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A REVIEW OF THE ENFORCEMENT OF ARBITRATION AWARDS; A COMPARATIVE STUDY OF NIGERIA AND SOUTH AFRICA.

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAW

BY

OKADAZIM NIELLA MAKINDE

(U05064296)

DEPARTMENT OF PROCEDURAL LAW

FACULTY OF LAW

UNIVERSITY OF PRETORIA

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SUPERVISOR: DR. RASHRI BABOOLAL-FRANK

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3. I have not used work previously produced by another student or any other person to hand in as my own.
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DEDICATION

This dissertation is dedicated to God Almighty for His grace throughout the period of this dissertation. To Him alone be all the glory, honour and adoration.

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LIST OF ACRONYMS

ADR -Alternative Dispute Resolution

ACA -Arbitration and Conciliation Act

AFSA – Arbitration Foundation of Southern Africa

FJA – Foreign Judgements (Reciprocal Enforcement) Act

IAA – International Arbitration Act

ICC – International Chamber of Commerce

ICSID – International Centre for Settlement of Investment Disputes

LFN – Laws of the Federation of Nigeria

LSAL -Lagos State Arbitration Laws

PBA -Protection of Business Act

REFAA – Recognition and Enforcement of Foreign Arbitral Awards Act

UNCITRAL - United Nations Commission on International Trade Law

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ABSTRACT

Arbitration, as one of the alternative dispute resolution procedures, aids in the quick resolution of disputes as against traditional litigation. The Courts' apparent lack of promptness in dispensing disputes necessitates the employment of arbitration in international and sometimes national businesses. The main purpose of parties in any dispute (particularly arbitration) is for the arbitrator's ruling to put an end to the dispute that has arisen between them. The purpose and logical conclusion of the arbitration process is the arbitral award. The award's concept must be obvious and unambiguous so that when it is issued, the winning party has no problem recognizing and enforcing it.

This study examines the current legal regime for recognising and enforcing arbitration awards in Nigeria and South Africa. It will also address the review of the enforcement of arbitral awards (both domestic and international), considering the issues and challenges that have arisen. The underlying policy considerations of each country in their quest to join the comity of nations in guaranteeing prompt enforcement of arbitral awards, as well as efforts to reform the primary legislation governing arbitration awards in both countries, will also be reviewed in this study.

Even though there have been several suggestions, efforts, and recommendations for reforming the laws and legislations governing arbitration, recognition, and enforcement of arbitral awards, this research will also provide a general analysis of regulatory deficiencies in the enforcement of arbitral awards. I will make recommendations for legal and judicial approaches that Nigeria and South Africa can adopt.

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CHAPTER ONE

INTRODUCTION

1.1 Background of Arbitration

The introduction of Alternative Dispute Resolution with a specific focus on arbitration into our formal legal framework has become essential in both developed and developing countries[1]. Individuals, companies and countries look forward to getting the justice that is fair, less risky fast, reliable, productive, versatile and affordable for resolving commercial disputes[2] and arbitration is increasingly becoming the tool of choice for resolving these disputes.[3] Arbitration has become one of the most successful ways of dealing with the difficulties that come with contract, trade and investment disputes[4] and has become the most common and preferred form of dispute resolution, especially between commercial parties.[5]

The bible narrative of King Solomon and the two mothers,[6] Medieval Common Law and others are thought to have influenced the development of arbitration as a method of resolving disputes.[7] Arbitration was primarily envisioned in the past as a peacekeeping institution whose primary goal was to promote harmony between parties meant to live together rather than guarantee the rule of law. This was primarily owing to the recognition that the law's norms and procedures were, in certain cases, excessively inflexible.[8] It is extremely difficult to identify the actual origins of arbitration, but it appears that the practice arose in response to societal changes, and its roots can be traced back over a thousand years[9] and may have been lost to history.[10]

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[1] Y Gao 'A Brief Analysis of International Arbitration as a Form of Alternative Dispute Settlements' (2021) 3(1) *Scientific and Social Research*.
[2] AG Adaralegbe 'The Challenges in the Enforcement of Arbitral Awards in the Capital Importing States (The Nigerian experience)' (2006) 23 *Journal of International Arbitration Law* 406
[3] EA Schwartz 'The Role of International Arbitration in Economic Development' (2009) 12 *International Trade and Business Law Review* 127
[4] TM Joseph 'Arbitration and Developing Countries' (1979) 13(2) *The International Article Lawyer* 22
[5] A Redfern & M Hunter '*Law and Practice of International Arbitration*, (2004) 4th edition, London Sweet and Maxwell 1 and PWC, 2013 International Arbitration Survey, Corporate Choices in International Arbitration, Industry Perspective 6 https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study
[6] 1st Kings 3: 16-28
[7] WS Holdsworth *A History of English Law* (1966) 187
[8] D Rene, Arbitration in International Trade Dispute and Taxation. (1985), Kluwer 29 quoted in A Redfern & M Hunter *Law and Practice of International Arbitration* (2004) 4th edition, London Sweet and Maxwell 3
[9] PA Karrer *Introduction to International Arbitration Practice* (2014) 233
[10] ES Wolaver 'The Historical Background of Commercial Arbitration' (1934) 83(2) *University of Pennsylvania Law Review and American Law Register* 132 -146

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Arbitration has been described as a legitimate and conclusive means of resolving facts and legal concerns between parties to a submitting contract.[11] It is an extrajudicial process that serves as an alternative to traditional litigation. It is a private and generally informal trial mechanism for the adjudication of disputes.[12] Arbitration's advantages and benefits have been discovered to outweigh litigation,[13] and its importance is shown in the universal acceptance of its advantages and benefits in international trade and commerce.[14] With shorter settlement periods, a more acceptable procedure, experienced decision-makers, and confidentiality,[15] arbitration can be faster, cheaper and more confidential with relative finality than litigation.[16]

