AN ANALYSIS OF DELAY IN ENFORCEMENT OF CONTRACTUAL JUDGMENTS AS IMPEDIMENT TO FOREIGN DIRECT INVESTMENTS (FDI) IN NIGERIA

BY

Ahmed RABIU
PhD/LAW/15194/2007/2008

DEPARTMENT OF COMMERCIAL LAW,
AHMADU BELLO UNIVERSITY,
ZARIA

DECEMBER, 2014

AN ANALYSIS OF DELAY IN ENFORCEMENT OF CONTRACTUAL JUDGMENTS AS IMPEDIMENT TO FOREIGN DIRECT INVESTMENTS (FDI) IN NIGERIA

BY

Ahmed RABIU
LL.B (Hons) BUK, LL.M (BUK), BL. (Lagos)
PhD/LAW/15194/2007/2008

BEING A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILMENT OF THE REQUIRMENTS FOR THE AWARD OF DOCTOR OF PHILOSOPHY DEGREE IN LAW-PhD

DEPARTMENT OF COMMERCIAL LAW,
FACULTY OF LAW,
AHMADU BELLO UNIVERSITY, ZARIA

DECEMBER, 2014

DECLARATION

I declare that the work in the Dissertation entitled '**AN ANALYSIS OF DELAY IN ENFORCEMENT OF CONTRACTUAL JUDGMENTS AS INPEDIMENT TO FOREIGN DIRECT INVESTMENTS [FDI] IN NIGERIA'** has been written by me in the Department of Commercial Law under the supervision of Doctors: A.A Akume, A.R Agom and A. K Usman. The information derived from literature has been duly acknowledged in the footnotes and a list of references provided. No part of this dissertation was previously presented for another degree or diploma at any University.

_____ _____

Ahmed RABIU Date

Law /PhD/15194/2007/2008

CERTIFICATION

This Dissertation entitled '**AN ANALYSIS OF DELAY IN ENFORCEMENT OF CONTRACTUAL JUDGMENTS AS INPEDIMENT TO FOREIGN DIRECT INVESTMENTS (FDI) IN NIGERIA b**y Ahmed Rabiu meets the regulations governing the award of the degree of Doctor of Philosophy of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

_____ _____

Dr. A.A Akume ***Date***
Chairman, Supervisory Committee

_____ _____

Dr. A. R Agom ***Date***
Member, Supervisory Committee

_____ _____

Dr. A. K Usman ***Date***
Member, Supervisory Committee

_____ _____

Dr. A.R Agom
Head, Department of Commercial Law **Date**

_____ _____

Prof A. Z. Hassan ***Date***
Dean school of Postgraduate Studies.

DEDICATION

To the memory of my Late father **ALHAJI RABIU YARO MUHAMMAD** (1948-2005)

May the Almighty **ALLAH** grant him **JANNAH, AMIN.**

ACKNOWLEDGEMENTS

All praise is to Almighty Allah may His blessings continue to shower upon His beloved Prophet Muhammad Bn Abdullah, members of his household, his companions and those who follow their footsteps to the last day.

I am grateful to Allah for sparing my life and granting me the ability to pursue this study. My profound gratitude to the Vice Chancellor Bayero University, Kano, my mentor and god-father Professor Abubakar Adamu Rasheed OFR *mni* for his immeasurable contributions and prayers to my successes. Sir, I say thank you JAZAKALLAH BI KHAIR.

Many thanks to my indefatigable supervisors Dr. A.A Akume, Dr. A.R Agom and Dr. A.K Usman for their mentoring and valuable suggestions treating me not as their student but rather a younger brother. Similarly, I am humbled and sincerely appreciate the contributions of my internal examiners, the erudite Professors M.T Ladan J.A Audi and the Dean of Law Professor Y.Y Bambale. I appreciate the detail and constructive contribution of my external examiner Professor D. Asada university of Jos-Nigerian

My gratitude to the deputy Vice Chancellor Administration Ahmadu Bello University Zaria Professor N.I Sada. I also owe a duty of gratitude to my colleagues on the program, particularly Dr. Usman Muhammad Shu'aib (Zunnurain) and Aisha Haruna for the camaraderie and the companionship. I am also indebted to my colleagues at Faculty of Law Bayero University, Kano for their encouragement in the course of this qualification.

My profound appreciation goes to my mother Hajiya Aishatu AbdulRahman. To my amiable spouse Binta Aminu Mahe and children Aisha (Islam) Khadijah and Rabiu (Alhaji) for tolerating my absence in the course of pursuing this study.

Finally, I am responsible of all the inaccuracies herein contained.

LIST OF ABBREVIATIONS

BITs	-	Bilateral Investment Treaties
BPE	-	Bureau for Public Enterprises
CAMA	-	Companies and Allied Matters Act
CBN	-	Central Bank of Nigeria
CPC	-	Civil Procedure Code
EC	-	European Commission
EFCC	-	Economic and Financial Crime Commission
FDI	-	Foreign Direct Investment
GDP	-	Gross Domestic Product
ICPC	-	Independent Corrupt Practices Commission
IIAs	-	International Investment Agreements
IMF	-	International Monitory Fund
MDGs	-	Millennium Development Goals
NEPAD	-	New Partnership for Africa's Development
NIE	-	New Institutional Economics
NIPC	-	Nigeria Investment Promotion Council
NJI	-	National Judicial Institute
OECD	-	Organization for Economic cooperation and Development
SEZs	-	Special Economic Zones
UNCTAD	-	United Nation Committee on Trade and Development
WIR	-	World Investment Report

TABLE OF CASES **PAGE**

ACA Baker Marine Nig. Ltd v Chevron Nig. Ltd (2000) 12 NWLR (Pt681) 393 73

Adwork Limited v Nigeria Airways Limited (2000) 2 NWLR (Pt.645) 415 72

Afribank Nigeria Plc v Haco (Unreported FHC/L/CS/476/2008 70

Akpaji v. Udemba (2003) 6 NWLR (part 815) 169 70

Akpunonu v Bekaertoverseas (1995) 5 NWLR PT.393 Page42 at 66 A-B 166, 169

Anakwenze v Aneke & Other(1989) 4 NWLR PT. 107 100 162

Ashday v Dawnay (1852) 8 EXCH 237 165

Baker Marine Nig. Ltd. V. Chevron Nig. Ltd (2000) M NWLR (Pt.681) p. 393. 167

Bayero v. F.M.B.N PLC (1998) 2 NWLR PT.538 Page 509 167,170

C.G.D.E Geophysique v Etuk (2004) 1 NWLR 853 at 20 61

Commerce Assurance Limited v. Alhaji Buraimoh Alli (1992) 3 nwlr (pt 232) 70 68

Continental Sale Limited v R A shipping Inc (2013) 4 NWLR PT.1343 at 67 152

Domine v Grimsdall (1937) 2 aer 119 152

Experte the debtor v Goache(1979) 1 AER 870 165

Fabunmi v Oyewusi (1992) 1 NWLR pt.215 147,165

Grosvernor Casinos Limited v. Ghassan Halaoni 174

Guadalupe Gas Products Corp. v Nigeria (ICSID)
Case ARB/78/1- Discontinued on July 22, 1980. 152

Holman Bros. v The Compass Trad. Co. Ltd (1992)1 NWLR PT 217P. 368 170

Jalo v Military Governor Kano State (1980) 164

Kano Urban Development Board v. Fanz Construction Company Ltd (1990)
4 NWLR Pt. 142 68, 69

Leedo Presidential Hotel Ltd. v B.O.N. Ltd (1993) 1 NWLRPT.269 P. 334 170

M V Lupex v Nigeria Overseas Chattering & Shipping Ltd (2003)
15 NWLR (part 844) 469. 64

Macaulay v. rzb Austra 175, 177

Middlemiss v. Hartlepool Corporation (1973) 1 A.E.R 172 74

Minaj Systems Ltd. v. Global Plus Communication Systems Ltd. & 5 Ors (unreported suit no, ld/275/2008 70

Millet v Charis (1851) 16 QB 239 166

M.V. Lupex v. N.O.C 70

Onward Enterprises Ltd v MV Matrix (2010) 2 NWLR pt.1179) 530 152

Niger Progress Ltd. v. N.E.I. Corp (1989) 3 NWLR PT.107 68 70

Okoya v. Santili (1990) 2 NWLR pt.131 161

Okwoche vs Peter Dibia (1994) 2 NWLR pt.325 page 195 at page 204 148,168

Onuselogu Ent. Ltd. v. Afribank (Nig.) Ltd. (2005) 1 NWLR Part 940 577 69

Oyerogba v. Olaopa. (1998) 13 NWLR pt. 583 p .512. 74

Purification Techniques (Nig) Ltd v. Attorney General of Lagos State & Ors 171

Sounderson v Daker & Marin (1972) 3WILLS 309 165

Saraki & anor v Kotoye (1992) 9 NWLR pt.264 159

Shell Nigeria Ultra Deep Ltd. v FRN (ICSID Case ARB/07/18- Discontinued on August 2011- 152

STB Ltd v. Contract Resources (Nig) Ltd (2001) 6 NWLR p.708 170

Tukur v Governor of Gongola state (1998) 4 NWLR pt. 117 160,161

U.B.A Ltd v. SGB Ltd (1996) 10 NWLR pt 478 p.381 170

Ugaga Okwoche v. Peter Dibia (1994) 2 NWLR pt.325 141

Web v Stention (1893) 11 QBD 518 CA. 170

TABLE OF STATUTES **Pages**

Advanced fee fraud and other related offences Decree NO. 13 1995 55

Arbitration and Conciliation Act cap. A18 LFN 2004. 64,66,70,71,73,74,and 75

Banks and Other Financial Institutions Act, 1991. (Now cap. C. 20 LFN 2004). 51

Companies and Allied Matters Act (CAMA) 1990 51

Economic and Financial Crimes Commission (EFCC) Act1995 51

Failed Bank (Recovery of debt) and Financial Malpractice in
Banks Decree NO. 18 1995, 56

Foreign Exchange (Monitoring and Miscellaneous provision) Act 1995 51

Foreign Exchange Act 1995 (Now FEMMPA LFN2004). 52

Independent Corrupt Practices Commission (ICPC). 64

Investment and Security Act 2007 (ISA). 51

Money Laundering (Prohibition) No. 11 2011,
(as amended) by Harmonized Act NO. 1 2012. 51

Nigerian Investment Promotion Commission (NIPC) Act 1995
Now Cap 18 LFN 2004 50,58,63,and 64

ABSTRACT

Foreign Direct Investment (FDI) is about economic prosperity and wealth creation of developing economies, (FDI) brings with it capital, technology, it provides a platform for the creation of jobs and links to the world economy which brings development. The New Partnership for Africa's Development [NEPAD] asserts that to meet its developmental challenges, Africa will have to rely more on foreign direct investment [FDI] than aid. Given the fact, the aid flows to Africa have significantly declined over the years and that the continent has now to compete with other countries for the same resources needed for development. Therefore, [NEPAD] places greater emphases on the importance of foreign direct investment [FDI] as Africa's new engine of economic growth, particularly in the manufacturing and agricultural sector, as opposed to the oil and gas and other natural resources. However, the contribution firms, and foreign direct investment [FDI] make to the society is determined principally by the investment climate. There are many features of a good investment climate, aside of legal framework, provision of security and maintaining infrastructure, which provide the opportunities and incentives for the investment to flow and flourish and create confidence in the mind of the investors, to invest productively, and they include strong and vibrant contract enforcement. Delays or uncertainties in the enforcement of contractual rights erode the value of property rights and diminish the opportunities and incentives to invest. Therefore, the process of seeking redress through the normal court system is too protracted and unsatisfactory to continue to serve as primary recourse option of executives and potential investors, and this also explain the slow of improvement in FDI in the manufacturing and agricultural sector inflow to Nigeria. There are additional reasons for all these difficulties and hurdles that constitute a clog to an efficient contractual enforcement. The legal system that made judges of regular courts to also handle election petitions and other ad-hoc assignments to the detriment of the regular pending commercial cases before the courts. Secondly, there currently distinct rules for each state of the Federation and there number of civil procedure rules required to be complied with to move cases through the system from filing to judgment enforcement. This has created additional and unnecessary procedures that elongate the process of contract enforcement. Thirdly, despite these enormous powers of the Sheriff and bailiffs in the process of trials and enforcement of contractual judgments, in Nigeria majority of the bailiffs in all our courts including the courts of records are either retired police or military officers with no formal training on their powers and obligations in accordance with the provision of the law.The dissertation mainly recommended the creation of Commercial courts or Commercial divisions throughout the federation to handle contractual and commercial cases; secondly, Secondly, it is recommended for the unification and adoption of a single the civil procedure rules throughout the country. Lastly to institutionalize the training and re-training of sheriffs and court bailiffs on the provisions of the rules as it relates their functions of giving effect to court orders and judgment.These would go a long way in providing an effective and speedy movement of civil cases through the system of trial and subsequent enforcement in our courts, which may further create confidence and improve the investment climate for the inflow of the Foreign Direct Investment (FDI) in to Nigeria.

TABLE OF CONTENTS

Title Page -- -- -- -- -- -- -- -- -- **i**

Declaration -- -- -- -- -- -- -- -- -- **iii**

Certification -- -- -- -- -- -- -- -- -- **iv**

Dedication -- -- -- -- -- -- -- -- -- **v**

Acknowledgement -- -- -- -- -- -- -- -- **vi**

List of Abbreviations -- -- -- -- -- -- -- **vii**

Table of Cases -- -- -- -- -- -- -- -- **viii**

List of Statutes ---- -- -- -- -- -- -- -- **x**

Abstract -- -- -- -- -- -- -- -- -- **xi**

Table of Contents -- -- -- -- -- -- -- -- xii

CHAPTER ONE: GENERAL INTRODUCTION

1.1 Background to the Study -- -- -- -- -- -- 1

1.2 Statement of Problem -- -- -- -- -- -- -- -- 5

1.3 Aim of the study -- -- -- -- -- -- -- -- 7

1.4 Objectives of the study -- -- -- -- -- -- 8

1.5 Scope of the Research -- -- -- -- -- -- -- -- 8

1.6 Research Methodology -- -- -- -- -- -- 8

1.7 Literature Review -- -- -- -- -- -- -- 10

1.8 Justification of the Research -- -- -- -- -- -- 17

1.9 Organizational Layout -- -- -- -- -- -- 17

CHAPTER TWO

2. NATURE AND DEFINITION OF INVESTMENT AND FOREIGN DIRECT INVESTMENT (FDI) -- -- -- 20

2.1 Introduction -- -- -- -- -- -- -- -- 20

2.2 Definition of Foreign Direct Investment (FDI) -- -- -- 24

2.3 FDI Inflows into Africa -- -- -- -- -- -- 29

2.4 FDI Inflow into Nigeria -- -- -- -- -- -- 34

2.5 Importance of FDI to Developing Economies -- -- -- 39

CHAPTER THREE
3. IMPEDIMENTS TO FOREIGN DIRECT INVESTMENT (FDI) IN THE DEVELOPING ECONOMIES - -- -- -- 47

3.1 General Factors and Impediments of FDI in the Developing Economies 47

3.2 Delays in Contractual Judgment Enforcement as Impediment to Foreign Direct Investment (FDI) -- -- -- -- -- -- 62

3.3 Arbitration as an Effective Dispute Resolution Mechanism -- -- 66

3.4 Review of analysis of research findings on effective contractual- - - - - - 75 Judgment mechanism in selected jurisdictions

3.5 Enforcement of Contractual Judgment in Some European Union Counties 97

CHAPTER FOUR
4. CONTRACTUAL JUDGMENT ENFORCEMENT PROCESS -- 114

4.1 Introduction -- -- -- -- -- -- -- -- 114

4.1.1 Problem with the Judicial System -- -- -- -- -- 123

4.1.2 Problem with the Rules of Court -- -- -- -- -- 129

4.1.3 Problem with the role of the Bailiffs -- -- -- -- -- 145

CHAPTER FIVE
5. LEGAL FRAMEWORK FOR CONTRACTUAL JUDGMENT ENFORCEMENT -- -- -- -- -- -- -- -- -- 150

5.1 Enforcement of Contractual Judgments in Nigeria -- -- -- 150

CHAPTER SIX

6. CONCLUSION

6.1 Summary -- -- -- -- -- -- -- -- 180

6.2 Findings -- --- --- ---- --- --- -- -- -- -- 186

6.3 Recommendations -- -- -- -- -- -- -- 189

Bibliography -- -- -- -- -- -- -- -- 194

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the study

There is probably not a developing country in the world that does not work hard to attract more foreign direct investment [FDI][1]. Political leaders and policy makers initiate tours to developed countries to attract investors, they know that FDI brings with it capital, technology, jobs and links to the world economy. The New Partnership for Africa's Development [NEPAD] asserts that to meet its developmental challenges, Africa will have to rely more on foreign direct investment [FDI] than aid. However, FDI inflows to Nigeria outside the oil and gas sector and particularly in the agricultural and manufacturing sectors have remained low compared to other developing countries[2]. Successive governments in Nigeria have recognized that the growth and development of the Nigerian economy hinge on the inflow of foreign direct investment (FDI) in these sectors. That ensures economic, development and job creation. The government has thus taken steps to create an environment that encourages increased Foreign Direct Investment (FDI).

Therefore, [NEPAD] places greater emphases on the importance of foreign direct investment [FDI] as Africa's new engine of economic growth[3].

The above observation is not only peculiar to Africa but applies to all other developing economies; it is not unusual for economists to emphasize the importance of

---

[1] Jeffrey, D.S. The Importance of Investment Promotion in the poorest countries, World Investment Prospect, Special Edition (nd), P. 78

[2] O. G Wafure & A .Nurudeen. 'Determinant of Foreign Direct Investment in Nigeria: An Empirical Analysis' Global Journal of Human Social Science Vol.10 Issue 1 (Ver 1.0) April 2010 P.26

[3]Kebonang, Z. & Mosweu, S. NEPAD and the Challenges of attracting Foreign Direct Investment in Africa, .com/JSDA/Summer 2006 PDF/ARC NEPAD Challenges attracting foreign investment. Pd; accessed on the 4th of April, 2009

foreign direct investment [FDI] in fueling economic growth. In fact, since 1950s, FDI have been recognized as the most crucial factor in enhancing economic development and ensuring a reasonable standard of living for countries, which have been recipient of FDI. South Korea, Singapore, and Taiwan have been an example of nations that have benefited greatly from FDI. In recent years, China and India have made remarkable progress in attracting FDI and in realizing technological and economic successes.[4] There are adequate legal framework in Nigeria, and the country has implemented various reforms towards attracting FDI, Example the Nigerian Investment Promotion Commission [NIPC] Act 1995 (LFN 2004), allows 100% foreign ownership of firms outside the petroleum sector, where investment is limited to existing joint venture or new production-sharing agreement. Industries considered crucial to national security, such as firearms, ammunition, and military or paramilitary apparel, are reserved for domestic investors. Foreign investors are required to register with the NIPC after incorporation under the Companies and Allied Matters Act (JFN 2004); the Act prohibits the nationalization or expropriation of foreign enterprises except in cases of national interest.[5] Nigerian laws apply equally to domestic and foreign investors. These include the Securities and Exchange Act 1999 (now ISA 2007, the Foreign Exchange Act 1995 (Now FEMMPA LFN2004), Money Laundering (Prohibition) No. 11 2011 (as amended) by Harmonised Act NO. 1 2012. Banks and Other Financial Institutions Act, 1991[6] (Now cap C 20 LFN 2004).

Furthermore, the privatization of key sector, including telecommunications and power, calls for core investors to acquire controlling shares in formally state-owned enterprises. The Nigerian government ether repealed or amended decrees that inhibited

[4]Ali, A J 'Foreign Direct Investment and Development, Competitiveness Review' [2005] available at ALLBusiness.com. Accessed on 4th March 2009

[5](2009) 'Investment Climate Statement-Nigeria Bureau of Economic Energy and Business Affairs. Available at accessed on 11th April 2009.

[6] ibid

competition or conferred monopoly powers on parastatal firms. Since 1999, the Bureau for Public Enterprises [BPE], responsible for the privatization, has raised over $4. Billion by privatizing more than 140 enterprises, including cement manufacturing firms, banks, hotels, and vehicle assembly plants.[7] However, with the above efforts to provide the adequate legal framework to attract foreign direct investment [FDI] it was quickly added[8], in order to succeed, investors must understand the Nigerian business environment and engage in problem solving with local staff, Nigerian partners, and government officials. Potential investors must cope with poorly maintained infrastructure and arbitrary policy changes. Security is of special concern due to high crime and repeated cases of hostage taking and attacks in oil-rich Niger Delta region. In adequate law enforcement compounds the country's high crime rate, and sporadic outbreaks of communal violence.

Therefore, foreign investments in form of private firms, farmers, micro entrepreneurs to local manufacturing companies and multinational enterprises, are at the heart of the development process, and part of the foreign direct investment [FDI]. Driven by the quest for profits, they invest in new ideas and new facilities that strengthen the very foundation of economic growth and prosperity. They provide more than 90 percent of jobs, creating opportunities for people to apply their talents and improve their situations. They provide the goods and services needed to sustain life and improve living standards. They are also the main source of tax revenues, contributing to public funding for health, education, and other services. Foreign direct investment [FDI] is thus critical actors in the quest for growth and poverty reduction.[9] However, the contribution firms, and foreign direct investment [FDI] make to the society is determined principally by the investment climate. A good investment

[7] ibid
[8] ibid
[9] World Development Report [2005] PP 84-89 available at www.undoingbusiness2005 visited 2nd July 2014

climate fosters productive private investment-the engine for growth and poverty reduction. A good investment climate is one that is better for everyone in two dimensions. It benefits society as a whole, not just firms, and it expands opportunities for all firms, not just large or influential firms or investments[10].

There are many features of a good investment climate, aside of legal framework, provision of security and maintaining infrastructure, which provide the opportunities and incentives for the investment to flow and flourish, and inject the oxygen of confidence in the mind of the investors, to invest productively, and they include a strong and vibrant contract, or property rights enforcement[11].

Property or contractual rights are more secure, and more valuable, when the cost and risks of exchanging them are low. Delays or uncertainties in the enforcement of contractual rights erode the value of property rights and diminish the opportunities and incentives to invest. The ideal investment climate is that all contractual exchanges would occur without a hitch. However, such ideal is difficult, if not impossible to exist[12].

Many countries, firms or investments now have little confidence in courts to enforce their contractual rights. One reason may be the length of time and the cost required in many countries to resolve even simple cases. The time required in enforcing a contract range from under 50 days in the Netherlands, nearly 600 days in Bolivia, to 1.500 days in Guatemala[13], and in Nigeria 457 days[14]. This figure was just slightly different up to 2013, in Nigeria it takes the average of 447 days to enforce a simple contract[15] The result is where the courts, or

[10] ibid
[11] ibid
[12] ibid
[13] ibid
[14] Doing Business in Nigeria 2008, available at www.undoingbusiness2008 Accessed on 4th April 2009.
[15] Visited 5th July 2014

the contractual enforcement mechanism is weak the investor's costs and risks increase, in some instance investor resort to 'self help' or use police to enforce contractual obligations.

Hwever it should be noted that there is a remarkable improvement over the years. The position of Nigeria has improved in 2013 and 2014 as the country now ranked 138 and 148 respectively in the ease of doing business[16]Amidst this compelling requirement of a standard contractual enforcement mechanism, that many developing economies came up with different strategies of reforms to improve courts and other dispute settlement mechanisms. It is against this backdrop that this thesis seeks to make an in depth examination into these reforms [especially where they proved effective]. In other words, the dissertation seeks to identify, examine, make analysis into the positive effects of the reforms of the judicial systems and rules of court on contractual judgments enforcement mechanism of some developing economies, and see what lessons are there for Nigeria.

1.2 Statement of Problem

With a population of over 140 million,[17] Nigeria is Africa's most populous nation. It offers all it takes for investment to flow, and potentially the largest domestic market in sub-Saharan Africa. Unfortunately, notwithstanding the detail legal framework to attract the FDI much of that market potential is unrealized, because of the impediments to investment that includes slow and ineffective courts and dispute settlement, or resolution mechanism[18].

Regarding the contract enforcement, Nigeria was ranked 93 out of 178 countries surveyed, though it was ranked 66 out of 175 countries surveyed in 2006. However in 2012

[16] Visited 3rd July 2014

[17] National Population Commission (NPC) /NPC%20Releases%202006%20population%20figures%20%20Nigeria%20Village%20Square.webarchive visited Thursday 3rd July 2014 11:45

[18] U.S Department of State, Investment Climate Statement-Nigeria, Bureau of Economic, Energy and Business Affairs, [2009] available at http://www.state.gov/e/eeb/rls/othr/ics/2009/11724.htm

and 2013 the position has improved remarkably to 138 and 136 respectively[19] In addition, the report revealed that contract enforcement required 39 procedures and 457 days, the cost of which averaged 32 percent of the value of the contract a substantial improvement from 2005 position of 23 procedures, 730 days, and cost of 32.2 percent of the value of the contract. In 2009, the situation was not any better, the United Nations Report already ranked Nigeria 90 this time out of 181 countries surveyed, contract enforcement still require 39 procedures, and takes the average of 457 days, and cost 32.0 percent of the value of the contract[20].

Again even in the ease of the process of enforcing contracts the position of Nigeria among the international community has improved especially in 2013 and 2014 respectively. In the referred periods Nigeria ranked 138 and 136 respectively.[21] Therefore, the process of seeking redress through the normal court system is too protracted and unsatisfactory to continue to serve as primary recourse option of executives and potential investors, and this also explains the slow of improvement in FDI inflow to Nigeria, particularly in the manufacturing and agricultural sectors as could be seen from the referred figures. The findings of the United Nations, other regional and government's Reports are just the average of what obtains in Nigeria, but the reality of cases of contractual enforcement is much worst. Contract enforcement takes at least 5-10 years to be resolved. Property matters are notoriously slow, dragging on for period of up to 30 years in some instances.

There are additional reasons for all these difficulties and hurdles that constitute a clog to an efficient contractual enforcement. Nigeria has a complex three-tiered legal system

[19] ibid Visited 3rd July 2014
[20] ibid
[21] ibid Visited 3rd July 2014

composed of English common law, Islamic law, and Nigerian customary law, most business transactions are governed by 'common law', and it is the same courts that handle Civil and Criminal cases, the same judges are assign to handle Election petitions, and posted to states other than theirs. These often make the processes complex, and slow. Similarly, as it stands in Nigeria there are as many civil procedure rules, as there are states in the federation and there is no unified implementation of the High court civil procedure rules throughout the country[22]. Because of the segregated application of the Uniform civil procedure rules in Nigeria, the efficiency of contract enforcement is not uniform; the average duration of commercial dispute resolution across Nigeria conceals large differences among states[23]. This position remain the same up to 2013 in Nigeria a litigant in a simple contact will still have to comply with 40 procedures to enforcement of contract[24] Other contract enforcement legislations such as Sheriff and civil processes Act are obsolete; lastly, contract enforcement required 39 procedures and 457 days[25], which creates additional and unnecessary procedures that elongate the process of contract enforcement. The above position has now improved in 2013 and 2014 respectively[26]

1.3 Aim of the study

The aim of this Dissertation is:

i. Examination of the role of Laws regulating enforcement of contractual Judgments application.

---

[22] The uniform civil procedure rules apply in Abuja, [FCT], Lagos, and Kaduna. See Doing Business in Nigeria2008. Available at Doingbusiness.org/sub national/explore economies/Nigeria.aspx accessed 4TH April 2009.
[23] Doing Business 2009.
[24] Doing Business 2014 available at www.undoingbusiness2014 visited 3rd July 2014
[25] Doing business 2009 available at www.undoingbusiness2009
[26] Doing Business 2014 available at visited 3rd July 2014

1.4 Objectives of the Study

The objectives of this research are to:

i. Examine whether or not, delays in the enforcement of contractual judgments constitute an impediment to the inflow of investment or foreign direct Investment FDI into Nigeria.

ii. Provide findings.

iii. Give recommendations

1.5 Scope of the Research

This dissertation focused predominantly on research problem within the limit of the enforcements of contractual judgments by the regular courts, the current civil procedure rules in Nigeria as applicable in states jurisdiction and particularly the Lagos State High court Civil Procedure rules 2011. It includes also the NIPS Act 1995(LFN 2004) and other investments legislations. Reference has also been made to several rules of international investment and reports by international institutions for the purpose of further elucidations and understanding the Nigerian position on the impact of delay in the enforcement of contractual judgments as impediment to the inflow of the foreign direct investment.

1.6 Research Methodology

The research methodology used for the dissertation is doctrinal. The analyses are based on primary sources found in Nigerian statutes and various reforms. These reforms included the deregulation of the economy, the new industrial policy of 1989, the establishment of the Nigeria Investment Promotion Commission (NIPC) in early 1990s, the enactment of the Companies and Allied Matters Act 1990, Investments and Security Act 2007 and the signing of Bilateral Investment Treaties (BITs) in the late 1990s. Others were

the establishment of the Economic and Financial Crime Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC).

It should be noted that Nigeria has entered in to bilateral investment treaties (BITs) with the following countries: Egypt (not in force) Finland (not in force) France (August 1 1991) Germany (not in force) Korea (February 1 1999) the Netherlands (February 1 19994) Spain (not in force) Switzerland (April 1 2003) Turkey (not in force) and the United Kingdom (December 11 1990). [27] These BITs explicitly, where it is in force, afford the following protection to prospective foreign investors; fair and equitable treatment; standard protection against expropriation, which provides that expropriation must be in the public interest and be accompanied by prompt, adequate and effective compensation[28].

It involves similarly, the use of United Nations and other regional institutions reports and distinguished writers, on the importance of foreign direct investment [FDI] in the development, and prosperity of the developing economies. The researcher has made use normative approach to bring to light the impact of FDI in the developing economies and the effect of contractual judgment enforcement to its inflows. The researcher has also made use of textbooks and journals for the writer's analysis on the incentives necessary to attract the foreign direct investment [FDI] in particular the contractual judgment enforcement, also the reforms conducted, and successes recorded on this note through the court system and civil procedure rules in some developing economies these constituted the major secondary sources for this dissertation. The researcher has made use of legal analysis to examine domestic laws and policies in this direction to see how Nigeria's situation in this area of development could be improved in answer to the research question.

[27] Nigeria's Investment Laws and Policies Essien Esema & Associates available at www.Esema Associates post.com 3rd July 2014.
[28] ibid

1.7 Literature Review

There are several academic works in the area of political economy of International investment, and civil procedure. They have dealt largely with the importance of foreign direct investment FDI, to the developing host country, in creating jobs, and accelerating development. Others dealt with the incentives necessary to attract the foreign direct investment FDI, which includes among others, a vibrant and efficient contractual enforcement mechanism.

The importance of the foreign direct investment (FDI) has been stressed in the Economic transition of many developing economies in Asia, East European countries and the former Soviet[29].

Nigeria, within the period[30] of the reforms has also made a successful efforts to attract foreign direct investment (FDI), however the result have not been impressive especially in the manufacturing and agricultural sectors. But there has been remarkable improvement in the attraction of FDI by Nigeria especially in the oil and gas sector of the economy. By 2012 and 2013 Nigeria has again emerged number one destination for Foreign Direct Investment (FDI) in Africa, according to the United Nations Conference on Trade and Development (UNCTAD)[31].

UNCTAD said in its World Investment Report 2013, titled: "Global Value Chains: Investment and Trade for Development," that FDI inflows to Nigeria stood at $7.03billion. South Africa recorded $4.572 billion, Ghana ($3.295 billion), Egypt ($2.798 billion), and Angola (-6.898 billion), among others. A breakdown of the Global FDI report, released

[29] Tao, Z and Wang, S., foreign direct investment, and contract enforcement, school of Business, university of Hong Kong [1998] P. 2
[30] From 2005 TO 2013
[31] UNCTAD:%20Nigeria%20Remains%20Number%20One%20Investment%20Destination%20in%20Africa,%20Ar ticles%20%7C%20THISDAY%20LIVE. Visited 3rd July 2014.

2013, showed that Foreign Direct Investment flows to African countries increased by five per cent to $50billion in 2012, even as global FDI fell by 18 per cent.

According to the report, global FDI fell by 18 per cent to $1.35 trillion, while FDI is expected to increase to $1.45 trillion in 2013, $1.6 trillion in 2014 and $1.8 trillion in 2015.

UNCTAD said: "The road to FDI recovery is thus proving bumpy and may take longer than expected. UNCTAD forecasts FDI in 2013 to remain close to the 2012 level, with an upper range of $1.45 trillion – a level comparable to the pre-crisis average of 2005 to 2007.[32] Substantial part of these developments is in oil and gas. Nigeria still needs to do more to attact FDI in manufacturing and agricultural sectors to create job opportunities for growth and development.

The slow pace in the attraction of FDI by Nigeria in other manufacturing, Tourism and agricultural sectors among other considerations is lack of vibrant contractual enforcement mechanism. A long-standing deterrent to FDI in many developing countries is weak contract enforcement.[33] This position remain the same up to 2013 evidence on the factors that determines the inflow of FDI into Nigeria as there is ample evidence expenditures to ensure protection against risks and to establish and enforce contracts.[34] Making a case for the importance of foreign direct investment FDI in bringing prosperity and development, and integration into the world economy, Ogunkola, and Jerome, in their paper[35] said that FDI assumed prime importance in the wake of declining concessional aid, which has created a preference for long-term and more stable financial inflows. The lessons from

[32]NCTAD:%20Nigeria%20Remains%20Number%20One%20Investment%20Destination%20in%20Africa,%20Articles%20%7C%20THISDAY%20LIVE. Visited 3rd July 2014.
[33] Ibid
[34] Ebiringa O. T - (2013) available at www.undoingbusiness2013 visited 5th July 2014
[35] Foreign Direct Investment in Nigeria: Magnitude, Direction and Prospects. Available at htt://www.aeracafrica.org/ document/books/FDI-papers-booklengh-volume.pdh accessed 4th April 2009

the experience with the Asian financial crises also pushed FDI in its position as a suitable and more credible alternative, in addition to providing capital inflows. FDI can also potentially boosts the growth of a country by crowding in other investments with overall increase in total investment as well as, hopefully, creating positive spillover effect from transfer of technology, knowledge, and skills to domestic firms. It can stimulate economic growth by spurring competition, innovation and improvements to a country's exports performance.

According to Otepola, in his paper[36] while examining the growing impotence of foreign direct investment FDI, in Nigeria concludes that FDI contributes in a significant way to growth. He further identifies export as one channel through which the economy benefit from FDI.

Other International Institutions like the United Nations, in various reports, and instruments, in particular, in the United Nations Conference on Trade, and Development[37]. It says that, in the face of inadequate resources to finance long-term development in Africa and with poverty reduction and other Millennium Development Goals (MDGs) looking increasingly difficult to achieve by 2015, attracting foreign direct investment [FDI has assumed a prominent place in the strategies of economic renewal being advocated by policy makers at national, regional, and international levels. The experience of a small number fast growing East Asian, newly industraliesed economies [NIES] and recently China has strengthen the belief that attracting FDI is key to bridging the resource gap of low-income countries and avoiding further build-up of debt while tackling the causes of poverty.

[36] Foreign Direct Investment as a factor of Economic Growth in Nigeria, African Institute for Economic Development and Planning [IDEP] Dakar-Senegal [2002] 1

[37] Held in (2005), in Geneva, with the theme 'Economic Development in Africa' rethinking the role of Foreign Direct Investment.

Furthermore, in this direction Ali,[38] narrated that it is not unusual for economists to emphasize the importance of foreign direct investment [FDI] in fueling economic growth. In fact, since early 1950s FDI has been recognized as the most crucial factor in enhancing a reasonable standard of living for countries that has been the recipients of FDI. South Korea, Singapore, and Taiwan have been an example of such nations that benefit greatly from FDI and the integration in the global economy in recent years, China, and India have made remarkable progress in attracting FDI and in realizing technological and economic successes.

In another International report[39], it has been found that foreign direct investment FDI is an integral part of an open and effective international economic system and a major catalyst to development. However, it was quickly added[40], that the benefits of FDI do not accrue automatically and evenly across countries, sectors and local communities. National policies and the international investment architecture matter for attracting FDI to a larger number of developing countries and for reaping the full benefits of FDI for development. The challenges primarily address host countries, which need to establish a transparent, broad and effective enabling policy environment for investment and to build the human and institutional capacities to implement them.

According to the United Nations Report,[41] a good investment climate provides opportunities and incentives for firms-from micro entrepreneurs, to multinationals- to invest productively, create jobs, and expand. Improving the investment climate of their societies is critical for governments in the developing world, where 1.2 billion people survive on less than 1 [one]

[38] Foreign Direct Investment and Development, Competitiveness Review [2005] available at AllBusiness.com, accessed on 4th march 2009

[39] Organization for Economic Co-operation and Development [OEDC], Foreign Direct Investment for Development, Maximizing Benefits, Minimizing Costs, (2002). Overview, p3

[40] ibid

[41] World Developing Reports 2005 at P. 846

dollar, where youth have more than double the average unemployment rate, and where populations are growing rapidly.

Therefore, a provision of conducive investment climate according to the report[42] include among some others, facilitating contract enforcement in the event of any dispute in commercial transaction. This incentive has also been advocated in some other literatures[43]as one of the bases upon which investors would have the confidence to bring their investment in to any country. The consideration always is this, whenever the cost and risk of enforcement of contractual obligations are low, the property rights are more secure. Delays or uncertainties in the enforcement of such obligations erode the value of the property rights and diminish the opportunities and incentive to invest. In this regard, Manscurlson[44] have demonstrated a powerful causal link between an effective appropriate judicial system, and economic growth, in its protection of business and contractual rights.

Others[45] were blunter in putting the linkage between an effective contract enforcement mechanism and economic development. They advance the strong claim that the inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World.

These categorical conclusions have eventually led to several academic works on the best of ways to transform contract enforcement to make them more efficient, timely, and effective.

---

[42] ibid

[43] See U.S Department of State, (2009) Investment climate statement-Nigeria, Bureau of Economic, Energy, and Business Affairs. Available at accessed on the 11th April 2009. Also Doing Business in Nigeria 2009, The World Bank group, available at business.org/Explore Economies/?economyid=143 accessed on 4th April, 2009 also Tribilcock, M, and, Leng, J. The role of formal contract law, and enforcement in Economic Development Virginia Law Review 2006, vol.92, P.1518.

[44] In, [price water house coopers L.L.P] Prime contractors, the Nigerian Investor's Roadmap, and enabling environment strategy. Final Report [2002]

[45]Tribicock, M, and Leng, J. op cit. P.1520

Recently the improvement by Nigeria in the area of a condusive investment climente in still in the attraction of the FDI in the oil and gas sector throughout the last 10 years, Nigeria has been carrying an ambitious reform agenda. The most far reaching of those was to base the budget on a conservative reference price for oil, with excess saved in a special, Excess Crude Account (ECA). The economy responded with strong growth between 2003 and 2010 – averaging 7.6%. Nigeria was among the first countries to adopt and implement the Extractive Industries Transparency Initiative (EITI) to improve governance and oil sector.[46] Almost all the referred literature made suggestions and recommendations on the strategies to strengthen the system in the developing economies to make the courts and the contractual enforcement mechanisms more efficient and vibrant and to remove all the impediments to other dispute settlement outlets. According to the United Nations Report[47], the impact of a well-functioning court system, extends far beyond the number of cases it resolves, the more timely and predictable a court's decision, the better able the firms are to predict the outcome of any dispute. In some other report[48] make other recommendations on some other courses, of a weak enforcement process, as the absence of computerization of courts, absence of electricity in court room, the seniority- based pleading system, corruption, and even the traditional court dress requirement of wig and gown, in the context of extreme heat.

In Nigeria[49], the country is still ranked 90 out of 181 countries surveyed in the ease or difficulty of enforcing commercial contracts, which was determined by following the evolution of a payment dispute and tracking the time, cost and number of procedures

[46]World Bank Nigeria Overview available at *Last updated October 2013 visited 3rd July 2014*
[47] World Development Report, 2005
[48]Op.cit Foot note 11
[49] See Doing Business in Nigeria (2009), Op.cit foot note 22, the position as at 2012 and 2013 is that Nigeria was ranked 138 and 136 respectively, see www.Doing Business 2014.

involved from the moment a plaintiff files the law suit until actual payment. The ease of enforcing contract has improved by the new ranking of 138 and 136 in 2012 and 2013 respectively[50] The noble conclusion that could be reached is that, the problem continues notwithstanding the good suggestions and recommendations towards enhancing the process of contract enforcement. The problem of slow pace of the FDI inflows in to Nigeria is impressive in the oil and gas sector up to 2014. However with other sectors in manufacturing and agriculture still lagging behind.

