn, G., Op. Cit.

¹⁶⁹ International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, Cap 120 LFN 2004.

¹⁷⁰ Particularly Section 26, NIPCA Cap. N 117, L.F.N., 2004, formally a military decree.

¹⁷¹ *Guadalupe Gas Products Corporation v. Nigeria (ICSID Case No. ARB/78/1)* and *Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria (ICSID case No. ARB/07/18)*.

investment disputes, among other parameters. It is therefore in Nigeria's best interest to continue to demonstrate to the foreign investor-community its continual commitment to this forum of settling investment disputes.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

The dissertation ventures to provide a general background, setting a direction. The research problems are outlined to include issues bordering on the integrity of ICSID. The cost of arbitration, the imbalance in bilateral investment agreements, and the general incompetence of Nigerian courts in handling disputes of investment disputes. The research also set clearly its aim to appraise the recognition and enforcement of ICSID awards in Nigeria. In this work, existing contributions by several scholars in the field of arbitration have been reviewed to provide a springboard for the issues that were discussed.

The research started with a conceptual clarification to certain terms. These include investment arbitration, arbitral award, arbitration agreement, arbitration clause, and recognition and enforcement, and arbitral. Investor and investment are also conceptualized within the context of their applications under the ICSID jurisprudence. The dissertation further examines the nature of commercial arbitration in Nigeria for a deeper appreciation of some of the issues being addressed.

An analysis of domestic arbitration is also in focus, with emphasis on the local legislation regulating arbitration proceedings in Nigeria – the Arbitration and Conciliation Act,¹ and references are made to the Lagos State Arbitration Law of 2009.² Arbitration became popular as a result of apparent inadequacies in the Nigerian court system, such as the adversarial nature of litigation, unnecessary delays, and lack of confidentiality, among others problems. The Nigerian

¹ Cap A19, Laws of the Federation of Nigeria, 2004.

² No. 10, Lagos State Arbitration Law Laws of Lagos State, 2009.

courts responded to this development with caution at the onset, but recent developments have been positive and encouraging in the recognition and enforcement of arbitration agreements.³

With the enactment of the Arbitration and Conciliation Act,⁴ the Nigerian Legal System positioned and adjusted to rapid impact of arbitration domestically. This led other states, like Lagos to also follow suit in enacting laws at state level to regulate and give more teeth to arbitration practice. Although the Federal Act is fraught with criticisms, it has still been able to achieve some modest objectives, and the applications of the provisions have given arbitration practitioners direction and understanding of the next steps to take in order to take arbitration to the next level. This is why the amendment of the flaws in the act wouldn't have come at a better time.⁵

Believing that no scholar can hope to have a solid grasp of Investor-State-arbitration without a fair knowledge of international commercial arbitration, the work evaluates international commercial arbitration by exploring the legal infrastructure for the recognition and enforcement of arbitral awards in Nigeria. These are the New York Convention,⁶ United Nations Commission on International Trade Law (UNCITRAL) Model Law,⁷ where bulk of the provisions of the Arbitration and Conciliation Act⁸ emanate; UNCITRAL Arbitration Rules,⁹ the domestic legislation on arbitration – Arbitration and Conciliation Act, ICSID Convention,¹⁰ and

³ *C.N. Onuselogu Ent. Ltd. v. Afribank (Nig.) Ltd (2005) 1 NWLR Part 940 577*

⁴ Cap. A19, Laws of the Federation of Nigeria, 2004; initially Arbitration and Conciliation Decree No. 11 of 1988.

⁵ There is currently a Bill before the National Assembly for the amendment of the Act.

⁶ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1968.

⁷ Adopted on the 21st of June, 1985, and amended on 7th July, 2006 and adopted by Nigeria in 1990.

⁸ Cap A19, Laws of the Federation of Nigeria, 2004; formally Arbitration and Conciliation Decree No. 11 of 1988.

⁹ Arbitration Rules which were adopted by the Commission in April, 1976 and unanimously approved by the United Nations General Assembly in December, 1976.319. see UN General Assembly Resolution No. 31/98 of 15 December, 1976

¹⁰ Convention on the Settlement of Investment Disputes Between States and Nationals of other States, 1965 (ICSID Convention).

some provisions of the Nigerian Investment Promotion Commission Act.¹¹ Some provisions of the Foreign Judgement (Reciprocal Enforcement) Act¹² were also introduced, dealing with registration and enforcement of foreign arbitral awards in forms of judgements obtained in a country with reciprocal arrangement with Nigeria.