Arbitration, in its simplest form, is a method of resolving disputes between contending parties.[17] The disputing parties appoint or have appointed an impartial or neutral person to resolve their dispute on their behalf.[18] Businesses, according to conventional knowledge, choose binding arbitration because it is regarded to be different from litigation.[19] Arbitration is also known as a dispute-resolution mechanism in which the parties agree to be bound by the decision of an arbitrator, whose decision is generally final and legally binding on all parties.[20]

Even while some authors concede that a single standard definition of arbitration is difficult to elucidate,[21] certain texts do provide examples.[22] The practice of arbitration, on the other hand, is more concerned with how the arbitral procedures are applied by the arbitrator or arbitrators who oversee the process and conduct the proceeding than with its definition or lack thereof.[23]

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[11] WA Sturges 'Arbitration, what is it?' (1960) 35(5) *New York University Law Review* 1031-1048
[12] TE. Carbonneau *The Law and Practice of Arbitration* (2021) 1
[13] HT Edwards *'Advantages of Arbitration over Litigation – Reflections of a Judge'* (2016) 23-26
[14] E Togbor 'Commercial Arbitration Law and Practice in Nigeria by Paul Obaorenegbe Idornigie (2016) 32(2) *Arbitration. International*, 386-388
[15] RW Naimark and SE. Keer 'International Commercial Arbitration, Expectations and perceptions of Attorneys and Businesspeople' (2002) 30 *International Business Law* 203-04
[16] SR Cole 'Managerial Litigants? The overlooked problem of party autonomy in dispute resolution' (2000) 51 *Hastings Law Journal*, 1199, 1200-01
[17] AU Iwara 'Nature, Sources and Causes of Disputes, Unpublished paper delivered at an ADR Conference in Abuja, Nigeria, 2007
[18] Chartered Institute of Arbitrators Consumer Arbitration Scheme for the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA), England, 2000
[19] TJ Stipanowich and PH. Haskell 'Commercial Arbitration at its best; successful strategies for business users: a report of the CPR Commission on the Future of Arbitration, IL: CPR Institute for Dispute resolution.' (2001) .https://www.worldcat.org/title/commercial-arbitration-at-its-best-successful-strategies-for-business-users-a-report-of-the-cpr-commission-on-the-future-of-arbitration/oclc/45093769
[20] OJ Orojo, & AM Ajomo *Law and Practice of Arbitration and Conciliation in Nigeria* (1999) 480
[21] HJ Brown & A Marriot *ADR Principles and Practice* (1994) 49
[22] R Bernstein, J Tackaberry & AL Marriot *Handbook of Arbitration Practice* (1998) 13
[23] ENA Torgbor '*A comparative study of law and practice of arbitration in Kenya, Nigeria and Zimbabwe, with particular reference to current problems in Kenya'* Unpublished PhD Thesis, Stellenbosch University, 2013 8

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1.2. Overview of the study

Alternative dispute resolution can take many forms, including arbitration, mediation, negotiation, and conciliation, the focus of the dissertation is arbitration. The discussion will be on a comparative study of the review of the enforcement of arbitration awards in Nigeria and South Africa. Nigeria and South Africa are enormous and potentially blessed with the ability to handle very intricate disputes arising from domestic and international commercial relations and transactions.

The extent of the review of the enforcement of arbitration awards in both nations may be limited since the study does not have all the historical and expositions of arbitration in Nigeria and South Africa. The law and practice of arbitration in Nigeria and South Africa, as well as the enforcement of arbitration awards, will be examined. These will be in light of these countries' current legislation, which covers both domestic and international law.

The question is what standard of review should be utilized in recognizing and enforcing arbitration awards in both Nigeria and South Africa? Stemming from this question, the result and scope of this research are limited to the arbitration process and the actions that may be taken to analyse and improve the issues that arise in the enforcement of arbitration awards.

1.3. The Research Statement

Over time, practice has demonstrated that it is critical to resolving disputes (whether commercial or general) in a private, consensual, quick, and binding manner that leads to a final judgment in the interest of maintaining a relationship between the parties. This protects parties from unwarranted risks, allows them to continue their connections, provides for quick hearings, and gives all parties involved a better decision.

Arbitration has been accepted by many developed and developing countries as a more flexible approach to resolving disputes outside of the courtroom. They have adopted and revised domestic legal frameworks to accommodate businesses, attract commercial investments and investors, and make domestic disputes more bearable.

Some of the challenges and obstacles encountered in the domestic and international resolution of some of these issues are viewed as barriers and drawbacks that should be eliminated. The goal is to reduce arbitration time, save money, relieve the arbitral tribunals of unnecessarily large responsibilities in dealing with them, and reduce procedural obstacles and

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the uncertainties that come with them. This would thus make it easier to reach finality and ultimately, to have decisions enforced faster.

These issues persist, in part because the regulatory framework regulates them either partly or not at all; and while some of them may be remedied by better legislation, others cannot.

Arbitrators with varying levels of academic and professional experience, ethnic backgrounds, and practical experience address these challenges differently. This frequently results in contentious rulings and decisions, which do not foster arbitration consistency or the establishment of strong arbitration norms and standards, which results in difficulties in the enforcement of arbitration awards.

This study will seek to examine some of these difficulties, which may be specific to Nigeria and South Africa alone, review them, and give possible suggestions and recommendations that will be beneficial to these countries in the long term.

1.4. The Research Questions

The necessity to explore and review the many obstacles experienced in the enforcement of arbitral awards in Nigeria and South Africa prompted and motivated this research. The fundamental topic to evaluate is whether, under both nations' current legal frameworks, the procedures for enforcing arbitration awards are sustainable in terms of achieving justice for parties who select arbitration as a means of settling their disputes.