There is also no work dedicated to the examination of our judicial system in which the same court hears the civil, and criminal cases, the same judges hears their cases, and are assign to hear Election petitions, and the effect of that system on our contracts enforcement process in the regular court. There is no work on the assessment of the uniform application of the High court civil procedure rules, the length of the procedures to be followed by a plaintiff or his lawyer to enforce contractual claims and timely enforcement. There is no work on roles of the Bailiffs in moving civil cases through the system in line with the ease, or difficulty of contractual judgment enforcement.

This dissertation contributed to the development of the reforms in the framework of efficient contractual judgment enforcement as key incentive in attracting foreign direct investment [FDI] in this direction.

It is now imperative to emphasize on the judicial system not only the courts, on the reforms and unified application of the High court civil procedure rules, to study the rule and analyze the provisions in the context of other judgment enforcement legislations to identify the obsolete, cumber sum, and unnecessary technical procedures, which elongate the process of contract enforcement. We also this time, emphasized on the current composition of court

[50] Doing Business 2014 ibid

bailiffs, who by the rules of courts are responsible for the enforcement of the court's orders and judgments, and finally to study the level of patronage of the Alternative disputes resolution. The literatures now available lack an in-depth analysis on these issues.

1.8 Justification of the Research

This research is justifiable in order to establish findings on the processes of enforcement of contractual judgment especially owing to the current global economic crisis, every country, and its policy makers are now on their toes in the efforts to bring economic development to its people, one sure way of doing that is by attracting foreign direct investment because of the uncountable benefits that comes with it. A key incentive to attract the FDI is the contractual judgment enforcement mechanism; any attempt to analyze the obstacles that weaken this process is justified, in trying to find solutions, through reforms of the system.

This research therefore would be of great interest to the Government, and other policy makers in their efforts to attract FDI to Nigeria. Secondly, the citizens of Nigeria are now under a heavy burden of unemployment, a good investment climate, through the effective contractual judgment enforcement mechanism, will attract FDI that brings jobs, and economic prosperity. Thirdly, multinational enterprises, and the local firms involved in investment would be interested in knowing the extent of what is being done to improve the investment climate in Nigeria, in taking decision of investment locations.

1.9 Organisational Layout:

This dissertation is divided into six chapters. Chapter one provides the general introduction, background, structure, and the framework of the dissertation.

Chapter two came up with nature and definitions of investment and foreign direct investment FDI the chapter captured the variety of views on what constitute FDI and its indices. The chapter explained the detail analysis of the FDI inflow to Africa and to Nigeria respectively and then the importance of Foreign Direct Investment [FDI] to the developing economies, and to Nigeria. In dealing with the main thrust of this dissertation, the first priority is to develop a basis that will aid the identification of the core issues that will be used as basis for argument and analysis in the entire dissertation.

Chapter three examined the focal point of this research, the factors that constitute a clog in encouraging foreign direct investment FDI. The investment climate determines the level of foreign investment in a particular country. Therefore, the chapter captured the potential impediments to such investment climate and then to the attraction of FDI by the developing countries. The chapter also identified, particularly, the delay in contractual judgment enforcement as one of the factors attracted or relied upon by the investors in a decision to invest in a particular country, the investment that would create jobs, encourage development and economic growth.

Chapter four examined, and made an in- depth analysis of the problem that the dissertation seeks to tackle, the problem of 'all in-one' judicial system in which all cases are heard and determined in one court, in which same judge may be assign to another judicial assignment while his cases are pending. Secondly, the problem of uncoordinated application of the High court civil procedure rules throughout Nigeria and how that affects the ease of judgment enforcement. The chapter discussed the problem of the number of procedures needed to be complied with by a litigant, to enforce contracts under the High court civil procedure rules, and other Judgment enforcement legislations, for an effective enforcement.

Lastly, the important role by the bailiffs in moving civil cases through the system for effective contractual judgement enforcement. The apparent lack of training of these officers of the court in Nigeria and the implication of that to the smooth and effective judgment enforcement

Chapter five examined the legal framework for contractual judgments enforcement in some developing economies, and their effectiveness, compare with the situation in Nigeria, particularly in the context of the judicial system, the rules of court, and bailiffs, and finally the level of acceptance, and patronage, and impediments of the other alternative dispute outlets.

Chapter Six concluded the dissertation with finding, and recommendations

CHAPTER TWO

NATURE AND DEFINITION OF INVESTMENT AND FOREIGN DIRECT INVESTMENT (FDI)

2.1 Introduction

The word 'investment' is undoubtedly an economic term, which means in that circle, the putting together of some things in anticipation of proceeds later. However it has been argued[1], that it is too late in the day for anyone to divorce law from economics and economic development simply because the production of goods and services cannot be carried on in the absence of it, since law among other things lays down the framework, standard, and procedure for the establishment of business. Law also protects the rights of individual and corporate ownership and production of goods and services.

It is from this standard point that, it can be positively asserted that what amounts to investment or Foreign Direct Investment (FDI) and what ensure its flow, and sustenance are issues of both economics and law.

Under the International economic law there is a tradition of differentiation between direct and portfolio investment which is mainly an economic and less a legal one. In general, one distinguishes between foreign direct investment (FDI) and portfolio investment[2]. Foreign

[1] Odume, I. Law as a Catalyst for Economic Development. A Reflection on Nigerian Investment Promotion Commission Act. International Journal of Law and Contemporary Studies, Vol. 2, No.1&2 2007, Development Universal Consortia. P. 26

[2] Cf. UNCTAD, scope and Definition, Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11(Vol.11),8 ("An investment is considered direct when the investor's share of ownership is sufficient to allow control of the company, while investment that provides the investor with a return, but not control over the company, generally is considered portfolio investment")

direct investment relates to investors who are involved in management and risk usually directly controls the foreign direct investments[3]. Portfolio investments are made through contribution of capital, example through shares or loans, without any managerial involvement by the investor.

The definition of investment is of particular importance in modern international investment law for a number of reasons. It therefore satisfies not only the scholarly mind to bring order into the chaotic real-life of cross-border investment flows by finding appropriate categorizations, and some decisive consequences for highly practical issues.[4]

In finance, investment means the purchase of a financial product or other item of value with an expectation of favorable future returns,[5] In general, terms, investment means the use of money in the hope of making more money,[6] and in business on the other hand, investment means, the purchase by a producer of a physical good, such as durable equipment or inventory, in the hope of improving future business.[7]

On the level of substantive law, the definition of investment in various international investment agreements (IIAs) of a multilateral or bilateral nature, such as bilateral investment

[3] Cf. OECD Benchmark Definition of Foreign Direct Investment, 4th edition, April 2008, Para 11, available at http: www.oecd.org/data oecd/26/50/40193734.pdf. ("11 Direct investment is a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the investment enterprise) that is resident in an economy other than that of the direct investor. The motivation of the direct investor is a strategic long-term relationship with the direct Investment enterprise to ensure a significant degree of influence by the direct investor in the management of the direct investment enterprise. The "lasting interest" is evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise. Direct investment may also allow the direct investor to gain access to the economy of the direct investment enterprise which it might otherwise be unable to do. The objectives of direct investment are different from those of portfolio investment whereby investors do not generally expect to influence the management of the enterprise.")

[4] August, R, Recent Developments in International Investment Law. Universtepantheonasas (paris11) institute des Hautes etudes internationals de Paris. 2009 page5

[5] last visited 23rd November 2010

[6] ibid

[7] ibid

treaties (BITs), is decisive for the scope of protection of the covered economic activity. Only what qualifies, as an "investment" under an IIA will enjoy the treaty's protection[8]. Most BITs use a wide definition of investment, providing for protection of "every kind of asset", which covers the classical protection of moveable and immovable property as well as other rights in rem, shareholdings, contractual claims like loans, intellectual property rights and concessions[9]. An example is the German Model BIT 2005 which states as follows:

> The term 'investment' comprises every kind of asset, in particular. (a) Movable and immovable property as well as other rights in rem. such as mortgages, liens and pledges. (b) Shares of companies and other kinds of interest in companies. (c) Claims to money, which has been used to create an economic value. (d) Intellectual property rights, in particular copyrights, patents, utility-model patents, industrial design, trade-marks, trade-names, trade and business secrets, technical processes, know-how and good-will; (e) business concessions under public law, including concessions to search for, extract and exploit natural resources …[10]
>
> In a similarly broad way, the 2004 US Model BIT states that;
>
> Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profits, or the assumption of risk. Forms that an investment may take include;

(a) An enterprise;

(b) Shares, stock, and other forms of equity participation in an enterprise;

(c) Bonds, debentures, other debt instruments, and loans;

(d) Futures, options, and other derivatives;

[8] Ibid
[9] Ibid page 6
[10] Article 1(1) German Model BIT (2005) reprinted in; R. DOLZER/C. SCHREUER, principle of International Law 368(2008), and reproduced by August, R. ibid page 6.

Turnkey, construction, management, production, concession revenue sharing and other similar contracts …[11]Developing countries, on the other hand, tend to use a more narrow definition of investment, particularly in their national legislation[12], generally restricting it to foreign direct investment since in their view only investments involving management tasks would contribute to the economic development of the state[13]. Thus, as could be seen from this variety of views and perspectives on the scope of the definition of investment has become one of the central and controversial issues in the context of the negotiations for a multi lateral investment agreement[14].

Today, however, increased investment flows from so-called developing countries to Western States and between developing countries has changed these roles and a new more restrictive trend is possible. In spite of developments like this, it is clear that modern investment law covers a very broad field of economic activities vastly transgressing the traditional notions of protecting tangible property rights of foreigners, to a wider perspective of what could also be seen as valuable assets worth the legal protection. Therefore, it is certainly correct when the investment tribunals have held that "the reference to 'every kind of assets' is possibly the broadest' among similar general definitions contained in BITs"[15].

---

[11] Article 1(1) US Model BIT 2004, reprinted in; DOLZER/ C.SCHREUER, Principle of International Investment Law 385(2008) and reproduced by August, R. ibid

[12] See section 31 Nigerian Investment Promotion Commission Act (NIPC) (Decree 16 1995) Cap Laws of the Federation of Nigeria 2004 defined investment to mean "investment made to acquire an interest in an enterprise operating within and outside the economy of Nigeria"

[13] See A. PARRA, "principles Governing Foreign Investment, as Reflected in National Investment Codes", 7 ICSID Review-FILJ 428 (1992)

[14] OECD, MAI Negotiating, Final Version, 24 April 1998, DAFFE/MAI (98)7/REV1, 11, available at www1.oecd.org/daf/mai/pdf/ng/ng987rle.pdf.

[15] BayindirInsaat Turizm Ticarer VeSanayi A.S V Islamic Republic of Pakistan, ICSID case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, Para. 113, available at http://ita.law.uvic.ca/documents/Bayindr-jurisdiction.pdf.

Now it is in line with current notion of investment that we look at Foreign Direct Investment (FDI), what has recently assumed the crucial role in the internationalization of economic activities.[16]

2.2 Definition of Foreign Direct Investment (FDI)

In principle, the traditional customary international law principle according to which each State has unrestricted powers to limit the entry of foreigners into its territory generally still valid today[17]. This admission control leaves it to the discretion of a State to decide if and to what extent it wants to admit foreign investment. This foundation is important that we can now appreciate what would in perspective, amount to the foreign direct investment, as a matter of National law.

An agreed framework definition of foreign direct investment (FDI), refers to an investment made to acquire a lasting management interest (normally 10% of voting stock) in a business enterprise operating in a country other than that of the investor defined according to residency.[18] Foreign Direct Investment FDI reflects the objective of obtaining a lasting interest by a resident entity in one economy ("direct investor") in an entity resident in an economy other than that of the investor ("direct investment enterprise"). The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise.[19] Therefore, the combination of the foreign direct investment, the foreign investor and the

[16] OECD Benchmark Definition of Foreign Direct Investment, Third Edition P. 7
[17] I. Shihata, Recent Trends Relating to Entry of Foreign Direct Investment, 9 ICSID Review-FILJ 47(1994)
[18] Ayanwale, A.B, FDI and Economic Growth Evidence from Nigeria, AERC Research Paper 165 2007 P.1.
[19] Ibid. Similar definition also according to fifth edition IMF's Balance of Payment Manual, reproduced by D. Maitena, and Banco de Espana, Definition of Foreign Direct Investment (FDI) a methodological note, final draft, July 31 2003, P. 2.

direct investment enterprise are largely subject to the municipal law of a host country, which may provide what may constitute a foreign direct investment (FDI) which may or may not be in line with the international standard of that notion.

A foreign direct is investor is an individual, an incorporated or unincorporated public or private enterprise, a government, a group of related incorporated and/or unincorporated enterprises which has a direct investment enterprise-that is, a subsidiary, associate or branch-operating in a country other than the country or countries of residence of the foreign direct investor or investors.[20] The direct investment enterprises on the other hand, according to the OEDC[21] is an incorporated or unincorporated enterprise in which a foreign investor owns 10 percent or more of the ordinary shares or voting power of an incorporated enterprise or equivalent of unincorporated enterprise.

The numerical guideline of ownership of 10 per cent of ordinary shares or voting stock determines the existence of a direct investment relationship. An effective voice in the management, as evidenced by an ownership of at least 10 per cent, implies that the direct investor is able to influence or participate in the management of an enterprises; it does not require absolute control by the foreign investor.[22]Although not recommended by the OECD, some countries may still feel it necessary to treat the 10 percent cut-off point in a flexible manner to fit the circumstances. In some cases, the ownership of 10 percent of ordinary shares or voting power may not lead to the exercise of any significant influence while, on the

[20] Ibid P. 8
[21] Ibid P.8
[22] Ibid. Similar definition of FDI in Nigeria is also in accordance with the International standards; the basic criterion of defining FDI in Nigeria is 10 percent ownership by a non-resident investor, regardless of whether the investor has an effective voice in the management. However, the definition also includes enterprises in which the nonresident investor owns less than 10 percent, but has an effective voice in the management. See Odeniran, A. J. Direct Investment Compilation Practices, Data Sources and Methodology, research dpt. Central Bank of Nigeria. P. 2

other hand, a direct investor may own less than 10 percent but have an effective voice in the management.[23] OECD does not recommend any qualifications to the 10 percent rule. Consequently, countries that choose not to follow the 10 per cent rule in all cases should identify, where possible, the aggregate value of transactions not falling under the 10 per cent cut-off rule, so as to facilitate international comparability.[24] Some countries consider that the existence of elements of a direct investment relationship be indicated by a combination of certain factors[25].

Other relationships may exist between enterprises in different economies, which exhibit the characteristics set out for a direct investment, although there is no formal link with regard to shareholding. For example, two enterprises, each operating in different economies, may have a common board and common policymaking and may share resources including funds but with neither having a shareholding in the other of 10 per cent or more. In such cases where neither is a direct investment enterprise of the other, the transactions could be treated as between related subsidiaries; these are not regarded as direct investment.[26]

Similarly, in the process of economic activities, cross border transactions are carried out, that at a glance may be regarded as foreign direct investment (FDI) when in fact they do not meet the criteria. For example:

[23] Like in Nigeria, see Odeniran A. J ibid. P.3
[24] See OECD Benchmark Definition of Foreign Direct Investment, op cit P. 8.
[25] In Nigeria such factors includes a. representation on the Board of Directors, b. participation in policy-making, c. material inter-company transactions, d. interchange of managerial personnel, and/ or e. provision of technical information. See Odeniran, A. J. op.cit. P.3
[26] See OECD Benchmark Definition of Foreign Direct Investment. 4th edition, April 2008, Para 11, available at http: www.oecd.org/data oecd/26/50/40193734. Op.cit.

a. An enterprise under takes to build for a foreign client, usually a government, a complete manufacturing plant, to provide technical know-how, and to manage and operate a plant for a number of years, without an ongoing on-site managerial presence and without other criteria for existence of a direct investment enterprise being met. It has complete control over day-to-day operations and receives a management fee, paid either in cash or in goods produced by the plant. However, the enterprise has no equity stake in the plant and is performing a cross-border service.

b. An enterprise has a long-term contract with a foreign company, provides it with technical expertise, and has considerable influence over the quality of output. The enterprise may provide a loan to the foreign company and sometimes will have a member on the company's board. However, there is no equity stake. It is once again a cross-border service.

c. Some host countries have made agreements with a number of foreign enterprises where the host country supplies factory accommodation, electricity, staff accommodation, administration and labor. The foreign enterprise supplies all production machinery, fixtures, and fittings for the building and production materials, and is responsible for the initial training of labor force. The foreign enterprise then pays an agreed piecework rate for each item produced. Where the production machinery, fixtures, and fittings remain the property of the foreign enterprise, there is technically a direct investment branch, though the branch's profits will be zero. There is no direct investment interest if the machinery becomes the property of the host country.

d. Some professional firms operate much like a multinational firm, but do not hold equity in one another. For example, unaffiliated (in equity sense) accounting or management consulting firm may operate globally under a single name, refer business to one another and receive fees in return, share costs (or facilities) for such items as training or advertising and may have a board of directors to plan business strategy for the group. This is not direct investment, and would be difficult or impossible to account for as such, but it does have much in common with direct investment.

e. Other cases might include foreign sales and representatives' offices, as well as foreign stations, ticket offices, and terminals or port facilities of domestic airlines or ship operators. Such offices or activities can be treated as direct investment only if they meet the requirements of residence and the attribution of production in an economy as defined in the IMF Balance of payments MANUAL, Fifth Edition[27].

The definition of FDI comprises, not only the merger and acquisition and new investment of the referred criterion. However, it also reinvested earnings, loans, similar capital transfer between parent companies, and their affiliates. Many countries could be both host to FDI projects in their own country and a participant in investment projects in other countries.[28] A country's inward FDI position is made up of hosted FDI projects, while outward FDI comprises those investment projects owned abroad.[29] It is on this note now and in fact, for the distant future, FDI predominantly constitute one of the salient features of today's globalization drive. There is a conscious encouragement of cross-border investments especially by transnational corporations and firms. Many, especially developing countries,

[27] BPMS 1993.
[28] Ayanwale, A B. FDI and Economic Growth: Evidence From Nigeria, AERC Research Paper 165 African Economic Research Consortiums, Nairobi (2007), P. 1
[29] Ibid.

now see attracting FDI as an important element in their strategy for economic development. This is the position because FDI is seen as an amalgamation of capital, technology, marketing and management.[30]

2.3 FDI Inflow into Africa

The developing economies particularly in Africa and around the world strive to attract foreign direct investment (FDI) because of it's acknowledged advantages as a tool of economic development. The efforts of the African continent in seeking FDI is evidenced by the formation of New Partnership for Africa's Development (NEPAD) which has the attraction of foreign investment to Africa as a major component. In fact, the pillar on which NEPAD was launched was to increase available capital to US $64 billion through a combination of reforms, resource mobilization and conducive environment for FDI.[31]

Unfortunately, the efforts of most African countries to attract FDI have been futile.[32] This is in spite of the perceived and obvious need for FDI in the continent. The development is disturbing, sending very little hope of economic development and growth for these countries. Further, the pattern of the FDI that exist is often skewed towards extractive industries, meaning that the differential rate of FDI inflow into sub-Saharan African countries has been adduced to be due to natural resources, although the size of the local

[30] Ibid.
[31] Funke, N. and S.M Nsouli The New Partnership for Africa's Development (NEPAD): Opportunities and Challenges. IMF Working paper No.03/69. International Monetary Fund, Washington, D.C 2003
[32] Anyanwale, A.B op.cit.

market may also be a consideration.[33] However, the economic Report on Africa by the United Nations Economic Commission for Africa advocates that FDI is the key to solving Africa's economic problems. Bodies such as the IMF and the World Bank have suggested that attracting large inflows of FDI would result in economic development. All African countries are keen on attracting FDI. Their reason would differ but may be summarized as trying to overcome scarcities of resources such as capital, entrepreneurship, access to foreign markets; efficient managerial techniques; technological transfer and innovation and employment creation.[34]African countries, like most other developing countries have taken various initiatives to attract FDI. These initiatives include incentives, signing of investment treaties and investment promotion activities. FDI flows to developing countries surged in 1990s and became their leading source of external financing. In Africa, the main attraction for FDI are market-related, notably the size and the growth of the local market and access to regional markets.[35]Investment flows to Africa have declined steadily. In 1970s, Africa accounted for 25% of foreign direct investment to developing countries. In1992 it only accounted for 5.2% whereas in 2000 it received 3.8% of the total FDI to the developing world.[36]According to the World Investment Report (WIR) 2001, FDI inflows to Africa declined from$10.5 billion in 1999 to $9.1 billion in 2000. Africa share of FDI in the world fell below1 percent in 2000. The inflow to its top recipients, namely, Angola; Morocco; and South Africa have fallen by half. Also according to the (WIR 1999) the main sources of FDI

[33] Morisset, J. Foreign direct investment in Africa: Policy also matters, Transnational Corporations, 2000 9(2): P. 107-25.
[34] Mwilima N. Foreign Direct Investment in Africa, Labour Resource and Research Institute (LaRRI) 2003 P. 33
[35] Ibid at P. 39
[36] Ibid

to Africa were France, the United Kingdom, and the United States, and to a lesser extent, Germany and Japan.

On the average FDI, flows to North Africa remain more or less the same as in the previous year, $2.6 billion. Flows declined into Morocco and Algeria but increased to Sudan (concentrated in petroleum exploration) from $370 million to $392 million. Egypt has remained the most important recipient of FDI flows in North Africa.[37]In Sub-Saharan Africa, there has been a decrease in FDI from $8 billion in 1999 to $6.5 billion by the year 2000. A sharp drop of inflows into two countries coursed the overall drop of inflows into Sub-Saharan Africa: Angola and South Africa. In South Africa, the reduced inflow of M&As in the country played a role in the downturn. The decline of inflows in Angola resulted in FDI flows to the least developed countries to drop from $4.8 billion in 1999 to $3.9 billion in 2000.[38] However, as worldwide FDI inflows increases in 2006 and FDI inflows to Africa have increased from $9.68 billion in 2000 to $1.3 trillion.[39]However, the story was not the same in 2010[40]. In that year the FDI inflows to Africa fell to $59 billion- a 19 per cent decline compared to 2008, this is mainly due to contraction in global demand and falling commodity prices. Commodities producers in west and east Africa were affected. Flows to North Africa also declined despite its more diversified FDI and sustained privatization programs.

[37] Ibid at P. 40
[38] Ibid
[39] UNCTAD, World Investment Report, 2007, United Nations, New York.
[40] UNCTAD, World Investment Report, 2010. United Nations, New York. P. 9

Nevertheless, in most African nations, FDI inflows rose mainly in the primary sector, because of the existence of vast natural resources[41], and the market size due to its population, and not generally on other businesses, commercial or manufacturing activities, that would create jobs and bring development. Recently[42]the developed countries including the United States and Japan hitherto the second largest economy were faced with serious economic crises[43]. It is imperative to assess the impact of the crises on the FDI flows particularly in the African countries.

The year 2008 marked the end of a growth cycle in international investment that started in2004 and saw World Foreign Direct Investment (FDI) inflows reach a historic record of $1.9 trillion in 2007.[44] However, due to the impact of the ongoing worldwide financial and economic crises, FDI inflows are estimated by UNCTAD to have declined by 15 per cent in 2008. This fall in global FDI in 2008-2009 is the result of two major factors affecting domestic as well as international investment. First, the capability of firms to invest has been reduced by a fall in access to financial resources, both internally- due to a decline in corporate profits- and externally-due to the lower availability and higher cost of finance. Second, the propensity to invest has been affected negatively by economic prospects, especially in developed countries that are hit by the most severe recession of the post-war era. The impact of both factors is compounded by the fact that, as early as 2009, a very high

[41] The demand for Africa's natural resources, particularly oil, is increasing. The United States and European countries has been reducing their dependence on Middle East and increasing, instead, their interest in supplies from Africa.
[42] From 2008 up to 2011
[43] This deteriorating climate began to leave its first negative marks on investment programs, including in early 2008. According to the UNCTAD 2008-2010 World investment prospects survey, conducted April-June 2008, 40percent of the respondent companies already mentioned at that time that the financial instability had a "negative" or "very negative" impact on their investment programs.
[44] See Assessing the impact of the current financial and economic crisis on global FDI flows. UNCTAD, April 2009.

level of risk perception is leading companies to extensively curtail their costs and investment programs in order to become more resilient to any further deterioration of their business environment.[45] Even though the impact of the current crises, in particular as it relates to FDI inflows, the developed countries have so far been the most affected with a significant decline in FDI inflows in 2008[46]. It is interesting to know that these developments has not affected on the level of FDI inflow to the developing economies particularly in Africa. By region, preliminary estimates suggest that inflows of FDI to Africa have grown further to more than $70 billion despite the slowdown in global economic growth and its negative consequences for the region[47].

However, while the decrease in FDI inflows has hit developed countries the hardest, some developing economies are also very vulnerable to external shocks. For example, FDI inflows particularly in areas outside of oil and mineral resources have declined sharply in countries such as Indonesia, Pakistan, the Republic of Korea, Singapore and Turkey, due to fallout from financial crisis.[48] Secondly, the level of the apparent increase in the FDI inflows in some sectors, is highly concentrated and driven only by the natural resources and market size, usually associated to the developing and African countries including Nigeria. There is still the decline in the vital sectors of the economy that create jobs and developments, Foreign direct investment FDI raise the efficiency expand output and lead to higher economic growth in the host country.

---

[45] See Assessing the impact of the current financial and economic crisis on global FDI flows. UNCTAD, April 2009.
[46] Preliminary results of the World Investment Prospect Survey 2009-2011 (WIPS) Conducted by UNCTAD also show that developed economies in Europe and North America-which still host the major share of World FDI inflows and Stocks- have so far been the most affected by the reduction in these international investment programs.
[47] UNCTAD April 2009 op cit.
[48] Ibid.

By the current year (2014) the good news is Cautious optimism returns to global foreign direct investment (FDI). After the 2012 slump, global FDI returned to growth, with inflows rising 9 per cent in 2013, to $1.45 trillion. UNCTAD projects that FDI flows could rise to $1.6 trillion in 2014, $1.7 trillion in 2015 and $1.8 trillion in 2016, with relatively larger increases in developed countries. Fragility in some emerging markets and risks related to policy uncertainty and regional instability may negatively affect the expected upturn in FDI.[49] Developing economies maintain their lead in 2013. FDI flows to developed countries increased by 9 per cent to $566 billion, leaving them at 39 per cent of global flows, while those to developing economies reached a new high of $778 billion, or 54 per cent of the total. The balance of $108 billion went to transition economies. Developing and transition economies now constitute half of the top 20 ranked by FDI inflows[50].

2.4 FDI Inflows into Nigeria

Nigeria is one of the countries in Western Africa richly endowed with natural resources mainly oil and gas, mineral deposits, and vast agricultural land. Nigeria's natural resource balance is dominated by petroleum. Known oil reserves could last for another 30-40 years.[51]

Many African countries including Nigeria have reformed their economic policy, investment laws and improved financial system in order to attract FDI inflows. UNCTAD has collected data on changes in national laws related to FDI since 1992. This annual survey has uniquely documented how countries in the past two decades have introduced new policy

[49] World Investment Report 2014 www.doingbusiness visited July 2014
[50] ibid
[51] D. Soumyananda, '*Factor attracting FDI to Nigeria: an Empirical Investigation*. 2009. Madras School of Economics, Chennai, India. P. 3

measures to make their environments more favorable to FDI. Between 1992 and 2007, of 2,540 national regulatory changes 2,292 or 90 per cent were welcoming to inward investment.[52] Most of the changes observed are related to investment promotion. Many countries have introduced new or more generous fiscal and financial incentives, established special economic zones (SEZs) and strengthen their investment promotion agencies. UNCTAD has been observing a steady trend of lowering corporate income taxes, often justified on the grounds of making locations more attractive to FDI. Other areas in which many changes have been noted relate to specific sectors and measures concerning the protection of FDI[53] The Nigerian Government adopts several policies to attract FDI because of its strategic importance to the economic growth and development, particularly in this globalized era. The government implemented IMF monitored liberalization of its economy, welcomes foreign investors in the manufacturing sector, offers incentives for ownership of equities in all industries except key industries like military equipment. The incentives like tax relief are available to investors and concessions for local raw material development. In line with its economic reforms, starting from the 1980s, Nigeria undertook a far-reaching privatization program. This change started in 1989 and onwards due to several policies (like introduction of Structural Adjustment Program in 1986, Export processing Zone Decree in1991, Investment Promotion Commission in 1995) adopted by the Nigerian Government.[54] Even though, without prejudice to these far-reaching reforms, an effective, cheap and speedy contractual judgment enforcement mechanism in our judicial system in Nigeria still pose significant problem in attracting FDI inflows to the country.

[52] UNCTAD Investment Brief Number 3, 2008
[53] Ibid.
[54] D. Soumyananda op cit. PP. 3-4

Furthermore, the common perception is that attraction of FDI in Africa is largely, driven by market size in terms of purchasing power with vast population and particularly, in natural resources comprising of oil and minerals. This perception is also consistent with the UNCTAD[55] data, which suggest that the three largest recipients of FDI are South Africa, Nigeria, and Angola-all are natural resource rich nations.

Similarly, in another authentic source[56] FDI inflows to Sub- Saharan Africa have traditionally gone to resource-based sectors. Sub-Saharan African countries in general, have not been able to attract FDI due to poor infrastructure, political uncertainty, corruption and restrictive policies towards FDI. However, several African countries have recently improved the environment for foreign investment and have managed to attract FDI inflows towards activities in non-resource based sectors.

During 1991-94, only 21 percent of FDI inflows to Sub- Saharan Africa went to countries that were not major exporters of oil and minerals. Nevertheless, the share of FDI inflows to these countries rose to about 49 per cent in 1995-1999. Countries such as Mozambique, Tanzania and Uganda, which receive most of the FDI inflows in agriculture, light manufacturing, and utilities, saw a sharp increase in FDI inflows in 1995-99. In Lesotho FDI inflows has been undertaken to service market in neighboring South- Africa through the Lesotho High lands water project.[57] Nigeria as a country, given her natural resource base and large market size, qualifies to be a major recipient of FDI in Africa and indeed is one of the top three leading African countries that consistently received FDI in the past decade.

[55] World Investment Report .2007
[56] See World Bank, Global Development Finance. 2001
[57] ibid

However, the level of FDI attracted by Nigeria is mediocre,[58]compared with the resource base and potential need. The empirical linkage between FDI and economic growth in Nigeria is yet unclear, despite numerous studies that have examined the influence of FDI on Nigeria's economic growth with varying outcomes; the results of the studies carried out on this are not unanimous in their submission.[59] The UNCTAD world Investment Report 2006 shows that FDI inflows to West Africa are dominated by inflow to Nigeria, who received 70% of the sub-regional total and 11% of Africa's total. Out of this Nigeria's oil sector alone, receive 90% of the FDI inflows. This performance in FDI inflows to Nigeria in the oil sector further lend credence to the argument that the FDI inflows in the country are not generally in areas that could bring with them economic growth and improve the lives of the ordinary people. Such FDI are not in sectors such as agriculture, technology transfer, managerial expertise or any other manufacturing activities. This nature of FDI would attract capital, technology and expertise that transnational corporations can bring, which characterized the importance of the FDI in creating jobs, promoting growth and encouraging development.

In 2014 Nigeria has again emerged number one destination for Foreign Direct Investment (FDI) in Africa, [60] UNCTAD said in its World Investment Report 2013, titled: "Global Value Chains: Investment and Trade for Development," that FDI inflows to Nigeria stood at $7.03billion. South Africa recorded $4.572 billion, Ghana ($3.295 billion), Egypt ($2.798 billion), and Angola (-6.898 billion), among others. A breakdown of the Global FDI report, released, showed that Foreign Direct Investment flows to African countries increased

[58]Asiedu, E. Capital controls and Foreign direct investment, World Development,32(3) 2003, PP. 479-90
[59] See Oseghale, B.D. and E.E Amonkhienan. 'Foreign debt, oil export, direct foreign investment(1960-1984) 1987 The Nigerian Journal of Economic and Social Studies 29(3) page 356-80 See also Oyinola, O. 'External capital and Economic development in Nigeria (1970-1991) , the Nigerian Journal of Economic and Social Studies 37(2&3) 1995 PP. 205-22.
60 According to the United Nations Conference on Trade and Development (UNCTAD) Report 2014.

by five per cent to $50billion in 2012, even as global FDI fell by 18 per cent. These figures were emphatically corroborated Nigeria is the highest recipient of Foreign Direct Investment (FDI) inflows in Africa, despite the high level of insecurity in its Northern region pulling in over $20 billion in the last three years.[61] However it should be noted that notwithstanding these remarkable improvement in the FDI inflow to Nigeria "Sectors with major FDI inflows over the years have been the oil and gas…" the Lagos-based investment and research firm[62] said. Nigeria's major sources of FDIs have been the home countries of the oil majors. The United States of America, present in Nigeria's oil sector through Chevron Texaco and Exxon Mobil, has investment over $3.4 billion. The United Kingdom, one of the host countries of Shell, is another key FDI partner. The UK FDIs into Nigeria is about 20% of Nigeria's total foreign investment. China is also becoming one of Nigeria's most important sources of FDI. Nigeria is China's second largest trading partner in Africa, after South Africa. China's direct investment in Nigeria is reportedly worth over $6 billion. The oil and gas sector receives 75% total FDI in Nigeria.[63] - Similarly, Since however, Nigeria's FDI relies on its natural resources, it is likely to remain relatively immune from the decline of overall global FDI. Under the 1995 Nigerian Investment Promotion Commission Act, 100 percent foreign ownership is allowed in all industries except for oil and gas. Typically, Nigeria's most important sources of FDI have been the home countries of the oil majors: the United States (Chevron Texaco, Exxon Mobil), the UK (Shell), China, and South Africa.

[61] By the Coordinating Minister for the Economy and Minister of Finance, Dr. Ngozi Okonjo-Iweala during a world press launch of the 24th WEF on Africa. Abuja-Nigeria
[62] Financial Derivatives Company Limited (FDC)
[63] See more at: www.foreigndirectinvestmentsinflownigeria. Visited July 2nd 2014 2:40pm

Therefore it is extremely important that other sectors like manufacturing, infrastructure development, services and consumer goods sectors on the one hand and Furthermore, the emerging opportunities in hospitality, tourism, shopping mall development and restaurants on the other hand shall be attracted for the purpose of jobs creation technology transfer for accelerating growth and development.

In the future, countries like Nigeria may need to do more and direct their promotional activities, by introducing the necessary reforms particularly in the area of improving the effectiveness of contractual judgment enforcement mechanism. This would set the country to become more selective and targeted to attract the type of FDI with direct impact on economic growth and development of such countries.

2.5 Importance of FDI to Developing Economies

Direct Investment will refer to the investment done by a foreign individual or corporation in a country with the purpose of having an influence over the development of a firm's long-term strategy. This type of investment may also be referred as productive investment, as it is done in companies that are part of productive sectors of a country, be it industrial, financial or services.

According to the International Monetary Fund,

> *"direct investment reflects the aim of obtaining a lasting interest by a resident entity of one economy (direct investor) in an enterprise that is resident in another economy (the direct investment enterprise). The "lasting interest" implies the existence of a long-term relationship between the direct*

investor and the direct investment enterprise and a significant degree of influence on the management of the latter"[64]

There are many reasons why foreign direct investment (FDI) has become a much-discussed topic. The keen interest in FDI is also part of a broader interest in the forces propelling the ongoing integration of the world economy, or what is popularly described as "globalization". Together with the more or less steady rise in the world's trade-to-GDP ratio, the increased importance of foreign-owned production and distribution facilities in most countries is cited as tangible evidence of globalization.[65] Foreign direct investment is also viewed as a way of increasing the efficiency with which the world's scarce resources are used. A recent and specific example is the perceived role of FDI in efforts to stimulate economic growth in many of the world's poorest countries. Partly this is because of the expected continued decline in the role of development assistance (on which these countries have traditionally relied heavily), and the resulting search for alternative sources of foreign capital. More importantly, FDI, *very* little of which currently flows to the poorest countries, can be a source not just of badly needed capital, but also of new technology and intangibles such as organizational and managerial skills, and marketing networks. FDI can also provide a stimulus to competition, innovation, savings and capital formation, and through these effects, to job creation and economic growth. Along with major reforms in domestic policies and practices in the poorest countries, this is precisely what is needed to turn-around an otherwise pessimistic outlook[66].

[64] Maitena D. (2003). "Definitions of Foreign Direct Investment (FDI): a methodological note". Banco de España.
[65] World Trade Organization, WTO Report. 'Trade and Foreign Investment' Press/57 October 1996.
[66] Ibid

It was in the same token that it has been observed that there is no country in this world, including those isolated by the International communality for political or other reason, like North Korea, that does not work hard to attract more foreign direct investment FDI.[67] This fact is attributed to the long-standing existence of an additional growth impact of FDI as widely accepted.[68]Foreign direct investment (FDI) has proved to be resilient during financial crises. For instance, in East Asian countries, such investment was remarkably stable during the global financial crises of 1997-98. In sharp contrast, other forms of private capital flows—portfolio equity and debt flows. The resilience of FDI during financial crises was also evident during the Mexican crisis of 1994-95 and the Latin American debt crisis of the 1980s. This resilience could lead many developing countries to favor FDI over other forms of capital flows, furthering a trend that has been in evidence for many years.[69] On the other hand, economists tend to favor the free flow of capital across national borders because it allows capital to seek out the highest rate of return. Unrestricted capital flows may also offer several other advantages; First, international flows of capital reduce the risk faced by owners of capital by allowing them to diversify their lending and investment. Second, the global integration of capital markets can contribute to the spread of best practices in corporate governance, accounting rules, and legal traditions.

Third, the global mobility of capital limits the ability of governments to pursue bad policies.[70] Perhaps the most prevalent version of beneficial conceptualization begins with a stylized description of how FDI may help the host country to breakout the vicious cycle of

---

[67] See Jeffrey, D. The importance of investment promotion in the poorest countries. World investment prospects special edition. The economist Intelligence Unit. P. 78

[68]Foreign Investment for Development. Maximizing Benefits, Minimizing Cost. Overview OECD 2002page 9

[69]Lougani, P. and Razin, A. 'How beneficial is Foreign Direct Investment for Developing Countries?' Finance & Development. A quarterly magazine of the IMF, June 2001 vol.38 number 2 P. 1

[70] Ibid

under development. Here, the potential host is mired in a poverty-laden equilibrium, low levels of productivity leads to low wages, which leads to low levels saving, which leads to low levels of investment, which perpetuate low levels of productivity.[71] FDI can break this cycle by complementing local savings and by supplying management that is more effective, marketing and technology to improve productivity.[72] Another observation on this is issue also pointed at the fact that, the gain in national income depends on the capital inflow and elasticity of demand for capital. Furthermore, technological and managerial inputs, transfers, and spillover to local firms may course the national production function to shift out word.[73] In line with this therefore, under reasonable competitive condition-, which the foreign presence may enhance- FDI should raise, efficiency expand output and lead to higher economic growth in the host country. The interaction between economic and social development should be positive as well. The additional supply of capital should however be relative return to capital, while the additional demand for labor should bid up the wages of workers, thereby equalizing the distribution of income and improving (quite probably) health and education through the society.[74] To the economist,[75] the emphasis on the new resources that foreign investor brings to relieve the bottlenecks that constrain development is a common theme among international business groups and multinational agencies that urge greater acceptance of international corporations within the developing countries. It is the prevailing assumption in macroeconomic growth model gaps in savings and in foreign exchange that set the limits to long-term growth.

[71]The impact of FDI on host-country Development; The Heritage of theory and Evidence. Institute for International Economic. PP. 19-20 visited 22/3/2011.
[72] The impact of FDI on host-country Development; The Heritage of theory and Evidence. Institute for International Economic. PP. 19-20 visited 22/3/2011.
[73] Ibid
[74] Ibid.
[75] Ibid

As a complementing point, we can identify a number of other positive welfare effects of foreign direct investments FDI in the host economy. Effects of capital inflows on the economy's output potential, through the economy's productive capacity, which is, supply-side effects, technology transfer through foreign firms who bring superior technology, the know-how in the domestic market, managerial skills, increase in competition in the host economy. The establishment of foreign firms leads to advantages in terms of foreign market access, augmenting domestic savings and investment, increasing exports and thereby earning foreign exchange and employee training. If foreign firms introduce new products or processes to the host economy's domestic market, domestic firms may benefit from the diffusion of new technology or the diffusion of new technology might occur when domestic employees move from foreign-owned to domestically owned firms.