International commercial disputes can be very complex and their resolution may be by exploiting various methods of dispute resolution, with the prime option being litigation in domestic courts. But for so many reasons the process in national courts has proved antithetical to quick and satisfactory resolution of international commercial disputes, especially in Nigeria. This led to the development and adoption of other alternative means of resolving such usually complex disputes. The trend in arbitration suggests its soaring popularity in international commercial dispute resolution. More than thirty years ago, the Nigerian government recognised this, and as a consequence of this realisation and as part of its involvement in the reform work of UNCITRAL in drawing up a Model Law of International Commercial Arbitration.¹³

International commercial arbitration may require reference to as many as four different systems or rules of law. There will be the law that governs the recognition and enforcement of the arbitral agreement; the actual proceedings themselves, the law or set of rules that the arbitral tribunal must apply to the substantive matters in dispute; and the law that governs recognition of the award must also be considered.

Although there have been growing concerns about the satisfactory outcome of international commercial arbitrations in Nigeria, ranging from the enforceability of arbitration clauses in commercial agreements, to the perceived sluggishness of the national courts in dealing

¹¹ Nigerian Investment Promotion Commission (NIPC) Act, Cap. NI17, Laws of the Federation of Nigeria, 2004.

¹² Cap. F35, Laws of the Federation of Nigeria, 2004.

¹³ See the Report of the National Committee on the Reform and Harmonisation of Arbitration ADR Laws, Inaugurated by Chief Bayo Ojo S.A.N. on the 23rd September, 2005.

with interim applications, enforcement of the final award and other matters, there has been a remarkable improvement in the international commercial arbitration regime in Nigeria.

This is because of the enactment of the Arbitration and Conciliation Act, with extensive provisions dealing with international commercial arbitration, modelled after the 1958 UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dealing with awards rendered outside Nigeria. These provisions are also based upon the UNCITRAL Model Law, both products of a United Nations agency,¹⁴ and enjoy broad international acceptance.

The dissertation dwelled on the main thrust of the research. That is, the recognition and enforcement of awards by the centre for settlement of investment disputes – ICSID. Issues bordering on jurisdiction of the Centre, the role of the Bilateral Investment Treaties (BITs), the costs of arbitration and recognition and enforcement of arbitral awards rendered by the centre are all fairly appraised.

From the analyses, International Centre for Settlement of Investment Disputes (ICSID)¹⁵ is by far the most popular international mechanism for settling such investor-state disputes. An autonomous international institution, created as a mechanism to resolve investment disputes within the structure of the World Bank.¹⁶ The procedure of ICSID is Arbitration which is governed by the ICSID Convention and the ICSID Arbitral Rules in accordance with the BIT or other investment agreements that constitute the agreement.

¹⁴ United Nations Commission on International Trade Law

¹⁵ Nigeria ratified the ICSID Convention as far back as back as 23rd August, 1965. There are currently 150 signatories with Canada as the 149th Member State, and the Republic of San Marino as the 159th signatory State to the ICSID Convention. See ICSID ANNUAL REPORT 2 0 1 4 retrieved from : https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID_AR14_ENG.pdf on 16/1/2015

¹⁶ The International Bank for Reconstruction and Development, now called the World Bank, developed ICSID as a forum for arbitration specifically between investors and states.

In a similar fashion, some of the challenges confronting the Centre, especially in the light of the growing concerns from its critics, are bared. The growing popularity of ICSID has placed it under serious scrutiny in recent years, with several signatory-nations denouncing the ICSID Convention.

Part of the challenges is a prevalent perception that ICSID was established by the developed economies in the West to protect the interest of investors abroad. ICSID arbitration is seen to have done more to protect capital exporter states and the interests of their citizen-investors. In this light, ICSID acts as a proxy from investors from the West, who in long term can afford its services. From the high cost of arbitration, to time consumption and abuse of the processes by parties, questions on legitimacy have also been raised. The ICSID Arbitration is perceived as biased towards wealthy Western States and their investors as an ideological and normative proposition.

Structural and functional challenges like the role of the Secretary General of the ICSID in appointing arbitrators to resolve disputes, given the limited number of candidates from developing countries have also been raised. The venue of the hearings is also one challenge further grounding the ideological bias of ICSID in favour of investors from wealthy nations. There are also allegations of inconsistent jurisprudential approach of the tribunals, failing to recognise the public nature of many ICSID arbitrations. This is rooted in the need for a standard of review in investment arbitration under ICSID. It is maintained that annulment is not enough, that there is the need to create an appellate mechanism to give room for correcting errors in order to develop a system with consistent precedents.