Other questions to be considered will include.

a. What are the challenges experienced in the enforcement of arbitration awards in Nigeria and South Africa, that warrant the necessary review?
b. What other efforts should be considered considering the challenges currently faced in the enforcement of arbitral awards in Nigeria and South Africa?
c. What improvements can be made to facilitate and improve the efficient enforcement and execution of arbitral awards?
d. Is there a need for the review of the existing legal framework or structures already in existence?

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These issues and questions arise regularly in arbitration processes, and they tend to create or contribute to frustration, confusion, delay, and high costs in Nigerian and South African arbitration practice.

1.5. The Research Objectives.

The goal of this study is to examine how arbitration awards are enforced in Nigeria and South Africa to increase effectiveness, however, there may never be a true criterion for determining what level of review or recommendations are appropriate for the topic at hand. The following objectives will be put into consideration when determining the topic at hand.

1. To discuss the laws and procedures of arbitration in Nigeria and South Africa.
2. To identify how arbitration awards are enforced in Nigeria and South Africa both domestically and internationally and establish if existing laws have been beneficial in the enforcement of these awards.
3. To investigate and review some of the challenges faced in the enforcement of arbitration awards in Nigeria and South Africa based on the existing laws.
4. To make recommendations where necessary to allow for improvement in the enforcement of arbitration awards in Nigeria and South Africa.

1.6. Research Methodology and Approach

The doctrinal research approach will be used to examine this dissertation. Reliance on primary and secondary legal materials on this topic, such as legislation, case laws, books, essays, and internet sources written on the subject will be considered. Since the topic at hand can only be understood via historical context, a historical perspective on the topic will be necessary. The topic will also use a comparative approach to evaluate the processes of arbitration laws and procedures, as well as a review of the enforcement of arbitration awards in Nigeria and South Africa, based on the existing problems.

This study will not attempt a comprehensive and exhaustive review of the enforcement of arbitration awards in Nigeria and South Africa, it will aid in the creation of domestic and international quality standards for both countries. There are also numerous works of literature on this topic that have been thoroughly examined and analysed, but this study will allow recommendations to be made that will align with continued prospects on the topic, its objectives and purpose. It is also not an attempt to refute already existing laws, concepts,

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theories or literature, but rather an endeavour to offer knowledge that might be legal, social, economic, or even traditional, which is a crucial necessity.

The similarities in origin, issues, shared experiences, similar legislation, rules, procedures, and their relevance to their systems inspired the choice of Nigeria and South Africa for this study. The preferential approach is also founded on the notion that, in terms of arbitration, both States are linked by their colonial history, which placed them in the same Commonwealth legal system, laws, and post-independence legislation derived from common English sources.

Nigeria has a large, rich, and relevant arbitration history and jurisprudence, while South Africa's arbitration heritage and experience, based on African customs, Roman-Dutch Law, and Common Law, contributes to the comparison's value. Furthermore, these countries may be considered exemplary instances of African jurisdictions having modern arbitration laws in their different regional areas of the continent, given their broad dispersion.

This research will address why despite several concerted State efforts, enforcement of arbitration awards has remained weak. It is important to also acknowledge many contributions made by individuals and institutions already working in this field of law, which data shall be used in this research.

1.7. Overview of Chapters

The study is divided into five (5) chapters, each of which covers a different topic. To begin, it informs the reader about the history of arbitration and provides general definitions, which are not exhaustive because there are many.

A brief history of arbitration in Nigeria and South Africa will be presented in Chapter one (1). Almost every convention and international law relating to arbitration have been ratified or acceded to by Nigeria and South Africa on a domestic and international level. The general characteristics and principles of arbitration in both nations will be discussed, as well as the existing legislative framework and the roles/impact of these laws/procedures on the generality of dispute settlement in Nigeria and South Africa.

The focus of Chapter two (2) will be on arbitration awards, the process and procedure for the enforcement of arbitration awards, the review of the enforcement of arbitration awards in Nigeria and the applicability of various Nigerian legislation to arbitration awards. This

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discussion will be crucial in considering the numerous discrepancies, flaws, and recent revolt, notwithstanding minor hurdles, that have been identified and experienced in the recognition and enforcement of arbitration rulings. Although recognition and enforcement of arbitration awards are not mutually exclusive, it is Nigerian tradition that by enforcing an arbitration award, the award is presumed acknowledged in the country where it was issued.

In Chapter three (3), the review of arbitration award enforcement in South Africa will be examined, along with some other rudimentary topics that were already covered in Chapter two (2). This will also contain a structured overview of the important practical concerns surrounding the enforcement of arbitral awards in South Africa, following the normal procedures for the enforcement of both domestic and foreign arbitral awards under South African law. What improvements to existing laws and procedures should be considered, as well as possible reform proposals to strengthen these laws and other aspects of arbitration award enforcement in South Africa?

The primary element of this study will be contained in Chapter four (4), which will compare the reviews of both nations' (Nigeria and South Africa) enforcement of arbitration awards and how useful each discovery can be for the growth of arbitration in either country. The investigation will be based on a comparison of case law, pertinent statutes, and applicable laws in both countries, which have either developed or slowed significantly.

The research is concluded in Chapter Five (5), which suggests probable legislative action that may be required to attain the recommended ideal results on arbitration award enforcement. The findings from the preceding chapters will be examined in light of the analytical tools developed by important legal studies in this chapter. Recommendations to the questions raised in this dissertation will be proposed, as well as proposals for the essential legal laws that should be established to ensure that arbitration awards are enforced efficiently in Nigeria and South Africa.

As a result, given the topic's practical and theoretical importance, it attempts to conduct a thorough examination of the conditions that must be met for it to be legitimate. This will include an emphasis on the question of the relevant law as well as a full theoretical study of these two countries' efforts to ensure that justice is served in the enforcement of arbitration awards.