Technology diffusion can take place through a variety of channels that involves the transmission of ideas and new technologies, such as, imports of high-technology products, adoption of foreign (superior) technology and acquisition of human capital.[76] The general assessments are that, as part of the impact of the FDI on development FDI brings essential economic resources to the host developing country that they typically lack, such as financial capital, advanced technology and production techniques, production facilities and machinery, managerial expertise, and foreign networks. [77] In addition, it has also been identified that, utilizing FDI for development may have an advantage over alternative state industrial

[76] Nilsson, J. 'FDI and Economic growth; Can we expect FDI to have a positive impact on the Economic growth in Sub-Saharan Africa? 2008, Uppersala University, P. 11

[77] Young-Shik, L. Foreign Direct Investment and Regional Trade Liberalization; A Viable Answer For Economic Development? Journal of World Trade. 39 (4) 2005 Kluwer Law International, Netherlands, page 708. See also Medina Arango, O. 'Importance of FDI in development of Emerging Countries, Application to Colombia and the Philippines'. Academic Department of International business. EAFIT University Colombia.

promotion policies in that FDI is driven by market forces, and therefore, is less susceptible to domestic political considerations that often diminish the effect of state industrial support. Bureaucratic inefficiencies and possible corruptions that are landmark problems with state industrial support, may not apply to FDI run by private enterprises. FDI is considered, to be a positive stimulus for any economy, including that of developing countries. FDI, is believed to be a major engine for the rapid economic growth in China since the 1980s[78]. A subsequent survey[79] indicated that beyond the initial macroeconomic stimulus from the actual investment, FDI influences growth by raising total factor productivity and, more generally, the efficiency of resource use in the recipient economy. This works through three channels: the linkages between FDI and foreign trade flows, the spillovers and other externalities Vis a Vis, the host country's business sector, and the direct impact on structural factors in the host economy.

In the same vein, other areas impacted by FDI to the host country are generally on Trade and Investment Technology transfer, Human capital enhancement, and Competition and Enterprises development.[80] In particular and in line with the importance of FDI identified generally, the New Partnership for Africa's Development NEPAD asserts that, to meet its developmental challenges, Africa will have to rely more on Foreign Direct Investment FDI than economic aid.[81] NEPAD places greater emphases on the importance of FDI as Africa's new engine of economic growth.

---

[78] See Kevin H. Zhang, 'How Does FDI Affect Economic Growth in China?' Economics of Transition 3, 2001 pages 679-693. See also Andreas, J. The Effects of FDI inflows on Host Country Economic Growth. 2005 Junkuping, Sweden

[79] By the OECD in 2002. See Foot note 73 Op cit

[80] Ibid P. 9-19

[81] Kebonang, Z. and Mosweu, S. NEPAD and Challenges of Attracting Foreign Direct Investment in Africa. PDF/ARC Nepad challenges attracting foreign investment. Pd. Access 4/4/09

Overall, the importance of the FDI to the developing economies, lies in the picture of the effects of the FDI on enterprises restructuring that one can derive from recent experience. This is because investors will have picked their targets among enterprises with a potential for achieving efficiency gains. However, from a policy perspective, this makes little difference, as long as foreign investors in their ability or willingness to improve efficiency or realize new business opportunities. Authorities aiming to improve the economic efficiency of their domestic business sector have incentives to encourage FDI as a vehicle for enterprise restructuring.

The highlights in this chapter are on the analysis of the nature of FDI generally and particularly how the FDI is linked to the economic prosperity of the developing economies, like Nigeria. The chapter also analyses the inflows of the FDI to the African continent and to Nigeria. On the FDI inflows, reference had been made to the fact that a larger percentage of such inflows to Nigeria are in the oil sector, which does not bring with it the much-needed jobs creation, the technology transfer or managerial expertise to the country.

Such FDI has little or no bearing with what in reality motivates the developing economies to engage in political, social and legal reforms to attract the FDI in manufacturing and agricultural sector, with a view to improving the lives of the citizens and bringing development and economic growth.

In the subsequent chapter, the focal point is going to be on the factors that constitute a clog in encouraging such foreign investment. Generally, the investment climate determines the level of foreign investment in a particular country. Therefore, we shall see the possible impediments to such investment climate and then to the attraction of FDI by the developing

countries. The chapter would also identify, particularly, the delay in contractual judgment enforcement as one of the factors attracted or relied upon by the investors in a decision to invest in manufacturing sector that would create jobs, encourage development and economic growth.

The chapter shall also study the position of contractual judgment enforcement mechanism and procedures in other three jurisdictions, with a view to identifying what makes the processes in those countries to be cheap, speedy and effective.

CHAPTER THREE

IMPEDIMENTS TO FOREIGN DIRECT INVESTMENT (FDI) IN THE DEVELOPING ECONOMIES

3.1 General Factors and Impediments to FDI in the Developing Economies:

The business atmosphere, conducive for investment to flow and flourish generally determines the factors that triggered the flow of Foreign Direct Investment FDI and the contributions it makes to the developing economies. These factors are determined by the location, the market size, and presence of natural resources, infrastructure and other specific government policies that has the tendencies to persuade foreign investors to locate their investment. This includes ability of the government to carry out wide ranging reforms and enactment or amendments of legislations that shape and encourage the opportunities and incentives for the multinational companies and firms to invest productively, bring development and create jobs for the well-being of the citizenry.

These explain that economic growth is an important objective and is the focus and achievement any government can proudly arrogate to it. The routes towards achieving these objectives are diverse involving a combination of political, economic, legal and social factors in determining success.[1]

Further, on the other level, every day, firms around the world face important decisions. A rural micro-entrepreneur considers whether to open a small business to compliment her family's farm income. A local manufacturing company ponders whether to expand its production line and hire more workers. A multinational enterprise evaluates

[1] Yorokun, O 'Legal Aspects of Export Trade in Nigeria' Gravitas Review of Business and Property Law (GRBPL) Lagos: Gravitas Publishing Limited, 1990 PP. 78-86 at P.78.

alternative locations for its next global production facility. Their decisions have important implications for growth and poverty in each location, their decisions will depend largely on the way government policies, and behaviors shape the investment climate in those locations.[2] The government policies and behaviors play a key role in shaping the investment climate. While governments have limited influence on factors such as geography, they have influence on security of property rights, approaches to regulations and taxation, the provision of infrastructure, the functioning of finance and labor markets, and broader governance features such as corruption.[3] It must be noted here that Nigeria is Africa's most populous nation with an estimated population of over 150 million[4]. It offers investors a low-cost labor pool, abundant natural resources, and potentially the largest domestic market in sub-Saharan Africa. Despite these advantages, much of that market potential is unrealized. Impediments to investment include inadequate infrastructure, corruption, an inefficient property registration system, an inconsistent regulatory environment, restrictive trade policies, and slow and ineffective courts and dispute resolution mechanisms.

Therefore, Foreign Investors are attracted by such factors, which highlight a sound host-country policies toward attracting FDI and benefiting from foreign corporate presence are largely equivalent to policies for mobilizing domestic recourses for productive investment. An enabling domestic business environment is vital not only to mobilize domestic recourses but also to attract and effectively use international investment[5]. This position is also part of the experience of the developed nations. That striving for FDI by host country entails a reform of institutional frame works, regulatory and infrastructure for the

[2] World Development Report (2005)
[3] ibid
[4] Global Trade, net 'Investment climate in Nigeria' The United Nations, New York
[5] UNCTAD, Economic Development in Africa, Rethinking the Role of Foreign Direct Investment.2002 United Nations New York. P. 24

benefit of the investors. As the experience of OECD members and other countries, the measures available to host-country authorities fall into three categories. Improvements of the general macroeconomic and institutional frameworks, creation of a regulatory environment that is conducive to inward FDI and upgrading of infrastructure, technology and human competence to the level where the full potential benefit of foreign corporate presence can be realized.[6] In the same token, there was the analysis[7] on the factors that attracts the International investors to a developing economy, and their absence constitutes serious impediments, unfriendly investments climate and discourages the potential investors.

In assessing country conditions, investors reported giving top priority to:

a. A legal framework defining investors' rights and obligations.
b. Payment discipline and enforcement.
c. The availability of a guarantee from the government or a multilateral agency.

In identifying the most important factors in the success or failure of investments, investors gave top ranking to:

a. The retail tariff level and collection discipline.
b. Fair adjudication of tariff adjustments and disputes.
c. Operational control and management freedom.
d. Regulatory commitment sustained through a long-term contract.

The results indicate a "back to basics" approach in the international investor community. Many investment decisions in the 1990s rested on basic assumptions that collections would increase, that laws would be enforced, that government commitments

[6] ibid
[7] 'What International Investors look for when investing in developing countries' Energy and Mining Sector Board Discussion Paper, Paper No. 6 May 2003

would be sustained. However, in many developing countries these assumptions proved invalid. To reassure investors and attract or retain their interest, governments need to focus attention on some of investors' basic priorities.[8] To this end that in consideration of the legal framework Nigerian authorities have tried to examine the rationale and objectives of the legislative and regulatory central mechanisms of foreign investment in Nigeria. The institutional and various municipal legislations relating to these have been institutionalized in trying to attract FDI via various reforms.

These reforms included the deregulation of the economy, the new industrial policy of 1989, the establishment of the Nigeria Investment Promotion Commission (NIPC) in early 1990s, and the signing of Bilateral Investment Treaties (BITs) in the late 1990s. Others were the establishment of the Economic and Financial Crime Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC). However, FDI inflows to Nigeria have remained low compared to other developing countries[9], especially in the manufacturing and agricultural sectors. Successive governments in Nigeria have recognized that the growth and development of the Nigerian economy hinge on the inflow of foreign direct investment (FDI). They have thus taken steps to create an environment that encourages increased FDI. The Nigerian Investment Promotion Commission (NIPC) Act of 1995 aims to remove most of the legal disincentives to foreign investment; the most significant of these is the abrogation of the restriction on the level of equity a foreigner may hold in a local entity.

The government liberalized the investment climate by removing various bottlenecks to the free flow of FDI. These plans include repealing restrictive laws, improving security,

[8] Ibid
[9] O. G Wafure & A. Nuurudeen. ' Determinant of Foreign Direct Investment in Nigeria: An Empirical Analysis' Global Journal of Human Social Science Vol.10 Issue 1 (Ver 1.0) April 2010 P. 26

signing investment-protection Treaties, providing additional fiscal incentives, privatizing utilities and fully equipping the export-processing zones. Along with the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act of 1995, which permits unhindered repatriation of foreign currency, the NIPC Act substantially eliminates discrimination against foreign investors. A provision permitting 100% foreign ownership in Nigerian entities lets existing investors build up controlling stakes. The government has recently reconstituted the governing council of the NIPC in the hope of attracting more local and foreign investments.[10] These and similar investment incentives are used to attract foreign direct investors as they are effective in influencing investment decisions.[11] An empirical research conducted[12] revealed that in order to check the investor's attitude towards investment climate respondents were asked to assess the importance of the major problems creating difficulties for doing business in the host countries. Each of the responders ranked the importance of the problem from 1 to 5 (1 – the least important, 5 – the most important). Based on the analysis, the most urgent problems in those countries are the volatility of the political environment, uncertainty of the economic situation, ambiguity of the legal system and corruption. However, the top three ones differ among countries. Political and economic instability are of particular concern for the foreign companies operating in Kyrgyzstan. The next most important obstacle is the lack of physical infrastructure. All other problems are relatively less important in the light of the three mentioned above. Ukraine and Moldova are more stable in political terms and foreign investors perceive there extensive bureaucracy, corruption and uncertainties connected to

[10] Nigeria, Country Business Guide; Comparative Business Indicator, November 2004.
[11] Odume, I. 'Law as a catalyst for Economic Development. A Reflection on Nigerian Investment Promotion Commission Act' International Journal and Contemporary Studies, vol.2, No. 1 & 2 The Development Universal Consortia. 2007, P. 33.
[12] A. Kudina&M. Jakubia, OECD, Global Forum on International Investment; The Motives and Impediments to FDI in the CIS P. 15

domestic legislations as the main obstacles for their businesses.[13] It has been observed[14] that many of the legal requirements regulating foreign investment in Nigeria are encouraging; the reoccurring question in the mind of some scholars and indeed the average Nigerian and the International communities is why there has not been appreciable level of promotion of foreign investment in the Nigerian economy after years of independence. Various factors have culminated to give this regrettable picture and position that the country has found it self.

It is to be noted here that the existence of this genetic term, 'investment climate' is therefore key to investment attraction, at the same time the presence of unfriendly situations are also impediments to the attraction of the Foreign Direct Investment FDI to any host country, some of these impediments to FDI inflows could be in any of the following:

3.1.1 Insecurity: The outbreak of war or other widespread violence spells the end of almost all-productive investment. Rampant cases of robbery, fraud and other crimes against property and against person undermine the investment climate. According to these analyses[15], crimes discourages firms from investing and increases the cost of business, whether through direct loss of goods or the costs of taking precautions such as hiring security guards, building fences or installing alarm systems. The damaging effect of fraud commonly referred to as "419" in Nigeria has done great harm to the economic and business interest of Nigeria globally and within the country.

In the extreme, foreign firms will decline to invest and domestic ones will flee the country for a more peaceful locale. Crime imposes large costs on societies around a quarter of GDP in some countries in Latin America.18 Surveys show that crime is also a serious

[13] ibid
[14] Ibrahim, A. 'An Appraisal of the Legal Framework for Foreign Investment in Nigeria' Modern Practice Journal of Finance and Investment Law Vol. 8 Nos. 1-2 2004 P. 154.
[15] World Development Report (2005) P. 89

constraint for many firms in all regions. Promising strategies involve efforts to prevent and deter crime, as well as to improve enforcement. More countries around the world are pursuing community-policing strategies along the lines of those applied in New York City[16]. Estimates compiled in the year 2000[17] show the devastating impact of violent crime and property crime on the economies of six Latin American nations. In Colombia and El Salvador, almost one-quarter of national GDP was lost to crime; only in Peru was the cost of crime less than 10 percent of GDP.

The World Bank's Investment Climate Surveys show that crime retards entrepreneurial activity in every region. In Latin America, more than 50 percent of firms surveyed judged crime to be a serious obstacle in conducting business. In Sub-Saharan Africa and East Asia, more than 25 percent or more said the same[18].

In Nigeria, the Investment Climate survey shows 37 percent of respondents identify crime as a major or severe constraint on their operations[19]. The damaging effect of fraud commonly referred as"419" has done great harm to the economic and business interest of Nigeria globally and within the country itself. This trend has greatly affected foreign investment potentials of the country generally.[20] The Central Bank Of Nigeria (CBN), the Police, Manufacturers and many citizens in Nigeria have expressed deep concern about the devastating effect of this new wave of fraud in the protection and promotion of foreign investment in Nigeria.[21] The federal Government in Nigeria also in response promulgated

[16] Ibid. See also Londono and Guerrrro (2002)
[17] ibid
[18] ibid
[19] ibid
[20] A. Ibrahim 'An appraisal of Legal Framework for Foreign Investment in Nigeria' modern practice journal of finance and investment law. Vol.8 Nos.1-2 (2004) P. 149
[21] ibid

Advanced Fee Fraud and other Related Offences Decree (No.13) of 1995[22]. Various other explanations have been adduced for Africa's poor FDI record.

3.1.2 Uncertainty: Firms do not make decisions based on the formal content of laws, regulations, or policy statements alone. Uncertainty plays a central role in investment decisions, because those decisions are forward looking, with the bulk of costs uncertainty as their dominant concern among investment climate constraints, Concerns about policy uncertainty from vagueness or ambiguity in current policies and laws.

However, no matter how well defined current policies may be on paper, there may still be concerns about how they will be implemented in practice or evolve over time. The latter concerns reflect on the credibility of governments and their policies, including the ability of governments to deliver what is promised. The impact of policy uncertainty on investment decisions varies along several dimensions. The nature of the investment obviously matters. While all investments involve up-front costs, some can be reversed more easily than others can. The less reversible an investment and the greater the firm's vulnerability to uncertain future changes. The greater the value in waiting to see if the uncertainty is resolved before investing.[23] For example, firms in Ghana and Uganda were more likely to increase their hurdle rate of return as uncertainty increased, and uncertainty had a more negative effect on firms with less reversible investments[24]. Uncertainty and irreversible investments imply that reductions in uncertainty, rather than changes in interest rates, may be more effective in influencing investment.

---

[22] Okonkwo C.O 'advance Fee Fraud and Other Offences Decree 1995: An Appraisal'. In I.A Ayua (Ed) Law, Justice and the Nigerian Society: Essays in Honor of Justice Mohammed Bello, (Lagos; Nigerian Institute of Advanced Legal Studies, 1995 P. 307.

[23] World Development Report (2005) United Nations New York.

[24] Haltiwanger (2000) and Bartelsman, Scarpetta and Schiverdi (2003). Qouated in World Development Report 2005

Beyond issues of reversibility, some investments are more sensitive to policy changes than others are. Investments in heavily regulated sectors such as infrastructure can be especially sensitive to policy uncertainty because the profitability of the venture is often determined directly by government regulation. For example, Hungary's initial attempt to involve private investment in its energy sector—before defining the policy and regulatory framework attracted few bids and the tender was aborted in 1993. Two years later, with a clearer regulatory framework in place, it attracted bids of nearly $2 billion.[25] One of the reasons why foreign investors are reluctant to invest in Africa, despite its enormous profitable opportunities, is the relatively high degree of uncertainty in the region, which exposes firms to significant risks. Uncertainty in the African region manifests itself in three different ways:

3.1.3 Political instability: The region is politically unstable because of the high incidence of wars, frequent military interventions in politics, and religious and ethnic conflicts. There is some evidence that the probability of war a measure of instability is very high in the region. In a recent study,[26] computed regional susceptibility to war indices for the period 1960-2001. It was found that wars are more likely to occur in Africa than in other regions. The regional susceptibility to war index is 26.3% for Africa compared to 19.4% and 9.9% for Asia and the Western Hemisphere respectively. The study also showed that there is a statistically significant negative correlation between FDI and conflicts in Africa.

Nigeria's political history is a clear picture of how military adventurism has truncated the country's political landscape for about 30 years of the country's 50 years of independence. The insistent instability of military rule and the attendant high-level risk

[25] See World Development Report (2005) and see also Scarpetta and Bartelsman (2003)
[26] Rogof, K &Reinhert C. 'FDI in Africa: The Role of Price stability and currency instability ' IMF working Paper 03/10 (2003)

associated with such regimeshas affected positive foreign investment immensely. The average investor is always afraid to invest since there is no predictability of the political atmosphere. So rather, than attract both foreign and local investors, military regimes have rather succeeded in ostracizing Nigeria from the league of international economic communities.[27] While peace is essential to unleash productive investment, firms require more than this. They require an environment with a reasonable level of political and economic stability, and one where personnel and property are reasonably secure. Political instability can create considerable uncertainty and risk for firms, undermining the credibility of current laws and policies.

3.1.2.2 Macroeconomic instability: Instability in macroeconomic variables as evidenced by the high incidence of currency crashes, double-digit inflation, and excessive budget deficits, has also limited the regions ability to attract foreign investment. Recent evidence based on African data suggests that countries with high inflation tend to attract less FDI[28]Considering the propensity with which these problems are on the increase and huge damage, fraudulent and hazardous financial transactions had brought to bear on Nigeria's financial sector, the Federal Government promulgated the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1995. [29]It should be noted that the effectiveness of these efforts in to solving the problems, is minimal in the face of the present day incidences of some of these banks being used in the perpetration of nefarious financial crimes both locally and internationally.

[27] A. Ibrahim 'An appraisal of Legal Framework for Foreign Investment in Nigeria' modern practice journal of finance and investment law. Vol.8 Nos.1-2 (2004) P. 155
[28] . (Onyeiwu and Shrestha, 2004
[29] Ibid at P.158

3.1.2.3 Lack of policy transparency: In several African countries, it is often difficult to tell what specific aspects of government policies are. This is due in part to the high frequency of government as well as policy changes in the region and the lack of transparency in macroeconomic policy. The lack of transparency in economic policy is of concern because it increases transaction costs thereby reducing the incentives for foreign investment.

At the world market level, particularly in the developing economies of the third world, there was a greater dimension in the use of foreign investment towards the implementation of international commercial transaction. Some of the reason for this was that, the existing international economic order and largely the legal framework, within which the then economic order operates, no longer satisfy the legitimate expectations of the overwhelming majority of the states and the people.[30]

3.1.2.4 Inhospitable regulatory environment: The lack of a favorable investment climate also contributed to the low FDI trend observed in the region. In the past, domestic investment policies, for example on profit repatriation as well as on entry into some sectors of the economy–were not conducive to the attraction of FDI. Clearly, the costs of entry, as a percentage of 1997 GDP per capita, are very high in Africa relative to Asia. Within Africa, the costs are higher in looking; firms' judgments about the future are critical. Many risks for firms, including uncertain responses by customers and competitors, are a normal part of investment, and firms should bear them. However, governments have an important role to play in maintaining a stable and secure environment, including by protecting property rights.

[30] Hussain K. (ed)' Legal Aspects of the New International Economic Order', New York: Nichols Publishing Company 1990 P. 8

Policy uncertainty, macroeconomic instability, and arbitrary regulation can also cloud opportunities and chill incentives to invest[31].

In Nigeria the Nigerian Investment Promotion Commission (NIPC) Act and FEMMO Act was promulgated to ensure and create a liberal investment climate, attract inflow of foreign capital, stimulate industrial and economic growth and development, create more employment opportunities, ensure speedy transfer of foreign technology to Nigerians, create an atmosphere of healthy competition between Nigerians and foreigners in all facets of the economy. The legislation's objectives are also to create a more conducive and attractive investment climate in Nigeria; ensure easy inflow and out –flow of investment, capital, profit, dividends and interest; remove all forms of bottlenecks and unnecessary administrative hurdles and enhance economic co-operation between Nigeria and other countries.[32]

3.1.3 Corruption: The exploitation of public office for private gain—can harm the investment climate in several ways. "Corruption is conventionally defined as 'the abuse of public office for private gain.' Behind this definition lies an image of a predatory state seen as a large 'grabbing hand, 'extorting firms for the benefit of politicians, high officials and bureaucrats...[Here] we shift the focus to the role of firms. The new evidence suggests that many firms in practice...collude with politicians for their mutual benefit.... We conclude with rather different implications for action." When it infects the highest levels of government, it can distort policymaking on a grand scale and undermine the credibility of government. Even when played out through officials at lower echelons of government, corruption can be a tax

[31] World Development Report (2005)

[32] Odume, I. 'Law as a catalyst for Economic Development. A Reflection on Nigerian Investment Promotion Commission Act' International Journal and Contemporary Studies, vol.2, No. 1&2 The Development Universal Consortia. 2007, P. 28

on entrepreneurial activity, divert resources from the public coffers, and create a constituency for erecting or maintaining unnecessary red tape.[33] The Investment Climate Surveys show that the majority of firms in developing countries expect to pay bribes. They also show how corruption can vary by firm size in addition, by region, and how the main locus of bribe taking can vary between countries. Corruption manifests itself as a public sector phenomenon. Typically, firms, consumers, or other groups make payments to politicians or public officials in return for favorable decisions—whether a high-level policy decision or a more mundane matter, such as getting a connection to utilities, clearing goods through customs, or registering a business. Unlike most production, corruption is subject to increasing returns: an increase in rent-seeking activity may make corruption more attractive, not less. So high levels of corruption can be sustainable, and divert energy from more productive activity. No country can claim to be immune from the Problem. In the extreme, a "predatory" state consumes the surpluses of the economy, as Government offices come to be treated as income-generating property.[34] In Nigeria the level of our faith in the Rule of Law and respect for Human Rights are also pivotal to the level of confidence, which the foreign investors repose on the country. Issues of corruption in all its ramifications, human rights, good governance, and social justice as critical issues for sustainable development weigh in the minds of foreign investors, hence the need to ensure that our slandered meet with the international expectations. Our legal system must have the capacity to curb any form of financial malpractices, prevent, detect and punish economic and financial crimes and ensure that transnational criminal organizations are kept at bay.

---

[33] Kaufmann, Daniel, 2004. "Corruption, Governance and Security: Challenges for the Rich Countries and the World," in Global Competitiveness Report, McMillan. Online, http://www.worldbank.org/wbi/ governance/ pubs/gcr2004.html.

[34] World Development Report (2005) See also OECD (2002b), Carlson and Payne (2003), Dollar, Hallward-Driemeier, and Manistee (2003).

It is really disheartens as an erudite scholar[35] made an astonishing conclusion that there are many unresolved problems in Nigeria, but the issue of the upsurge of corruption is troubling and the damages it has done to the polity are astronomical. The menace of corruption leads to slow movement of files in offices, police extortion tollgates and slow traffics on the highways, port congestion, queues at passport offices and gas stations, ghost workers syndrome, election irregularities, among others. Even the mad people on the street recognize the havoc caused by corruption - the funds allocated for their welfare disappear into the thin air. Thus, many in the society that corruption is the bane of Nigeria believe it. Consequently, the issue keeps reoccurring in every academic and informal discussion in Nigeria and the issue will hardly go away!

Other concern includes the provision of state of the art infrastructures to improve the investment climate that attracts and persuade investors in the smooth operation of the foreign direct investment (FDI). On this the World Development Report (2005) opined at the very beginning that Building and maintaining roads, ports, electricity grids, and telecommunications networks is expensive, so it is no surprise that poor countries in Africa, South Asia, and elsewhere have worse infrastructure than rich countries. Nevertheless, the challenge of improving infrastructure is not just one of finding more money.[36] Firms with access to modern telecommunications services, reliable electricity supply and efficient transport links stand out from firms without them. They invest more, and their investments are more productive. Yet in most developing countries, many firms must cope with infrastructure that fails to meet their needs. The problems, as expressed by firms, vary by

[35] Victor Dike ' Corruption in Nigeria: A new paradigm for effective control' 2002 Morris publishing company, U.S at P. 1

[36] See, for example, Tanzi and Davoodi (1997); Tanzi and Davoodi (1998); and Devarajan, Swaroop, and Zou (1996). Cited in World Development Report (2005) www.worlddevelopmentreort2005 visited July 2014

region, with Sub-Saharan Africa and South Asia having poorer infrastructure than Europe and Central Asia. They also tend to vary by infrastructure service and firm size electricity is often the biggest problem, and larger firms express more concerns than smaller firms do about all services all types of infrastructure including airports, railways, and distribution networks for water and natural gas matter to some firms. This Report[37] looks at four that matter to a very wide range of them roads, ports, electricity, and telecommunications. Although the Report focuses on the impact of infrastructure services on firms, improvements in the coverage and quality of these services also benefit households.

The underlying problem in the provision of much infrastructure is thus the combination of two reasonable concerns customers fear that firms will use their market power to overcharge, and firms fear that governments will use their regulatory power to prevent them from covering their costs. Private firms originally created much of the world's infrastructure, but the playing out of these fears, combined with a prevailing skepticism about markets and private ownership, led to widespread nationalization of infrastructure after World War II.[38]

These analyses and expositions clearly deficits the array of the experts' position of various factors and impediments to FDI influx. These factors are proved to attract or impedes the flow of foreign direct investments (FDI) to developing economies. However, these impediments are not exhaustive. An important area of our Legal system that foreign investors consider a great obstacle to determine an investment location is delay in contractual

[37] ibid

[38] For discussions of the problem and the history of private infrastructure, see Gomez -Ibáñez (2003); Gomez-Ibáñez and Meyer (1993); Klein and Roger (1994); Levy and Spiller (1994); Levy and Spiller (1996); Smith (1997b); Spiller and Saved off (1999); and Willig (1999). The problems are greatest when investors are asked to make large one-off investments and smaller when a series of small investments creates a "repeated game" that encourages the government not to expropriate the investor.

judgments enforcement. An expensive, weak and ineffective contractual enforcement mechanism constitutes a large potion of impediments that beclouds the investment climate of the developing economies.

3.2 Delay in Contractual Judgment Enforcement as Impediment to Foreign Direct Investment (FDI)

Delay in contractual judgment will occur when parties to a commercial or contractual litigation hiding behind the available platform in the judicial system to engage in delay tactics, obstruct proceedings, or fail to abide by court orders. When parties improperly use the Rules of court to prolong the judicial process, when the bailiffs and other court officials failed to serve processes correctly and failed to appreciate or to apply correct provisions of the Rules of court in relation to the enforcement of judgment.

After a trial on the merits in which a judgment was reached and in case the debtor has not voluntarily complied, the judge issues an order to begin enforcement proceedings. First, the judge orders the defendant-debtor to comply with the judgment. Then, in case the debtor fails to comply, the judge orders the seizure of assets. Finally, the property is sold, and the judge orders the final liquidation and payment to the creditor. Enforcement is the last stage of the judicial process after the legal right; claim or interest has ended in a judgment or order, which remains to be enforced. It is the process whereby a judgment or order of court is enforced or to which it is made effective according to law. Most judgments require compliance with their terms

These processes required strict compliance with the rules of court to prevent unnecessary delays or obstacles to completion. Therefore there is a need to carry out wide-

ranging reforms of the judicial system in relation to these issues in order to promote efficiency and minimize the delay in the enforcement of contractual judgment.

In accordance with the reforms carried out on legal framework to attraction the FDI and to improve the process of enforcement of contractual judgment already in place, Nigerian authorities have tried to examine the legislative and regulatory central mechanisms of foreign investment in Nigeria. The institutional and various municipal legislations relating to these have been institutionalized in trying to attract FDI via various reforms. These reforms included the deregulation of the economy, the new industrial policy of 1989, the establishment of the Nigeria Investment Promotion Commission (NIPC) in early 1990s, and the signing of Bilateral Investment Treaties (BITs) in the late 1990s. Others were the establishment of the Economic and Financial Crime Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC).

However, FDI inflows to Nigeria outside the oil and gas sector and particularly in the agricultural and manufacturing sectors have remained low compared to other developing countries[39]. Successive governments in Nigeria have recognized that the growth and development of the Nigerian economy hinge on the inflow of foreign direct investment (FDI) in these sectors. They have thus taken steps to create an environment that encourages increased Foreign Direct Investment (FDI).

The Nigerian Investment Promotion Commission (NIPC) Act of 1995, in particular, aims to remove most of the legal disincentives to foreign investment; one of the most

[39] O. G Wafure&A .Nurudeen. ' Determinant of Foreign Direct Investment in Nigeria: An Empirical Analysis' Global Journal of Human Social Science Vol.10 Issue 1 (Ver 1.0) April 2010 P. 26

significant of these is the Settlement of Investment Dispute.[40] The relevance and desirability of a reliable framework for the settlement of investment disputes cannot be overemphasize, and the Act sets out the mode of settlement of investment dispute, which is by arbitration, where mutual discussion has failed in resolving the dispute.

However, it could be observed for this purpose that the problem of dispute settlement remained intact notwithstanding the NIPC Act 1995. This is because the disputes that may be referred to arbitration under the NIPC Act 1995 are issues that affect the "investment" dispute "within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of the investor are parties". Or "in accordance with any other national or international machinery for settlement of investment dispute agreed upon by the parties."[41] "It may also be in accordance with the rules of the International Center for Settlement of Investment Disputes, where there is a settlement."[42] However, it could be seen on the other hand and even though it is clear that the above provisions do not cover arbitrations over contractual disputes between foreign investors and their individual or corporate customers, between foreign investors and Banks or other lending institutions and other similar 'contractual' disputes, that are subjects of judicial settlement. In all such and other similar circumstances, the foreign investor can resort to yet another voluntary dispute resolution mechanism in form of arbitration and conciliation as has also been provided under the Arbitration and conciliation Act.[43] Due to its low cost and easy access, arbitration may become an appropriate mechanism for resolving conflicts over certain issues, such as capital ownership, that firms face. The search for a negotiated solution, the

[40] See Section 26 (3) NIPC Act 1995
[41] See Section 26(2) (b) (c) NIPC Act 1995.
[42] See Section 26 (3) ibid.
[43] Cap. Cap A18, LFN, 2004, section 54 clearly explain that arbitration and conciliation rules shall apply only to differences arising out of legal relationship, which is contractual.

active participation of the parties, the use of simple language, and a process without ritualistic court formalities have the potential to make arbitration a valuable and efficient alternative to the court system. However, in the absence of a clear agreement to resolve the dispute through the arbitration contracting parties may then seek refuge in regular court, as a prevailing contractual dispute mechanism.

Bearing in mind the general nature of litigation in regular court and its practice by Lawyers especially in Nigerian legal environment have made it least suited particularly for resolving disputes arising from commercial and contractual transaction. Therefore there is a need to search for a viable alternative, especially as it involves foreign direct investment FDI.[44] A new study by the World Bank and the International Finance Corporation, entitled: "Doing Business 2014," ranks Nigeria 136th in effective enforcement of judgments arising from litigations over contracts.

The study also provides a ranking for the world's countries with the most cumbersome litigation systems. The report ranked Nigeria 22nd in sub-Saharan Africa after Cape Verde, Rwanda, Tanzania, Ghana, Ethiopia, Equatorial Guinea, Mauritius, Gambia, Eritrea and Namibia.

Many of these countries used tools such as reforming their civil procedure rules, establishing specialized commercial courts or divisions, deploying information technology and other case management techniques, in order to make their judicial systems more efficient.[45] The Enforcement of Contracts index assesses the efficiency of the judicial system by following the evolution of a commercial sale dispute and the tracking of the time, cost and

[44] Dele P. (2006) *Arbitration& Conciliation Act Companion including customary Arbitration (with cases from 1958-2005)* Dee-Sage Nigeria Limited, Lagos P.1
[45] Doing business 2014

numbers of procedures involved from the time a claimant files a lawsuit until payment is received.

3.3 Arbitration and the challenge of enforcement of arbitral award

Arbitration and Conciliation Act[46] is the main Nigerian statue dealing with Arbitration. The purpose of the law was clearly spelt out from its long title, that is, to "provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration."

Since the Arbitration Ordinance of 1914, arbitration in Nigeria has metamorphosed from almost a state of non-existence to that of irresistible dominance. The major international arbitration instruments namely the United Nations Commission on International Trade Law (UNCITRAL Model Law)[47] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) have been domesticated[48] as required by the country's constitution for their application. This was achieved in the basic law to wit the Arbitration and Conciliation Act, Cap A18, LFN, 2004 (referred to herein as

[46] Cap 18, Laws of the Federation of Nigeria 2004

[47] United Nations Commission on International Trade Law, UN Doc, A/40/17 (Annex. 1) Adopted on 21st June 1985

[48] See **Section 53** ACA which allows the application of Arbitration Rules set out in the First Schedule, and allows parties to a 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 the Act or the UNCITRAL, Arbitration Rule or any other International Arbitration Rules acceptable to the parties. And **Section 54** ACA which provides for the application of Convention on the Recognition and Enforcement of Foreign Arbitral award where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the convention set out in the second schedule to the Act shall apply to any award made in Nigeria or any contracting state. Where the state has reciprocal legislation recognizing the enforcement of arbitral award made in Nigeria under the Convention, and that the Convention is applicable only to differences arising out of legal relationship which is contractual.

ACA). This law applies throughout the federation.[49] It however recognises the applicability of the provisions of other laws in respect of which disputes might be submitted to arbitration or settled in any manner provided under that law concerning certain transactions. Parties are free to choose the law applicable to the arbitration proceedings but where they have not predetermined the law, the arbitral proceedings shall be governed by the ACA[50].

Although this law purports to domesticate the operation of the New York Convention, it introduced some modifications to its application. It seems to apply only to disputes arising from contractual legal relationship and not otherwise.[51] Thus, some writers have submitted that the Arbitration and Conciliation Act ACA is a breach of treaty obligation since it derogated from the provision of the Convention to which Nigeria is a party,[52] which is supposed to apply to disputes arising in any legal relationship *"whether contractual or not."*

Similarly, in its Interpretation section[53] the Act defines 'arbitration' to mean "a commercial arbitration whether or not administered by a permanent arbitral institution". However, more elaborate is the definition in *Stroud's Judicial Dictionary*[54] relying on Romilly M.R[55] states that: "Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between parties"

[49] See C.G.D.E Geo physique V Etuk (2004) 1 NWLR 853 at P. 20
[50] Section 15(1) and (2)
[51] See Convention on the Recognition and Enforcement of Foreign Arbitral Award, New York, 10th June, 1958, 330 U.N.T.S. 38 No. 4739 (entered into force on 7th June, 1959) Art. II(1) which provides for „whether contractual or not; see also Art 7(1), UNCITRAL Model Law
[52] Idornigie, P., (2004)*The Principle of Arbitrability in Nigeria Revisited*, J.Int.Arb. 21-3 279-288
[53] Section 57(1) ibid
[54] Third Edition, Vol.1 at P.180
[55] See Collins V, Collins 28 LJ Ch. 186

Further more, *Haisbury Laws of England*[56] defines arbitration as follows: "An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than in court of competent jurisdiction,"[57]

Another reputable author[58] on the subject explains arbitration from the point of view of agreement. According to him: "When two or more persons agree that a dispute or potential dispute between them shall be decided in legally binding way by one or more impartial persons in a judicial manner, that is upon evidence before him or them, the agreement or a submission to arbitration. When, after a dispute has arisen, it is put before such person or persons for decision, the procedure is called arbitration and the decision when made is called award"

Arbitration is a dispute resolution mechanism between two or more persons by seeking and accepting a decision by a third party of their choice. An essential component of arbitration is an agreement to arbitrate, which implies a submission to arbitration. Generally, the import is that the submission is voluntary[59] even though there are cases where arbitration is imposed by statute.[60] The use of arbitration as a dispute resolution mechanism is quickly gaining ground in Nigeria. The principal advantages of arbitration are the opportunity to be able to appoint a person with relevant knowledge to resolve the dispute as well as the relatively shorter time taken to resolve the dispute as compared to litigation, which takes

---

[56] Third Edition Vol. 2

[57] ibid at P.2 para.2 see also Russell on arbitration seventeenth Edition at P.3 where the author states that – "The essence of sort of arbitration to which this book is concerned is that some dispute is referred by the parties for settlement to a tribunal of their own choosing instead of to a court"

[58] Ronald Bernstein (ed) *the Hand Book of arbitration*, Sweet and Maxwell quoted by C. Obi *Introduction to Arbitration Clauses,* Continuing Legal Education Association (Nigeria) Lecture Notes-Nos.3a and 3b at P.14 See also Kano Urban Development Board V. Fanz Construction Company Ltd (1990) 4 NWLR (Pt. 142 at P.32

[59] See Commerce Assurance Limited V. Alhaji Buraimoh Alli (1992) 3 NWLR (Pt 232) P. 70

[60] Like the industrial arbitration under the Trade Dispute Act cap 432 Laws of the Federation of Nigeria 2004. See also C. Obi op cit. P.14.

much longer. Disputes arising out of basic commercial contracts are common, it has become a real alternative to court proceedings, particularly for disputes arising from commercial transactions[61].

The growing success of arbitration as a mechanism for settling commercial disputes lies in 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.[62]

With regard to the courts' support for arbitration, Nigerian courts are today generally believed to be arbitration-friendly, as they would readily enforce arbitration agreements and awards. In the case of ***Kano State Urban Development Board v Fanz Construction Co Ltd***[63] where the Supreme Court held that the courts strive to uphold arbitration agreements so that even loose and brief expression such as "arbitration to be settled in a ["named place"] or "suitable arbitration clause" will often be given sufficiently precise meaning to ensure arbitration.[64] A further review of the decided cases shows a general recognition by Nigerian Courts of arbitrations a good and valid alternative dispute resolution mechanism. In ***C.N. Onuselogu Ent. Ltd. v. Afribank (Nig.) Ltd.***[65], the Court held that arbitral proceedings are a recognized 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.

---

[61] Adekoya o. and Emagun D, (2012) *Arbitration Guide* IBA Arbitration Committee, Nigeria P.20
[62] ibid
[63] (1990) 4 NWLR (part 142) 1 and 33,
[64] See also the Supreme Court's decision in *M V Lupex v Nigeria Overseas Chattering & Shipping Ltd* (2003) 15 NWLR (part 844) P. 469.
[65] (2005) 1 NWLR Part 940 P. 577

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.[66] However, in ***Afribank Nigeria Plc v Haco***[67] the Court granted interim relief and directed the parties to arbitrate under the provisions of ACA. Upon the publication of the award the parties returned to the Court for its enforcement as judgment of the Court.