5.2 Findings

From the forgoing analyses, the following are our findings:

The research found out that the hostility against International Centre for the Settlement of Investment Disputes (ICSID) is rooted in ideological conflict between the developed capital exporting economies and the host economies. ICSID is seen as a tool of the World Bank basically instituted from the onset to protect and further the interests of the predominantly capital exporting developed economies. This is even more so, considering that some developing nations lack the array of strategic options available to the powerful states and this is at interplay in ICSID not just in its structure and procedures but also in its functionality.

It is also found that an award rendered by the ICSID is not subjected to any form of review through appeal thereby making it impossible to correct functional errors made by the tribunals.¹⁷ Annulment provided for by the Convention is not enough, because sometimes all that is needed is for the award to be varied slightly. This inadequacy of review mechanism leaves aggrieved states in an awkward position and in the end resort to denouncing the Convention as seen in the case of Ecuador, Venezuela and Bolivia.

The research further found that arbitration under the ICSID is a very expensive and complex venture. Considering the tribunal costs and the costs the parties have to bear in hiring counsel and other professionals, along with arbitrators' fees and transportation, small scale investors do not even contemplate taking cases to ICSID. It also makes it difficult for developing countries to defend against some claimant investors whose fortunes may even be greater than the formers' economies.

¹⁷ As seen in the cases of *CMS Gas Transmission Company*¹⁷ ICSID Case No. ARB/01/08 and *LG&E Energy Corporation*. ICSID Case No. ARB/02/1

Nigeria is yet to make rules of enforcement according to section 2 of ICSID (Enforcement of Awards) Act in making or adapting rules of court for the enforcement of awards in Nigeria, in order to give effect to the provisions of the Act. This research finds this situation untidy because it does not project seriousness to wait for an investor to secure an award against Nigeria before these rules are made. Because such a situation will no doubt defer the winning party's enjoyment of the fruit of the award – a situation sought to avoid in the first place.

It is also this research's finding that Nigeria has voluntarily signed few Bilateral Investment Treaties (BITs). However, only five out of 22 BITs signed are in force. This does not send a good signal as a nation serious with its commitments to other nations.

5.3 Recommendations

In view of the preceding findings the following recommendations are made:

There is a serious need for reform of ICSID. Arbitration is growing faster globally, and being embraced in the developing world. More and more arbitration experts are coming out of these places. The ICSID must involve and engage such experts in running its affairs in order to reform and actually giving developing nations wider roles to play as partners in running the affairs of ICSID. Their appointments to serve in the panels are not enough if the negative perception of ideological, structural, procedural and functional biases are not done away with in order to alleviate the fears of the developing countries.

There is an urgent need to develop a system of appeal in order for parties to have recourse to a review mechanism in the light of the inconsistent decisions rendered by ICSID Tribunal. The appellate mechanism will give room for the correction of errors in order to develop a system with consistent precedents. For this reason we recommend the International Court of Justice (ICJ). To this end, the ICSID Convention specifically should be amended to refer appeals to the ICJ. Also,

Chapter II of the statute of the International Court of Justice should be amended to add jurisdiction to entertain appeals from ICSID and accommodate conditions for such an appeal.

To significantly reduce the cost of arbitration, the Schedule of Fees has to be reviewed to make tribunal charges proportionate to the amount involved in the claim. Also, ICSID should not just stop at collaboration with regional centers but must also open offices globally, especially in member countries to reduce the cost of transportation to its headquarters in Washington D. C. for arbitration. ICSID should come to members rather than members going to ICSID to reduce the cost of transportation. Provisions can be made for online filing of cases and even online exchange of pleadings. The virtual world can in fact accommodate the proceedings. This will significantly obviate delays and reduce the cost of arbitration.

If Nigeria must re-affirm its commitment to ICSID to demonstrate its whole hearted commitment to the international investor-community, it must endeavor to make rules for the enforcement of ICSID award pursuant to section 2 of ICSID (Enforcement of Awards) Act.

In order not to fall into the embarrassing pit of shying away from activating BITs, during negotiations the Nigerian Government through Inter-Ministerial Committee on Investment Promotion and Protection Agreements should also involve experts in the field of investment arbitration, not only from the Academia, but also from the diaspora so as to avoid uncritical copying of precedents of clauses in BITs and applying them to every situation. This is because every country has its unique sets of laws which must be understudied during such negotiations, as crafty nations tend to insert clauses which they rely on later in pleading necessity, thereby rendering the investor helpless. Efforts should also be made to ensure that all the 22 BITs are in force.

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