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1.8. Brief Background of Arbitration in Nigeria

For a long time, Nigeria has used arbitration as an alternative to dispute resolution. Nigeria has long been a strong supporter of arbitration and other types of alternative dispute resolution (ADR) in various forms.[24] Customary arbitration and other forms of alternative dispute resolution (ADR) were significantly more common in traditional cultures before the advent of modern arbitration in Nigeria.[25] The goal was to sustain existing connections rather than just declare rights and obligations, which may or may not result in effective and lasting justice.[26]

Traditional methods of resolving disputes were popular in Nigeria prior to the arrival of the colonial government in the late 19th century. Parties were represented by people with brilliance and the ability to persuade through arguments.[27] The village leaders and elders settled most of the contentious matters. Due to their faith in the wisdom and decisions of the elders, the people of most of these communities trusted the conclusion of these disagreements and did not need to appeal.[28] Following that, parties began to resolve their issues through the courts, since it became the sole option for aggrieved parties who were dissatisfied with the community heads' final decisions, given the fact that the decisions were not binding.[29]

Traditional litigation in Nigeria's regular courts can be a costly, time-consuming, inefficient, and ineffective process that obstructs rather than helps the resolution of disputes. Since minor matters are almost always relegated to the courts, it almost always impedes the speedy resolution of disputes owing to inconvenient procedures, congestion, and needless overpopulation.[30] Considering commercial disagreements are not to linger long, they must be settled as quickly as practicable.[31] As a result of these factors, arbitration was formally adopted as a method of dispute resolution in Nigeria.

The Arbitration and Conciliation Act 1988 (now known as the Arbitration and

[24] MA Rufai 'Alternative Dispute Resolution' *Compendium of the 2002 -2003 workshops in Alpha Juris Series, Port Harcourt, Juriscope Press* (2005) 95
[25] MM Akanbi, LA Abdulrauf, and AA Daibu. 'Customary arbitration in Nigeria: a review of extant judicial parameters and the need for a paradigm shift' (2015) *Journal of Sustainable Development Law and Policy* 6(1) 199-201
[26] A Chukwuemerie 'Salient Issues in the law and practice of arbitration in Nigeria' (2006) 14(1) *African Journal of International and Comparative Law* 1
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[28] AT Ajayi & LO Buhari 'Methods of Conflict Resolution in African Traditional Society (2014) 8(2) *African Research Review* 138 http://dx.doi.org/10.4314/afrrev.v8i2.9.
[29] Ufomba V. Ahuchaugo, (2003) F.W.L.R. (Part 157) 1013, 1038
[30] Y Olaoluwa 'Analysis of the Strengths and Weaknesses of Alternative Dispute resolution (ADR) in Commercial Disputes' (2021) 17 https://afribary.com/works/adr-in-commercial-disputes. (Accessed 26 Nov. 2021)
[31] BA Temitayo 'Why Arbitration Triumphs Litigation: Pros of Arbitration' (2014) 3(2) *Singaporean Journal of Business Economics and Management Studies* 34.

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Conciliation Act, Cap A18 Laws of the Federation of Nigeria, 2004) (ACA) is the primary law that governs arbitration in Nigeria. It covers and applies to all states in Nigeria on matters relating to arbitration.[32] The first attempt at consolidating arbitration in Nigeria was in 1914 when the first statute, the Arbitration Ordinance Act of 1914 was adopted.[33] The Arbitration Ordinance Act 1914 was enacted later that year to replace the Ordinance.[34] Some states, however, have created arbitration statutes that only apply to disputes that occur within these states alone. An example of such a state is Lagos State which has its arbitration law.[35]

The Arbitration and Conciliation Act's principal goal is to create a unified legal framework for the fair and efficient resolution of economic disputes through arbitration and conciliation[36]. The ACA ratifies and integrates the New York Convention (the basic principle for international arbitral award enforcement in Nigeria), which was enacted in 1970 with reciprocity and commercial reservations. This means that only awards made in states that have signed the New York Convention will be enforced by Nigerian courts.[37]

The Arbitration and Conciliation Act governs domestic and international arbitrations in Nigeria if the parties have not stipulated in their arbitration agreement that another arbitration legislation will control their proceedings.[38] The ACA is divided into four parts: the first deals with general arbitration, the second with conciliation, the third with special rules relating to international business arbitration and conciliation, and the fourth with miscellaneous provisions.

The New York Convention, the UNCITRAL (United Nations Commission on International Trade Law) arbitration rules, and the UNCITRAL Model Law are all foreign statutes that have influenced the law and practice of arbitration in Nigeria.[39] The Arbitration Act 1914, the Arbitration and Conciliation Decree 1988, Nigerian Customary Laws, Nigerian Statutes, and other similar jurisdictions on the provisions of arbitration statutes and laws that

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[32] O Adekoya, O Philip-Idiok & PA Iwu. Arbitration Guide, IBA Arbitration Committee, Nigeria, 2018 4. https://www.ibanet.org/MediaHandler?id=DE581C32-3C61-4A0F-A3FC-FE1F8B14E65F.
[33] C Mwalimu 'The Nigerian Legal System' (2005) *Public Law (1) Peter Lang* 646, 658
[34] A Akinbote 'The State of Arbitration in Nigeria' (2009) 6(1) *Transnational Dispute Management*
[35] Lagos State Arbitration Law 2009.
[36] E Dike 'Facts and Myths on the Enforcement of Foreign Arbitral Awards in Nigeria' (2012). *Commercial Dispute Resolution* https://iclg.com/cdr/arbitration-and-adr/facts-and-myths-on-the-enforcement-of-foreign-arbitral-awards-in-nigeria.
[37] OS Osaloni 'Evolution of Commercial Arbitration Law in Nigeria and Practices' (2020) Academia. Edu. https://www.academia.edu//41817771/Evolution_of_com.
[38] F Adekoya & I Berenibara 'Arbitration in Nigeria' (2019) https://www.lexology.com/library/detail.aspx?g=6a68419d-2136-49f2-a9de-3af1f5753f58.
[39] AU Ezeanya 'Legal Framework of Arbitration in Nigeria' https://www.academia.edu/29683673/LEGAL_FRAMEWORK_OF_ARBITRATION_IN_NIGERIA.