The Courts in Nigeria are often inclined to uphold the provisions of sections 4 and 5 of the ACA provided the necessary conditions are met. A live case in point is the case of **Minaj *Systems Ltd. v. Global Plus Communication Systems Ltd. & 5 Ors***[68] In this case, the Claimant instituted a Court action in breach of the arbitration agreement in the main contract and on the Defendant's application, the Court granted an order staying proceedings in the interim for 30 days pending arbitration. In ***Niger Progress Ltd. v. N.E.I. Corp.***[69] the Supreme Court followed section 5 of the ACA, which gives the Court the jurisdiction to stay proceedings where there is an arbitration agreement. In ***M.V. Lupex V. N.O.C***[70] the Supreme Court held that it was an abuse of the Court process for the respondent to institute a fresh suit in Nigeria against the appellant for the same dispute during the pendency of the arbitration proceedings in London. In ***Akpaji v. Udemba***[71] the Court held that where a defendant fails to raise the issue of an arbitration clause and rely on sameat the early stage of the proceeding

[66] See sections 4 and 5 of the ACA. See sections 6(3) and 21 of the Lagos Law, which empowers the Court to grant interim orders or reliefs to preserve the *res* or rights of parties pending arbitration. Although the ACA in section 13 gives the arbitral tribunal power to make interim orders of preservation before or during arbitral proceedings, it does not expressly confer the power of preservative orders on the Court and section 34 of the ACA limits the Courts' power of intervention in arbitration to the express provisions of the ACA.
[67] (Unreported FHC/L/CS/476/2008)
[68] Unreported Suit No. LD/275/2008
[69] (1989) 3 NWLR (Part 107) P. 68
[70] (2003) 15 NWLR (Part 844) P. 469
[71] (2003) 6 NWLR (Part 815) P. 169

but takes positive steps in the action, he would be deemed to have waived his right under the arbitration clause.

The only formal requirement is that the arbitration agreement should be in writing, either executed by the parties, or evidenced in an exchange of letters, telex, telegrams or other means of communication, which provide a record of the agreement. An exchange of points of claim and of defense in which the existence of an arbitration agreement is alleged by one party and not denied by the other party will also fulfill the legal requirement.[72]

The award in arbitration is further regulated by the ACA, Section 26 of the Act and Article 32 of the Rules provide for formal requirements of an award. These requirements include: the 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 must be given, except where otherwise agreed by the parties; the date and place of the award must be stated. 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.

It is not clear whether arbitrators can award punitive or exemplary damages but they can award interest on the sum of money awarded. With regard to the rate of interest, the arbitrators are guided by what is fair and just in the absence of any specific provision of the law or agreement of the parties. The arbitrators may award compound interest if it is fair or agreed to by the parties or provided by the law governing the issue or by the custom of the trade in dispute[73].

[72] See, section 1(1) c ACA
[73] ,Adekoya O. and Emagun D. (2012) *Arbitration Guide* IBA Arbitration Committee, Nigeria P.22

By the provision of section 31 ACA an arbitral award shall be recognized as binding and subject to the section and section 32 of the Act, shall, upon application in writing to the court, be enforced by the court. The party seeking to enforce the award will apply to the High Court within the jurisdiction where it wishes to enforce for recognition and enforcement of the award. The application must exhibit 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. In practice, the Courts in Nigeria will recognize and enforce an arbitral award in the absence of any valid and convincing ground for setting aside or for refusal of recognition and enforcement. A party applying for the recognition and enforcement of an arbitral award shall furnish the Court with:

(i) The duly authenticated original award or a duly certified copy thereof; [74]

(ii) The original arbitration agreement or a duly certified copy thereof; and [75]

(iii) Where the award or arbitration agreement is not made in English Language, a dually certified translation there of in to English Language.[76]

Grounds for refusal include that there is 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.[77] Where an application for the refusal to recognize an award is before the court, the court may upon application stay execution of the award

[74] section 31 (2) (a) ACA
[75] Section 31 (2) (b) ACA
[76] See also Section 51(1) a,b,c ACA , See Adwork Limited v Nigeria Airways Limited (2000) 2 NWLR (Pt.645) P. 415
[77] See Section 52 ACA

pending the determination of the application.[78] Once the local court grants **recognition and enforcement** of an award, the award is treated as a judgment of the registering court and enforced in a similar manner.[79] A writ of execution or garnishee order can be issued to compel payment of a money award. The rules of civil procedure will apply, and a party can apply to court in respect of the award, usually to seek payment on favorable terms.

There are two alternative methods of enforcement of an award[80] open to an applicant, namely;

1. "By application directly to enforce the award… or
2. By application to enter judgment in terms of the award and so to enforce the judgment by one or more of the usual forms of execution…"

Thus the two alternative methods are fundamentally different. The summary method treats the award as an existing judgment and only seeks to enforce it. The enforcement by action seeks to get judgment in terms of the award. There can, therefore, be no question of proceedings by way of summary procedure to enforce the award being pleaded, as *estoppel per rem judicatam*, as in that case the court itself decides nothing. It simply enforces the award as if it were a judgment.[81] The duration of enforcement proceedings depends on whether the other party contests the award or not. There is no expedited procedure for the enforcement of an award. Awards like court judgment must be enforced within 12 years from the date they become enforceable.[82] A party to arbitration may be deemed to have waived his right to object to any non-compliance from the award that any requirement under the arbitration agreement, has not been complied with and yet precedes with the arbitration

[78] Section 52 (3) ACA See Baker Marine Nig. Ltd v Chevron Nig. Ltd (2000) 12 NWLR (Pt681) P. 393
[79] Section 31 (3) ACA
[80] See Supreme Court Practice, 1979, paragraph 3787 Vol. 2
[81] at PP.723-724 ibid.
[82] Adekoya o. and Emagun D. *op cit*

without stating his objection to such non-compliance.[83] There are no special rules that apply to the enforcement of an award against a State or State entity. However, it should be noted that awards might be enforced against a State or State entity where there is a waiver of diplomatic immunity,[84] Awards may also be enforced where the State engages in commercial transactions, which are subject of arbitration. In these situations, the State's entry into an arbitration agreement is treated as a waiver of immunity. [85] An award disposes of all disputes between parties that were submitted to arbitration. Thus if a party brings a Court action on the same subject matter that has been disposed of by arbitration and on the same cause of action, the Court will dismiss the action on the ground that the issues are *res judicata* on the basis of issue estoppel[86]. Issue of estoppel arises where an issue had earlier on been adjudicated by a Court of competent jurisdiction between the same parties. The law is that either party to the proceedings is estopped from raising that same issue in any subsequent suit between the same parties and the same subject matter. ***Oyerogba v. Olaopa.***[87] Issue of estoppel also arises in respect of issues which ought to have been raised in the former suit but which were not raised. It applies to issues raised but not expressly decided; such issues are deemed to have been decided by implication and thus *res judicata*[88].

Issue estoppel has been held to extend to arbitration. See ***Middlemiss v. Hartlepool Corporation***[89]The question of whether an arbitral award will operate, as *res judicata* has not

[83] Section 33 ACA
[84]Under Section 2, 5(2), 7, 8 10 and 16 of the *Diplomatic Immunity and Privileges Act,* Cap D9, Laws of the Federation of Nigeria, 2004.
[85]PUNUKA Attorneys & Solicitors Nigeria2010iclg to: international arbitration on 26/6/2014
[86] ibid
[87](1998) 13NWLR pt. 583 P. 512.
[88] PUNUKA Op cit
[89](1973) 1 A.E.R. 172.

been fully tested in Nigeria but the provision of section 31 of the ACA implies that an arbitral award has the same effect as the judgment of Court[90].

It has also been found that as a panacea to the regular courts and adjudication process, generally, many commercial agreements now contain an arbitration clause and a wide range of disputes are increasingly being referred to arbitration especially in the construction, capital markets, oil and gas, maritime, and banking industries. Within these industry sectors, disputes involving breach of contract terms and shareholder disputes are common.

Arbitration has continued to maintain the lead as the preferred mechanism for the resolution of domestic and international business disputes in the Nigerian legal system, the major attraction being the flexibility of the process and the freedom exercised by contracting parties in choosing their own tribunal, particularly for complex and technical cases requiring specialized knowledge in the subject matter of the dispute.

But it should be noted here that arbitration process regulate faster "trial" of commercial disputes. In the end all awards by the arbitration tribunal would have to be presented to our conventional courts for recognition, execution and enforcement. Therefore by this retains all the legal problems so far identified in this research to constitute impediments to the enforcement of contractual judgments in our courts.

3.4 Review of analysis of research findings on effective contractual judgment mechanism in selected jurisdictions

It is on this note that this research emphasizes the importance of the judicial enforcements of contracts and impediments to it as a factor of encouraging foreign direct

[90]See sections 31(1) & (3) which provide that an arbitral award shall be recognised as binding and may be enforced in the same manner as a Court judgment or order to the same effect.

investments. It has been observed[91] that the relationship of the rule of law to economic development reflects the assumption in economic theory that economic growth is dependent on non-interference by governments in private property rights. Less controversial is the view that the abuse of state power is particularly damaging in economic terms when economic policies are changed without changes in the law (by manipulating or ignoring courts), when there is uncertainty about property rights, when entrepreneurial minorities suffer harassment by the state. Such weaknesses in the legal foundation of economic policy lead to uncertainty for domestic and foreign investors. Firms and citizens have to find other ways to monitor contracts and enforce dispute resolution.

In line with this argument, than a suggestion that economic development requires institutional arrangements to resolve disputes among firms, citizens and government and clarification of ambiguities in laws and regulations. Adequate resources need to be devoted to the enforcement of compliance with the law.[92] For example in Poland, enforcement is constrained by reluctance on the part of the authorities to provide adequate resources to serve court documents, or seize and dispose of assets.[93] Markets and investors generally cannot function well without social order underpinned by institutions, in particular a judiciary with independent, effective authority to rule. The rule of law is required to ensure that debts are repaid, contracts enforced which is why a fair and effective judiciary thus offers some prospects of recourse in disputes, and efficiency of the judicial system is important for development.

Again, another fantastic analysis on this issue is drawing on an earlier tradition in the field of law and development associated with American writer, that societies to develop

[91] Smith B.S, Good Governance and Development (2007) Palgrave Macmillan New York P. 81
[92] Ibid at P. 82t
[93] Ibid.

effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World"[94]The framework offered by the New Institutional Economics ("NIE") approach, as exemplified by the work of Jurist, suggests that a full understanding and explanation of a nation's economic development require both acceptance of the premises of the neo-classical economic approach and recognition of its inadequacies.[95] Specifically, writers embrace the idea of the individual as a rational, self-interested economic agent who responds to economic incentives.[96] He then suggests, however, that the neoclassical approach is inadequate as an explanatory tool insofar as it fails to recognize explicitly that the decisions made by individuals are predicated on the information and institutions available to them.[97] Institutions, says North, "are the rules of the game in a society" and can be manifested either in formal rules or in informal codes of conduct and behavior.[98] North's framework for understanding economic development is premised on the view that the rules and norms governing economic interactions are the most significant drivers of an economy's success or failure. North's emphasis on the role of institutions in determining economic performance leads him to suggest that the differential performance of economies through time can be explained in terms of the differential quality of countries' institutions.[99] These institutions include the Judiciary.

In similar vein, Oliver Williamson proposes that economic activity is best understood and explained by "an examination of the *comparative costs of planning, adapting, and monitoring task completion under alternative governance structures*."[100] He argues that

[94] Douglass C. North, Institutions, Institutional Change and Economic Performance 5 (1990)
[95] See ibid at P. 112
[96] Ibid at P.108
[97] Ibid at PP. 108-109
[98] Ibid at P. 3
[99] Ibid at PP. 3, 107
[100]Oliver E. Williamson, The Economic Institutions of Capitalism 2 (1985).

neither spot market neither transactions nor transactions within vertically integrated firms require formal enforcement mechanisms, because both entail minimal transaction costs.[101] Conversely, the vulnerability experienced by at least one party to long-term, non-simultaneous transactions creates a significant need for a credible third-party enforcement mechanism.[102] Credible third-party enforcement addresses the reluctance of private sector agents to participate in non-simultaneous economic transactions, which often entail significant sunk costs, due to a lack of assured protection of the parties' economic interests. Williamson contemplates a continuum of microeconomic activity: at either end of this continuum are types of activities that do not require a formal mechanism for contract enforcement, while in the middle lie economic activities that require some degree of external enforcement.[103] From the perspective articulated by Williamson and North, and given the existence of transaction costs, individuals require assurances that those transaction costs will not negate the benefits they seek to derive from a transaction itself. Recalling that institutions include both the formal and informal constraints that shape human interaction,[104] and that enforcement is an important factor in calculating transaction costs,[105] North first identifies self-enforcement as the primary feature of contracts used in tribes, primitive societies, and close-knit small communities—settings in which personal knowledge of transacting parties about one another is extensive, and repeat dealings are pervasive.[106] North then points out the limits of self-enforcing contracts in a world of increasing impersonal exchange. In such a world, simultaneous exchange and repeat dealings are no longer the prevailing norm; thus,

[101] Oliver E. Williamson, The Mechanisms of Governance 332 (1996).
[102] Ibid
[103] Ibid
[104] North, Supra foot note 37 at P. 4
[105] Ibid at P. 54 no 1
[106] Ibid at P. 55

self-enforcing contracts become insufficient because there no longer exists a dense social network of interaction to enable transacting to take place at low cost.[107] Instead, individual specialization and exchange expansion in both time and space require additional contract enforcement mechanisms to assure compliance. These additional mechanisms, North explains, include the exchange of hostages, ostracism of delinquent merchants, the threat of reputational loss, kinship ties, loyalty, common beliefs held by minority groups in hostile societies, and, at times, ideological commitments to integrity and honesty.[108] Although these additional, albeit still informal, mechanisms can, depending on the costs of information, provide assurance of contract compliance, the dilemma posed by impersonal exchange without effective third-party enforcement remains because of information costs and the persistence of "end game" problems in long-term relationships.[109] For this reason, North calls a credible, low-cost, and formal regime of third-party enforcement essential. One particular understanding of this assessment by North in contemporary development studies is that as developing countries' economies become more fully integrated into the larger global economy, formal contract enforcement mechanisms assume a larger significance. North explains, "third-party enforcement" means "the development of the state as a coercive force able to monitor property rights and enforce contracts effectively."[110] North concludes that the lack of low-cost, effective contract enforcement mechanisms (in particular, effective state enforcement through coercion) is the most important contributor to economic inefficiency and low growth rates in the developing world.[111] He then cautions, however, that no one has yet successfully proposed how to develop the state into a coercive force able to protect

[107] Ibid
[108] Ibid
[109] Ibid at PP. 55-58
[110] Ibid at P. 59
[111] Ibid at P. 54

property rights and enforce contracts effectively without also risking abuse of its coercive power to the detriment of society.[112] Further to all these, some other development studies in line with this notion suggest that less developed countries with poor property rights and weak contract enforcement mechanisms "fail to attract foreign investment and sustain growth."[113] Another cross-country study by Ross Levine, Norman Loayza, and Thorsten Beck in the law and finance literature examines the role of financial intermediaries in facilitating economic growth and they evaluates how legal and accounting practices (including contract enforcement) affect financial development.[114] In their regression analysis, the authors use as a dependent variable the growth rate of real per capita gross domestic product. The primary level of financial intermediary development, but other repressors includes a broad set of variables that serve to provide conditioning information.[115] Levine and his colleagues conclude that "the degree to which financial intermediaries can acquire information about firms, write contracts, and have those contracts enforced will fundamentally influence the ability of those intermediaries' to identify worthy firms, exert corporate control, manage risk, mobilize savings, and ease exchanges."[116] Once, the authors conclude that there is a correlation between contract enforcement and financial development; they conduct cross-sectional analysis to establish a correlation between financial development and economic growth. They find that "financial intermediaries that are better at ameliorating information and transactions [sic] costs induce a more efficient allocation of resources and faster

[112] Ibid at PP. 59-60
[113] Avinash K. Dixit, Lawlessness and Economics 14 (2004) (citing DaniRodrik, Introduction *to* In Search of Prosperity: Analytic Narratives on Economic Growth 8–15 (DaniRodrik ed., 2003)).
[114] Ross Levine et al., Financial intermediation and growth: Causality and causes, 46 J. Monetary Econ. 31 (2000).
[115] Ibid at P. 44
[116] Ibid at P. 35

growth."[117] This finding leads them to support the conclusion of previous work by Rafael LaPorta and his colleagues[118] that "the legal and regulatory system will fundamentally influence the ability of the financial system to provide high-quality financial services."[119]

The primary reason why financial markets are particularly dependent on law and state contract enforcement institutions is that financial contracts tend to be highly technical and complex and usually involve large amounts of financial assets. Therefore, financial contracting usually entails considerable transaction risks and requires stable and predictable contract protection and compliance assurance, including the protection of minority investors' rights (which are vulnerable to both managerial abuses and expropriation by majority investors).[120] Such assurance is presumably best provided by effective formal contract law and related legal institutions. Viewing finance as a set of contracts, the broad law and finance literature suggests, based on extensive empirical testing, that a country's contract, company, bankruptcy, and securities laws, combined with effective enforcement of these laws, fundamentally determine the rights of securities holders and the performance of financial systems.[121] Similarly, Kenneth Dam reports additional empirical evidence from financial markets on the positive correlation between a strong and effective judiciary, acting as an important formal contract enforcement institution, and economic development.[122] He cites a number of studies to suggest that "the degree of judicial independence is correlated with

[117] Ibid at P. 62
[118] Rafael La Porta et al., Legal Determinants of External Finance, 52 J. Fin. 1131, 1132, 1149 (1997).
[119] Levine et al., supra foot note 57, at P. 35.
[120] Thorsten Beck & Ross Levine, Legal Institutions and Financial Development, *in* Handbook of New Institutional Economics 251, 253 (Claude Ménard& Mary M. Shirley eds., 2005) (citing Andrei Shleifer& Robert W. Vishny, A Survey of Corporate Governance, 52 J. Fin. 737, 742 (1997)).
[121] Beck & Levine, supra note 63, at P. 253.
[122] Kenneth W. Dam, The Judiciary and Economic Development (Univ. Chi. John M. Olin Law & Econ., Working Paper No. 287, 2d series, 2006), available at http://ssrn.com/abstract=892030.

economic growth" and that "better performing courts have been shown to lead to more developed credit markets," thus contributing to rapid growth of small, as well as larger firms in an economy.[123] In particular, Dam cites the World Bank's World Development Report of 2005, which argues that, within individual countries in Latin America, firms doing business in provinces of Argentina and Brazil that have competent courts enjoy greater access to credit.[124] Similarly, the larger and more efficient firms in Mexico can be found in states that have superior court systems.[125]The World Bank report attributes these favorable economic outcomes to the factor that "better courts re-duce the risks firms face, and so increase the firms' willingness to invest more."[126] By contrast, ineffective and poor quality courts are incapable of addressing contract enforcement problems faced by private agents dealing with the state and public sector agents in economic transactions. Dam also describes the case of Brazil, where the government's "judicial liability" (that is, unenforced judicial claims against the public sector) is believed to be roughly equal to the country's public debt.[127] This deficiency of the Brazilian judiciary essentially levies a considerable tax on private sector agents, because they can neither earn interest on their unrecovered assets pending court proceedings nor put these assets to other value-adding uses.[128]

An equally detrimental consequence of ineffective courts for creditor rights protection is that banks are forced to lend at extremely high interest rates due to their inability to foreclose on

[123] Ibid at P. 1
[124] The World Bank, World Development Report 2005: A Better Investment Climate for Everyone 86 (2004).
[125] Ibid
[126] Ibid
[127] Dam, supra foot note 65, at P. 2 (citing Jonathan Wheatley, Why Brazil's judicial system is driving the country nuts: A lack of will to alter a dysfunctional legal system is hampering development, Fin. Times (London), May 24, 2005, at P. 20).
[128] Dam, supra note 65, at PP. 2–3.

debts without the assistance of courts.[129]As a result, vital infrastructure projects are not pursued because investors are doubtful about the courts' ability to protect their rights in case of default.[130] Finally, Dam cites the results of an empirical study on transition economies by Katharina Pistor, Martin Raiser, and Stanislaw Gelfer[131] to demonstrate the critical role played by "legal effectiveness" in promoting financial market development by expanding market capitalization and private sector credit (where effective courts that can enforce private contracts are an essential indicator of such effectiveness).[132] Rainer Haselmann and his colleagues identify two major drawbacks to the broad law and finance literature.[133] First, most of the research in this context use aggregate, macro-level indicators for financial market development, such as the size of credit markets relative to gross domestic product; the use of such metrics makes it difficult to "disentangle the impact of legal change on different market participants."

However[134] most of the existing research in this area compares countries with good legal institutions to those with poor quality legal institutions by "relating differences in legal institutions to various economic parameters."[135] For example, some researchers have tried to explain the relationship between countries' laws regarding creditor and shareholder rights

[129] Ibid. at 3 (citing Wheatley, supra foot note 65).
[130] Dam, supra note, at 3 (citing Wheatley, supra foot note 65).
[131] Katharina Pistor et al., Law and finance in transition economies, 8 Econ. Transition 325, 356 (2000).
[132] Dam, supra foot note 65, at 4. Similarly, Gillian Hadfield also emphasizes the importance of an effective and competent judiciary in adjudicating contract disputes. She argues that contract law on the books is not enough to assure contract enforcement; many other legal institutions are also necessary for structuring an effective law of contracts and supporting contractual commitments. These supporting legal institutions include courts and judges, lawyers, the legal environment in which contract law operates, and private dispute resolution mechanisms, which complement formal contract law. See Gillian K. Hadfield, The Many Legal Institutions that Support Contractual Commitments, *in* Handbook of New Institutional Economics, supra note 63, at PP.175, 181–200.
[133] Rainer Haselmann et al. How Law Affects Lending 1 (Columbia Law & Econ., Working Paper No. 285, 2006), available at http://ssrn.com/abstract=846665.
[134] Ibid
[135] Ibid

and levels of development in banking finance and securities markets.[136] This approach ignores concerns that economic performance may be caused not by changes in legal institutions, but rather by omitted variables or unobserved differences between countries,[137] and private sector credit (where effective courts that can enforce private contracts are an essential indicator of such effectiveness).[138] In part, to rectify these methodological deficiencies in the broad law and finance literature, Haselmann and his colleagues conducted an empirical study of the role of creditor rights protection law in bank lending in twelve transition economies in Central and Eastern Europe; the authors focused on exploring the relationship between reform of bankruptcy law and collateral law, on one hand, and macro-level behavioral changes by banks in their lending activities on the other.[139] There are three major findings in their study. First, law (in this case, formal creditor rights protection under both bankruptcy and collateral law) does in fact promote lending by increasing lending volume over time,[140] thus suggesting a causal relationship between formal contract enforcement institutions and financial market development. Second, collateral law designed to protect individual creditors' claims is of greater importance for expanding bank lending than is bankruptcy law, which is aimed at establishing a collective enforcement regime.[141] In particular, in the sample countries that have undergone reforms of collateral regimes, bank lending is positively associated with the recognition of non-possessory security interests in movable assets (that is, personal property, as opposed to real property); bank lending is also positively associated with the establishment of an effective registration system to verify such

[136] See, e.g., Rafael La Porta et al., Law and Finance, 106 J. Pol. Econ. 1113, 1115 (1998).
[137] Haselmann et al., supra foot note 76, at P. 1
[138] Ibid at P. 2
[139] Ibid
[140] Ibid
[141] Ibid

interests.[142] Finally, in the countries they studied, the authors also found that the biggest beneficiaries of legal reform with regard to creditor rights protection were foreign banks; foreign "Greenfield" banks,[143] in particular, benefited from legal reform, as indicated by their substantially greater increase in lending volume over that of incumbent domestic banks, regardless of whether they were privately or state owned.[144] It is also worth noting that although the broad law and finance literature largely emphasizes the central thesis that legal institutions influence corporate finance and financial development, views diverge regarding the degree to which the legal system should simply enforce private contracts while doing little else (the Coasian view) and the degree to which the legal system should set up specific legal rules governing shareholder and creditor rights. The critics of this view contend that for private contracting in financial markets to work effectively, courts must enforce private contracts in an impartial and sophisticated way that is attentive to the technicalities and complexities of these contracts.[145] These critics note, however, that effective judicial enforcement often does not occur in many developing countries with weak judiciaries. Thus, "there are potential advantages to developing company, bankruptcy, and securities laws that provide a framework for organizing financial transactions and protecting minority shareholders and creditors."[146] One caveat to this emphasis on a larger role for legal institutions in governing financial contracting is that, although the resultant standardization may render financial transactions more efficient by decreasing transaction costs, too much

[142] Ibid at PP. 27-30
[143] The descriptive term "greenfield" refers to newly establish foreign banks in the domestic market, in contrast to foreign banks that have taken over or acquired domestic banks in order to enter the domestic market. See id. at P. 17.
[144] Ibid at PP. 2, 27-30
[145] See Edward Glaeser et al., Coase Versus the Coasians, 116 Q.J. Econ. 853, 854
[146] Beck & Levine, supra note 63, PP. at 254.

rigidity in the law may also hamper efficient customization of contracting.[147] While the broad law and finance literature tries to explore the specific dynamics of how legal institutions impact countries' financial development, an emerging new field of research in contemporary development studies has expanded its inquiries into the relationship between governance or institutional quality and economic development more generally. For example, the most recent *Governance Matters* study published by the World Bank traces the state of governance globally.[148] The report identifies six institutional areas that are used both independently and collectively as governance indicators: voice and accountability, political stability, government effectiveness, regulatory quality, rule of law, and control of corruption.[149] The study defines the rule of law indicator as "measuring the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence"[150], and indicates that there is "substantial causation" between better governance (including improved rule of law) and higher income levels.[151] More generally, the study's authors find that "a one standard deviation improvement in [collective governance indicators] would lead to a two- to three-fold difference in income levels in the long run."[152] Furthermore, when they isolate and remove reverse causality, they find the causation between governance and development remains significant.[153]

Thus far, the study that has most closely examined the strength of state enforcement of contracts, conducted by Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes,

[147] Ibid
[148] Daniel Kaufmann et al., Governance Matters IV: Governance Indicators for 1996–2004 (2005), http://www.worldbank.org/wbi/governance/pdf/GovMatters_IV_ma in.pdf.
[149] Ibid
[150] Ibid at P. 4
[151] Ibid at P. 36
[152] Ibid
[153] Ibid PP. 36-38

and Andrei Shleifer, is known as the Lex Mundi project.[154] This study measures and describes the exact procedures used by litigants and courts to evict tenants for nonpayment of rent and to collect bounced checks. It provides cross-country data on the procedures involved in formal dispute resolution in each of the 109 countries examined. The study further offers comparative evidence regarding the effectiveness of legal institutions in realizing the purposes they were created to serve. In a comment on the Lex Mundi project, Kevin Davis suggests, however, that while the results of the study are useful to legal reformers, they should not be relied upon as strict or accurate indicators of the relationship between contract enforcement and development.[155] Davis's criticism relates to the project's methodology, which assesses a state's vigor in enforcing contracts by collecting data on the processes involved in enforcing two particular types of contracts—tenant evictions and collecting on bounced checks.[156] Davis contends that, at best, "the data can be described as measures of the enforceability of *particular types* of contracts . . . as there is no reason to presume that any given legal system treats *all* contractual claims similarly."[157] At most, the study speaks to the ability of certain contract enforcement mechanisms to realize the purpose for which they were implemented. Moreover, it does not provide any useful data on the positive effects that contract enforcement has on economic growth.

Dam suggests another problem with the Lex Mundi project: the term "formalism," defined in this project as procedural complexity in court proceedings, cannot fully capture the actual degree of judicial effectiveness across countries, especially between civil law countries

[154] For a complete description and analysis of the Lex Mundi project, see Simeon Djankov et al., Courts, 118 Q.J. Econ. 453, 459 (2003); see also Kevin E. Davis, What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?, 26 Mich. J. Int'l L. 141, 159 (2004) (referring to the Djankov study as the "Lex Mundi project").
[155] Davis, supra foot note 97, at P. 159.
[156] Ibid
[157] Ibid at P. 157

and common law countries.[158] He also suggests that the project's implicit judgment that formalism was not efficient for the two simple types of cases studied may be misleading. He concludes that while higher degrees of judicial formalism, measured by the number of requirements for court proceedings, are found most often in civil law countries, including many developing countries, common law countries with lower degrees of judicial formalism, including wealthier countries; do not necessarily score higher in timely resolution of these cases.[159] For example, certain developed common law countries manifested unusual delay in the check collection case—421 days in Canada and 320 days in Australia, compared to forty days in Swaziland and sixty days in Belize, countries with the same common law tradition.[160] Moreover, in Asia, civil law countries have shorter durations of court proceedings than common law countries in the Lex Mundi project, indicating another deviation from the project's implicit judgment that common law countries generally have lower degrees of formalism—and hence generally higher degrees of judicial effectiveness—than civil law countries.[161] A study by Daron Acemoglu and Simon Johnson suggests a similar problem; the authors find that while enforcement of property rights correlates significantly with economic growth, financial development, and investment, formal contract rules have a significant effect only on firms' use of financial institutions, and thus on the form of financing used in structuring deals.[162] For example, countries with inferior formal contracting institutions have less developed stock markets, so firms in these countries may use more debt rather than equity financing because debt contracts are cheaper to enforce.[163]Acemoglu and Johnson

[158] Dam Supra foot note 65 at 9-10
[159] Ibid
[160]Ibid at .P. 10
[161] Ibid at P. 11
[162]Daron Acemoglu & Simon Johnson, Unbundling Institutions, 113 J. Pol. Econ.949, 983–84 (2005).
[163] Ibid at PP. 953, 983-84

conclude that formal contracting institutions have a more limited effect on growth, investment, and the total amount of credit in the economy.[164] Various country specific studies also suggest the benefits of contract law in facilitating successful and profitable transactions. For instance, a study of enterprises in Russia by Kathryn Hendley, Peter Murrell and Randi Ryterman argues that law and legal contract enforcement institutions do add value to the Russian economy.[165] The authors found that since Russia significantly reformed those legal institutions in the years following the collapse of the Soviet Union, Russian firms have steadily increased their use of the new *arbitrazh* court system to resolve contract disputes.[166] Despite the increasing inclination of Russian firms to resort to courts for contract enforcement, the reliability and effectiveness of those courts in enforcing judgments has been much debated. For example, the *arbitrazh* courts have been criticized for their inability to effectively enforce judgments or meet litigants' other basic needs.[167] Then, why do firms go to courts at all, if the judgments cannot be effectively enforced? Federico Varese provides a plausible explanation. Drawing on rich empirical data on the operation of the Russian *arbitrazh* courts in handling cases involving contract disputes over non-payment, he discovered that large formerly state-owned firms, privatized in the 1990s, make up the majority of litigants in these cases; by contrast, small enterprises in the private sector generally shun the courts in enforcing contracts.[168]According to Varese, one possible reason for this disparity is that managers of large Russian enterprises, which often are less efficient and competitive than smaller private enterprises, have strong incentives to file cases with the

[164] Ibid at P. 988
[165] Kathryn Hendley et al., Law Works in Russia: The Role of Law in Interenterprise Transactions, *in* Assessing the Value of Law in Transition Economies 56, 88 (Peter Murrell ed., 2001).
[166] Ibid at PP. 56, 70
[167] Kathryn Hendley, Growing Pains: Balancing Justice & Efficiency in Russian Economic Courts, 12 Temp. Int'l & Comp. L.J. 301, 330–31 (1998).
[168] Federico Varese, The Russian Mafia: Private Protection in a New Market Economy 53–54 (2001).

arbitrazh courts as a "signaling" strategy. Despite knowing that favorable court judgments are not likely to be effectively enforced, these managers still go to courts when contract disputes arise because they want to be perceived as making efforts to recover bad debt in a legal way.[169]Sending out such "law abiding" signals to both the market and the state may afford these firms two possible benefits: either losses resulting from managerial incompetence can be concealed, and hence future transactional opportunities sustained, or they can continue to receive bank loans and state subsidies.[170] By comparison, smaller private enterprises, which usually face greater transactional uncertainty and have shorter business time-horizons than large enterprises tend to resolve contract disputes largely outside the courtroom due to skepticism over the courts' ability to enforce judgments in a timely manner.[171] Difficulty in enforcing judgments in a timely manner often creates substantial adverse commercial results in transition economies struggling with macro-economic instabilities. Most critically, during periods of high inflation, even a short delay in recovering debt or payment through formal enforcement by "slow", weak and in effective court's system can cause significant real financial losses.[172] The main conclusion to derive from this review of the literature on the relation between formal contract law, enforcement and development, or for all intent and purposes, the role of an effective contract enforcement mechanism in persuading foreign direct investors, is that the existing empirical evidence specifically examining the correlation between a country's economic growth and the state as a credible third-party enforcer of contracts, suggests a strong correlation mostly in the financial sector.

[169] Ibid at P. 53
[170] Ibid at PP. 53-54
[171] Ibid at 54
[172]See generally, Michael Trebilcock and Jing Leng ' the role of formal contract law and enforcement in economic development' Virginia Law Review trebilcock & leng_book, Vol. 92: P. 1517.

Better contract enforcement appears beneficial in facilitating financial intermediation and attracts foreign direct investment (FDI)

A further strong support for the position of an effective contract enforcement mechanism or the role of its absence as impediments to the flow of the foreign direct investments is endless. It has been observed[173] on this note that on the side of the foreign investors, contractual dealings and property rights are more secure, and more valuable, when the costs and risks of exchanging them are low. Delays or uncertainties in the enforcement of exchange erode the value of property rights and diminish the opportunities and incentives to invest. In an ideal world, all contractual exchanges would occur without a hitch, neither party would ever fail to deliver the promised good or service or be short on the quality or quantity promised. It is easy to see why such a world would have an extraordinarily favorable investment climate. Firms could commit to long-term, complex commercial relationships with perfect strangers, confident that the other side would faithfully uphold its end of the bargain over as many years as the contract lasts. It is also easy to see why such a world does not exist.[174] Eventually a centralized contract enforcement mechanism operated by the state becomes a less costly alternative.[175] Rather than incurring substantial costs before entering into a transaction, firms find it less expensive to turn to a court after the fact to resolve differences over performance. The importance of courts grows as the number of large and complex long-term transactions increases. The impact of a well-functioning court system extends far beyond the number of cases it resolves. The more timely and predictable a court's decisions, the better able firms are to predict the outcome of any dispute. As predictability

[173] World Development Report 2005, this position remain intact see Doing Business 2014 available at www.doing business2014.com visited 6th July 2014.
[174] World Bank World Development Reports (2005) United Nations New York
[175] ibid

and timeliness improve, the number of disputes filed may decline, because a credible threat of pursuing a remedy in court provides incentives for the parties to honor their obligations. Bargaining takes place in the shadow cast by the courts and the laws they enforce. The stronger the shadow they cast, the lower the risk of transacting, the larger the number of transactions, and the lower their cost,[176]where the shadow is weak, a firm's costs and risks increase[177].

A research underlines the importance of well-performing courts for a sound investment climate. Studies from Argentina and Brazil show that firms doing business in provinces with better-performing courts enjoy greater access to credit.[178] New research work in Mexico shows that larger, more efficient firms are found in states with better court systems. Better courts reduce the risks firms face, and so increase the firms' willingness to invest more.[179] Firms in Brazil, Peru, and the Philippines report that they would be willing to increase investment if they had more confidence in their nation's courts.[180] Firms in Albania, Bulgaria, Croatia, Ecuador, Moldova, Peru, Poland, Romania, Russia, Slovakia, Ukraine, and Vietnam say they would be reluctant to switch suppliers, even if offered a lower price, for fear they could not turn to the courts to enforce the agreement.[181] Firms with confidence in the courts in Poland, Romania, Russia, Slovakia, and Ukraine are more likely to extend trade credit and to enter new relations with local firms.

[176]Mnookin and Kornhauser (1979). Cited in World Development Report (2005) Better Investment Climate for all.
[177] World Bank World Development Reports (2005) see also Doing Business 2014 op.cit
[178]Cristini and Moya (2001) and Castelar-Pinheiro and Cabral Cited ibid.
[179]Laevan and Woodruff (2003). Cited ibid.
[180]Castelar-Pinheiro (1998); Sereno, de Dios, and Capuano (2001); and Herrero and Henderson (2001). Cited ibid
[181]Johnson, McMillan, and Woodruff (2002a) and Broadmanand others (2004). Cited ibid

a. In Bangladesh and Pakistan the World Bank's Investment Climate Surveys[182] show that while firms with confidence in the courts make half their sales on credit, those with little confidence extend credit on only one-fourth of their sales.

b. In Burundi, Cameroon, Côte d'Ivoire, Kenya, Madagascar, Zambia, and Zimbabwe, where firms have little confidence in the courts, they are unwilling to expand trade by doing business with anyone other than those they know well.[183]

However, The World Investment Report 2014 launched globally in 41 locations generated intense interest from the international development community and the media, where more than 500 articles have already appeared. The report's main findings on international investment trends show that foreign direct investment (FDI) inflows increased by 9 per cent in 2013 to $1.45 trillion. Developing countries increased their global share of FDI inflows to a record level of 54 per cent, and developing Asia now attracts more inward FDI than either the EU or the United States. As investors, developing and transition countries have been steadily increasing their investments abroad and last year they accounted for a record 39 per cent of global FDI outflows - up from just 12 per cent in the early 2000s.[184]

The Investment Climate Surveys, similarly, shows that in many countries, firms have little confidence in courts. One reason may be the length of time and the cost required in many countries to resolve even simple cases. The World Bank's Doing Business Project shows that in 2003 up to 2013[185] the time required to enforce a contract range from under 50 days in the Netherlands, nearly 600 days in Bolivia, to nearly 1,500 days in Guatemala and in

[182] In World Development Report 2005
[183] Bigsten and others (2000) and Fafchamps and Minten (2001). Cited ibid.
[184] Availableathttp://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=790&Sitemap_x0020_Taxonomy=UNCTAD%20Home; visited 6th July 2014
[185] See Doing Business 2014 op cit

Nigeria 447[186] day there is no evidence to show that slower, more costly courts deliver better results than less expensive, more expeditious ones.[187] The role of formal contract law and contract enforcement institutions in economic development as *World Development Report 2004*[188] has on this theme showed, agencies that provide a public service perform better when they are accountable to users. When users have a say in the policies governing the delivery of the service, and when those providing the service have a strong incentive to deliver quality services. These same principles apply to courts. A common result of giving users more voice in the operation of the courts is procedural simplification. Court procedures in many developing countries are more complex and costlier than those in developed countries. Not only do these lengthier and more expensive procedures provide no off setting benefits, they are often simply a further drag on entrepreneurial activity.[189]

The World Development Report (WDR) 2014 however on the other hand examines how improving risk management can lead to larger gains in development and poverty reduction. It will argue that improving risk management is crucial to reduce the negative impacts of shocks and hazards, but also to enable people to pursue new opportunities for growth and prosperity. Risk management is also a shared responsibility that requires the active participation of different economic and social systems, as well as the State.[190] In Brazil, complex court procedures retard credit markets and increase the cost of credit transactions.[191]

---

[186] ibid

[187] Djankov and others (2003b).cited op cit.

[188] The World Development Report 2013: Jobs stresses the role of strong private sector led growth in creating jobs and outlines how jobs that do the most for development can spur a virtuous cycle. The report finds that poverty falls as people work their way out of hardship and as jobs empower women to invest more in their children.

[189] ibid

[190] Availablehttp://econ.worldbank.org/wbsite/external/extdec/extresearch/extwdrs/extnwdr2013/0.contentMDK:23459971~P. PK:8261309~piPK:8258028~theSitePK:8258025,00.html visited 6th July 2014

[191] World Bank (2003). cited in World Development Report (2005) see also world Development Report 2013 supra foot note 123

Coupling procedural reform with changes in the way courts are managed and combining both with the introduction of information technology can dramatically cut the time needed to decide a case. This mix produced an average reduction in processing time of 85 percent in six pilot courts in Ecuador. Similar results were realized across a range of courts Venezuela as well. In Barquisimeto and Ciudad Bolivar, reforms introduced in 1999 trimmed the time required to dispose of leasing and debt collection cases from anywhere between half to two-thirds. Judges were relieved of routine administrative tasks; clerical work was centralized in a judicial support office, while the entire litigation process, from the filing of a complaint to the scheduling of hearings to the issuance of judgment, was automated.[192] One frequently considered option for speeding up commercial cases is the creation of either a separate court or a separate division or chamber within an existing court to handle business disputes. Tanzania's recently created commercial court draws praise from lawyers who appear before it, and although it's filing fees are higher than the ordinary courts, to which litigants can also turn; its caseload continues to grow. Efforts to create specialized commercial courts in Bangladesh, Indonesia, Cape Verde, Côte d'Ivoire, Pakistan, and Rwanda have so far been less successful. The difference often lies in the political support courts enjoy. In Tanzania, the court handles cases filed by banks and other financial institutions that constitute a powerful lobby in support of the court. However, progress is more difficult when the targets of court action hold significant political influence. In Bangladesh; for example, the defendants include influential citizens being asked to repay millions of dollars in loans from banks. Similarly, in Indonesia the defendants include those being asked to accept significant losses in court-ordered reorganization and liquidation proceedings.[193] We have tried to put in

[192] ibid
[193] World Development Report (2005)

perspective the factors and impediments to foreign direct investment (FDI) in the developing economies. We have shown both the general and as depicted by the recent trend,[194] we have specifically identified a cheap, speedy and effective contractual judgment mechanism as not only an incentive to foreign direct investment (FDI), but also a fundamental feature that clears the investment climate, conducive for such investment to flow and flourish. Similarly, we are inclined to draw a general observation from the empirical evidence, surveyed above, that formal contract enforcement becomes more widely used at higher levels of growth in most of the East Asian economies. If the rule of law, a cheap and effective enforcement process secures and enforces contracts and property rights, it constitute one of the 'significant determinants of the speed with which countries grow'[195] These analyses are in most cases the product of empirical studies and research conducted in several developing countries. Developed countries with strong and effective contractual judgment mechanism, have laid the processes to achieve this milestone. Developing economies like Nigeria may have a lot to learn in that regard.