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are similar to the ACA 2004, have continued to have a compelling impact on issues of arbitration in Nigeria.[40]

With the adoption of the Convention by the Arbitration and Conciliation Act of 2004, Nigeria, as a signatory to the New York Convention, which was ratified on March 17, 1970, and entered into force on June 15, 1970, now uses the same in the arbitration of international commercial disputes.[41] According to Section 54(1) of the Arbitration and Conciliation Act, the New York Convention is laid out in the 2nd schedule.[42] Articles IV and V of the New York Convention on the Recognition and Enforcement of Arbitral Awards are in Pari Materia[43] with Sections 51 and 52 of the Arbitration and Conciliation Act of 2004.[44]

Prior to the adoption of the New York Convention 1958, the Foreign Judgement (Reciprocal Enforcement) Act, Laws of the Federation of Nigeria, No. 31 of 1960, which stipulated, among other things, that such an award must be registered in a Nigerian High Court, was the only way to enforce a foreign arbitral award in international arbitration.[45] Through the ACA, the New York Convention has been domesticated in Nigeria, following section 12 of the 1999 Constitution as amended. Since arbitration is on the concurrent and residuary list of the 1999 constitution, it can be legislated by both the federal and state governments.[46]

The Arbitration and Conciliation Act is a minor modification of the UNCITRAL model law of 1985, which Nigeria has also ratified. With international arbitration agreements, Section 53 of the ACA 2004 allows for the adoption of the UNCITRAL Model Law[47]. Even though the ACA's presenting sequence differs from that of the UNCITRAL Model Law, the

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[40] GO Obla '*Arbitration as a Tool for Alternative Dispute Resolution in Nigeria, How Relevant Today*?' (2011) 16. University of Ibadan, Faculty of Law.
[41] D Ufot 'The Influence of the New York Convention on the Development of International Arbitration in Nigeria' (2008) 25(6*) Journal of International Arbitration,*821, 836
[42] "Without prejudice to the Section 51 and 52 of this Act, where the recognition and enforcement of any award arising out of international commercial arbitration are sought, the convention and enforcement of Foreign Awards (hereinafter referred to as the convention) set out in the 2nd schedule to this Act shall apply to any award made in Nigeria or any contracting state.
[43] Article IV of the New York Convention, governs the formal condition that an applicant must meet in order to obtain recognition and enforcement of an award, while Article V sets forth the limited and exhaustive grounds on which recognition and enforcement of an arbitral award may be refused by a competent authority in a contracting state where recognition and enforcement are sought.
[44] Sections 51 of the Act deals with the enforcement of arbitral awards generally both domestically and foreign while Section 52 of the Act provides the procedures a party who wants to oppose the application of the awards could adopt.
[45] The Foreign Judgements (Reciprocal Enforcement) Act 1960, now referred to as the Foreign Judgements (Reciprocal Enforcement) Act Cap F. 35, Laws of the Federation of Nigeria, 2004.
[46] A Idigbe & O Tiku 'The International Comparative Guide to International Arbitration (2013) 10th Edition, 462. http://punuka.com/wp-content/uploads/2019/01/international_arbitration_2013__10th_edition_ia13_chapter-56_nigeria.pdf.
[47] F Adekoya & I Berenibara (n 38) 2.

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ACA significantly borrows from the UNCITRAL Model Law's provisions.[48] Even though the Model Law was created particularly for international commercial arbitration,[49] the drafters recognized that governments may use it for domestic arbitration as well.[50]

According to its lengthy title, the Arbitration and Conciliation Act asserts a unified legal structure for the fair and efficient resolution of disputes through arbitration and conciliation, as well as making the New York Convention applicable to any award made in Nigeria or any contracting state arising from international commercial arbitration.[51] According to Article 1 of the New York Convention, any international or foreign decree based on the New York Convention may be upheld in Nigeria if the contracting state party where the decree was issued has enacted laws that are equal to those enacted in Nigeria. The Convention's applicability is likewise limited to conflicts arising from a legally bound relationship, according to the same statute.[52]

In Nigeria, arbitration is primarily used as a technique for resolving disputes because the parties voluntarily submit to the process. Parties are not forced to participate in a process where they are bound by rules, regulations, and precedents they do not want to be bound by.[53] The presence of arbitrators who are experts in the field or area of dispute in which the parties are concerned is also advantageous.[54] Arbitration in Nigeria is distinct from other forms of alternative dispute resolution in that it has the same legal force and effect as a court judgment and is binding on all parties.[55]

In Nigeria, arbitration is either mandatory or consensual,[56] however arbitration under the Arbitration and Conciliation Act is almost always voluntary.[57] When the parties to a