We shall now focus on the implementation of this noble idea, the impact of an effective enforcement mechanism in some countries of European Union.

[194] the position of on effective contract enforcement mechanism on FDI again emphasized in 2013 see doing business 2014 op cit
[195] Smith B.C op cit at P. 82

3.5 Enforcement of Contractual Judgement in Some European Union Countries:

With regard to policy considerations, building contract enforcement institutions that support markets takes time.[196] It is widely acknowledged[197] that efficient courts issuing fair judgments play a significant role in establishing the rule of law. Member states of the European Union (EU) and international bodies have been quick to recognize this fact and have adopted international conventions; regulations and recommendations aimed at ensuring court judgments are recognized and enforced.

The Brussels Convention of 1968, which had previously addressed this issue, has been replaced in most EU countries, with some exceptions, by the new Council Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Regulation No. 44/2001 provides for the recognition of any judgment given in a EU member state by the court of another EU member state without requiring any special procedure.[198]

Regulation (EC) has recently complemented this regulation No. 805/2004 of the European Parliament and of the Council, which creates a European Enforcement Order for uncontested claims. Regulation (EC) No. 805/2004 simplifies largely the access to enforcement of uncontested claims, improving on the exequatur procedure provided for in

[196] John McMillan & Christopher Woodruff, Dispute Prevention Without Courts in Vietnam, 15 J.L. Econ. & Org. 637, 637–38 (1999) at P. 640.

[197] Veronica, B (Ed) 'The enforcement of judgments in civil and commercial cases in the new EU member states' European Bank for Reconstruction and Development. Law in transition online . 2006

[198] Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 33 (1) can be found online at: en/oj/dat/2001/l_012/l_ 01220010116en00010023.See ibid

Regulation No. 44/2001.[199] The European Enforcement Order should be issued by the court that delivered the judgment, based on requirements set forth in Regulation (EC) No. 805/2004 and is required to be enforced in any other member state without the need for a declaration of enforceability.[200] The regulations mentioned above, however, limit their ruling to ensuring access to enforcement in other member states, whereas the law of the member state where the enforcement is sought governs the enforcement procedures. Most early members of the EU have long established enforcement procedures, which have been historically formed and shaped in line with their development. In contrast, the eight countries, which have joined the EU, more recently are still in the process of transition and are continuing to develop and perfect their enforcement frameworks. It was only relatively recently that international bodies began to turn their attention to the importance of efficient enforcement of the law application process, recognizing that [201]the enforcement of court decisions in particular within a reasonable time, has to be regarded as an integral part of the right to a fair trial for the purposes of Article 6 of the European Convention on Human Rights"[202]and proper, effective and efficient enforcement of court decisions is of capital importance for member states in order to create reinforce and develop a strong and respected judicial system."[203] In line with this new approach, the Committee of Ministers of the Council of Europe adopted on 9 September 2003 Recommendation Rec (2003) 17 of the

[199] Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Article 3 can be found online at: lex/pri/en/oj/dat/2004/l_143/l_ 14320040430en00150039, see Veronica, B (Ed)ibid
[200] Ibid., Articles 5, 6.
[201] Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Article 20., see ibid
[202]Council of Europe, Legal Affairs, Operation_of_justice/Enforcement_of_judgments/.
[203] Prof. Dr. Alan Uzelac, University of Zagreb, Establishing common European standards of enforcement: recent work of the Council of Europe as regards enforcement procedures and bailiffs, Paris, Sorbonne, 15 November 2002, P. 4, . Hr/Pdf/Radovi/rencontres. See ibid

Committee of Ministers to member states on enforcement (the recommendation).[204] The Recommendation sets forth the principles of regulation and the application of enforcement procedures and basic guidelines regarding enforcement agents. The recommendation encourages:

a. The clarity and ease of enforcement procedures
b. Effective and appropriate means of serving documents
c. Measures against procedural abuses
d. Regulations on transparency
e. Quick procedures.

The recommendation further specifies that the activity and status of enforcement agents should be clearly defined by relevant regulations. In particular, enforcement agents should be adequately trained, remunerated and equipped, they should have attained a specified level of professional qualification and they should be subject to monitoring. An explanatory memorandum that provides background information about the principles accompanies the recommendation.

We shall than come up and provide a succinct overview of enforcement procedures and their efficiency in eight new members of the European Union, namely the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic and Slovenia. Lawyers from each country describe the main features of the enforcement procedures in their country and suggest measures for improving the quality of enforcement.

[204] Available online at , see ibid

3.4.1 Czech Republic

3.4.1.1 Legal framework

All court decisions and arbitral awards in civil and commercial matters compliant with Czech legal requirements[205] can been forced either by the relevant court and its bailiff under the Civil Procedure Code (CPC),[206] as amended, or by a private court executor (the executor),[207] under the Execution Code (EC), as amended.[208] The CPC, which was adopted in 1963, regulates civil court procedure including execution procedures.[209] There have been almost 30 amendments to the provisions relating to execution including the:

a. Improvement of execution against a debtor's salary, bank accounts and other financial revenues and, especially, execution by auction sale of movable and immovable property[210] Creation of the institution of "declaration of property"[211] by the debtor.

b. Establishment of new methods of enforcement[212] Improvement of existing methods[213] Improvement of the court mail delivery system.[214] The most significant change to the

[205] Such a decision must be in legal force (generally, delivered to the parties of the dispute and no appeal may be lodged against it) and enforceable (the time limit for the fulfillment of the duty of the debtor given by the court has passed). See ibid.
[206] Act No. 99/1963 Coll.
[207] The official name of the executor under the Execution Code is the "court executor". On the one hand, the court executor has the status of a governmental agent who possesses certain state powers but, on the other hand, he/she is a private individual performing activities in order to make profit t. See Sections 1.3, 2.2 and 3.2 thereof. See. ibid
[208] Act No. 120/2001 Coll. A third possible way of enforcing executable claims being secured by mortgage, pledge, lien or limitation of the transfer of immovable property is a non-voluntary public auction pursuant to Sections 36 et seq. of Act No. 26/2000 Coll., Public Auction Act. See ibid
[209] Part 6 of the Civil Procedure Code, Sections 252 to 351a, governs executions under the Civil Procedure Code and, with regards to the methods of enforcement, executions under the Execution Code as well.
[210] Act No. 519/1991 Coll.
[211] J. Bureš, L. Drápal, M. Mazanec (2001), Civil Procedure Code – Commentary, p. XII. (5th ed). Declaration of property is an instrument which assists a creditor with a monetary claim with discovering the debtor's property through a court order before the execution is ordered.
[212] Ibid. Execution can now be performed by means of the seizure and sale of the debtor's share in a company and the debtor's enterprise
[213] Act No. 30/2000 Coll
[214] Act. No. 555/2005 Coll. According to the explanatory report of the submitter of this act, it is strict and clear and gives a party to any court proceedings less margin to avoid delivery of court mail (Parliament documents, Print No. 580/0,). See ibid

enforcement of judgments in the Czech Republic came with the enactment of the EC in 2001. Prior to that, the court and its bailiffs had to deal with a large volume of enforcement requests with only limited resources. In addition, under the CPC, courts and bailiffs are still limited by procedural obstacles and have little motivation to ensure enforcement. The main purpose of the EC was to expedite the enforcement process and to help courts by transferring some of their responsibilities to the executors and, therefore, increase the number of successful executions.[215] To a certain extent, this goal has been achieved.

3.4.1.2 Enforcement bodies

The competent court and its bailiffs should undertake enforcement based on the CPC.[216] The relevant court and its bailiffs are supervised by the chairperson of the court and by the next level of court. Enforcement based on the EC vests with the executors, who should be members of the Czech Executors' Chamber.[217] Executors are supervised both by the relevant court, (for example, in cases relating to general activities, fees) and by the Executors' Chamber (for example, in cases relating to complaints by either the creditor or the debtor in the proceedings against an executor).[218] The creditor can choose whether to follow the enforcement procedure established by the CPC or the enforcement procedure established by the EC. Reasons for the creditor choosing one procedure over another depend on the complexity of the proceedings and the cost.

---

[215] Pursuant to the procedure under the Civil Procedure Code, some cases took years before they officially started after the submission of respective petitions for the issuance of the execution order due to the high number of petitions. See ibid

[216] The competent court of first instance, that is the court to which the claimant submits its petition for the order of the execution, is generally, under both the Civil Procedure Code and the Execution Code, the district court where the debtor has its residency, for individuals, or registered office, for legal entities.

[217] The number of executors per district is decided by the Minister of Justice and is related to the number of its residents. See ibid

[218] Pursuant to Sections 116 et seq. of the Execution Code, the executor is responsible for disciplinary offences, including substantial or repeated breach of statutory obligations or dignity of the executor's profession, with such possible results as monition, penalty or revocation from the executor's office. See ibid

3.4.1.3 Enforcement procedure

An enforcement procedure under the CPC starts with the submission by the creditor of a petition for execution. Based on the petition, which must comply with legal requirements and indicate the method of execution and whether the supporting decisions have been submitted, the competent court will issue a court execution order.[219] The court execution order will establish the method of enforcement, as well as the obligations of the debtor and other participants. Upon delivery of such an order to the debtor, the property of the debtor as specified in the petition will be seized. An enforcement procedure under the EC also starts with the submission by the creditor of a petition to court.

However, the creditor is not required to specify in the petition the method of execution. The court will issue an executor execution order within 15 days. Based on the order, the executor is entitled to take all necessary steps to complete the execution. The executor will issue an executor's writ specifying the method of execution decided by the executor.[220] After the executor execution order and the executor's writ are served on the debtor, the debtor is not allowed to dispose of any of its property except for property necessary for the purposes of ordinary business and the satisfaction of basic living needs and maintenance of its property. Any act undertaken by the debtor in breach of this restriction

[219] However, contrary to proceedings under the Execution Code, the court does not have a set time limit under which to order the execution. Because the procedure under the Civil Procedure Code takes longer and because the claimant has to choose the method of enforcement, the Civil Procedure Code procedure is used in only a few cases – usually when the debtor has, for example, immovable assets which can be easily seized by the court and, therefore, no charge for the executor is required to be paid by the claimant in the event that the costs are not covered by proceeds from the execution. See ibid

[220] The executor is also entitled to request information from various state bodies, banks, insurance companies, notaries, advocates, the Securities Centre and other individuals and legal entities regarding the debtor's bank accounts, business activity, tax issues and property. See ibid

will be deemed null and void.[221] Should the executor's writ specify certain property, the exemption mentioned above will not apply to this property.[222] Both the creditor and the debtor have the right to appeal the executor execution order, but they do not have the right to appeal the executor's writ.[223] The EC and the CPC provide for several methods of enforcement of monetary claims and corresponding rights of the enforcement bodies, including: requesting the employer or the bank to withhold and transfer the salary, balance of the bank account and other revenues of the debtor (including seizure of the bank account or salary) seizure and sale of a receivable (including rights from trademarks, licenses, securities and shareholdings) seizure and sale of movables, immovable property and businesses.[224] Non-monetary claims may be enforced by: vacating the property or seizure of property the partition of property held in joint ownership the provision of works and services.[225] The cost of enforcement proceedings under the CPC and the EC includes a court fee; the fee and documented expenses of the executor (under the CPC only one fee is calculated as a percentage of the value of the monetary claim); and the costs of the creditor.[226] All such costs

[221] The main court activity under the Execution Code procedure is the issuance of an execution order. Afterwards, the executor is responsible for the performance of execution; however, the decision on the use of the execution proceeds is, in most cases, a duty of the court. See ibid

[222] However, the execution may be realized (for example, by sale of movables, debiting the balance of bank accounts, salary, and so on) after the execution order is in legal force, that is when the order is delivered to the debtor and the debtor does not appeal against it within 15 days of its receipt. See ibid

[223] The effects of the delivery of the court execution order and the executor's writ are not affected by the appeal (see also footnote 25). Generally, the right to appeal, due to its wide scope, is often abused by debtors in order to delay the performance of the execution, for instance, of immovable property, shareholdings, and so on

[224] It is necessary to emphasize that, for the purpose of execution under the Execution Code, the stipulations of the Civil Procedure Code's execution procedures has subsidiary application, for instance, concerning the methods of execution and their particular procedures. See ibid

[225] Besides these methods of enforcement, the claimant has a right to ask a court (under the Civil Procedure Code) or the executor (under the Execution Code) to request the debtor to issue a declaration of property. The court (under the Civil Procedure Code) and the executor (under the Execution Code) may also request the debtor to voluntary fulfill the relevant judgment. See ibid

[226] This is strictly set in the Notice of the Ministry of Justice No. 330/2001 Coll., as amended. However, the executor is entitled to arrange a contractual fee with the entitled person, which is usually the same amount as the statutory fee. The reason this contractual fee is common is that, unfortunately, it "motivates" the executor to fulfill its statutory obligations. See ibid

are primarily covered by the proceeds of the seized assets. In the event that the execution is not successful, the court may order the creditor to reimburse enforcement costs.

There is no time limit for the enforcement procedure. It terminates for the reasons stated in the CPC or the EC. For example, a procedure is terminated due to successful enforcement, petition of the creditor or the fact that enforced assets are insufficient to cover the costs of execution. In the event of bankruptcy, ordinary enforcement procedures cease and they are replaced by bankruptcy proceedings.[227]

3.3.1.4. Improvements

The key issue regarding the regulation of enforcement of judgments in the Czech Republic is whether to keep dual enforcement proceedings or to assign execution solely to executors and to delegate certain types of enforcements such as those related to alimony or custodial issues to courts and bailiffs.[228] There is some pressure from regulatory authorities and lawyers to include separate enforcement procedures in the EC and to exclude enforcement provisions from the CPC.

However, such a major change to the existing regime would take some time to implement. Another controversial issue is the right of the debtor to formally appeal against any court decision and, thereby, delay the proceedings.[229] According to the Minister of

[227] Z. PrudilováKoníčková (2003), "Concurrence of the execution and bankruptcy proceedings", Legal *Advisor*, vol. 12, pp. 19-20. In the case of a bankruptcy order, the respective judgment cannot be executed (Sec. 14 e/ of the Act No. 328/1991 Coll., Act on Bankruptcy and Settlement) and the claimant must claim its receivable in the bankruptcy proceedings. After the end of the bankruptcy proceedings, the execution shall continue, provided the debtor did not cease to exist due to bankruptcy proceedings and the entitled person was not fully satisfied with the procedure. See ibid

[228] It should also be considered whether the executor should be given the authority to decide on the use of the proceeds and whether the court should only make decisions with respect to objections and appeals against executors. See ibid

[229] Although no appeal is allowed against an executor's writ, the right of the debtor to appeal a court decision or a court order (for example, in the execution of immovable property on the use of revenues from the sale of the immovable or company) or to make an objection regarding the executor's prejudice is often abused. See ibid

Justice, an amendment limiting this right of the debtor may be proposed shortly.[230] An additional area for improvement is the limited number of executors. This is currently being addressed by increasing the number of executors and their employees. In addition, some methods of enforcement are difficult to perform, including the seizure of shareholdings, the sale of movables in the possession of third persons, and the sale of immovable[231] and/or a business.[232] These issues need to be regulated in a more clear and detailed manner. The creditor should also have an unlimited right to change the executor due to incompetence and/or inactivity.[233] Setting a time limit on certain executor activities by statute would also help to improve the execution proceedings in the Czech Republic[234].

3. 4 .2 Hungary

3.4.2.1 Legal framework

The enforcement of commercial and civil court decisions in Hungary is primarily based on the 1994 Act on judicial enforcement (JEA)[235]and on the 2001 decree by the Minister of Justice on the organization of judicial enforcement.[236] The most substantial amendment to the JEA since its enactment in 2001 was aimed at creating a more efficient

[230] The record of the interview with the Minister of Justice, PavelNěmec, from 29 May 2005, can be found at: www.vlada.cz. With regards to recent parliamentary elections, the amendment is not likely to be adopted within the next few months and, therefore, there is no public information regarding the content and timing of the amendment. See ibid

[231] See "Few pillars for the amendment of the Execution Code" on ; M. Kasíková (2003), "Execution at the Court of the First Instance", *Legal Advisor*, vol. 6, p. 17. Cited in see Veronica, B (Ed)ibid

[232] The solution for this issue is partially proposed in footnotes 31 and 33. The matter of business shares, movables in the possession of third persons and businesses may be solved by extending the executor's authority over companies and third persons in order to reduce the right to appeal of the latter two and the consequences of an appeal of the execution. Complementary to the above, it may be an option have an unlimited number of executors and, therefore, have the executors expedite the proceedings. see ibid

[233] At present, this right is limited – the court revokes the executor if there are "reasons of special respect". If the executor simply does not act adequately, it is very difficult to have him or her revoked, notwithstanding the fact that a basic fee and documented costs are still being paid

[234] See generally PavelKejla, and PetrProuza Cited in Veronica, B (Ed) ibid

[235] Act LIII as of 1994, effective from 1 September 1994.

[236]Decree No. 16 as of 2001, effective from 3 September 2001.

judicial enforcement procedure.[237] Specifically, the amendment sought to simplify and accelerate enforcement procedures, to promote the interests of creditors and, in particular, to make it easier for creditors to enforce their claims while, at the same time, protecting the interests of debtors. One of the main results of the changes is that the enforcing court may now suspend execution upon the debtor's application, subject to certain conditions. Further, a request for enforcement, which falls within the competence of independent bailiffs, may, in most cases, also be submitted directly to the bailiffs instead of sending it only to the court. The purpose of this is to facilitate the initiation of the enforcement procedure by persons who do not use lawyer's services. The amendment also ensures better and wider access to the various databases from which the assets of a debtor may be identified.

Although these amendments are designed to meet the needs of creditors they have, arguably, not resulted in a quicker or more efficient enforcement procedure.

3.4.2.2 Enforcement bodies

Judicial enforcement is ordered and/or implemented by the court and the Minister of Justice carries out certain other officials, such as court bailiffs, independent bailiffs and others.[238] General supervision of the organization of judicial enforcement. The activity of independent bailiffs is supervised by the Hungarian Chamber of Court Bailiffs (the Chamber), whereas the supervisory authority for the court bailiffs is the chair of the competent county court. There are various legal remedies against court decisions in connection with judicial enforcement, including the withdrawal of the certificate of

[237] Act CXXXVI as of 2000, effective from 1 September 2001.
[238] Others include, for example, deputy independent bailiffs, deputy court bailiffs, trainee bailiffs, trainee court bailiffs and court administrators. Cited in see Veronica, B (Ed) ibid

enforcement, an appeal of the enforcement order and an objection to enforcement and legal remedies by prosecutors.

3.4.2.3 Enforcement procedure

Pecuniary claims are often enforced through a prompt collection order. This order allows the collection of the debt through the banking system prior to the initiation of a full-blown formal judicial enforcement procedure. A so-called "enforceable document" is not required at this preliminary stage. It is only required for the final and binding judgment. However, a formal enforcement procedure must always be based on an enforceable document. Although several types of enforceable documents exist, the usual enforcement document is a certificate of enforcement issued by the competent court upon the request of the creditor, based on a court judgment.

The court issuing the enforceable document provides it to the relevant bailiff. Upon commencement of the enforcement procedure, the bailiff delivers the enforceable document to the debtor and requests immediate performance. If the debtor fails to comply with the enforcement order, the bailiff has the power to collect the creditor's claims out of the debtor's income, including his or her salary and from his or her other assets.

A seizure of assets is performed gradually in order to cause the least possible prejudice to the debtor's interests. At first, collection is attempted from bank accounts and from the earnings of the debtor. Then, if full collection of the claim has still not been fulfilled, movable assets and any real property of the debtor can be seized. There are no statutory time limits for the procedure and they are almost invariably lengthy. According to the JEA, the costs of enforcement are funded by the creditor and are recoverable from the debtor. These costs include any stamp duty on an *ad valorem* basis, the fees of the creditor's

legal representatives, and the fees of the bailiff and the costs of recovering any commission. Enforcement costs are recovered first from the proceeds, before the creditor's claims are satisfied[239].

3.4.2.4 Improvements

Although the judicial enforcement procedure has developed a lot in recent years and some of the former constraints have been removed by amendments to the JEA, there are still a number of issues, which can result in lengthy proceedings.

In principle, the JEA contains strict procedural deadlines for all parties involved in the enforcement process but, in practice, bailiffs do not adhere to these deadlines and the failure to meet the deadlines has no legal consequences. With regards the prompt collection order prior to the formal judicial enforcement procedure, some legal practitioners suggest that its scope should be broadened to include the bank accounts of individuals. In addition, rules for the execution and monitoring of withdrawals should be more precisely defined for financial institutions. It is also common for bailiffs to be willing to suspend enforcement proceedings where they are unable to detect any asset of a debtor. After enforcement is suspended, bailiffs are no longer obliged to regularly monitor databases in order to identify new assets and from time to time, the creditor must request the bailiff to proceed. Some statutory deadlines. Inserted into the JEA would solve this problem. Access to various databases is established, but the databases still need to be updated more regularly in order for the system to be effective.

It has been suggested that the current system of supervision needs amendment. According to one proposal for revision, the chief judge of the county court would supervise independent bailiffs rather than the Chamber. Even with this change, other measures would

[239] Cited in Veronica, B (Ed) ibid

need to be taken by the Chamber in order to ensure that enforcement proceedings are more effective and follow the statutory deadlines[240].

3. **Poland**

i. Legal framework

Primarily the Code of Civil Procedure dated 17 November 1964 regulates the enforcement of court decisions in civil and commercial matters in Poland. The Code has been amended several times, including a recent, major change concerning the rules and procedure for execution proceedings, which became effective last year. The amendments were aimed at simplifying and ensuring better protection for creditors.

ii. Enforcement bodies

The two execution proceeding authorities are the court and the court execution officer. The main authority is the court execution officer who carries out all execution activities except those reserved for courts. He or she is a public officer associated with a district court, with a designated territorial sector for his activity. The creditor, however, has the right, with some exceptions, to select a court execution officer, other than one designated for a certain territorial sector the activity of court execution officers is supervised by a designated court. Actions taken by court execution officers may be appealed. The supervising court hears such appeals.

iii. Enforcement procedure

In order to commence execution proceedings against a debtor, a creditor must have an enforcement document (*tytułegzekucyjny*) including a court judgment, for which a writ of

[240] See generally Dr. MilánKohlrusz , cited in Veronica, B (Ed) ibid

execution (*klauzulawykonalności*) has been granted by a competent court.[241] A writ of execution is a confirmation by a court enabling the creditor to commence execution proceedings against the debtor on the basis of an enforcement document. The creditor must submit to the court the request for enforcement together with the enforcement document, in order for it to issue the writ of execution. The court must issue the writ of execution within three days of the filing of the request. However, this usually takes much longer in practice[242].

Once the court has issued a writ of execution, the debtor against whom the writ of execution has been issued has a right to oppose the writ. The writ can be opposed if the debtor does not agree with the court's decision and denies the facts on which the writ of execution was based, or an event occurred, as a result of which the obligation was discharged or cannot be enforced[243].

The creditor files the application for the commencement of the execution proceedings with a court execution officer. It should specify the claim to be satisfied by the debtor and the manner of execution. The law lists a number of possible methods of execution for enforcement of pecuniary claims against real property, movable property, a salary, bank accounts, other receivables and other property rights, sea vessels or by means of establishment of mandatory administration upon the enterprise.[244] The statute of limitations for claims resulting from a final and unconditional decision of a court, other authorized body or a settlement expires after 10 years.46 The costs of execution proceeding vary depending

[241] Enforcement documents can be: 1) a final and unconditional court judgment or a decision of a junior judge, or a settlement made before a court; 2) an arbitration tribunal award or a settlement made before such a tribunal; 3) a settlement made before a mediator; 4) a notarial deed in which a debtor has voluntarily accepted execution and which provides for the obligation of payment of a certain amount of money or delivery of other assets; or 5) a notarial deed in which the owner of real property has accepted enforcement against the collateralized property. Additionally, banks can issue banking enforcement documents in accordance with the principles set out in the banking law based on banking books or other banking documents. See ibid

[242] ibid

[243] Ibid

[244] Ibid

on the value of the claim and the value - up to 15 per cent - of the amount enforced, including interest. However, the costs may not be less than 10 percent or higher than 3,000 per cent of the average monthly wage, which is approximately €600.[245] As a rule, proceeding costs are calculated and enforced after the claim itself has been enforced, except for advance payments charged by the court execution officer before the commencement of the proceedings. The bankruptcy of the debtor affects execution proceedings.

Generally, if the debtor is declared bankrupt, the execution proceedings concerning the receivables of the debtor are suspended or terminated by law. The creditor may enforce its claims on the basis of an extract from a list of claims only.

iv. Improvements

The most significant obstacle to effective claim enforcement in Poland is the time involved. Execution proceedings may take years due to court inefficiency, legal measures available to the

Debtor enabling him to effectively delay proceedings and, in some cases, insufficient protection of the creditor's interests.

Any changes to the execution procedure should focus first and foremost on their further simplification, improving the creditor's position and introducing time frames for completing proceedings.

Each of the eight countries reviewed in this article have reformed their enforcement framework during the past five years in pursuit of a more efficient system. Nonetheless, the major concerns remain, namely:

a. Court inefficiency

b. Executors' inefficiency

[245] Ibid

c. Delays in enforcement procedures

d. The lack of clarity regarding newly introduced provisions.

In countries where courts are heavily involved in the enforcement process, there is a backlog of cases, due to a lack resources and equipment for dealing with all of the enforcement requests. However, even where enforcement duties lie primarily with bailiffs or private enforcement agents, courts still have an important role to play in the enforcement process, such as authorizing the execution process by issuing the enforcement writ. Therefore, efficient courts remain an essential ingredient for the efficiency of the enforcement process.

Among the principal shortcomings in the efficiency of the court or private executors is a lack of motivation on the part of some executors (which results in delays in the enforcements proceedings) and the limited use by bailiffs of the available enforcement tools. Basically, the contributors suggested two solutions: (i) improving the remuneration scheme for the executors; and (ii) raising the level of supervision and transparency. The Estonian enforcement framework seems to allow a wider flexibility to executors, including the terms of payments for their services. However, the dangers of such flexibility of powers and actions are also mentioned. Transparency can be improved by means of wider publicity for the acts of the executors, where the availability of such information does not require specific knowledge or professional skills. In addition, the lack of deadlines for enforcement proceedings contributes to reported delays. Countries that have recently changed their relevant legal framework point to the need for comprehensive interpretation of the new provisions. Also highlighted is the need to enhance the professional skills of executors and

raise their admission standards.[246] The above detail procedures, as applicable in parts of the European Union Countries, again shows that, there is no perfect contractual enforcement process regardless of the level of civilization or development status. The contractual enforcement process is closely monitored and where necessary, amended to meet up the emerging challenges. Every country must therefore identify its peculiarities and squarely address the factors that lead to the impaired, expensive and ineffective judgment enforcement process.

In the next chapter, this research would examine generally factors attributed for weak contractual judgment process in Nigeria.

[246] See generally A. Grabalski, cited in Veronica, B. (Ed) ibid

CHAPTER FOUR

CONTRACTUAL JUDGMENT ENFORCEMENT PROCESS

4.1 Introduction

Contractual judgment enforcement process in this context includes an analysis and a detailed summary of the efficiency of contract enforcement. It follows the evolution of a contractual dispute, tracking the time, cost and number of procedures involved from the moment the plaintiff files the lawsuit until actual payment. This information was collected as part of the Doing Business project, which measures and compares regulations relevant to the life cycle of a small- to medium-sized domestic business in 189 economies. The most recent round of data collection was completed in June 2013.[1]A judgment of a court is contractual if it is relating, or part of a binding legal agreement as a contratual obligation.[2] The legal institution saddled with the onerous responsibilities of solving disputes, is the Judicature. What is the Judicature? Simply put, it is the organic processes of the state that are concerned with the determination of rights and obligations of citizens and other legal entities within its jurisdiction the physical manifestations of which are comprised in courts of law, tribunals, administrative and judicial panels, and allied institutions related to the administration of Justice.[3] Michael Corbett, reputed to be one of the greatest Chief Justices of South Africa posited, "The executive might transgress, the legislature might become unruly but it has always been the judiciary that has stood the test of time by standing firm on the side of truth

[1] www.doingbusiness2013 visited 6th July 2014
[2] Available at www.udgmentenforcementnigeria. Visited 5th July 2014
[3] Franklin O. The Judicature: Its Role, Monitoring and Fumigation—NJC Probe March 15th, 2011

and justice." [4] The judiciary's foremost role as the third branch of government is to defend and uphold the constitution and assure the rule of law prevails. "Under this general duty and mandate, the work of the judiciary reflects to some extent the level of a court's jurisdiction."[5] A pervasive element in the judiciary's role at every level is the protection of each person's constitutional, human, civil and legal rights. The judiciary also has an essential role in protecting citizens from each other's wrongdoing, protecting the weak from the strong and the powerless from the powerful. Moreover, the judiciary plays a crucial role in securing domestic tranquility by providing a structured institutionalized form for the resolution of discord and dispute and the vindication of civil and criminal wrongdoing. The judiciary exercises these roles and stamps its authority through the courts.

The court provides the framework within which individuals will get protection, redress and resolution of disputes and conflicts that cannot be effectively and peacefully settled elsewhere. In the intense clamor of competing interests, a court's role is to be a fair, firm and calm advocate, not for one side or the other, but for the law and justice. When a court responsively punishes wrongs, protect rights and resolves discord by thoughtful, independent and unbiased application of laws, "the justice system secures the freedoms, tranquility and equality that foster a social environment wherein man's highest aspirations and evolution can be realized." [6]. To this end, Theodore Roosevelt declares; "The decision of the courts on economic and social systems 'create' for the peaceful progress of 'citizens'

[4] Masunda, M.A. *The Role the Judiciary Must Play in Society.(2009).* www.thezimbabweanindependent.com
[5] Ladner, John *Role of the Judiciary*. (2000). www.smartvoter.org
[6] Ibid

during the twentieth century."[7] With the judiciary being the third arm of government, and drawing from the above discussion, the courts therefore cannot be removed from governance.

The Courts are the arbiter on matters of both common law and statutory interpretation throughout the state. It also undertakes the more general responsibility of interpretation of the constitution. The court ought to be routinely involved in the identification and interpretation of common law its occasional refinement, and eventually, its adaptation in light of changed and compelling circumstances[8], points out that "the constitutional role of the High Court … has two aspects 'of which' the courts' first and primary role as a constitutional judiciary is to maintain the federal balance."[9] There are comments that courts strike a balance between efficient governments, on the one hand and the protection of the citizens against misgovernment on the other. The courts therefore, are bent on preserving good governance, which is hinged largely on rule of law, liberty and equality. These concepts "together represent the troika that is universally accepted now as the index of a civil society."[10] The rule of law loses its conflict-resolving and confidence-inspiring function if there is no independent and credible judicial system to assure that private contractual arrangements are respected. It is evident that confidence in the enforceability of agreement is required for the proper functioning of an economy and for conducting efficient private economic activities.[11] Further, unreasonable delays, uncertainty, and high costs in enforcing agreements between

---

[7] Obaseki, A.O. Constitutional Structure and the Position of the Judiciary –Interpretative Jurisdiction of the Courts and Interpretation of Other Statutes (1990).. In *Judicial Lectures: Continuing Education for the Judiciary*. Lagos:MIJ Publishing. (1994). Justice in Nigerian Courts in Statistics: Case Flow Management and Problems of Congestion of Cases in Courts. *In Judicial Lectures: Continuing Education for the Judiciary.* Lagos: MIJ Professional Publishers Ltd

[8] Craven, Greg Reforming *the High Court*. (2007). www.samuelgriffith.org.au/papers

[9] Wade, William) Constitutional Fundamentals. (1989 A Paper Delivered at the *Hamlyn Lectures 32 on Adjudication. Pages 77-79*

[10] Sabharwal, Y.K. The Role of the Judiciary in Good Governance. (2005) at P.16 www.supremecourtofindia.nic.in

[11] Governance and Development, The world Bank 1992 International Bank for Reconstruction and Development, Washington D.C P. P. 37

private parties all tax economic actors inequitably and damage economic efficiency.[12] On the other hand a strong judiciary is vital in enforcing contracts.

In Nigeria, the position is the same. In a democratic system of government, the three arms of government are the legislative, executive and the judiciary. In assessing the relationship between these three arms,[13] the judiciary, though "the third arm of government, it is by no means the weakest of the three arms of government." Corroborating this[14] claim "In a democratic system of government, the three arms of government are the legislative, executive and the judiciary – all these being equal and co-ordinate."

Each of the three arms of government, therefore, has vital role to play in the society to achieve this purpose. This is done by the legislature through the exercise of its legislative powers, by the executive through the exercise of it executive powers and by the judiciary through the exercise of the judicial powers vested in it. The judicial powers "are expressly vested in the courts. Sub sections (1) and (2) of section 6 of the 1979[15] Constitution expressly provides that; (1) the judicial powers of the federation shall be vested in the courts (2) the judicial powers of a state shall be vested in the courts."[16] In Nigeria, the judiciary exists at two levels of court systems: the Federal Courts, which are the appellate courts, the States High Courts the Sharia courts of appeal and the customary courts of appeal of various states and the courts with jurisdiction over matters contained in the exclusive list while the state courts exercise other judicial powers not covered by the Federal courts.

---

[12] . ibid

[13] Olatokunbo, Samuel' The Rule of Law: A Panacea to Corruption. In Onyeakagbu, A. Ikedinma (ed), *The Role of the Judiciary in Nigerian Democratic Process.* Essays in Honour of Justice IcheN.Ndu. (2008). Lagos: Vox Nigeria Limited at P.157

[14] Awogu, Olisa. Enforcement of Court Orders and the Stability of Government and Society. *In Judicial Lectures: Continuing Education for the Judiciary*. (1992) Lagos: MIJ
Publishers Ltd. P. 62

[15] In parimateria with section 6 of the constitution of the Federal Republic of Nigeria 1999.

[16] Obaseki, Op.cit at P. 7

On the applicable laws in these courts, the Country has a complex legal system composed of the English Common Law, Islamic Law and Nigerian Customary Law.[17] Nigerian civil courts handle disputes between corporate bodies and the Government of Nigeria as well as between Nigerian businesses and foreign investors. The court occasionally rules against the Government of Nigeria, however, the settlements in these cases are not always expeditiously paid.[18] Nigerian courts allow for enforcement of foreign judgments after proper hearing in Nigerian court, and plaintiffs receive monetary judgments in the currency specified in their claims.[19] In majority of circumstances, business transactions are governed by 'Common Law' as modified by statute to meet local demands and conditions. The Nigerian court system has too few court facilities, lacks computerized document processing systems and poorly remunerates judges and other court officials, all of whom encourage corruption and undermines enforcement.[20] The provisions[21] of the 1999 Constitution lays down provisions for the establishment and powers of these courts in Nigeria. These include:

a. The Supreme Court
b. The Court of Appeal
c. The Federal High Court
d. The High Court of Federal Capital Territory Abuja
e. The High Court of a State
f. The National Industrial Court

[17] 2009 Investment Climate Statement-Nigeria. Bureau of Economic, Energy and Business Affairs U.S Department of State found in accessed on 4/2/2009
[18] Ibid at P. 5
[19] Ibid
[20] ibid
[21] See Sections 230-284

g. The Sharia Court of Appeal of the FCT Abuja

h. The Sharia Court of Appeal of a State

i. The Customary Court of Appeal of the FCT

j. The Customary Court of Appeal of a State.

Such other courts as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which the National Assembly or House of Assembly may make laws.

The Courts as listed above, it has been explained[22], "represents in a strict sense what may be regarded as the Nigerian judiciary based on the constitutional provisions." The powers conferred on the courts (the judiciary) under the 1999 Constitution include the following:

i. To hear and determine all disputes involving citizens

ii. To hear and determine disputes involving citizens and non-citizens with jurisdiction)

iii. To hear and determine all disputed cases involving citizens and Government and agencies of government.[23]

In view of the above analysis, the courts apparently stand at the center of the judicial process. With the political transformation of the Nigerian State from regions to states, the implication now is that, each state has its own high court. As a result, there are thirty-six state High Courts in Nigeria. To this, Odinaku[24] notes, "each of the states is a distinct legal system. Each legal system is serviced by its own system of courts." It has been noted[25]

---

[22] Olatokunbo, Samuel The Rule of Law: A Panacea to Corruption. In Onyeakagbu, A. Ikedinma (ed), *The Role of the Judiciary in Nigerian Democratic Process.* (2008). P. 158

[23] Ibid

[24] In Onyekpere, Eze '*Justice for Sale: A Report of the Administration of Justice in the Magistrate's and Customary Courts of Southern Nigerian'. Lagos*: Civil Liberties Organization. (1996). At PP. 21

[25] Otteh, Joseph *Fading Lights of Justice: An Empirical Study of Criminal Justice Administration in Southern Nigeria Customary Courts*. Lagos: Civil Liberties Organization; The Danish Centre for Human Rights. (1995).

further, "each state is at liberty to constitute divisions of its High Court. The judicial divisions are for administrative convenience". Despite the judicial divisions for administrative convenience, the Nigerian judiciary is plagued by certain teething problems.

In Nigeria[26], it has been argued that, a major problem is the fact that a substantial proportion of the common law in practice there are no longer in use in England from where we inherited them due to their out-datedness. This as an awkward situation compounded by the fact that "the Nigerian courts have not effected significant adaptation of the rules of English common law and equity as otherwise demanded by the reality of the Nigerian social condition." The technical setbacks arising thereof from this state of affairs, have contributed in making the courts in Nigeria slow in the dispensation of cases. Consequently, "the protection, security and facilities offered to the citizens by the law become undependable and lawlessness becomes the order of the day."[27] This indicates that the condition of the judiciary is precarious in a number of developing countries. Even in countries with a nominally independent judiciary, the courts are usually overworked and disputes resolution takes a long time. Often, the courts lack proper facilities, and there is an urgent need to improve the training of the persons involved in the administration of justice.

Another problem, which has militated against the speedy dispensation of justice by the courts in Nigeria, is the congestion of cases in courts. Congestion occurs when cases are filed at a rate far in excess of what judges in the courts jurisdiction can dispose of within a reasonable time. As such, the congestion of pending cases is bound to build up. As noted by Obaseki[28], "congestion tends to defeat the objective of the Rule of Law and deprive litigants

[26] Agbede, I.O.) Dynamics of Law Reform Enterprise: Nigerian Experience. In *Nigerian Bar Journal.* (2005(5) 3 Nigerian Bar Association, PP. 50-64
[27] Ibid
[28] Op cit

of fundamental right of fair hearing within a reasonable time. It effectively delays justice in the courts and constitutes a clog in the wheel of the administration of justice." Of major importance to the crux of this research is the fact, which Obaseki notes further; "there are more litigation in the centers of civilization and commerce."[29] The implication here is that the more urban and business activities a center is, the greater the number of litigations filed in the courts, which implies a higher possibility of congestion and of course, delayed justice.