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[48] PO Idornigie 'The relationship between Arbitral and Court Proceedings in Nigeria (2002) 19(5) *Journal of International Arbitration* 443, 446.
[49] Article 1(1) and (3) of the UNCITRAL Model Law.
[50] HM Holtzmann & JE. Neuhaus 'A Guide to the UNCITRAL Model Law on International Commercial Arbitration: *Legislative History and Commentary* (1989) *Deventer: Kluwer*.
[51] Obla (n 40 above).
[52] F Adekoya, I Berenibara (n 38 above)
[53] GG Otuturu *The Legal Environment of Business in Nigeria (*2003) Port Harcourt, Ano Publication, 77
[53] LA Ayinla, AK Adebayo & BA Ahmad 'An Appraisal of the Nexus and Disparities between Arbitration and Alternative Dispute Resolution (ADR)' (2017) *8*(1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 182, 185
[54] BA Temitayo 'Why Arbitration Triumphs Litigation: Pros of Arbitration' (2014) 3(2) *Singaporean Journal of Business Economics and Management Studies* 34
[55] LA Ayinla, AK Adebayo & BA Ahmad 'An appraisal of the nexus and disparities between arbitration and Alternative Dispute Resolution (ADR)' (2017) *8*(1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 182, 185
[56] T Umahi & T Nwano 'Procedural Aspect of Arbitration in Nigeria' (2012) 1 *Enugu State University of Technology Law Journal* 125,141
[57] Elizabeth Idigbe and Betty Biayeibo, Nigeria: International Arbitration Laws and Regulations (2020). https://punuka.com/wp-content/uploads/2020/08/IA20_Chapter-34-Nigeria-PUNUKA-Attorneys-Solicitors-.pdf.

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transaction sign an arbitration agreement or include an arbitration clause in their contract to handle any issues that may arise as a result of the transaction, this is known as consensual arbitration. The parties in this dispute decide on the arbitration process and outcome.[58]

Mandatory arbitration, on the other hand, occurs when parties are obliged or forced to resolve their disputes through a third party, accept the arbitrator's ruling and the arbitrator's decision is final and binding on the parties.[59]

The lack of a formal evidentiary procedure is one of the primary disadvantages or obstacles of mandatory arbitration.[60] To sort the evidence, the arbitrator's expertise and experience are completely relied on. In Nigeria, the Trade Dispute Act, for example, provides for mandatory arbitration by requiring industrial disputes to be referred to the Industrial Arbitration Panel before the National Industrial Court can exercise jurisdiction.[61] In this case, the parties do not decide if they want arbitration or not, the decision to first resort to arbitration is foisted on the parties mandatorily.

In Nigeria, to properly constitute a valid arbitration, there must be an unequivocal agreement to submit the matter to arbitration.[62] The Arbitration and Conciliation Act provides that “every arbitration agreement shall be in writing contained in a document signed by the parties or in exchange of letters, telex, telegrams or other means of communication which provides a record of the arbitration agreement or in an exchange of points or claim and of defence in which the existence of an arbitration agreement is illegal by one party and not deemed by the other”.[63]

Section 2 of the ACA further states that “any reference in a contract containing an arbitration clause constitutes an arbitration clause if such contract is in writing and the reference is such as to make the clause part of the contract”. This means that an arbitration agreement can be an explicit clause in a contract, where the parties have agreed to arbitrate future contracts or a distinct document, but most importantly, it must be consensual.[64]

[58] T Umahi & T Nwano (n 56 above) 141.
[59]. M Grant Mandatory Binding Arbitration (2021) https://www.investopedia.com/terms/m/mandatory-binding-arbitration.asp.
[60]. J Murray, The Benefits and Drawbacks of Arbitration. (2019) https://www.thebalancesmb.com/what-are-the-benefits-and-drawbacks-of-arbitration-398535.
[61]. Trade Disputes Act, Cap. T18, Laws of the Federation of Nigeria, 2004
[62] SA Fagbemi ‘The Doctrine of Party Autonomy in International Commercial Arbitration. Myth or Reality? (2015) 6 *Afe Babalola University Journal of Sustainable Development Law and Policy*, 226
[63] Section 1 of the Arbitration and Conciliation Act, 2004.
[64]. Osaloni (n 37 above)

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At common law, the parties could agree to submit to arbitration orally, and such an agreement would be legitimate; nevertheless, every arbitration agreement must be in writing due to the previous provision (Section 1 of the ACA 2004). The arbitration agreement or arbitration clause, which was willingly signed by the parties, serves as the foundation for going to arbitration. It's critical to underline that the arbitration agreement is at the heart of any dispute. It not only establishes the legal foundation for compelling a reluctant party to arbitrate, but it also defines the arbitration's scope.[65] It is therefore necessary to ensure that the arbitration agreement's contents are written in such a way that no deficiencies in its administration and execution exist.[66] Article II of the New York Convention further recognizes that the arbitration agreement is the source of the arbitration process, emphasizing the contractual element of arbitration.

Parties were free to choose their rule of the procedure before the Nigeria Arbitration and Conciliation Act, notably in both domestic and international arbitration, subject to any public policy restrictions imposed by the law of the place of arbitration. However, the Arbitration and Conciliation Act now governs the situation, and parties are obligated to follow the Act to the letter.[67] Section 15 (1) of the Act provides that "the arbitration proceedings shall be in accordance with the procedure contained in the arbitration rules, set out in the first schedule to this Act." Parties who know that any provision of or requirement under the ACA has not been complied with but proceed with the arbitration without quickly stating their objection to such non-compliance are presumed to have waived their right to object as a result of the preceding clause.[68]

Also, Sec 15 (2) provides that “Where the rules referred to in subsection (1) of this section contains no provision in respect of any matter related to or connected to any particular arbitral proceedings, the arbitral tribunal may, subject to this Act, conduct the arbitral proceedings in such a manner as it considers appropriate to ensure fair hearing”. The significance of this clause is that the arbitration tribunal in Nigeria has the authority to decide and determine which law would apply to a dispute if the Arbitration and Conciliation Act does

[65] OI Aderibigbe ‘Dethroning an Arbitration Agreement: Is Your Commercial Arbitration Agreement Valid in Nigeria?’ (2015) 2(4) *Scholedge International Journal of Management & Development* 7-18.
[66] Obla (n 40 above)
[67] B David-Akoro & L Oyefeso. ‘Dispute resolution in Nigeria’ https://www.lexology.com/library/detail.aspx?g=8dc72adb-30e1-414c-8e90-4bfb17ca24be
[68] Akpaji v. Udemba (2003) 6 NWLR (Part 815) 169

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not provide for it.[69]

The detailed procedure required to ensure a valid arbitral proceeding in Nigeria includes, but is not limited to, the issuance of the notice of arbitration, the constitution of the tribunal, the hearing and determination of preliminary issues, the presentation of cases/documents/evidence, the hearing of evidence, the final submissions, and the publication of final decisions.[70]

Furthermore, for an arbitration agreement to be effective, it must comply with the ACA's stipulation that the subject matter of the disputes must be capable of being settled by arbitration under Nigerian law. The arbitration agreement must only apply to disputes that can be determined by arbitration. This provision indicates that the arbitration agreement must be functional, which means that it must be enforceable against the parties.[71]

Even though the ACA does not identify or delimit matters that are capable of being settled by arbitration, disputes originating out of tax matters, criminal matters, illegal and void contracts, or matters leading to a change in the status of the parties are generally not arbitrable.[72] Commercial disputes emerging from a legitimate arbitration agreement, on the other hand, are generally considered capable of being resolved through arbitration in Nigeria.[73] However, the question of whether a matter can be resolved by arbitration or not is frequently left to the interpretation of the courts, as demonstrated by the Court of Appeal decision in *Ogunwale v Syrian Arab Republic,*[74] which held that the test for determining whether a dispute can be referred to arbitration is whether the dispute arises from the arbitration agreement's clause.

It has also been established that the criteria for whether a matter is arbitrable are whether or not the disagreement may be resolved legitimately through accord and satisfaction.[75] Legal experts agree that issues affecting an individual's legal standing are not arbitrable.[76] In the case of *Kano State Urban Development Board v. Famz Construction Ltd*,

[69] STA Law Firm. 'Overview: Arbitration Proceedings in Nigeria' (2019) https://www.stalawfirm.com/en/blogs/view/arbitration-proceedings-in-nigeria.html?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.
[70] M Bamigboye 'Arbitration Law and Practice in Nigeria: Does National Court Involvement Undermine the Arbitration Processes?' (2015) http://dx.doi.org/10.2139/ssrn.2858812.
[71] Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria 2004, s 48(a)(ii) and 52(a)(ii)
[72] F Adekoya & PA Iwu 'Arbitration Procedures and Practice in Nigeria: Overview' https://uk.practicallaw.thomsonreuters.com/1-542-4705
[73] Statoil (Nig) Ltd v. Nigerian National Petroleum Corporation (2013) 14 NWLR (Pt 1373) 1 @ 29
[74] (2002) 9 NWLR (Part 771) 127
[75] United World Ltd Inc v. MTS (1998) 10 NWLR (Pt 568) 106.
[76] F Adekoya & PA Iwu (n 72 above)

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the Supreme Court identified the following categories of matters that are not arbitrable in Nigeria: an indictment for a public offence, dispute arising out of an illegal contract, disputes arising under agreements void as being by way of gaming or wagering, divorce petitions, and any agreement purporting to give an arbitrator the right to give judgment in rem.[77]

Unless the parties agree differently, arbitration sessions in Nigeria are private. As a result, the arbitration hearing imposes an implied duty of confidentiality on the parties.[78] It's important to note, however, that the ACA doesn't include an express provision for confidentiality in arbitral procedures. Nigeria, on the other hand, adheres to the basic confidentiality requirement outlined in UNCITRAL Arbitration Rules Article 25 (4), which states that "hearings shall be held in camera unless the parties agree otherwise." This implies that arbitration is conducted in private, with only the parties, their representatives, and counsel present. Parties may, however, agree to waive confidentially and enable those who aren't involved in the arbitration to attend the hearing.[79]

The International Chamber of Commerce, the London Court of International Arbitration, the Lagos Court of Arbitration, the Regional Centre for International Arbitration-Lagos, the Chartered Institute of Arbitration (Nigerian Branch), and others are among the arbitration organizations responsible for resolving commercial disputes in Nigeria[80].

The execution of arbitration agreements in Nigeria has been viewed favourably by Nigerian courts. Arbitration is generally recognized as a good and valid alternative dispute resolution procedure by Nigerian courts.[81] The Court concluded in *C. N Onuselogu Ent. Ltd v. Afribank (Nig) Ltd* that arbitral proceedings are a recognized form of resolving disputes and that both counsel and parties should not take them lightly. The only stipulation is that the parties must agree to arbitrate, which is voluntary submission to arbitration.[82]

The provisions of the Nigerian Arbitration and Conciliation Act cover a wide range of arbitration procedures, regulations, and other guiding criteria for general arbitration regulation in Nigeria. Despite its drawbacks, arbitration is gradually becoming Nigeria's most popular means of settling disputes. However, attempts are underway to amend Nigeria's arbitration

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[77] (1990) 6 S.C. 103
[78] O Adekoya & D Emagun, 'Arbitration Guide: IBA Arbitration Committee Nigeria' (2012) http://www.ibanet.org/Document/Default.aspx?DocumentUid=DE581C32>
[79] Osaloni (n 37 above).
[80] F Adekoya & PA Iwu (n 72 above)
[81] UP Emelonye & U Emelonye 'Public Policy Exception in the Enforcement of Arbitration Awards in Nigeria' (2021) 11 *Beijing Law Review,* 266, 286
[82] (2005) 1 NWLR (Pt 955) 577

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legislation to make the arbitration process more efficient and friendlier.[83]