The judiciary's primary role is to enhance justice, fairness and equity. However, efficient courts do much more they help the economy grow. They are essential to encourage businesses to engage with new customers. Without them, fewer transactions take and people must rely on social networks to decide with whom to do business. Yet in many countries, courts are slow, inefficient and corrupt. This is particularly the case in Sub –Saharan Africa; where on average commercial disputes last nearly 2 years and cost nearly half the value of the debt.[30]An analysis[31] of the efficiency of contract enforcement in 10 Nigerian states and Abuja by examining the average resolution of simple commercial disputes indicates that, on the average it takes 577 days to enforce a contract in Nigeria. That is slightly faster than the Sub-Saharan average but slower than some of the region's best performers. In Namibia, a similar case is resolved in about 270 days. The average duration of commercial disputes across Nigeria presents large differences among states. Commercial dispute resolution is fastest in Abia state, where filing, trial and enforcement can be completed in just less than 1 year. Contract enforcement is slowest in Enugu, where it takes 988 days, mainly because of lengthy execution of judgment.[32]Some of the bottlenecks confronted by litigants in trials and

[29] Ibid
[30] Doing Business in Nigeria 2008. Enforcing contract, court efficiency. Sub National series, at P.14
[31] ibid
[32] Ibid at P. 15

enforcement of contractual disputes very by each state. The time it takes from filing a case until the debtor is notified ranges from 21 days in Kano to 66 days in Kaduna. The duration of trial and judgment ranges from 240 days in Abia and Anambra to 751 in Kano. In other states, enforcement is a major contributor to delays.[33] In Anambra trial and judgment following the introduction of new High Court Procedure takes just 8 months, but enforcement may extend the process by another 6 months. In Enugu, enforcement is even longer, taking nearly 7 months. Enforcement is fastest in Kaduna and Kano, where it can be completed in about 1 month.[34]Contract enforcement costs include court, attorney and enforcement fees. Resolving a commercial dispute is cheapest in Kaduna, where it costs plaintiffs 13 percent of the value of the debt and most expensive in Cross-River, where it cost 53 percent.[35] For Nigeria as a whole, the public increasingly resorts to the court system and are more willing to litigate and seek redress, notwithstanding the problems. However, use of courts does not automatically imply fair or impartial judgment[36] In the World Bank's Publication[37], which surveyed 181 countries including Nigeria, it reported that the changes by Nigeria have led to some improvements in the way business is conducted, but more needs to be done in the area of reforms. Regarding the enforcement of contracts Nigeria was ranked 90 out of 181 countries surveyed, a slight improvement compared with its ranking of 93 out of 178 countries in 2008. In addition, the report revealed that contract enforcement required 39 procedures and 457 days, the cost of which averaged 32% of the value of the contract in Nigeria. This is in comparison to contract enforcement in OECD countries that required 30.8

[33] Ibid.
[34] ibid. this has been adopted in 2013 there is an average of 40 procedures to be followed by a plaintiff from filing to enforcement of contract. See doing business 2014. Op cit.
[35] ibid this position has remarkably improved by 2013 as the average time frame for enforcing contracts in Nigeria is 447 days see doing business 2014 op cit
[36] 2009 Investment Climate Statement-Nigeria, op cit
[37] Doing Business in Nigeria 2009

procedures, spanning 462.7 days at a cost of 18.9% of the claim; and Sub-Saharan African countries that require 39.4 procedures, 659.7 days and 48.9% of the claim[38] The 2014 Doing Business report maintain the indices of the previous years on factors that influence the flow of FDI including ease in enforcing contracts. This year's rankings on the ease of doing business are the average of the economy's percentile rankings on the 10 topics, which included starting a business, dealing with, construction permits, getting electricity, registering property, paying taxes, trading across borders, getting credit, enforcing contracts, protecting investors, and resolving insolvency.[39] The literature on the causes of delay in contractual judgment enforcement *simpliciter* are also in agreement with causes of delay in all other type of cases in our courts. The factors identified above constitute a mere fraction and assessments of what in practical terms hinder the trial andenforcement of the contractual judgment process. Therefore, this research further identifies the following:

4.1.1 Problem with the judicial system

By the problem with our judicial system, we mean in the area of trials of contractual disputes by the judges of the States High courts and Federal High court and the amalgamation of all sorts of cases. These cases include criminal, matrimonial, enforcements of fundamental Human rights and the Civil causes that involve the trials and the enforcements of contractual judgment in these courts. This is with a view to explain how these practices affect the effective trials and enforcement of contractual judgments.

[38] 2009 Investment Climate Statement-Nigeria, op cit at P. 6
[39] visited 6th July 2014.

The judicial powers of all sorts are conferred on the courts. The Constitution of the Federal Republic of Nigeria 1999, vests on the judiciary the power to adjudicate on matters arising between parties. Chapter 1, Part II, Section 6 of the Constitution states as follows:

(1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.

(2) The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.

(3) The courts to which this section relates, established by this Constitution for the Federation and for the States, specified in subsection

(5) (a) to (1) of this section, shall be the only superior courts of record in Nigeria; and save as otherwise prescribed by the National Assembly or by the House of Assembly of a State, each court shall have all the powers of a superior court of record.

(4) nothing in the foregoing provisions of this section shall be construed as precluding: - (a) the National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court; (b) the National Assembly or any House of Assembly, which does not require it, from abolishing any court which it has power to establish or which it has brought into being.

(5) *This section relates to: -*

(j) such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws; and

(k) Such other court as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.

(6) The judicial powers vested in accordance with the foregoing provisions of this section-

- *(a) Shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law*
- *(b) shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;*
- *(c) shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution;*
- *(d) shall not, as from the date when this section comes into force, extend to any action or proceedings relating to any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law.*

There is generally no specialty in Nigerian courts. Specialty in the form of the areas and subject matter the courts should entertain. To this extent, however, it is important to note that the courts[40] have equally risen to their responsibilities and this is being felt in many areas of adjudications, including pre-election and election petition issues, tenure elongation, the registration of political parties, the interpretation of party rules and regulations. The interpretation of the Constitution as it relates to State and Federal powers, the powers of the executive, the practice and procedure of the legislative arm of government, the regulation of political parties and the interpretation of constitutional powers and rights and all civil and criminal matters.[41]

In Nigeria, major commercial disputes are brought in the State High courts[42], which have unlimited jurisdiction[43] to hear all matters other than those which fall within the exclusive jurisdiction of the Federal High Court[44]. This is because the civil jurisdiction of magistrates' courts is limited to matters involving claims up to a limit of NGN1, 000, 000.[45] The judges of the State High courts handle all sorts of disputes including Elections petitions[46] and preside over investigative and judicial/ administrative panels of inquiries in most parts of the country.

[40] By the provision of Section 6 of the Constitution of the Federal Republic of Nigeria (CFRN) 1999, the courts are vested with judicial power
[41] Adelanwa B. ' The Courts And Management of Election Petitions**' Daily trust newspaper** 2 May 2011
[42] Established under the provision of section 270 Constitution of the Federal Republic of Nigeria, 1999.
[43] Section 272 ibid
[44] Under section 251 of the 1999 Constitution, the Federal High Court has jurisdiction, to the exclusion of the state high courts, over specific areas of law such as: Revenue, Company taxation, Customs and excise, Banking, Aviation and Shipping.
[45] See The Magistrate Courts Law 2000
[46] Which by the provision of Section 285 of the Constitution of the Federal Republic of Nigeria 1999 established one or more Election Tribunals for the Federation to be known as the National Assembly Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions ascertained therein.

The same judges of the High Courts are assigned to handle Elections Petitions in states other than their state after the general elections every (4) four years[47] to the detriment of the trials and enforcements of pending cases in their regular court.

A tribunal is a panel of officials – mostly judicial officers – appointed to adjudicate on particular issues[48]. It is an *ad-hoc* court. The rationale, initially for the creation of tribunals is to decongest the regular courts and to ensure speedy determination of peculiar matters. However, this is done at the expense of a huge number of contractual and other pending cases at the regular court.

Judges have had to make sure that they work very hard to ensure that justice was not only done to each of the matters, be it in the Election Tribunal or in the regular court, placed before them but that the disputes were resolved on time. The same judges also had their regular court cases pending and this has often created an enormous strain on the courts, particularly as it relates to the trial and subsequent enforcement of the regular cases in their courts. In spite of the statutory and constitutional provisions to ensure the quick conclusion of election petitions, it is sad that election petitions are still laboriously slow. This tardiness in election petitions threatens to upset our delicate democratic balance. There have been too many civil unrests and political disturbances owing to unresolved election complaints. As election petitions drag for indeterminable periods, grievances linger, breeding anxiety and uneasiness and leading to an inevitable eruption of rage. The cliché, justice delayed is justice denied is perhaps truest in the context of election petitions.

The waiting period before the disposal of election petitions dims the contesting party's hope of enjoying the fruit of his litigation, if he succeeds. While the tribunal is taking

[47] The current democratic experiments starts in 1999, than in 2003, 2007 and the most recent general elections in April 2011.
[48] Joyce Hawkins (ed) *The Oxford Mini reference Dictionary* (1995: Oxford University Press).

its time, an 'illegitimate' president, governor or legislator may be taking the privileges of an office to which he has no valid claim. In many cases, at the time the election petition is finally concluded, it makes no difference to the 'illegal' occupant of the office, for he would have taken virtually all there is to the tenure.[49] Worst still, the contractual and other commercial disputes are kept in abeyance and adjourn sina die at the regular courts until the return of these judges back to their duty posts.

To put it more succinct this legal problem and how it affects the speedy enforcement of contractual judgments in our courts is on the composition of the Election Tribunals throughout the Nigerian Federation. This is one of great challenges posed in adjudicating any electionprocess is the number of judges required to constitute a Tribunal. The 6th Schedule of the Constitution of the Federal Republic of Nigeria 1999 stipulates as follows;

1. *(1) A National Assembly Election Tribunal shall consist of a Chairman and four other members.*
2. *(2) The Chairman shall be a Judge of a High Court and the four other members shall be appointed from among Judges of a High Court, Kadis of a Sharia Court of Appeal, Judges of a Customary Court of Appeal or other members of the judiciary not below the rank of a Chief Magistrate.*
3. *(3) The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be.*

(1) A Governorship and Legislative Houses Election Tribunal shall consist of a Chairman and four other members.(2) The Chairman shall be a Judge of a High Court and the four other members shall be appointed from among Judges of a High Court, Kadis of a Sharia Court of Appeal, Judges of a Customary Court of Appeal or members of the judiciary not below the rank of a Chief Magistrate.(3) The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be.

[49] Franklin O. The Judicature: Its Role, Monitoring and Fumigation—NJC Probe March 15th, 2011

A quick mental calculation shows the implication of the total number of tribunals, judges and complimentary court staff required to sit per time, per zone, per types of matter across the nation. We can as wells imagine the cost implication for provision of needed facilities for the execution of the Tribunal proceedings.

It also has adverse effects on ongoing cases, which invariably includes contractual trails and its judgments enforcements before some of these regular courts with consequential impact on cost to innocent litigants. This retards other judicial duties because a large number of judicial officers are withdrawn from their regular duties to attend to Election Tribunal matters. It leads to delay in dispensation of justice, apprehension on the part of litigants simply due to anxieties arising from exigency of electoral matters.

In the context of commercial law adjudication, the present scenario, which requires a Judge to stand aloof from the dusty arena of conflicts, appears to be out of tune with the new development which sees the Judge as an activist for speed and justice delivery. This non-intervention stance of the court often resulted in litigants seizing control of the court to make the ultimate action of quick and fair redress almost an illusion. An environment where commerce is conducted under extreme caution, suspicion and prudence portends a snail-slow speed in all dealings with serious fall-outs in all facets of the economy. For fear of ending up with a wasteful and never-ending court case businessmen may opt out of an otherwise legitimate and beneficial dealing completely. As it is for the individual, so it is for the mercantile community – corporate bodies, banks, insurance companies, chambers of commerce and indeed Government bodies.

Other factors in relation to the problem of the legal system are the absence of separate courts for Elections issues in form of Constitutional Court, and a Commercial division of the

High Court responsible to handle contractual and other commercial cases. Judicial reform needs constant fine-tuning, establishing separate commercial courts with tailor-made rules for commercial cases and reducing the long delays in the trial and enforcement of contractual and other commercial disputes. Specialized commercial courts result in faster, cheaper contract enforcement. Countries that have specialized commercial courts, or specialized commercial divisions in general courts, resolve commercial disputes about 30 percent faster than countries that do not.[50] In addition, commercial courts often require less formal procedures resulting in faster trials.[51]

4.1.2 Problem with the rules of court

The slow pace of judicial processes, alongside undue delays and incessant adjournments that have become endemic in the Nigerian Judicial System are in some circumstances the effect of the civil procedure rules, enacted to regulate all civil proceeding before a State or Federal High Courts.

The problem is not only limited to the number of procedures a litigant is required to comply in the trial and subsequent enforcement in commercial dispute, but also in the fact that there are a number of High Court Civil Procedure Rules as the are states in the Nigerian Federation.

The issue is how does the absence of a Uniform Civil Procedure Rules applicable throughout the country has significantly contributes to delays in trials, including especially in contractual and other commercial cases, by this lack of reform in the civil procedures system in Nigerian superior courts.

[50] World Bank (2007) reproduced in Doing Business in Nigeria 2008. At P. 5.
[51] Ibid. Currently, in Nigeria only Abuja and Lagos have introduced specialized commercial Divisions.

The various states of Nigeria have their own High Court Civil Procedure Rules[52] governing the procedure for Litigation in the various High Courts of the States. Sometime in 1987 the Law Reform Commission, through the Attorney General of the Federation's Office sent draft Uniform Rules to all the States for promulgation by edicts. From within there had been various calls by legal Practitioners especially, for a Uniform Rules of Court to govern proceedings in the High Courts of the States. It was in response to this that the Law Reform Commission came up with a draft uniform rule for the States High Courts. However, this did not materialized, as the states Judiciary insist on true Federalism to have their independent rules.

The call of the Legal Practitioners was prompted by the difficulty usually encountered by practitioners whose practice covers more than one state of the Federation. The difficulty was accentuated by the fact that most of the Southern States, except the Eastern States had almost a uniform set of High Court Rules whereas the rules in the Northern States were quite different and distinct.[53] Because of the absence of a unified civil procedure throughout the country it has become the practice for lawyers to buy the different rules of court of all states in which they practice or had the ambition of practicing. In line with this argument that a standard unified civil procedure rules, though against the principles of federalism on its face, is in the best interest of our laws and procedure[54].

---

[52] See for example: (i) Oyo State of Nigeria High Court (Civil Procedure) Rules as Amended up to 26th April 1976.
(ii) Niger State High Court (Civil Procedure) Rules 1977: Niger State of Nigeria Gazette4 No. 2 Vol. 3 of 27th February 1978. Kano State High Court Civil Procedure Rules 1988
(iii) Kwara State of Nigeria High Court (Civil procedure) Rules 1975.
[53] Emeka Maduewesi02 April 2010 www.makingacaseforuniformcivilproceedurerules.com **visited last on 25th July 2011.**
[54] Ibid

The problem with the political and legal systems in Nigeria is that the Constitution is subsequent to most of our laws[55]. For that reason, these "existing laws" were not subjected to constitutional litmus test. Our Judges, who cannot be described as "timorous souls", do rather cautious, not want to upturn the apple cart by declaring any existing law or procedure unconstitutional. Our laws may be compared to an overbuilt and dilapidated house with conflicting architectural styles and a crumbling foundation, a sick patient who is about to expire, and a factory that has been littered with so much garbage that it can no longer operate productively[56].

The absence of standard unified civil procedure rules, though against the principles of federalism on its face, is in the best interest of our laws and procedure and is immeasurably affecting the effective, speedy and cheap contractual judgment process in the country.

In going into the merits of a unified civil procedure rules, we have the American drive to unify laws and procedure. Theoretically, when appearing before any court or administrative tribunal, what every counsel should know in equal measure, if possible are the rules of evidence, the rules of procedure and professional ethics; counsel need not know the facts of the cases equally since they see the same case from different angles[57].

Having a Uniform federally applicable rule for the high courts will require input from the best brains in the country, not just the best brains in a state and can produce the following advantages;

Firstly, one major problem to be solved by having a uniform set of rules for all the states high courts in Nigeria is that less money and time would be spent learning the rules. Students would learn only four sets of civil procedure rules, that is to say, the Uniform Civil

[55] ibid
[56] ibid
[57] EmekaMaduewes'' 02 April 2010 visited last on 25th July 2011.

Procedure Rules for State High Courts, the Federal High Court Civil Procedure Rules, the Court of Appeal Rules and the Supreme Court Rules.

On being admitted to the bar, counsel would commence work with what was taught at the Law School without having to learn the particular rules of the particular state where counsel chose to set up practice. More importantly, counsel who sets up practice in Onitsha would not have to learn the civil procedure rules of the neighboring states, especially those of Delta, Enugu and Imo. Again, any counsel appointed to the appellate court straight from the bar or any state high court judge elevated to the higher bench would not have to learn 38 different civil procedure rules to discharge his or her judicial duties effectively[58].

Secondly, to produce a good set of rules is a costly venture. To produce 38 sets is even more costly. Having a unified rule would reduce the cost. If each state spends Five Million Naira as sitting allowance for their ad hoc rules committee, 37 jurisdictions would have spent One Hundred and Eighty five million. A national rules committee would spend less than a quarter of that cost and still produce a better document. Again, in printing and publishing the rules, there is strength in numbers. We all know that when it comes to printing, the more you print, the less the average cost. It will cost less to produce a Uniform High Court Civil Procedure Rules than to produce different sets for each state and the federal capital territory. As for procurement, counsel need only one copy, not a copy for each court he or she appears[59].

Thirdly, Most of us do not know how much it costs to produce one software you can pick up over the counter. It costs even more to design and produce customized, enterprise grade software. If we have uniform rules, it means we can harmonize our resources to

[58] Emeka Maduewesi '' 02 April 2010 **visited last on 25th July 2011.**
[59] ibid

commission the creation of Nigerian dedicated software for use by all the courts and law firms. This means that your word-processing, document management, clients trust accounts and firm accounting procedures would be in the same software. As you transmit documents from a High court to the Court of Appeals, counsel need not worry that the two systems may not be on speaking terms. When counsel transmits documents from his or her desktop to another counsel or any court, the fear that garbage may spill out at the other end would be needless. Again, this holistic integration would make for proper compliance with solicitors trust accounting; this also shows the relationship between procedure and ethics[60].

Fifthly, Uniform Rule means uniform standards. Uniform internationally acceptable standard of the rules of procedure to be used all over the country. The spill over effect is that, the process of our trials of contractual and other commercial disputes and judgment enforcement process will be of that slandered.

Lastly, whenever there is just one uniform rules for all the high courts, there would be minimal confusion. This is the logical product of uniformity of standards. Counsel based in Onitsha, who is charged with professional malpractice for violating the Rules of Court at Asaba, will not plead mistake of fact. Similarly, there would not be discrepancies in the efficiency of contracts enforcement processes and mechanism in States of the Nigerian Federation.

The problem with the Civil Procedure Rules has been identified and confronted in Lagos State Nigeria. On 16 October 2000, the Summit of Stakeholders on the Administration of Justice in the 21st Century concluded that reducing delays and decongesting the courts would be impossible without reviewing the court rules. The review started in April 2002.

[60] Emeka Maduewesi '' 02 April 2010 visited last on 25th July 2011.

The 10 members of the Rules Committee were chosen from private attorneys, serving and retired justices, the Lagos Ministry of Justice, and representatives of the Lagos branch of the Nigerian Bar Association. A non-governmental organization of human rights lawyers, prepared afirst set of draft rules, inspired largely by the U.K. court rules after the Woolf reform. The Nigerian Institute of Advanced Legal Studies then drafted a second set of rules. From April 2002 to early 2003, the Rules Committee met weekly and sometimes daily to review existing rules and to take the best ideas from the 2 sets to produce a final version[61].

On important issues, such as introducing pretrial conferences, a committee member was asked to prepare a separate memo to be discussed at the following committee meeting. Heated debates took place on contentious issues, such as putting a cap on the number of extensions and adjournments, which some committee members said would violate fundamental rights.

In early 2003, the Rules Committee presented its draft rules at the second Summit of Stakeholders. All key officers of the justice system were present, which was particularly useful in winning over a group of opposing lawyers. The Rules Committee amended some of its rules and finalized them by the end of 2003. In March 2004, the Lagos State Legislature adopted them without changes and in June 2004, the new rules entered into force.[62] Currently, the Lagos Civil Procedure Rules adopt the front-loading procedure and so although previously a writ on its own could be issued, this is no longer acceptable. A writ of summons is not accepted for filing at the court Registry unless it is accompanied by**:**

a. A statement of claim.

b. A list of witnesses to be called at the trial.

[61] See Sabine Hertveldt ‘ Repairing a car with the engine running’ Enforcing Contracts CASE STUDY: NIGERIA (2008)
[62] Ibid

c. Written statements on oath of the witnesses.

d. Copies of every document to be relied on at the trial.

Every originating process must be served within six months[63] although a judge can order two renewals of the writ, no originating process will be in force for more than 12 months without being served.[64]On service of the originating process, the defendant has 42 days to file a statement of defense and counter-claim (if any) to which the claimant can respond by filing a reply (and defense) within the following 14 days[65]within 14 days after close of pleadings, the claimant must apply for a pre-trial conference notice and if it does not, the defendant can do this or apply to dismiss the action.[66] The pre-trial conference must not exceed three months in duration and the judge has power to dismiss a claim or enter final judgment against a defendant if the party fails to attend the pre-trial conference, obey a scheduling order or is "substantially unprepared to participate" or fails to participate "in good faith"[67]. Any such order that is made can be set-aside within one day of the judgment, or an extended period (not exceeding the three-month preconference trial period) as the judge may allow. For any delay in complying with the time limits, the party in default shall pay to the court a daily default fee of NGN200 (about US$2) for each day of delay in addition to the costs awarded on an application for extension of time.[68] It is a constitutional requirement that

[63] *Order 6 Rule 6(1), Lagos Civil Procedure Rules*.
[64] *Order 6 Rule 7, Lagos Civil Procedure Rules* Funke Adekoya, ÆLEX Dispute Resolution 2006/07 Country Q&A Nigeria Cross-border Dispute Resolution Handbook 2006/07 and is reproduced with the permission of the publisher, Practical Law Company. For further information or to obtain copies please contact jennifer.mangan@practicallaw.com, or visit . Similar front-loading Procedure have now been adopted in the Practice Direction 2010 made by the Chief Judge of Kano State under the Kano State High Court Civil Procedure Rules 1988.
[65] *Order 15 Rule 1(3), Lagos Civil Procedure Rules*.
[66] *Order 25Rule 1(3) Lagos Civil Procedure Rules*.
[67] *Order 25 Rule 6, Lagos Civil Procedure Rules*.
[68] *Order 44 Rule4, Lagos Civil Procedure Rules*

judgments must be delivered within three months of the conclusion of the hearing, although failure to do so will not invalidate the proceedings and the judgment, [69] Judges are mindful of this rule and in most cases; judgments are delivered within that time frame.

The duration of a matter depends on the type and complexity of the action. However, unless a matter is undefended it is unlikely that judgment will be given in less than one year from beginning of the action.

The costs of a case (whether simple or complex) depend on:

a. The skill, expertise and seniority of the lawyer involved.

b. The subject matter of the dispute.

c. The importance of the matter to the client.

d. The time spent on the matter.

Costs can range from a few thousand Naira to millions of Naira[70] The enforcement of a judgment depends on its terms. A declaratory judgment is not capable of enforcement as it merely states the rights of the parties. Judgments for specific performance, damages and injunctions can be enforced through:

a The issuance of a writ of execution.

b. Starting garnishee proceedings.

c. Contempt proceedings.

A domestic judgment of a court in one state in Nigeria can be enforced within the jurisdiction of another state court on the registration of the judgment in the enforcing court. It is then enforced in the same manner as a judgment of that court.[71] Nigeria has a Foreign

[69] See section *294, Constitution Federal Republic of Nigeria 1999*.
[70] Funke Adekoya, ÆLEX Dispute Resolution 2006/07 Country Q&A Nigeria Cross-border Dispute Resolution. Op.cit.
[71] Ibid

Judgment (Reciprocal Enforcements) Act, which is based on reciprocity of treatment. This statute enables judgments that are given in a foreign country to be enforceable in Nigeria by Nigerian courts.

An application to register a foreign judgment must be made within six years of the date of the judgment or any appeal in relation to that judgment.[72] A judgment is not registered if it is wholly spent (that is, the time for enforcing the judgment has expired according to the statute of limitations, or the terms of the judgment have been fully complied with elsewhere), or it would not be enforceable in the country of the original court. The affected party can also set the registration aside on application on the grounds that:

a. The Foreign Judgments (Reciprocal Enforcements) Act does not apply to the judgment or it was registered in breach of the Act.

b. The original court lacked jurisdiction.

c. Insufficient time was given to the non-appearing defendant in the original court to prepare for the matter.

d The judgment was obtained by fraud or is contrary to the public policy of Nigeria.

e. The rights under the judgment are not vested in the person applying for registration, or the registering court in Nigeria is satisfied that before judgment in the original court was given, the matter in dispute had been the subject of a final judgment of a court elsewhere that had jurisdiction in the matter.

Once the judgment has been registered, it has the same force and effect as a judgment of a Nigerian court[73].

[72] *section 4, Foreign Judgment(Reciprocal Enforcements Act*
[73] Ibid

Filing and service Plaintiff requests payment: Plaintiff or his lawyer asks Defendant orally or in writing to comply with the contract

1. Plaintiff's hiring of lawyer: Plaintiff hires a lawyer to represent him before the court.

k. Plaintiff's filing of summons and complaint: Plaintiff files his summons and complaint with the court, orally or in writing

l. Plaintiff's payment of court fees: Plaintiff pays court duties, stamp duties, or any other type of court fee.

2. Registration of court case: The court administration registers the lawsuit or court case. This includes assigning a reference number to the lawsuit or court case.

m. Assignment of court case to a judge: The court case is assigned to a specific judge through a random procedure, automated system, ruling of an administrative judge, court officer, etc.

3. Court scrutiny of summons and complaint: A judge examines Plaintiff's summons and complaint for formal requirements.

n. Judge admits summons and complaint: After verifying the formal requirements, the judge decides to admit Plaintiff's summons and complaint

4. Delivery of summons and complaint to person authorized to perform service of process on Defendant: The judge or a court officer delivers the summons to a summoning office, officer, or authorized person (including Plaintiff), for service of process on Defendant.

5. First attempt at physical delivery: A first attempt to physically deliver summons and complaint to Defendant is successful in the majority of cases.

6. Second attempt at physical delivery: If a first attempt was not successful, a second attempt to physically deliver the summons and complaint to Defendant is required by law or standard practice.

o. Application for pre-judgment attachment: Plaintiff submits an application in writing for the attachment of Defendant's property prior to judgment. (see assumption 5)

p. Decision on pre-judgment attachment: The judge decides whether to grant Plaintiff's request for pre-judgment attachment of Defendant's property and notifies Plaintiff and Defendant of the decision. This step may include requesting that Plaintiff submit guarantees or bonds to secure Defendant

7. Guarantees securing attached property: Plaintiff typically submits guarantees or bonds to secure Defendant against possible damages to attached property. (see assumption 5)

8. Pre-judgment attachment. Defendant's property is attached prior to judgment. Attachment is either physical or achieved by registering, marking, debiting or separating assets. (see assumption 5)

9. Custody of assets attached prior to judgment: Defendant's attached assets are put under enforcement officer's or (private) bailiff's care. (see assumption 5)

Trial and Judgment Defendant's filing of defense or answer to Plaintiff's claim: Defendant files a written pleading, which includes his defense or answer on the merits of the case. Defendant's written answer may or may not include witness statements, expert statements, the documents Defendant relies on as evidence and the legal authority

10. Deadline for Plaintiff to answer Defendant's defense or answer: Judge sets the deadline by which Plaintiff will be allowed to answer Defendant's defense or answer.

11. Plaintiff's written response to Defendant's defense or answer: Plaintiff responds to Defendant's defense or answer with a written pleading. Plaintiff's answer may or may not include a witness statements or expert (witness) statements.
12. Filing of pleadings: Plaintiff and Defendant file written pleadings and submissions with the court and transmit copies of the written pleadings or submissions to one another. The pleadings may or may not include witness statements or expert (witness) statements.
13. Adjournments: Court procedure is delayed because one or both parties request and obtain an adjournment to submit written pleadings.
14. Framing of issues: Plaintiff and Defendant assist the court in framing issues on which evidence is to be presented.

q. Court appointment of independent expert: Judge appoints, either at the parties' request or at his own initiative, an independent expert to decide whether the quality of the goods Plaintiff delivered to Defendant is adequate. (see assumption 6-b of this case)
15. Notification of court-appointment of independent expert: The court notifies both parties that the court is appointing an independent expert. (see assumption 6-b of this case)

r. Delivery of expert report by court-appointed expert: The independent expert appointed by the court delivers his or her expert report to the court. (see assumption 6-b of this case)

18 Mediation hearing: The judge during this informal meeting with the parties encourages them to settle the case. The judge acts as mediator. If the case cannot be

settled, the judge may draft a pre-trial conference report, after which the case may be allocated to another judge

s. Request for interlocutory order: Defendant raises preliminary issues, such as jurisdiction, statute of limitation, etc.

t. Court's issuance of interlocutory order: Court decides the preliminary issues the Defendant raised by issuing an interlocutory order.

u. Plaintiff's appeal of court's interlocutory order: Plaintiff appeals the court's interlocutory order, which suspends the court proceedings.

19. Plaintiff's appeal of court's interlocutory order: Plaintiff appeals the court's interlocutory order, which suspends the court proceedings.

v. Setting of date(s) for oral hearing or trial: The judge sets the date(s) for the oral hearing or trial.

20. Pre-trial conference aimed at preparing for trial: The judge meets with parties to make practical arrangements for the trial (for example, the number of witnesses parties intend to call on during trial, how much time each party is given to present oral arguments etc.).

w. List of (expert) witnesses: The parties file a list of (expert) witnesses with the court. (see assumption 6-a)

21. Adjournments: Court proceedings are delayed because one or both parties request and obtain an adjournment to prepare for the oral hearing or trial.

22. Adjournments: Court proceedings are delayed because one or both parties request and obtain an adjournment to prepare for the oral hearing or trial.

23. Adjournments: Court proceedings are delayed because one or both parties request and obtain an adjournment to prepare for the oral hearing or trial.

x. Final arguments: The parties present their final factual and legal arguments to the court either by oral presentation or by a written submission.

24. Writing of judgment: The judge produces a written copy of the judgment.

25. Registration of judgment: The court office registers the judgment after receiving a written copy of the judgment.

26. Plaintiff's receipt of a copy of written judgment: Plaintiff receives a copy of the written judgment.

27. Notification of Defendant of judgment: Plaintiff or court formally notifies the Defendant of the judgment. The appeal period starts to run the day the Defendant is formally notified of the judgment.

28. Appeal period: By law, Defendant has the opportunity to appeal the judgment during a period specified in the law. Defendant decides not to appeal. Judgment becomes final the day the appeal period ends.

29. Reimbursement by Defendant of Plaintiff's court fees: The judgment obliges Defendant to reimburse Plaintiff for the court fees Plaintiff has advanced, because Defendant has lost the case.

Enforcement of judgment Plaintiff's hiring of lawyer: Plaintiff hires a lawyer to enforce the judgment or continues to be represented by a lawyer during the enforcement of judgment phase.

30. Plaintiff's approaching of court enforcement officer or (private) bailiff to enforce the judgment: To enforce the judgment, Plaintiff approaches a court enforcement officer such as a court bailiff or sheriff, or a private bailiff.

y. Plaintiff's request for enforcement order: Plaintiff applies to the court to obtain the enforcement order ('seal' on judgment).

31. Attachment of enforcement order to judgment: The judge attaches the enforcement order ('seal') to the judgment.

z. Delivery of enforcement order: The court's enforcement order is delivered to a court enforcement officer or a (private) bailiff.

32. Request to Defendant to comply voluntarily with judgment: Plaintiff, a court enforcement officer or a (private) bailiff requests Defendant to voluntarily comply with the judgment, giving Defendant a last chance to comply voluntarily with the judgment.

33. Identification of Defendant's assets for attachment by court official or Defendant: Judge, a court enforcement officer, a (private) bailiff or the Defendant himself identifies Defendant's movable assets for attachment.

34. Contestation of selection of assets identified for attachment: The party, Plaintiff or Defendant, who was not involved in the designation of the assets to be attached, contests the selection of assets for attachment.

35. Plaintiff's identification of Defendant's assets for attachment: Plaintiff identifies Defendant's assets for attachment.

36. Notification of intent to attach: A court enforcement officer or (private) bailiff notifies other creditors of the intent to attach Defendant's goods.

37. Attachment: Defendant's movable goods are attached (physically or by registering, marking or separating assets).
38. Sale through public auction: The Defendant's movable property is sold at public auction.

    Direct sale: Defendant's property is sold but not through a public auction. (assumption 9 is disregarded here)
39. Distribution of proceeds: The proceeds of the public auction are distributed to various creditors (including Plaintiff), according to the rules of priority.
40. Reimbursement of Plaintiff's enforcement fees: Defendant reimburses Plaintiff's enforcement fees, which Plaintiff had advanced previously.
41. Payment: Court orders that the proceeds of the public auction or the direct sale be delivered to Plaintiff.[74]

It is clear that absence of a unified rules in the country is both time consuming and costly and immeasurably hinder the smooth trial and enforcement of contractual judgment, However, the Lagos model of the Civil Procedure Rules is to a large extent simplified and accommodative and could well be adopted by all the States of the Nigerian Federation as a Uniform Civil Procedure Rules for Nigeria.

[74] The information was collected as part of the Doing Business project, which measures and compares regulations relevant to the life cycle of a small- to medium-sized domestic business in 183 economies. The most recent round of data collection for the project was completed in June 2010. **Enforcing Contracts in** Nigeria International Finance Corporation World Bank Doing Business Measuring Business Regulations (2010)

4.1.3 Problem with the role of the Bailiffs;

According to Black Law Dictionary[75] a Bailiff: " is a court officer or attendant who has charge of a court session in the matter of keeping order, custody of the jury and custody of prisoners while in court. One to whom some authority, care, guardianship or jurisdiction is delivered, committed or entrusted. One who is deputed or appointed to take charge of another's affairs, an overseer or superintendent; keeper; protector or guardian, a steward. A person acting in ministerial capacity who has by delivery the custody and administration of land or goods for the benefit of the owner or bailor and is liable to render an account thereof"

This officer of the court exercise these duties and responsibilities on behalf of a Sheriff[76] who is also defined[77] as "the chief executive and administrative officer of a county, being chosen by popular election. His principal duties are in aid of the criminal courts and civil courts of record such as serving process, summoning juries, executing judgments, holding judicial sales and the likes. He is also the chief conservator of sales and the likes"

What we can discern from these definitions are the invaluable role of the Sheriffs and Bailiffs in the administration and dispensation of justice and particularly in given effect to the judgments of our courts otherwise known as execution or enforcement of Judgments.

The Law[78] which is An Act to make provision for the appointment and duties of sheriffs the enforcement of judgments and orders, and the service and execution of civil process of the Courts throughout Nigeria. Particularly provide that There shall be appointed for each State of the Federation and the Federal Capital Territory, Abuja, a fit and proper

[75] 5th Edition, P. 129
[76] See section 5 SCPA 1990 Provides " the Sheriffs may appoint such number of persons as bailiffs as may be necessary"
[77] Black Law Dictionary 5th Edition P.1234
[78] Sheriffs and Civil Process Act Chapter 407 Laws of the Federation of Nigeria 2004

person to be the Sheriff for the State or for the Federal Capital Territory, Abuja.[79] Similarly, the Law[80] provides that there shall be appointed for each State of the Federation and the Federal Capital Territory, Abuja, a fit and proper person to be the Deputy Sheriff who shall be subject to the general control and direction of the Sheriff. These officers are at the helms of affairs in the service of court processes and execution of judgment in Nigeria. They speed up or retard the process of trial and enforcement depending of how professional and efficient they act.

However, the Sheriff is also under a duty to act in the discharge of the obligations, through the bailiffs. The Law provides,[81] that the sheriffs may appoint such number of persons as bailiffs as may be necessary. The Act further spelt out how to carry out the functions of the bailiffs. The Act provides that every bailiff and every other person who has authority to intermeddle with the execution of writs issued by any court of record, shall before he does so make any declaration, which shall be exempted from stamp duty, in the form in the First Schedule to this Act, or to the like effect, before any judge or magistrate for the division or district in which he exercises such authority.[82]Court Bailiff exercises an important role in the discharge of judicial functions. The bailiffs are actually the officers of the court on the ground in giving effect to judicial pronouncements, order and judgments. The duties of the bailiff runs from filling of cases and run through to the execution of the judgment of the court. A bailiff is a court attendant entrusted with duties such as the maintenance of order in a courtroom during a trial. An official who assists a sheriff and who has the power to execute writs, processes, and arrests

[79] See Section 3
[80] See Section 4
[81] Section 5
[82] See Section 6

On the one hand, the Bailiffs and their assistants serve summonses and other important legal documents on parties as required by a Court or Tribunal or as requested by a person who is a party to litigation. For example, a court or tribunal hearing which parties are required to attend clearly cannot proceed unless there is proof that the parties concerned have had the summonses to attend properly served on them in a manner specified by law. On the other hand, the Bailiff plays an important role in promoting full compliance with Court and Tribunal judgments and orders. For example if a judgment debtor who has been ordered to settle a debt, or a person who has been ordered to vacate premises, fails to do so, application can be made to the Bailiff Section to take the appropriate steps to try to recover the debt or deliver the premises to the applicant.[83] The duty of the bailiff is to the judgment creditor, he must carry out the execution as soon as opportunity arises[84]

While the Bailiff will always use its best efforts under the law to assist a litigant, it should be noted that judgments could not always be enforced, for example, if the defendant is penniless, his whereabouts are unknown, or where the bailiffs are ignorant of their power under the law.

It should also be noted that Bailiffs carry out execution of orders and judgments upon the application of the applicant[85]. It is not the job of the Bailiff to trace the whereabouts of the debtors or to ensure that the sum owed to the applicant is recovered. Further, there is no

[83] Bailiff's Office, Bailiff's new Territories (Regional tsuan wen) Judiciary, 6th Edition (2010) at P. 5
[84] See Domine vs Grimsdall (1937) 2 AER 119. See also Section 40 SCPA 1990.
[85] See Fabunmi VS Oyewusi (1992) 1 NWLR PT.215 P. 35 at P. 37.

guarantee that the Bailiffs will succeed in getting any sum or seizing any goods of value. In such cases, the judgment creditor, still have to bear the costs of execution[86].

Bailiffs execute orders and judgments of the court. They are authorized to:

i. Seize goods and chattels at a value equivalent to the judgment debts plus the incidental expenses of the execution; and

ii. Repossess lands / premises.[87] Despite these enormous powers of the Sheriff and bailiffs in the process of trials and enforcement of contractual judgments, in Nigeria majority of the bailiffs in all our courts including the courts of records are either retired police or military officers with no formal training on their powers and obligations in accordance with the provision of the Law.[88] In many case upon their employment with the states or Federal judiciaries the bailiff learn on the job thereby making the process of moving the cases through the system incoherent, complex and unprofessional. The unprofessional handling of these powers by the bailiffs has particularly been identified as one of the factors for delays in moving civil cases through the system and ineffective contractual judgment enforcement in Nigeria.[89] The findings in the report[90] reveals that lack of adequate training had meant that both judges and support staff were not up to date with the law or with improved techniques of case management that ensure speedier and more efficient handling of cases, reduction in

[86] Ibid
[87] ibid. The writ of execution is an absolute justification to the Sheriff through the Bailiffs for what is done in Pursuance of it even though the judgment on which it is founded ma be set aside afterward, See Ugaga Okwoche vs Peter Dibia (1994) 2 NWLR pt.325 page 195 at P. 204
[88] These powers of the bailiffs are available in Rules of court of various States and the Sheriffs and Civil Process A ctchapter 407laws of the federation of Nigeria 1990 (LFN 2004), which is An Act to make provision for the appointment and duties of sheriffs the enforcement of judgments and orders, and the service and execution of civil process of the Courts throughout Nigeria.
[89] See Rabiu, A. (2007) Security, justice and growth program, justice component. Rollout of training of judicial officers, Kano state project. DFID report June-November 2007
[90] Ibid

delays and greater respect for the rights of citizens. The lower level of courts staff in the category of bailiffs, messengers, clerks and registrars had not received training for years, some of them had never received training since they were employed. This meant the standard court procedures which facilitated quick disposal of cases as embodied in legislation had been kept in abeyance, because training opportunities were inadequate, and newly appointed staff received their orientation and direction principally from their superiors and predecessors based on tradition rather than from knowledge of the relevant laws.

What obtained at the state judiciary level was total reliance on the National Judicial Institute (NJI) to provide training, without commitment at the state level to meet those needs that NJI courses could not provide. This means that court personnel training needs remained largely unmet.[91]

[91] Ibid.

CHAPTER FIVE

LEGAL FRAMEWORK FOR CONTRACTUAL JUDGMENT ENFORCEMENT

5.1 Enforcement of Contractual Judgments in Nigeria

Enforcement is the last stage of the judicial process after the legal right; claim or interest has ended in a judgment or order, which remains to be enforced. It is the process whereby a judgment or order of court is enforced or to which it is made effective according to law. Most judgments require compliance with their terms. It is only in the case of a declaratory judgment, which merely declares what the right of a party is, without imposing any sanction on a defendant, or directing either of the parties to do anything that execution is not called for or levied. Also execution will be totally unnecessary where there is voluntary compliance with the judgments and orders of the courts.

It is trite that every successful litigant is entitled to the fruit of his judgment. It is also true that the overriding function of the judicial process of enforcement is to enable the judgment creditor reap the fruits of his judgment with a view to obtaining for him due satisfaction, compensation, restitution, performance or compliance with what the court has granted by way of remedy or relief. The process of enforcement is broadly referred to as execution. Lord Denning aptly summarized the process thus**;** Execution means quite simply the process for enforcing or giving effect to the judgment of the court… In case when execution was had by means of a Common Law writ, such as fierifacias; it was legal execution; when it was had by means of an equitable remedy, such as the appointment of a Receiver then it was equitable execution because it was the process for enforcing or giving effect to the judgment of the court.

At all times however, the process of enforcement is at the initiative of the successful party at the trial. In Nigeria, the power of a court to enforce and ensure compliance with its judgment or order is derived from Constitution[1]. This portion of our organic law directs that the judicial powers of the court "shall extend notwithstanding anything to the contrary in this constitution to all inherent powers and sanctions of a court of law".

Outside of our Constitution, other laws that regulate enforcement of judgments in Nigeria are the Sheriffs and Civil Process Act, the Sheriffs and Civil Process Laws of the States and the Judgments (Enforcement) Rules made there under. It must be emphasized that the Judgments (Enforcement) Rules do not apply to proceedings in customary courts because the Sheriffs and Civil Process Act under which the Rules were made defines "court" as including only the High Court and Magistrates' Court. The said Act also defines a judgment as including an order and as a consequence, references to judgments in this piece include the orders of courts. It should be observed that these laws name the Sheriff, the Deputy Sheriffs and the Bailiffs as the officers critical to the entire process of execution of the judgments of courts.

The emphasis in this research[2] has been on the importance of the ability to make and enforce contracts and commercial relationship agreements and resolve disputes as very fundamental factor if markets are to function properly and for foreign investment to flow and flourish. Good enforcement procedures enhance predictability in commercial relationships and reduce uncertainty by assuring investors that local courts will uphold their contractual

[1] See Section 6(6) (a), (b) and (c).
[2] See chapter three supra.

rights promptly.[3] When procedures for enforcing commercial transactions are bureaucratic and cumbersome or when contractual disputes cannot be resolved in a timely and cost effective manner, economies rely on less efficient commercial practices. Traders depend more heavily on personal and family contacts; banks reduce the amount of lending because they cannot be assured of the ability to collect on debts or obtain control of property pledged as collateral to secure loans; and transactions tend to be conducted on a cash-only basis. This limits the funding available for business expansion and slows down trade, investment, economic growth, employment and development. It deals with cross-border investments and concerns contract enforcement through international channels in the event of expropriation of assets.[4] The investors need to examine these mechanisms. From an economy-wide perspective, the issue is not whether a contract can be enforced but rather the cost of the various enforcement mechanisms and their efficacy in improving confidence between contracting parties. To be effective, the costs of enforcement must not outweigh the gains achieved from increased contractual commitment.

Effectiveness of the rule of law in particular must manifest in the keeping of promises or enforcement of contracts. That is the bit, which gives most confidence to investors both locally and internationally. The fact that what is agreed is binding on parties involved and can be enforced with maximum objectivity and ease, gives great confidence to investors as

[3] It should be noted that Nigerian court demonstrated a 'pro-enforcement bias in commercial/contractual settlement/arbitration matters especially 2(two) cases so far (though discontinued before the conclusion of the arbitration proceedings) (a.) Guadalupe Gas Products Corp. v Nigeria (ICSID) Case ARB/78/1- Discontinued on July 22, 1980. b. Shell Nigeria Ultra Deep Ltd. V FRN (ICSID Case ARB/07/18-Discontinued on August 2011. The same in relation to enforcement of arbitration agreement and arbitral award in the case of Onward Enterprises Ltd v MV Matrix (2010) 2 NWLR pt.1179) 530 the court of appeal held that: once an arbitration clause is retained in a contract which is valid and the dispute is within the contemplation of the clause, the court will give regard to contract by enforcing the arbitration clause. It is there fore the general policy of the court to hold parties to the bargain which they freely entered'. See also Continental Sale Limited v R A shipping Inc (2013) 4 NWLR PT.1343 at P. 67

[4] OECD 50 'contract enforcement and Dispute Resolution' Policy framework for Investment. User's toolkit accessed at on 23/12/2011.

they can make and negotiate long-term plans and program without fear that unanticipated changes can alter those arrangements.

There are many ways in which promises are made and kept but the most popular is through the judicial system. This is because those entering into contracts keep them aside the reasons of reputation and its consequential advantages but primarily for fear of lawsuits. Vital posers are: When a firm advertises a program for which the public is expectant and equally made some levels of psychological and financial commitments, does the firms realize that it is some promise or contract that must be kept? When passengers' departure is delayed by airlines, do the airlines realize that it is a violation of contracts and promises made to the customers at the point of purchase of air tickets? When government takes taxes or makes budget and promises to provide electricity for all within a four year period, does it realize that it is a contract or a promise that must be kept? We all know that in this country, keeping promises and enforcing contracts are at a zero level. Even private firms whose prosperity lies largely on the enforcement of contracts are major violators of this very important component of the rule of law.[5] The primary mechanism through which the rule of law affects economic growth and development is through its impact on the system of private property. When people have rights over what belongs to them, they can trade on it. It is difficult for legitimate and lawful economic exchange to take place on properties for which those who possess them have no real right to transfer them. But this right starts with the right to ones life, which is invariably the most fundamental property of any person. Once born, humans find themselves jealously and desperately guarding their lives from harm and death.

[5] Martin, O 'The Rule of Law and Economic Development of Nigeria' @ChatAfrikArticles.com on 4th January 2012.

The Constitution of the Federal Republic of Nigeria 1999 - just like many other constitutions across countries in the world - recognizes these fundamental rights. Accordingly it stipulates that "every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria[6] Every citizen of Nigeria has the right to acquire and own immovable property anywhere in Nigeria…No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law". The question now is: to what extent are peoples fundamental rights to life and property protected in Nigeria? Which investor will gladly want to do business or invest in an environment where the right to his life and wealth generated by him are not fully protected and guaranteed?[7] Nigeria is Africa's most populous nation with an estimated population of over 140[8] million. It offers investors a low-cost labor pool, abundant natural resources, and potentially the largest domestic market in sub-Saharan Africa. Despite these advantages, much of that market potential was unrealized. Impediments to investment include inadequate infrastructure, corruption, an inefficient property registration system, an inconsistent regulatory environment, restrictive trade policies, and slow and ineffective courts and dispute resolution mechanisms.[9] The concern here is the ineffective courts and dispute resolution mechanism. What has now been identified as some of the possible courses and significant barriers to effective courts and

[6] See Chapter 11
[7] Ibid.
[8] National Population Commission (NPC) /NPC%20Releases%202006%20population%20figures%20-%20Nigeria%20Village%20Square.webarchive visited Thursday 3rd July 2014 11:45
[9] Global Trade.Net the Network of International Trade services 'Investment Climate in Nigeria' accessed on visited 23/12/2011

enforcement procedures in Nigeria are firstly, that the legal system failed to make provision for the dedication of judicial officers and judges to handle constitutional and electoral disputes separate from regular contractual and commercial disputes. The same judges are posted and assigned to states of the Nigerian Federation to man the Election Tribunals at election exercise every four years, at the detriment of the regular and pending contractual cases in the various courts. Secondly the lack of uniformity in the Rules of procedure in the High courts and Federal High courts of Nigeria and the number of the procedure a plaintiff is required to follow in the various rules of court for the trial and enforcement of contractual judgment has also been identified to have immeasurably slowed down the effective and speedy trial and enforcement process. Thirdly, even where there is a provision of a distinct courts to handle contractual and commercial cases and a uniform and effective rules of procedure in our states and federal high courts there may still be a slow and ineffective enforcement where the court official, in term of the court registrars, Clarks and bailiffs, responsible to move the contractual cases through the judicial system are either not qualified or lack the training to do the job effectively and in accordance with the provisions of the law.[10] This research identifies the caliber of court bailiffs in Nigerian courts and the level of their training to give effect to the judgment of our courts and clearly indicated how that has affected the smooth and effective judgment enforcement process in Nigeria.

In this chapter this research examines the legal framework for the enforcement of contractual judgment in Nigeria. Only recently[11] has a general consensus emerged that the fair, effective and efficient enforcement of court judgments, including judgments against the State, is of critical importance to the Rule of Law and judicial independence. Indeed, only

[10] See generally chapter three, supra.
[11] Henderson, K (ed) Regional Best Practices: Enforcement of court Judgments, Lesson Learned from Latin America, April 2004, IFES Rule of Law White paper series. P. 1

recently has international jurisprudence, as evidenced by such courts as the European Court of Human Rights and Inter-American Court of Human Rights, given life to the legal principle that the fair and effective enforcement of judgments is required under the universal right to a fair trial. It is now also acknowledged that the timely enforcement of judgments is important to sustainable economic and political reform, democratic governance and the fight against corruption, organized crime and terrorism.

The enforcement of civil judgments has recently been recognized as an essential underpinning of, and even measure of, the Rule of Law in both developed and developing countries. Credibility of the judiciary relies on it. However, in many transition and developing countries, certain enforcement problems appear more serious and intractable than in more developed countries.

It is submitted here that, there are laws in Nigeria for the regulation of the civil trials and enforcement of contractual judgments, what perhaps is deficient is the system structure and manpower development that promotes the impartial, speedy and effective law enforcement just in line with the laws.

Listed below is a detailed summary of the efficiency or otherwise of contract enforcement in part of Nigeria. It follows the evolution of a sale of goods dispute, tracking the time, cost and number of procedures involved from the moment the plaintiff files the lawsuit until actual payment in the country.

This information was collected as part of the *Doing Business* project, which measures and compares regulations relevant to the life cycle of a small- to medium-sized domestic

business in 183 economies. The most recent round of data collection for the project was completed in June 2011[12].

The legal framework regulating enforcement of contractual judgment in Nigeria reveals that there are two parties to enforcement of a judgment. These are the judgment creditor and the judgment debtor. In almost every case of enforcement, these two are the parties to the suit. A judgment creditor means any person for the time being entitled to enforce a judgment and a judgment debtor means a person liable under a judgment. The use of the words "creditor" and "debtor" does not imply that the judgment must be for payment of money. The terms are used for every type of judgment or order. Thus, parties to an order of mandamus can be described as judgment creditor and judgment debtor, the former being the person entitled to enforce the order to carry out the contents of same.[13]A judgment debt itself is a debt or damage or other monetary award which has been pronounced upon by a court of competent jurisdiction. It begins when the court has pronounced its judgment in favor of the plaintiff. Such a debt or damage or award does not become a judgment debt until the court or judge adjudges the defendant liable to pay it. Where the judgment creditor resorts to garnishee proceedings to enforce a judgment for instance, there are usually three parties, the judgment creditor becomes the garnish or, the judgment debtor and a third party, against whom the proceedings are taken, called the garnishee. [14] There are few exceptional cases in which a judgment creditor or debtor is not a party to the suit to enforce judgments. Where, for example, there is devolution of the rights and liabilities under a judgment as a result of death or otherwise, the successor in title of either of the two parties may enforce or be liable

[12] http://www.doingbusiness.org/data/exploreeconomies/nigeria/enforcing-contracts
[13] See Order 4 Sheriffs and Civil Process Act 1990
[14] ibid

under the judgment. Thus, on the death of a judgment debtor before execution, application for execution of the judgment may be made against his legal representative or estate and if the court grants the application, the judgment may be executed accordingly. Notice of this application must be served on the personal representative. For the purpose of this sort of execution, the property of the deceased judgment debtor may be attached and sold if the judgment is for money to be paid out of the property. Where the judgment creditor has died, his legal representative may also apply to the court for leave to enforce the judgment. Such application may be made ex parte. An assignee of a judgment can only levy execution if the whole judgment is assigned, but not where the assignment is of part only of the judgment. In representative proceedings, the representatives as well as persons represented are bound by the judgment.

Where a judgment is against a firm, execution may issue against its property, any person who had admitted in the proceedings that he was a partner when the cause of action arose or who has been adjudged to be liable as a partner, and any person who was individually served with summons as a partner or a person sought to be made liable, if there was a trial and the person so served failed to appear at the trial; or if the proceeding was an action on the undefended list or default action, judgment was entered in default of defense.

If the judgment creditor claims to be entitled to issue execution against any other person as a partner, he may apply to the court by motion on notice served on the alleged partner personally and on the hearing of the application, the court may give leave to issue execution if liability is not disputed but if it is disputed, may order the issue of liability to be

tried in such manner as the court thinks fit, and may give all necessary directions for that purpose. Order distinguished from Judgment.

An order on the other hand, is a written direction or command delivered by a court or judge[15]. It is also the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the matter on the merits, but adjudicating a preliminary point or directing some steps in the proceedings. While an order may under some circumstances amount to a judgment, they must be distinguished, owing to the different consequences flowing from them, not only in the matter of enforcement and appeal but in other respects as, for instance, the time within which proceedings to annul them must be taken. Rulings on motions are ordinarily orders rather than judgments.

Every judgment of the court must be obeyed and is effective from the date of delivery or from such date as the judgment itself appoints. The judgment is meant to be obeyed without demand and if there is default in obedience, the judgment creditor is entitled to commence enforcement proceedings[16]. Generally, any judgment the time for compliance with which has arrived, which has not been satisfied, which requires the payment of money or which directs its recovery, which requires the transfer, delivery or recovery of possession of property, real or personal or which requires a person to do or abstain from an act, which is not stayed or on which execution is not stayed, which has not become statute barred may be executed.

[15] See *Saraki & anor v Kotoye* (1992) 9 NWLR PT.264 P. 156.
[16] See Babalola, A 'Enforcement of judgments' (2003) Intec Printers Limited, Ibadan. P. 6

It must be underscored that the method of enforcing a particular judgment will depend largely upon the type of judgment[17]. Thus, the Supreme Court in the case of ***Tukur v. Governor of Gongola State***[18] itemized the methods of enforcing different kinds of judgment as follows:

i. A judgment or order for the payment of money may be enforced by a writ of fierifacias, garnishee proceedings, a charging order, a writ of sequestration or an order for committal on judgment debtor summons.

ii. A judgment for possession of land may be enforced by a writ of possession, a writ of sequestration or committal order.

iii. A writ of specific delivery or restitution of their value, a writ of sequestration or a writ of Committal may enforce a judgment for delivery of goods.

iv. A judgment ordering or restraining the doing of an act may be enforced by an order of committal or a writ of sequestration against the property of the disobedient person.

All these methods of execution are contained in the Sheriffs and Civil Process Act and Laws. However, there are some other special forms of execution created by special statutes. Examples are Decree of Dissolution of Partnership, Winding up of Companies and Adjudication in Bankruptcy. Hence, under statutes these constitute execution strictusensu.

[17] Ibid at P. 7
[18] (1998) 4 NWLR PT. 117 P. 592

Therefore, "Execution" includes both legal execution and equitable execution. Unenforceable Judgments: Suffice it to note that there are some judgments that do not require enforcement or are incapable of being executed as the judgment or the order itself is all that the party obtaining it requires. One of such judgments is a declaratory judgment, the reason being that a declaratory order merely declares the rights of the parties and is dormant; hence it has no force of execution in the judgment or order. A declaratory order may however be enforced by an action. Thus, the party who obtains a declaratory judgment or order may go back to the court and seek an order to enforce it[19].

Affirming this position, Karibi Whyte JSC in the case of ***Okoya v. Santili***[20] held as follows:"…It is a matter of general consensus among academic writers and judicial decisions that a declaratory judgment which is an embodiment of the recognition of a particular right may be the basis for subsequent proceedings to enforce such rights, where such right is threatened or is being violated. It seems to me correct to postulate that a declaratory judgment or order is recognition of a dormant right. Hence a declaratory order or judgment remains a dormant right until subsequent proceedings have been taken to protect the threat to or violation of the rights so declared in the judgment or order."

Another type of judgment, which cannot be executed, is an interlocutory judgment. The Supreme Court in ***Tukur v Governor of Gongola state***[21] noted: "One of the types of judgment which cannot be executed is an interlocutory judgment because it does not at once affect the status of the parties; neither does it finally dispose of their rights since it leaves

[19] See Babalola, A op cit at P. 9
[20] (1990) 2 NWLR PT.131 P. 172
[21] (1998) 4 NWLR PT. 117

undecided the various points at issue and no execution can proceed without reference to court."

The judgment of a court should be complied with without demand immediately after the order has been made. But the judgment itself may direct a period when it is to take effect. In that case, the order will take effect at the specified period.

No process other than the Writ of Possession shall be issued until after the expiration of three days from the day the judgment is given. With the leave of court, execution may still be levied after the expiration of the prescribed period in each case. The application for such leave is made ex parte. A writ of execution remains valid for one year only from the date of its issue, but the court may, on the application of the judgment creditor, extend its life beyond this period. A new writ may however be issued instead of applying for the extension. The disadvantage in so doing, however is that the new writ takes priority from its date, whereas by renewing a writ, its priority is preserved. Execution is effected between 6 am and 6 pm of any day other than on a Sunday or Public holiday, unless the judge or magistrate directs otherwise by order endorsed on the process to be executed. Generally speaking, the Court from which Process is to issue is the court which gave the judgment and in no other court. The judgment given on appeal by an appellate court becomes the judgment of the court from which the appeal came. This is without prejudice to the Court of Appeal's case of ***Anakwenze v. Aneke & others***[22] that the Court of Appeal being a superior court of record has an inherent power to enforce a judgment given by it on appeal.

[22] (1989) 2 NWLR

The general rule is that process shall be executed by or through the court for the division or district where the judgment debtor or the property to be affected is or is situate and by no other court.

A judgment creditor who wants to enforce a judgment may make an application for the appropriate process to the registrar. If the required process is one, which may issue without an order of the court or a judge or magistrate, he shall apply to the registrar in the first instance for it. But if it is one for which such order is necessary, the application to the registrar is made after the order for its issue shall have been obtained form the court for application for issue of some processes, a praecipe or form is required or prescribed. In such a case, the judgment creditor has only to obtain the praecipe from the court, duly complete it and then return it completed to the registrar. If a praecipe is not necessary, the application to the registrar is made by the judgment creditor filing a written request for the issue of the process specifying the number and title of the suit, the date of judgment, the nature of the process, the name of the party against whom, and the amount, if any, for which it is to be executed.

Although the various modes of execution do not apply where the Government, Federal or State is the judgment debtor, judgment can be executed against the government. A copy of such judgment is sent to the Attorney General of the Federation, in the case of the Federal Government, or to the Attorney General of the State in the case of State Government. If the judgment is for payment of money the Attorney-General concerned, by warrant under his hand, directs that the amount awarded be paid and, in the case of any other judgment, takes such measures as may be necessary to cause the same to be carried into effect. Where

he thinks fit, the Attorney General may, instead, direct that an appeal be filed against the judgment.

In ***Jallo v. Military Governor, Kano State***[23], the Court of Appeal held that "…Under the new dispensation which has also been enshrined in the 1989 constitution, it ought to be the duty of the Attorney-General, Federal or State to consult quickly with the Minister or Commissioner of Finance or Budget to provide funds to satisfy judgment debts lawfully obtained against the State. No Attorney-General worth his salt should fold his arms and do nothing when the State is a judgment debtor"

The judgment creditor pays the fees in the first instance. He also pays for the expense of the conveyance to and subsistence of the judgment debtor in prison, in case of the latter's committal therein for default in carrying out the court's order. He is legally responsible for paying the expenses and providing all necessary fees and the execution shall not be proceeded with, until he has done so.

Except as otherwise prescribed by the Sheriffs and Civil Process Act or the Judgment (Enforcement) Rules, the costs, the fees and expenses of and incidental to the issue and execution of any process paid by the judgment creditor are allowed against the judgment debtor, unless the judge or magistrate otherwise directs. It must however be noted that the sheriff, deputy sheriff and bailiff are public officers and are paid for their services by the state.

[23] (1982) KLR

In exercising his functions in executing writs, order or judgment of the court, the sheriff or bailiff acts as an officer of the court, this consequence flows from the appointment of the sheriff, which is done by the judiciary. For all executions carried out in the course of his official duty (except in cases of wrongful execution) he is protected from legal action at the instance of the aggrieved party because the writ of execution is an absolute justification to the sheriff for what is done in pursuance of it[24].

It seems to suggest by Order 2 Rule 29[25] that the sheriff is the agent of the judgment creditor. In ***Fabunmi v. Oyewusi***[26], the court held that "…the deputy sheriff is the agent of the judgment creditor for the purposes of levying execution of the judgment of the court." It has also been held that the sheriff is a public functionary with duties to the judiciary who appointed him. In ***Exparte the debtor v. Goacher***[27], it was held that the sheriff is not simply an agent of the judgment creditor but has wider responsibilities, which include duties towards the official receiver or trustee in bankruptcy. The sheriff is liable if any act is done in excess of the authority given by the writ. In ***Saunderson v Daker & Martin***[28], the court held that it was trespass for the sheriff to have seized goods from the wrong person. In ***Ashday v. Dawnay***[29], the court held that it was trespass for remaining in possession for an unreasonable time.

The execution creditor may sue the sheriff for not duly enforcing the writ and either the creditor or debtor may sue for any unreasonable delay or negligence in the execution,

[24] See Sections 3 and 5 of the Sheriffs and Civil Process Act Cap 407 Laws of the Federation of Nigeria 1990
[25] Judgments (Enforcement) Rules of Oyo State Cap 117 Vol VI Laws of Oyo State 1978 (which provision is in parimateria with Laws of Federation Cap 407)
[26] (1992) 1 NWLR PT.215 at P. 35
[27] (1979) 1 AER 870 cited in Babalola, A op cit at P. 17
[28] (1772) 3 WILLS 309 cited ibid at P. 19
[29] (1852) 8 Exch. 237 cited ibid at P. 19

provided actual damage is shown. Thus in ***Millet v Charis***[30], the sheriff was held liable to the judgment debtor for sale at undervalue in consequence of negligence. However, it must be emphasized that where an allegation of impropriety is made against a court bailiff in the process of execution of judgment, the allegation must be proved beyond reasonable doubt as it is in the nature of an allegation of crime.

On the modes of enforcement of judgment, attention shall be paid to Enforcement of money judgments, Enforcement of judgments other than money judgments and Enforcement of foreign judgments.

Enforcement of Money Judgments. Under the Judgment (Enforcement) Rules and Section 20 (1)[31] a judgment for payment of money to a party is enforced by one or more of these modes.

(i) Writ of fierifacias,

(ii) Garnishee proceedings and

(iii) Judgment summons.

The Writ of Fieri Facias: against movable properties. This is the most common of all writs of execution and is usually referred to in a shortened form as the writ of fifa. It is useful when the judgment creditor seeks to recover the amount ordered to be paid by the seizure and sale of the judgment debtor's properties and chattels[32]. From the proceeds of

[30] (1851)16 QB 239 Cited ibid at 20.
[31] Sheriffs and Civil Process Act Cap 407 LFN 1990.
[32] See *Akpunonu v Bekaertoverseas* (1995) 5 NWLR PT.393 P. 42 at 66 A-B

sale, the judgment debt is satisfied. It is therefore directed to the sheriff, requiring and ordering him to seize and sell enough of the judgment debtor's goods to satisfy the judgment debt. It is a writ of attachment (i.e., seizure or detention) and sale against goods[33]. The forms of the writ are specified in the First Schedule to the Act.

By means of this writ, execution is levied not only against chattels but also immovable[34] property of the judgment debtor. The execution is against goods and chattels and it is where these are not sufficient for payment of the debt that execution is extended to immovable properties[35].

Application for Issue may be made to the registrar for the issue of a writ of fifa. The judgment creditor does this by filing with the registrar a praecipe in Form 3 in the First Schedule to the Act. Where two or more judgment debtors are jointly liable, an application may be made in the same praecipe for execution against the goods of all such debtors or those against whom the judgment creditor wants to proceed. The next stage is the issue of the writ by the registrar in the appropriate form, that is, in Form 4, 5 or 6, as the case may be. The praecipe comprises two parts – one to be completed by the judgment creditor and the other by the registrar. One of the endorsements by the registrar is the date and hour of the application for the writ. This date is important because it determines priority. Judgment creditors take priority as regards the proceeds of execution according to the respective dates and hours of receipt of their applications for the writ of fifa[36]. Thus, a writ applied for on 1st

[33] See Section 21Sheriffs and Civil Process Act Cap 407 LFN 1990.
[34] By the provision of Section 18(1) of the Interpretation Act, Cap. 192 Laws of the Federation of Nigeria 1990 defines immovable property as follows: "Immoveable property means land" and Section 2 of the Judgments (Enforcement) Rules interprets the 'Land' to include building.
[35] See *Bayero V F.M.B.N PLC* (1998) 2 NWLR PT.538 P. 509 at PP. 526-527
[36] See Section 20 (2) and Section 32 of the Sheriffs and Civil Process Act Cap 407 LFN 1990.

April, 2010 had priority over that applied for on the 5th April, 2010, even though both were issues on the same date, 6th April, 2010.The writ is signed by a judge or magistrate and is sent by the registrar to the sheriff or the deputy sheriff in the division or district in which execution is to be levied for action[37]. The sheriff is charged with the responsibility for execution but is represented in the various divisions or districts by deputy-sheriffs who perform his duties there. The actual execution, like seizure and sale and arrest of judgment debtors, is the work of the bailiffs who act on behalf of the sheriff[38]. If the place of execution is outside the judicial division or the magisterial district of the court that issued the writ, the registrar has to send the writ to his counterpart of the court in the judicial division or the magisterial district within which the place lies for it to be executed there. The report of such execution will be later remitted to the registrar of the issuing court. Where a court makes an order for payment of the judgment debt by installments such an order operates as a stay of execution of the original judgment and execution can issue only for the amount of installments, which have become due and unpaid. The bailiff executes the writ by seizing in any place within the judicial division or the magisterial district of the place of execution any goods or chattels of the judgment debtor, except for his wearing apparels and bedding or those of his family and the tools and implement of his trade to the value of ten naira[39]For shares, attachment is by an order prohibiting the person in whose name the shares may be standing from making any transfer, or receiving payment of dividends thereof, and the

[37] See Okwoche v Dibia (1994) 2 NWLR PT.325 Page 195 at P. 204.
[38] See Section 25 Sheriffs and Civil Process Act Cap 407 LFN 1990.
[39] See ibid. it is doubtful whether there is any wearing apparel or tool of trade that is not valued for more than Ten Naira today. That part of the law today seems to be obsolete. However , if the law were to provide some safeguard to the judgment debtor and his family, than there is every need to amend that part of the law to reflect the realities of modern times. See also Babalola, A op cit at 41

manager, secretary or other proper officer of the company or corporation from permitting any such payment until further order of the court.

By virtue of the provisions of Sections.22 (2) and 23[40].which provides that the judgment debtor may, after the attachment of his goods but before their actual sale, pay or cause to be paid or tendered to the registrar of the court from which the writ issued, or to the bailiff holding the writ, the judgment debt and costs as indorsed on the writ, or part of the debt as the judgment creditor may agree to accept in full satisfaction together with the bailiff's fees already accrued. Where this happens, the execution is superseded and the seized properties discharged and set at liberty.

The sale of the seized goods shall not take place until the expiration of at least five days next, following the day of their seizure unless the goods are of perishable nature or the person whose goods are seized so requests in writing[41]. The court may, however, if it thinks fit, direct that the sale be postponed for any time not exceeding twenty-eight days after the attachment. As a general rule, sale is by public auction where the value of the goods exceeds forty naira. The property is knocked down to the highest bidder for ready money. For property less than the value of forty naira, the sale may be held at a place decided on by the deputy sheriff.

The Writ of Fifa against immovable properties. Immovable property of a judgment debtor may be seized and sold in satisfaction of the judgment just like his chattels and other

[40] Sheriffs and Civil Process Act Cap 407 LFN 1990. See also the case of Akpunonu v Bakaert Overseas (supra) at PP. 66-67 h-a
[41] see Akpunonu v Bakeart Overseas (supra)

movable goods but execution can only be levied against the immovable property if no movable property of the judgment debtor can, with reasonable diligence be found, or if the movable property is insufficient to satisfy the judgment[42]. Where a building is owned or occupied by a judgment debtor and he is not entitled under customary law to alienate it or the right to occupy it but he is entitled to remove the materials used in its construction, his right, title, or interest in such building shall not be sold without the leave of court first obtained[43]. No immoveable property attached shall be sold for the purpose of satisfying the Writ of Execution until the expiration of at least fifteen days next following the day on which the property has been attached, unless the person whose property has been attached so request in writing.[44]

Garnishee Proceedings: By these proceedings, a judgment creditor may attach or garnishee debts, which another person owes to the judgment debtor in satisfaction of the judgment debt. Garnishee proceedings therefore involve the attachment of debt due from a third party to the judgment debtor and the use of the amount of that debt in liquidating the judgment debt[45]. For the purposes of the proceedings the third person indebted to the judgment debtor is called the garnishee, and the judgment creditor is referred to as the

[42] See Section 44 Sheriffs and Civil Process Act Cap 407 LFN 1990. See also the cases of Bayero V F.M.B.N PLC (SUPRA) and Leedo Presinential Hotel Ltd. v B.O.N Ltd (1993)1 NWLR PT.269 P. 334 at 349

[43] See Section 43Sheriffs and Civil Process Act Cap 407 LFN 1990.See Order 5 Rule 3 and 4 of the Judgments (Enforcement) Rules. See also the case of Holman Bros. v The Compass Trad. Co. Ltd (1992)1 NWLR PT 217 P. 368 at P. 376

[44] See Order 7 Rule 6 (1) of the Judgments (Enforcement) Rules

[45] For the judicial definitions of Garnishee, see STB Ltd v Contract Resources (nig) ltd (2001) 6 NWLR pt .708 P.115. Per Olagunju J.C.A at P. 123 See also U.B.A LTD V SGB LTD (1996) 10 NWLR PT. 478 P. 381 at P. 383.

garnishor[46]. For any debt to be attachable, it must be "due or accruing to the judgment debtor"[47] The debt must be certain in amount and the judgment debtor must have an immediate legal right to it. Untaxed costs cannot be attached. Similarly, a claim under a policy of insurance being an un-liquidated claim for money cannot be attached.[48]

In ***Purification Techniques (Nig) ltd v. Attorney General of Lagos State & ors***[49] the Court of Appeal held that the existence of an application seeking for an order of stay of execution of a judgment does not preclude a judgment creditor from seeking to use garnishee proceedings to enforce the judgment. In the instant case, the contention of the respondent that the appellant was not entitled to enforce the judgment in its favor by garnishee proceeding because the respondent had filed an application for stay of execution is untenable. This decision raises a critical query on the essence of an application for stay of execution because if it is not capable of halting processes targeted at execution, an application for stay of execution may become a mere academic exercise. By this mode, a judgment debtor who is capable of satisfying the judgment debt but fails to pay the debt may be committed to prison for his default. Such a consequence does not, however, arise where the default is through poverty. The judgment debtor is summoned to court and examined orally on oath in court as to his means and if at the end of the exercise the court is satisfied of his ability to pay, it may make any of the orders provided for in that regard, one of which is committal of the judgment debtor to prison. In addition to these modes of enforcing

[46] See Babalola, A op cit at P. 91
[47] See Web v Stention (1893) 11 QBD 518 CA. Cited in Babalola, A Op cit at P. 95
[48] NwadialoF: Civil Procedure in Nigeria 2nd Edition (University of Lagos Press) 2000.
[49] (1996) 2 NWLR PT. 421

money judgments, judgment for payment of money may be enforced by way of bankruptcy notice, and by way of a winding up order under the Companies and Allied Matters Act[50].

Other than money judgments, our courts are empowered by relevant statutes[51] to enforce interlocutory orders, judgment for possession in an action for recovery of land, judgment for delivery of goods and sequestration[52]. Thus, by the method laid down in the Rules, if the plaintiff makes default or fails in fulfilling any interlocutory order, the court may, if it thinks fit, stay further proceedings in the suit until the order is fulfilled. It may, alternatively, give judgment against or non-suit such plaintiff with or without liberty of bringing any other suit on the same ground of action, or may make such other order on such terms as it may consider just. The foregoing is apart from the powers of the court to cite the defaulting party for contempt of court. Also, a judgment or order for the recovery of land or the delivery of possession of land in an action other than an action between a landlord and tenant under the Recovery of Premises Law is enforceable by a writ of possession.

Where a plaintiff obtains judgment for the delivery of certain goods to him, he may enforce that judgment by means of a writ of delivery. The judgment may be delivery simpliciter of the specific goods or chattel or for the delivery of the goods or payment of their assessed value. Finally, execution by writ of sequestration is directed against the movable and immovable property of the judgment debtor but not with a view to their sale as in the case of a writ of fifa. The circumstances under which a writ of sequestration may issue are:

[50] See Section 407 Companies and Allied Matters Act 1990.
[51] See various Civil Procedure Rules of the States High Courts and the Federal High Court.
[52] This is provided by Section 82 Sheriffs and Civil Process Act Cap 407 LFN 1990

(a) Where an order or warrant of arrest, commitment, or imprisonment has been issued against a judgment debtor but he cannot be found and consequently the execution of the order or warrant against him is not possible; he may have gone into hiding or just disappeared in order to evade or frustrate the execution;

(b) Where he has been arrested and detained in custody for failing to obey the judgment of the court but in spite of the arrest and detention persists in his disobedience of that judgment. In any of these two cases the court may order the writ to issue against his property[53].

In Nigeria, enforcement of judgments of the court of a foreign country by a Nigerian court is achievable by either action at common law or reciprocity or reciprocal enforcement. Action at Common Law: At common law, a judgment of the court of one country may be enforced in a foreign country by way of an action commenced in the court of the foreign country, with the judgment as the cause of action. The judgment creditor must then institute an action in a Nigerian court claiming the reliefs granted him in the foreign court. The judgment then shall be the cause of action and the action need not go through the pith and hog of a substantive trial[54]. Generally, speaking; only the judgments of a superior court of a foreign country will be enforced in Nigeria and this can only be done by a High Court in Nigeria. In other words, it must be a court of an equivalent status with a Nigerian High Court or more. Such a judgment may be enforced in a Nigerian High Court irrespective of whether or not the foreign court would reciprocally enforce judgments of Nigerian courts. For the

[53] See Order 11 Rule 9 Judgments (Enforcement) Rules In accordance with Form 69
[54] Ojukwu E and Ojukwu C.N: Introduction to Civil Procedure 3rd Edition 2009 (Abuja; Helen-Roberts Press)

enforcement action to be successful, the foreign judgment must meet the following requirements:

(a) The judgment must be final and conclusive;

(b) The judgment must have been delivered by a competent court in terms of jurisdiction;

(c) The judgment must be for a definite sum of money, provided that it is not money recoverable as tax, fine or penalty;

(d) If the judgment is for a res other than money, the res must have been situate at the jurisdiction of the foreign court that gave the judgment as at the time of delivery.

By Reciprocal Enforcement: Enforcement of foreign judgment under this process is done on the basis of reciprocity, i.e. the foreign country whose court delivered the judgment, must also be ready to enforce judgments of Nigerian courts in its courts. Such countries that render reciprocal enforcements to Nigeria are those to be listed in an order made by the Minister of Justice under Part 1 of the Foreign Judgments (Reciprocal Enforcement) Act. Legal Regime Regulating Enforcement of Foreign Judgments in Nigeria: There are two statutes regulating enforcement of foreign judgments in Nigeria namely:

1. Reciprocal Enforcement of Foreign Judgments Ordinance, Cap 175, Laws of the Federation of Nigeria and Lagos, 1958 ("the 1958 Ordinance") and

2. Foreign Judgments (Reciprocal Enforcement) Act, Cap 152, Laws of the Federation of Nigeria, 1990 ("the 1990 Act").

There has been until recently, intense intellectual polemics amongst text writers, commentators and legal practitioners as to which of these two statutes regulates the

enforcement of foreign judgments in Nigeria. This confusion emerged as a result of various judgments of the High Court which mostly applied the 1990 Act, the Common Law Rules of Private International Law (or Conflict of Laws) and, in extreme cases, the Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990. A few of these cases, which later went on appeal, are discussed below. In the case of ***Grosvernor Casinos Limited v Ghassan Halaoui***, an application was made to the High Court to set aside the registration of a foreign judgment for non compliance with the provisions of Section 6(2) of the 1990 Act. The High Court, relying on Sections 73, 74(1) (m) and 135(2) of the Evidence Act, declined to set aside the registration of the judgment. On appeal, the Court of Appeal in setting aside the judgment of the High Court held that the relevant statue was the 1990 Act and the Evidence Act and the common law were inapplicable for the enforcement of foreign judgments in Nigeria. In Halaoui's case on the other hand, the Court of Appeal was silent on the applicability of the 1958 Ordinance. This would however seem to be due to the fact that it was not canvassed before that court by any of the parties. It is submitted that much of the confusion on the applicable law regulating the enforcement of foreign judgments has arisen from a misinterpretation of the provisions of section 9(1) of the 1990 Act which provides thus:"This part of this Act shall apply to any part of the Commonwealth other than Nigeria and to the judgments obtained in the courts thereof as it applies to foreign countries and judgments obtained in the courts of foreign countries, and the Reciprocal Enforcement of Judgments Ordinance shall cease to have effect except in relation to those parts of Her Majesty's Dominion other than Nigeria to which it extended at the date of the commencement of this Act".From the above provision, it would seem that the 1958 Ordinance applies only to the extent that the Minister of Justice has not made an order pursuant to section 3(1) of the 1990

Act extending the said Act to the United Kingdom and other foreign countries. Thus when the Minister makes such an enactment the 1958 Ordinance will become inapplicable.

This view is buttressed by the decision of the Court of Appeal as approved by the Supreme Court in ***Macaulay v. rzb Austra*** where it was held that the interpretation of Section 9 of the 1990 Act made the 1958 Ordinance applicable in the enforcement of foreign judgments in Nigeria but only to the extent that the Minister of Justice had not made any order under Section 3(1) of the1990 Act extending that Act to the United Kingdom and other foreign countries.

What Foreign Judgments are enforceable? In order for a foreign judgment to be enforceable in Nigeria, a superior court of the country of the original court must pronounce upon it. This applies to both civil proceedings (including awards in arbitration proceedings) and judgments given in criminal proceedings for the payment of money in respect of compensation or damages to an injured party. To qualify for registration, the foreign judgment must be a money judgment. The judgment must be for a sum certain. A sum is sufficiently certain for this purpose if a simple arithmetical process can ascertain it. Additionally, the judgment must be final and conclusive as between the parties thereto. In other words, it must settle the rights and liabilities of the parties so as to be res judicata in the country in which it was given. As Lord Herschel put it:"It must be shown that the court in which it was produced, it conclusively, finally and forever established the existence of the debt which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties."

Thus interim or interlocutory and default judgments that do not finally and conclusively determine the rights and liabilities of the parties are not registrable. Also a judgment that is capable of being varied or rescinded by the court that gave it is not registrable. The onus of proof that the judgment is final and conclusive is on the party who so asserts. However, a judgment shall be deemed to be final and conclusive despite the fact that an appeal is pending against it or that it may still be subject to an appeal in the foreign country in which it was pronounced. Similarly, judgments of a non monetary nature such as declarations regarding an existing state of affairs and injunctions either directing or prohibiting a person from doing a particular thing (other than the payment of money) are not registrable. Judgments directing payment of taxes, revenues and penalties, judgments in criminal proceedings imposing terms of imprisonment or fines are also excluded from being registered. A judgment shall also not be registered if at the date of the application for registration the judgment has been wholly satisfied (paid) by the judgment debtor or if the judgment could not be enforced by execution in the original court. This will cover cases of declaratory judgments, which by their very nature are incapable of enforcement.

To be registrable, the sum payable under the judgment must be expressed in Naira. If the judgment sum is expressed in a currency other than the Naira, the law requires the sum to be converted into the Naira at the rate of exchange prevailing at the date of judgment. A query to be raised here is the rationale for this position considering the fact that Nigerian courts give and enforce judgments in foreign currencies. I therefore submit that this position of the law is due for review. The decision of Nigeria's Supreme Court in the case of ***Macaulay v Raffezzein Bank of Austria*** is very germane and examined hereunder: The précis of facts The respondent obtained judgment against the appellant at the High Court

Queens Bench Division Commercial Court in England on 19th December 1995.By order obtained ex – parte the Respondent registered the judgment as a foreign judgment in the High Court of Lagos Nigeria pursuant to the 1990 Act on 18th August 1997 (20 months after the judgment was obtained)The appellant applied to set aside the registration on two main grounds one of which was that it was not registered in accordance with the relevant and applicable law (i.e. the 1958 ordinance). The High Court dismissed the application prompting an appeal to the Court of Appeal, which dismissed the appeal. On further appeal the Supreme Court allowed the appeal up-turning the decisions of both the High Court and Court Appeal. The Holding the kernel of the decision, as evinced from the lead judgment is that the provisions of Section 3 of the 1958 Ordinance and Section 10(a) of the 1990 Act apply to the question of registration of judgment in the instant case. Each of these sections provides that the judgment is to be registered within twelve months from the date of the judgment. A judgment creditor who wants to enforce such a judgment has to apply to a High court in Nigeria at any time within six years after the date of the judgment, or where there has been an appeal against the judgment, after the date of the last judgment given in the appeal, to have the judgment registered in the High court. This application is made by motion supported by an affidavit and may be on notice.[55] This chapter has attempted an examination of the legal framework for contractual enforcement of judgments in Nigeria. As discussed in the chapter, there are some limitations to enforcing some judgments. For instance, judgments against the Government (Federal and State) and foreign judgments have inherent limitations

[55] Afolayan A.F and Okorie P.C: Modern Civil Procedure Law (Dee sage Press) 2007. See also generally Agbede I.O: Themes on Conflict of Laws (Shaneson) 2001, Efevwerhan D.I: Principles of Civil Procedure in Nigeria (Chenglo) 2007 : (Thomson Reuters) 2009. http://ssrn.stanford.edu.com. Visited July 2014

in their enforcements as provided by our laws. The limitation in attachment of Government funds (Federal and State) has its origin in the divine rights of Kings and Queens under the legal theory that you cannot impeach the Queen in her court. It is submitted that the Laws regulating these should be reviewed in the interest of justice. Per Oguntade JSC, "I have no doubt that it is inimical to the interest of trade and commerce if judgments in foreign countries cannot be readily enforced in Nigeria. It is particularly alarming that when, in a case like this, a person ordinarily resident in Nigeria obtains a credit in England and in satisfaction issues a cheque, which is later, dishonored, the judgment obtained against him cannot be enforced in Nigeria.

Furthermore, Under Section 3(2)(b) above, the judgment of a court in England cannot be enforced in Nigeria on the ground that a defendant has not submitted to the jurisdiction of the court. There is an urgent need to reform our law on the matter. It is an open invitation to fraud and improper conduct. It is therefore recommended that the Attorney General should take urgent steps to update the law so that a respondent would not use a loophole in the Nigerian Law to avoid his international obligation.

The coming chapter would provide a summary of what has been discussed in this thesis, give conclusion and articulate the main findings and recommendation.

CHAPTER SIX

6. CONCLUSION

6.1 Summary

The main thrust of this dissertation has been to contribute to contribute to the realization of economic prosperity, and development by Nigeria, and other developing economies through a strong, vibrant, and efficient contract enforcement mechanism. The research will promote reforms in the Nigerian legal system, and other judgment enforcement legislations, to accommodate new ideas obtainable in other jurisdictions, that will enhance smooth conduct of cases in our courts, and accelerate contract enforcement process, for development and prosperity. The research is towards understanding the negative impact of delay in the enforcement of contractual judgment as impediment to foreign direct investment (FDI) in Nigeria. To identify what are the impediments that constitute a clog to a cheap, speedy and effective contractual judgments enforcement by courts in Nigeria. The impediments identified the actual impact of the impediments on the enforcement of contractual judgment process by the courts and how that affects the influx of foreign direct investment (FDI) in Nigeria.

The summary run thus; after the introductory chapter, the foundation of the thesis was laid in chapter two which started by developing the nature and definition of investment and foreign direct investment (FDI), which is the framework for discussing the theme of the thesis. The chapter examined the general nature and definition of investment and the fundamental features of what transform mere investment to foreign direct investment (FDI) and the impact of its influx in the creation of jobs and reduction of poverty in a country. It

also looked at the efforts so far in place in some African countries with the aim of attracting foreign direct investment. The efforts of the African continent in seeking FDI is evidenced by the formation of New Partnership for Africa's Development (NEPAD) which has the attraction of foreign investment to Africa as a major component. It was however found that unfortunately, the efforts of most African countries to attract FDI have been futile. This is in spite of the perceived and obvious need for FDI in the continent. The development is disturbing, sending very little hope of economic development and growth for these countries. The position in Nigeria is not any different as one of the countries in Western Africa richly endowed with natural resources mainly oil and gas, mineral deposits, and vast agricultural land.

Nigeria has on many fronts reformed its economic policy, investment laws and improved financial system in order to attract FDI inflows. Most of the changes observed are related to investment promotion. The Nigerian Government adopts several policies to attract FDI because of its strategic importance to the economic growth and development, particularly in this globalized era. The government implemented IMF monitored liberalization of its economy, welcomes foreign investors in the manufacturing sector, offers incentives for ownership of equities in all industries except key industries like military equipment. The incentives like tax relief are available to investors and concessions for local raw material development. In line with its economic reforms, starting from the 1980s, Nigeria undertook a far-reaching privatization program. This change starts in 1989 and onwards due to several policies (like introduction of Structural Adjustment Program in 1986, Export processing Zone Decree in1991, Investment Promotion Commission in 1995) adopted by the Nigerian Government. Even though, without prejudice to these far-reaching reforms,

an effective, cheap and speedy contractual judgment enforcement mechanism in our judicial system in Nigeria still pose significant problem in attracting FDI inflows to the country.

Chapter three also provided statement in brief for general impediments to the attraction of foreign direct investment (FDI) to the developing economies and continued the search for how those impediments affected the inflow of the foreign direct investment (FDI) in the developing economies. While chapter two carried out a general analysis on the importance of the foreign direct investment (FDI) to a developing nation like Nigeria, this chapter focused specifically on the business atmosphere, conducive for investment to flow and flourish, which generally determines the factors that triggered the flow of Foreign Direct Investment FDI and the contributions it makes to the developing economies. These factors are determined by the location, the market size, and presence of natural resources, infrastructure and other specific government policies that has the tendencies to persuade foreign investors to locate their investment. This includes ability of the government to carry out wide ranging reforms and enactment or amendments of legislations that shape and encourage the opportunities and incentives for the multinational companies and firms to invest productively, bring development and create jobs for the well-being of the citizenry.

The main thread running through the theme is the Investment climate, therefore, Foreign Investors are attracted by such factors, which highlight a sound host-country policies toward attracting FDI and benefiting from foreign corporate presence are largely equivalent to policies for mobilizing domestic recourses for productive investment. An enabling domestic business environment is vital not only to mobilize domestic recourses but also to attract and effectively use international investment. This position is also part of the experience of the developed nations. That striving for FDI by host country entails a reform of

institutional frame works, regulatory and infrastructure for the benefit of the investors. Improvements of the general macroeconomic and institutional frameworks, creation of a regulatory environment that is conducive to inward FDI and upgrading of infrastructure, technology and human competence to the level where the full potential benefit of foreign corporate presence can be realized.

The chapter went on to show that these impediments are not exhaustive. An important area of our Legal system that foreign investors consider a great obstacle to determine an investment location is delay in contractual judgments enforcement. An expensive, weak and ineffective contractual enforcement mechanism constitutes a large potion of impediments that beclouds the investment climate of the developing economies. The analyses are in most cases the product of empirical studies and research conducted in several developing countries. Developed countries with strong and effective contractual judgment mechanism, have laid the processes to achieve this milestone. Developing economies like Nigeria may have a lot to learn in that regard.

The contribution of this chapter is that it further developed the conceptual framework establishing the delay in contractual judgment enforcement as part of the impediments to the foreign direct investment (FDI) in the developing economies including Nigeria. Finally, the chapter examined the implementation of this noble idea that is impact of an effective contractual judgment enforcement mechanism in some countries of European Union.

Chapter four is the climax of the research that shows the findings of the research study. Having established or identified and examined the factors for weak contractual judgment enforcement process in Nigeria. It looked at various factors for such impediments, which makes courts slow, inefficient and corrupt. This is particularly the case in Sub –

Saharan Africa; where on average commercial disputes last nearly 2 years and cost nearly half the value of the debt.

The chapter addressed some critical issues related to the analysis of the efficiency of contract enforcement in 10 Nigerian states and Abuja by examining the average resolution of simple commercial disputes indicates that, on the average it takes 577 days to enforce a contract in Nigeria. The intention was to ascertain the extent to which an effective contractual judgment enforcement process affects the ease or otherwise of doing business in Nigeria.

It is found that by and large, the problem of the judicial system in which the absence of separate courts for Elections issues in form of Constitutional Court, and a Commercial division of the High Court responsible to handle contractual and other commercial cases. Judicial reform needs constant fine-tuning, establishing separate commercial courts with tailor-made rules for commercial cases and reducing the long delays in the trial and enforcement of contractual and other commercial disputes. Specialized commercial courts result in faster, cheaper contract enforcement.

Similarly, it is found that there is the problem of not only the number of procedures a civil litigant is required to comply in the trial and subsequent enforcement in commercial dispute under the various civil procedure rules of the state's high courts and the federal high courts, but also in the fact that there are a number of High Court Civil Procedure Rules as the area states in the Nigerian Federation.

Also, it is found that there is the problem of the Bailiff, the officers responsible of moving the civil cases through the judicial system and who give effect and responsible to enforce the contractual judgment of the court. Despite these enormous powers of the bailiffs

in the process of trials and enforcement of contractual judgments, in Nigeria majority of the bailiffs in all our courts including the courts of records are either retired police or military officers with no formal training on their powers and obligations in accordance with the provision of the Law and rules of procedure. In many case upon their employment with the states or Federal judiciaries the bailiffs learn on the job thereby making the process of moving the cases through the judicial system incoherent, complex and unprofessional. The unprofessional handling of these powers by the bailiffs has particularly been identified as one of the factors for delays in moving civil cases through the system and ineffective contractual judgment enforcement in Nigeria.

The fifth chapter continued with the same objective pursued in chapter four but with focus on national legal frameworks. The chapter examined the extent to which national laws and the existing legal framework for Enforcement of contractual judgments in Nigeria. This is the last stage of the judicial process after the legal right; claim or interest has ended in a judgment or order, which remains to be enforced. It is the process whereby a judgment or order of court is enforced or to which it is made effective according to law. Most judgments require compliance with their terms. It is only in the case of a declaratory judgment, which merely declares what the right of a party is, without imposing any sanction on a defendant, or directing either of the parties to do anything that execution is not called for or levied. Also execution will be totally unnecessary where there is voluntary compliance with the judgments and orders of the courts.

The chapter concluded that the enforcement of civil judgments has recently been recognized as an essential underpinning of, and even measure of, the Rule of Law in both developed and developing countries. Credibility of the judiciary relies on it. However, in

many transition and developing countries, certain enforcement problems appear more serious and intractable than in more developed countries.

Finally chapter six, which is the current chapter now concludes the dissertation by raising the key findings of this thesis and offering the way forward in the area of providing a cheap and effective contractual judgment process in Nigeria that encourage foreign direct investment (FDI) for growth, job creation and development.

6.2 Findings

The research is meant to help in a better understanding of the causes of delay in contractual judgment enforcement as impediment to the inflow of the foreign direct investment (FDI) in Nigeria. Delay in contractual judgment enforcement has far reaching implications for the foreign investment to flow and flourish, the impact of the such delay and its causes are as follows:

a. In the first place, the significance of this dissertation is in bringing out the delays in the enforcement of contractual judgments as impediments to the inflow of foreign direct investment FDI in Nigeria. On the main theme of the research when the phrase Delay in contractual judgment enforcement is mentioned there is the tendency to impute to it the ordinary causes of such delay to be lack of manpower in the judiciary, corruption and other causes to which such delay are known and identified with. This is a legitimate response. But this dissertation sees the phrase to mean more in the light of the problem encountered in relation to the Legal system itself that made no provision for separate courts to handle commercial cases and other adhoc judicial activities from regular court that tried and subsequently enforce contractual judgments**.** By the problem with our judicial system, we mean in the area of trials of

contractual disputes by the judges of the States High courts and Federal High court, the amalgamation of all sorts of cases. These include criminal, matrimonial and enforcements of fundamental Human rights and the Civil that involve the trails and the enforcements of contractual judgment in these courts. This is with a view to explain how these practices affect the effective trial and enforcement of contractual judgments.

b. This dissertation further identified that the slow pace of judicial processes, alongside undue delays and incessant adjournments that have become endemic in the Nigerian Judicial System are in some circumstances the effect of the civil procedure rules, enacted to regulate all civil proceeding before a State or Federal High Courts. Considering the number of procedures a civil litigant is always required to follow in Nigerian courts for trial and enforcement of contractual judgment it compares with other developed economies and the absence of a unified civil procedure rules applicable throughout Nigeria led to disparity in the ease or other wise of enforcement of contractual judgments in different states of the federation. It is clear that absence of a unified rules in the country is both time consuming and costly and immeasurably hinder the smooth trial and enforcement of contractual judgment, However, the Lagos model of the Civil Procedure Rules is to a large extent simplified and accommodative and could well be adopted by all the States of the Nigerian Federation as a Uniform Civil Procedure Rules for Nigeria.

c. This dissertation further identified the absence of an institutionalized recruitment and training of court bailiffs in the enforcement of contractual judgment process as an impediment. Court Bailiff exercises an important role in the discharge of judicial

functions. The bailiffs are actually the officers of the court on the ground in giving effect to judicial pronouncements, order and judgments. The duties of the bailiff's runs from filling of cases and run through the execution of the judgment of the court. A bailiff is a court attendant entrusted with duties such as the maintenance of order in a courtroom during a trial. An official who assists a sheriff and who has the power to execute writs, processes, and arrests

On the one hand, the Bailiffs and their assistants serve summonses and other important legal documents on parties as required by a Court or Tribunal or as requested by a person who is a party to litigation. For example, a court or tribunal hearing which parties are required to attend clearly cannot proceed unless there is proof that the parties concerned have had the summonses to attend properly served on them in a manner specified by law. On the other hand, the Bailiff plays an important role in promoting full compliance with Court and Tribunal judgments and orders. Example if a judgment debtor who has been ordered to settle a debt, or a person who has been ordered to vacate premises, fails to do so, application can be made to the Bailiff to take the appropriate steps to try to recover the debt or deliver the premises to the applicant. The duty of the bailiff is to the judgment creditor; he must carry out the execution as soon as opportunity arises.

Despite these enormous powers of the Sheriff and bailiffs in the process of trials and enforcement of contractual judgments in Nigeria majority of the bailiffs, it is found that, in all our courts including the courts of records are either retired police or military officers with no formal training on their powers and responsibilities in accordance with the Law. In many circumstances the Bailiffs 'learn on the job' thereby making the process of moving the cases through the system incoherent, complex and unprofessional. The unprofessional handling of

these powers duties and obligations by the bailiffs has particularly been identified as one of the factors for delays in moving civil cases through the system and ineffective contractual judgment enforcement in Nigeria.

6.3 Recommendations

The important issues identified and dealt with in this dissertation, which includes the realisation of a cheap and effective contractual judgment enforcement process in Nigeria as a factor of influencing the flow of foreign direct investment (FDI), Nigeria in accordance with the **r**eforms carried out on legal framework, authorities have tried to examine the legislative and regulatory central mechanisms of foreign investment in Nigeria. The institutional and various municipal legislations relating to these have been institutionalized in trying to attract FDI via various reforms. It is a welcome development, however, it could be observed for this purpose that problem of dispute settlement and subsequent enforcement even in cases of arbitrations remained intact notwithstanding the reforms. There is a need to further amend the relevant laws to accommodate other forms of the factors identified in this dissertation.

i. On the Nigerian Judicial system in the area of trials of contractual disputes by the judges of the States High courts and Federal High courts and the amalgamation of all sorts of cases. These cases include criminal, matrimonial, enforcements of fundamental Human rights and the Civil that involve the trails and the enforcements of contractual judgment in the same courts and the ad hoc posting of the judges to Elections Petitions Tribunals. This is with a view to explain how these practices affect the effective trials and enforcement of contractual judgments.

   The creation or establishment of specialized courts may immeasurably curtail this problem. The specialized courts do play a major role in this direction, they have

several advantages associated with them and this include the improvement of the courts decision making process, reducing pending cases, encourage economic growth through protection of intellectual property and reducing the number of judge hours required to resolve complex cases.

There is a need, particularly in the constitutional amendment process of our judicial system to create specialized Constitutional courts as a specialized court centrally, and in each state of the federation to handle all Elections Petitions, Enforcement of Fundamental Human Rights and other Constitutional issues, on the one hand, and the creation of Commercial Division of the State and federal High courts. There is the need to establish, within the judiciary, the Constitutional Courts to handle election petitions and adjudicate on violations and enforcement of Fundamental Human Rights and to establish Matrimonial Courts, to handle family issues and custody of children and to establish Commercial Courts to handle commercial and contractual trials and enforcement.

The creation of commercial courts in all judicial divisions in Nigeria and the need for specialist Judges in all spheres of commerce, Banking and Credit, Companies and Allied Matters, Patents and Intellectual Property etc. These Judges by their background and training will be adequately equipped to appreciate the needs and aspirations of the business community in their adjudication. The ideal justice delivery system such as that envisaged by the establishment of commercial courts will be that where process and personnel are positioned to take full advantage of the developments in technology by employing the appropriate scientific devices to save judicial time and remove the physical stress placed on Judges in court who at the

present time still take notes in long hand, a job that can be more efficiently and conveniently handled by trained stenographers. The other advantage associated with the specialized courts is the reduction of pending cases where there is a reduction in pending cases in the general courts, thee courts therefore allow experts to deal with complex cases other than for them to be dealt with in generalized courts.

The number of appeals for cases dealt with by the specialized courts is minimal, the specialized courts reduce the possibility of appeals due the fact that they are assigned specialized judges whose ruling is of quality and fair. The growth in specialized courts represents an attempt of the system to address the root causes of most difficult social problems. Expertise, money saving, is typically mentioned among the key benefits of specialized courts.

ii. Secondly, on the problem with the rules of courts, the problem is not only limited to the number of procedures a litigant is required to comply in the trial and subsequent enforcement in commercial dispute, but also in the fact that there are a number of High Court Civil Procedure Rules as there are states in the Nigerian Federation. It is clear that absences of unified rules in the country is both times consuming and costly and immeasurably hinder the smooth trial and enforcement of contractual judgment.

The problem with the Civil Procedure Rules has been identified and confronted in Lagos State Nigeria. On 16 October 2000, the Summit of Stakeholders on the Administration of Justice in the 21st Century concluded that reducing delays and decongesting the courts would be impossible without reviewing the court rules. The review started in April 2002.

However, the Lagos model of the current Civil Procedure Rules is to a large extent simplified and accommodative and could well be adopted by all the States of the Nigerian Federation as a Uniform Civil Procedure Rules for Nigeria.

iii. Lastly on the problem of the role of the Bailiffs. The bailiffs are actually the officers of the court on the ground in giving effect to judicial pronouncements, order and judgments. The duties of the bailiff's runs from filling of cases and run through the execution of the judgment of the court. A bailiff is a court attendant entrusted with duties such as the maintenance of order in a courtroom during a trial. An official who assists a sheriff and who has the power to execute writs and other processes but who as a result of lack of training on employment.

For this purpose there are indications that changes to the system of bailiffs have reached a desperate proportion. There is a need for government to reform bailiffs. The government's recommended aims are to tackle aggressive and unnecessary bailiff activity without compromising proper and effective enforcement. The government should seek to update and clarify centuries of archaic law and to combine sensible powers of enforcement with stronger requirements for accountability and professionalism in the industry. Lack of adequate training had meant that both judges and support staff were not up to date with the law or with improved techniques of case management that ensure speedier and more efficient handling of cases, reduction in delays and greater respect for the rights of citizens. The lower level of courts staff in the category of bailiffs, messengers, clerks and registrars had not received training for years, some of them had never received training since they were employed. This meant the standard court procedures which facilitated quick disposal of cases as

embodied in legislation had been kept in abeyance, because training opportunities were inadequate, and newly appointed staff received their orientation and direction principally from their superiors and predecessors based on tradition rather than from knowledge of the relevant laws

There is the urgent need for the following:

a. A basic need for training on civil process and procedures for the judicial officers and for court support staff

b. A need to develop and institutionalize the internal capacity to design, deliver and manage a regular courts' education system at the state level.

These would go along way in providing an effective and speedy movement of civil cases through the system of trial and subsequent enforcement in our courts, which may further create confidence for the inflow of the Foreign Direct Investment (FDI) in to Nigeria.

BIBLIOGRAPHY

'What International Investors look for when investing in developing countries' Energy and Mining Sector Board Discussion Paper, Paper No. 6 May 2003.

"Few pillars for the amendment of the Execution Code" on www.exekuceonline.cz; M. Kasíková (2003), "Execution at the Court of the First Instance", Legal Advisor, vol. 6, p. 17. Cited in see 2009 'Investment Climate Statement-Nigeria. Bureau of Economic Energy and Business Affairs. Available at http://www.state.gov/e/eeb/rls/othr/ics/2009/117246.htm accessed on 11th April 2009.

2009 Investment Climate Statement-Nigeria. Bureau of Economic, Energy and Business Affairs U.S Department of State found in http://www.state.gov/e/eeb/ifd/2008/100994.htm accessesed on 4/2/2009Adekoya o. and Emagun D, (2012) Arbitration Guide IBA Arbitration Committee, Nigeria.

Adelanwa B. ' The Courts And Management of Election Petitions' Daily trusts newspaper 2 May 2011.

Afolayan A.F and Okorie P.C: (2007) Modern Civil Procedure Law Dee sage Press. Generally

Agbede I.O: (2001).Themes on Conflict of Laws (Shaneson) Efevwerhan D.I: Principles of Civil Procedure in Nigeria (Chenglo) 2007: (Thomson Reuters) 2009. http://ssrn.stanford.edu.comAgbede, I.O. (2005) Dynamics of Law Reform Enterprise: Nigerian Experience. In Nigerian Bar Journal. (5) 3 Nigerian Bar Association, Page 50-64

Alan Uzelac, P University of Zagreb, Establishing common European standards of enforcement: recent work of the Council of Europe as regards enforcement procedures and bailiffs, Paris, Sorbonne, 15 November 2002, http://alanuzelac.from. Hr/Pdf/Radovi/rencontres.

Ali, A J [2005] 'Foreign direct investment and development, competitiveness review' available Andrei Shleifer& Robert W. Vishny, A Survey of Corporate Governance, 52 J. Fin. 737, 742

Asiedu, E. (2003) Capital controls and Foreign direct investment, World Development, 32.

Assessing the impact of the current financial and economic crisis on global FDI flows. UNCTAD, April 2009. at ALLBusiness.com. Accessed on 4th march 2009

August, R, (2009) Recent Developments in International Investment Law.Universitepantheonasas (paris11) institute des Hautes etudes internationals de Paris.

Awogu, Olisa (1992) Enforcement of Court Orders and the Stability of Government and Society. In Judicial Lectures: Continuing Education for the Judiciary. Lagos: MIJ

Ayanwale, A B. FDI and Economic Growth: Evidence From Nigeria, AERC Research Paper 165 African Economic Research Consortiums, Nairobi 2007, Page 1.

Ayua I.A (Ed) Law, Justice and the Nigerian Society: Essays in Honor of Justice Mohammed Bello, (Lagos; Nigerian Institute of Advanced Legal Studies,) 1995.

Babalola, A (2003) 'Enforcement of judgments' Intec Printers Limited, Ibadan.
Claude Ménard& Mary M. Shirley eds., 2005)

Council of Europe, Legal Affairs, http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Enforcement_of_judgments/.

Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 33 (1) can be found online at: http://europa.eu/eur lex /pri/en/oj/dat/2001/l_012/l_01220010116en00010023.See ibid.

Craven, Greg Reforming the High Court. (2007). www.samuelgriffith.org.au/papers

Daniel Kaufmann et al., Governance Matters IV: Governance Indicators for 1996–2004 (2005), http://www.worldbank.org/wbi/governance/pdf/GovMatters_IV_ma in.pdf.

DaniRodrik, Introduction to In Search of Prosperity: Analytic Narratives on Economic Growth 8–15 (DaniRodrik ed., 2003)). Available online at http://www.coe.int/t/e/legal_affairs/legal_co-operation/operation_of_ justice/enforcement_of_judgments/2003r17,

Daron A. & Simon J. (2005).Unbundling Institutions, 113 J. Pol. Econ.949, 983–84.

Dele P. (2006) Arbitration & Conciliation Act Companion including customary Arbitration (with cases from 1958-2005) Dee-Sage Nigeria Limited, Lagos

Doing Business in Nigeria 2008, available at http://www.doingbusiness.org/subnational/ExploreTopics/EnforcingContracts/Detiails.aspx? Accessed on 4th April 2009.

Doing Business in Nigeria 2008. Enforcing contract, court efficiency. Sub National series.

Doing Business in Nigeria 2009

Doing Business in Nigeria 2009, The World Bank group, available at http://www.doionomies/?ng business.org/Explore Economies/? economyid=143 accessed on 4th April, 2009.

Doing Business in Nigeria2008. Available at http://www. Doingbusiness.org/sub national/explore economies/Nigeria.aspx accessed 4TH April 2009.

Douglass C. North, Institutions, Institutional Change and Economic Performance 54(1990)

EmekaMaduewesi 'NIGERIAN LAW: Making the Case for a Unified Civil Procedure Rules' 02 April 2010 www.nigerianlawregistry.com. visited last on 25th July 2011.

Foreign Direct Investment and Development, competitiveness Review [2005] available at AllBusiness.com, accessed on 4th march 2009

Foreign Direct Investment as a factor of Economic Growth in Nigeria, African Institute for Economic Development and Planning [IDEP] Dakar-Senegal [2002] 1

Foreign Direct Investment in Nigeria: Magnitude, Direction and Prospects. Available at htt://www.aeracafrica.org/ document/books/FDI-papers-booklengh-volume.pdh accessed 4th April 2009.

Foreign Investment for Development.2002 Maximizing Benefits, Minimizing Cost. Overview OECD

Franklin O. The Judicature: Its Role, Monitoring and Fumigation—NJC Probe March 15th, 2011.

Funke, N. and S.M Nsouli The New Partnership for Africa's Development (NEPAD): Opportunities and challenges. IMF Working paper No.03/69. International Monetary Fund, Washington, D.C 2003

FunkeA dekoya, ÆLEX Dispute Resolution 2006/07 Country Q&A Nigeria Cross-border Dispute Resolution Handbook 2006/07 and is reproduced with the permission of the publisher, Practical Law Company. For further information or to obtain copies please contact jennifer.mangan@practicallaw.com, or visit www.practicallaw.com/disputehandbook.

Global Trade.Net the Network of International Trade services 'Investment Climate in Nigeria' accessed onhttp://www.globaltrade.net/f/business/text/Nigeria/Investing-Investment-Climate-in-Nigeria.html visited 23/12/2011.

Governance and Development, The world Bank 1992 International Bank for Reconstruction and Development, Washington D.C

Henderson, K (ed) (2004) Regional Best Practices: Enforcement of court Judgments, Lesson Learned from Latin America, April 2004, IFES Rule of Law White paper series.

http://www.investorwords.com/2599/investment.html last visited 23rd November 2010

http://www.oecd.org/document/1/0,3343,en_39048427_39049329_39634113_1_1_1_1,00.html on 23/12/2011.

Hussain K. (ed)' (1990) Legal Aspects of the New International Economic Order', New York: Nichols Publishing Company.

Ibrahim A. (2004) 'An appraisal of Legal Framework for Foreign Investment in Nigeria' modern practice journal of finance and investment law. 5th edition Vol.8 Nos.1-2

Ibrahim, A (2004) 'An appraisal of Legal Framework for Foreign Investment in Nigeria' modern practice journal of finance and investment law. Vol.8 Nos.1-2

Idornigie, P., (2004) The Principle of Arbitrability in Nigeria Revisited, J.Int.Arb. 21-3 279-288

J. Bureš, L. Drápal, M. Mazanec (2001), Civil Procedure Code – Commentary, p. xii. (5th ed).

Jeffrey, D. (2001) The importance of investment promotion in the poorest countries. World investment prospects special edition. The economist Intelligence Unit.

Jeffrey, D.S. The Importance of Investment Promotion in the poorest countries, World Investment Prospect, Special Edition (ND).

John McMillan & Christopher Woodruff, Dispute Prevention Without Courts in Vietnam, 15 J.L. Econ. & Org. 637, 637–38 (1999).

Johnson, McMillan, and Woodruff (2002) and Broadmanand others (2004).

Joyce Hawkins(ed) The Oxford Mini reference Dictionary (1995): Oxford University Press).

Justice in Nigerian Courts in Statistics: Case Flow Management and Problems of Congestion of Cases in Courts. In Judicial Lectures: Continuing Education for the Judiciary. Lagos: MIJ Professional Publishers Ltd.

Katharina Pistor et al., Law and finance in transition economies, 8 Econ. Transition 325, 356 (2000).

Kathryn Hendley et al., Law Works in Russia: The Role of Law in Inter enterprise Transactions, in Assessing the Value of Law in Transition Economies 56, 88 (Peter Murrell ed., 2001).

Kathryn Hendley, (1998). Growing Pains: Balancing Justice & Efficiency in Russian Economic Courts, 12 Temp. Int'l & Comp. L.J. 301.

Kaufmann, Daniel, (2004). "Corruption, Governance and Security: Challenges

Kebonang, Z. &Mosweu, S. NEPAD and the Challenges of attracting Foreign Direct Investment in Africa, www.JSC/-africa .com/JSDA/Summer 2006 PDF/ARC NEPAD Challenges attracting foreign investment. Pd; accessed on the 4th of April, 2009.

Kenneth W. Dam, (2006) The Judiciary and Economic Development (Univ. Chi. John M. Olin Law & Econ. Working Paper No. 287, 2d series, available at http://ssrn.com/abstract=892030.

Kevin H. Zhang, (2005)'How Does FDI Affect Economic Growth in China?' Economics of Transition 3, 2001 Andreas, J. The Effects of FDI inflows on Host Country Economic Growth.Junkuping, Sweden.

Kudina A. &M. Jakubia, OECD, Global Forum on International Investment; The Motives and Impediments to FDI in the CIS.

Ladner, John Role of the Judiciary. (2000). www.smartvoter.org Lougani, P. and Razin, A. (2001) 'How beneficial is Foreign Direct Investment for Developing Countries?' Finance & Development. A quarterly magazine of the IMF, June vol.38 number 2

Martin, O 'The Rule of Law and Economic Development of Nigeria' @ChatAfrikArticles.com on 4th January 2012.

Masunda, M.A. The Role the Judiciary Must Play in Society. www.thezimbabweanindependent.com.

McMillan. Online, http://www.worldbank.org/wbi/governance/pubs/gcr2004.html.

Medina Arango, O. 'Importance of FDI in development of Emerging Countries, Application to Colombia and the Philippines'. Academic Department of International business. EAFIT University Colombia.

Morisset, J. (2000) Foreign direct investment in Africa: Policy also matters, Transnational Corporations, 9(2):

Mwilima N. (2003) Foreign Direct Investment in Africa, Labour Resource and Research Institute (LaRRI)

Nigeria, Country Business Guide; Comparative Business Indicator, November 2004.

Nilsson, J. (2008)'FDI and Economic growth; Can we expect FDI to have a positive impact on the Economic growth in Sub-Saharan Africa? Uppersala University.

Nwadialo F. (2000) Civil Procedure in Nigeria 2nd Edition (University of Lagos Press) .

O. G Wafure&A .Nurudeen. (2010)' Determinant of Foreign Direct Investment in Nigeria: An Empirical Analysis' Global Journal of Human Social Science Vol.10 Issue 1 .

Obaseki, A.O. (1994). Constitutional Structure and the Position of the Judiciary – Interpretative Jurisdiction of the Courts and Interpretation of Other Statutes (1990). In Judicial Lectures: Continuing Education for the Judiciary. Lagos: MIJ Publishing.

Odume. I. (2007) 'Law as a catalyst for Economic Development. A Reflection on Nigerian Investment Promotion Commission Act' International Journal and Contemporary Studies, vol.2, No. 1 & 2 The Development Universal Consortia.

OECD 50 'contract enforcement and Dispute Resolution' Policy framework for Investment. User's toolkit accessed at OECD Benchmark Definition of Foreign Direct Investment, Third Edition.

OECD, MAI Negotiating, Final Version, 24 April 1998, DAFFE/MAI (98)7/REV1, 11, available at www1.oecd.org/daf/mai/pdf/ng/ng987rle.pdf.

Ojukwu E and Ojukwu C.N (2009) Introduction to Civil Procedure 3rd Edition 2009 (Abuja; Helen-Roberts Press)

Olatokunbo, Samuel (2008). The Rule of Law: A Panacea to Corruption. In Onyeakagbu, A. Ikedinma (ed), The Role of the Judiciary in Nigerian Democratic Process.

Olatokunbo, Samuel'(2008). The Rule of Law: A Panacea to Corruption. In Onyeakagbu, A. Ikedinma (ed), The Role of the Judiciary in Nigerian Democratic Process. Essays in Honour of Justice Iche N. Ndu. Lagos: Vox Nigeria Limited.

Oliver E. Williamson, The Economic Institutions of Capitalism 2 (1985).

Oliver E. Williamson, The Mechanisms of Governance 332 (1996).

Onyekpere, Eze (1996) 'Justice for Sale: A Report of the Administration of Justice in the Magistrate's and Customary Courts of Southern Nigerian'. Lagos: Civil Liberties Organization.

Organization for Economic Co-operation and Development [OEDC], Foreign Direct Investment for Development, maximizing Benefits, minimizing costs, 2002. Overview.

Oseghale, B.D. and E.E Amonkhienan. (1987) 'Foreign debt, oil export, direct foreign investment(1960-1984) The Nigerian Journal of Economic and Social Studies .

Otteh, Joseph (1995). Fading Lights of Justice: An Empirical Study of Criminal Justice Administration in Southern Nigeria Customary Courts. Lagos: Civil Liberties Organization; The Danish Centre for Human Rights.

Oyinola, O. (1995) 'External capital and Economic development in Nigeria (1970-1991) the Nigerian Journal of Economic and Social Studies 37(2&3) .

PARRA, A (1992) "principles Governing Foreign Investment, as Reflected in National Investment Codes", 7 ICSID Review-FILJ 428

Preliminary results of the World Investment Prospect Survey 2009-2011 (WIPS) Conducted by UNCTAD also show that developed economies in Europe and North America- which still host the major share of World FDI inflows and Stocks-

Price water house coopers L.L.P Prime contractors, the Nigerian Investor's Roadmap, and enabling environment strategy. Final Report [2002]

PrudilováKoníčková Z (2003), "Concurrence of the execution and bankruptcy proceedings", Legal Advisor, vol. 12,

PUNUKA Attorneys & Solicitors Nigeria 2010 www.iclg.co.ukiclg to: international arbitration on 26/6/201 Publishers Ltd.

Rabiu, A. (2007) Security, justice and growth programme, justice component.roll-out of training of judicial officers, kano state project. DFID report June-November 2007

Rafael La Porta et al. (1997) Legal Determinants of External Finance, 52 J. Fin. 1131, 1132, 1149

Rainer Haselmann et al. (2006) How Law Affects Lending 1 (Columbia Law & Econ., Working Paper No. 285, , available at http://ssrn.com/abstract=846665.

Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Article 3 can be found online at: http://europa.eu.int/eurlex/pri/en/oj/dat/2004/l_143/l_14320040430en00150039,

Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Article 20.

Rogof, K &Reinhert C. (2003) 'FDI in Africa: The Role of Price stability and currency instability ' IMF working Paper 03/10

Ronald Bernstein (ed) the Hand Book of arbitration, Sweet and Maxwell quoted by C. Obi Introduction to Arbitration Clauses, Continuing Legal Education Association (Nigeria) Lecture

Ross Levine et al., Financial intermediation and growth: Causality and causes, 46 J. Monetary Econ. 31 (2000).

Sabharwal, Y.K. (2005) The Role of the Judiciary in Good Governance. www.supremecourtofindia.nic.in.

Sabine Hertveldt (2008) 'Repairing a car with the engine running' Enforcing Contracts case study: Nigeria.

Shihata, I. (1994) Recent Trends Relating to Entry of Foreign Direct Investment, 9 ICSID Review-FILJ 47

Smith B.S, (2007) Good Governance and Development Palgrave Macmillan New York.

Soumyananda D. (2009) 'Factor attracting FDI to Nigeria: an Empirical Investigation.. Madras School of Economics, Chennai, India.

Tao, z and Wang [1998] foreign direct investment, and contract enforcement, school of Business, university of Hong Kong.

Thorsten Beck & Ross Levine (1997) Legal Institutions and Financial Development, in Handbook of New Institutional Economics 251, 253

Tribilcock, M, and, Leng, J. (2006) The role of formal contract law, and enforcement in Economic Development, Virginia Law Review vol.92.

U.S Department of State, 2009 Investment climate statement-Nigeria, Bureau of Economic, Energy, and Business Affairs. Available at http://www.state.gov/e/eeb/rls/othr/ics/2009/117246.htm. accessed on the 11th April 2009.

U.S Department of State, Investment Climate Statement-Nigeria, Bureau of Economic, Energy and Business Affairs, [2009] available at http://www.state.gov/e/eeb/rls/othr/ics/2009/11724.htm.
UNCTAD April 2009.

UNCTAD Investment Brief Number 3, 2008

UNCTAD, Economic Development in Africa, Rethinking the Role of Foreign Direct Investment.2002 United Nations New York.

UNCTAD, World Investment Report, 2007, United Nations, New York.

UNCTAD, World Investment Report, 2010. United Nations, New York.

United Nations Commission on International Trade Law, UN Doc, A/40/17 (Annex. 1) Adopted on 21st June 1985

Veronica, B (Ed) 'The enforcement of judgments in civil and commercial cases in the new EU member states' European Bank for Reconstruction and Development. Law in transition online

Victor Dike ' Corruption in Nigeria: A new paradigm for effective control' 2002 Morris publishing company, U.S

Wade, William (1989) Constitutional Fundamentals. A Paper Delivered at the Hamlyn

WEB V STENTION (1893) 11 QBD 518 CA. Cited in Babalola, A Op cit at 95

World Bank (2003). Cited in World Development Report (2005)

World Bank (2007) reproduced in Doing Business in Nigeria 2008. At page 15.

World Bank World Development Reports (2005)

World Bank World Development Reports (2005) United Nations New York

World Bank, World Development Report 2005: A Better Investment Climate for Everyone 86 (2004).

World Developing Reports 2005

World Development Report (2005)

World Development Report (2005)

World Development Report (2005)

World Development Report (2005) page 89

World Development Report (2005) PP 84-89 available at UN website.

World Development Report (2005) See also OECD (2002b), Carlson and Payne (2003), Dollar, Hallward-Driemeier, and Manistee (2003).

World Development Report (2005) United Nations New York.

World Development Report 2005 UNITED NATIONS New York

World Investment Report .2007 World Development Report, 2005

World Trade Organization, (1996) WTO Report. 'Trade and Foreign Investment' Press/57 October

www.ebrd.com/counrt/sector/law. 2006 www.ebrd.com/country/sector/lawLawintransition. 2006 www.ebrd.com/country/sector/law. Law in transition online 2006.

Yerokun, O (1990) 'Legal Aspects of Export Trade in Nigeria' Gravitas Review of Business and Property Law (GRBPL) Lagos: Gravitas Publishing Limited.

Young-Shik, L.(2005) Foreign Direct Investment and Regional Trade Liberalization; A Viable Answer For Economic Development? Journal of World Trade. 39 (4) Kluwer Law International, Netherlands.