1.9. Brief Background of Arbitration in South Africa

Arbitration is a well-established and popular mechanism for resolving commercial disputes in South Africa.[84] It has gone through several phases in its growth and development, including the use by South African traditional communities to resolve their disputes rather than formal legal dispute resolution mechanisms, and the resolution of their disputes within communities.[85] Chiefs, headmen, and monarchs had an important role in resolving disputes between clan members in a traditional South African community.[86]

Colonialism later displaced this ancient manner of resolving community problems amicably, and South Africa adopted a Western approach to arbitration. The technique was chosen because it allowed parties to resolve their disagreements quickly. Later, this system was influenced by English and Roman-Dutch law.[87]

The introduction of the Roman-Dutch Law, which envisioned a peaceful, non-violent manner of resolving conflicts, was presided over by an impartial arbitrator whose integrity was outstanding.[88] Even though it was only for a brief time, English arbitration law had a significant impact on South African arbitration.[89] South African arbitration law is influenced by a blend of civil and common law influences founded on Roman-Dutch law, with concepts from English arbitration law incorporated.[90]

The Arbitration Act 42 of 1965 governs domestic arbitration law in South Africa. South Africa embraced arbitration as an alternative dispute resolution method to give a faster, more private, and less expensive alternative to litigation in order t efficiently resolve issues.[91] By accepting arbitration, South African courts have addressed the issue of overcrowding in the

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[83] F Alli & Associates 'Arbitration in Nigeria: Overview and Challenges' https://www.faa-law.com/arbitration-in-nigeria-overview-and-challenges/#
[84] D Williams 'Arbitration Procedures and Practice in South Africa: Overview' (2020) https://uk.practicallaw.thomsonreuters.com/4-502-0878
[85] J Brand 'Amicable Dispute Resolution in South Africa' in JC Goldsmith, A Ingen-Housz & GH Pointon *ADR in Business: Practice and Issues across Countries and Cultures* (2011) 2 *Kluwer Law International*, 591-600
[86] RBG Choudree 'Traditions of Conflict Resolution in South Africa' (1991) 1(1*) African Journal on Conflict Resolution* 9-27 https://www.accord.org.za/ajcr-issues/traditions-of-conflict-resolution-in-south-africa/.
[87] DP Rantsane, 'The Origin of Arbitration Law in South Africa' (2020) 23 *Potchefstroom Electronic Law Journal*, 1–27 https://doi.org/10.17159/1727-3781/2020/v23i0a8963.
[88] PA Ramsden & K Ramsden '*The Law of Arbitration: South African and International Arbitration*' (2009) Juta and Company Ltd 13
[89] PD Carrington & PY Castle 'The Revocability of Contract Provisions controlling Resolution of Future Disputes between the Parties' (2004) 67(1/2) *Law and Contemporary Problems* 207- 208
[90] DW Butler & E Finsen '*Arbitration in South Africa: law and practice*' (1993) Juta 4
[91] D Butler 'South African Arbitration Legislation-The need for reform' (1994) 27(2) *Comparative and International Law Journal of Southern Africa,*118, 121

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courts and the pressure that this puts on them to deal with matters thoroughly and expeditiously.[92] Arbitration has considerable advantages over court litigation and other means of dispute resolution in South Africa, which has contributed to its continued growth and expansion.[93]

Arbitration has thrived in South Africa, even though it is mostly based on old legislation that has remained intact despite changes in corporate practices.[94] Arbitration has also gained constant support from the courts and the business community in South Africa; nevertheless, in recent years, there has been a persistent clamour for a legislative amendment to the Arbitration Act of 1965.[95]

The International Arbitration Act (IAA) 15 of 2017, which governs international arbitration in South Africa, has greatly increased the popularity of arbitration in South Africa.[96] With some amendments, the UNCITRAL Model Law of 1985 is incorporated into South African law through the International Arbitration Act. Subject to the rules of the International Arbitration Act, the UNCITRAL Model Law, as adapted into Schedule 1 to the International Arbitration Act, applies in South Africa. The IAA 2017 took effect on December 20th, 2017, to harmonize and amend South African law on international commercial arbitration.[97]

Under the New York Convention, the IAA 2017 allows for the recognition and enforcement of arbitration agreements and foreign arbitral awards. Other key aims of the IAA 2017 include repealing and amending aspects of prior legislation dealing with enforcement, such as the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 and the Protection of Businesses Act 99 of 1978.[98]

While the IAA conforms to international best practices in international arbitration in South Africa, it does not provide for the adoption of the International Centre for Settlement of Investment Disputes (ICSID) Convention and does not apply to investments covered by the

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[92] DP. Rantsane, The Origin of Arbitration Law in South Africa. (2020) 23 *Potchefstroom Electronic Law Journal*, 1, 19
[93] STB Boyes & B Lewis 'Litigation V. Arbitration: Which to Use in a Civil Dispute?' (2019) https://www.golegal.co.za/litigation-arbitration-civil-dispute/.
[94] D Butler 'Inside Arbitartion: Attaining Maturity: South Africa's Transition to an international Arbitration Friendly Jurisdiction' (2020). https://hsfnotes.com/africa/2020/03/17/inside-arbitration-attaining-maturity-south-africas-transition-to-an-international-arbitration-friendly-jurisdiction/
[95] J Gauntlett, 'The legal system of South Africa and its approach to arbitration' (2007) *20*(2) *advocate* 28, 29 https://journals.co.za/doi/pdf/10.10520/AJA10128743_500.
[96] Kyle Bowles. The International Arbitration act: A step in the right direction. February 2018. https://www.hoganlovells.com/en/publications/the-international-arbitration-act
[97] T Chidede 'International Arbitration Legislation now in force – Implication for South Africa and Cross Border Businesses' (2018) https://www.tralac.org/blog/article/12663-international-arbitration-legislation-now-in-force-implications-for-south-africa-and-cross-border-businesses.html.
[98] Bowles (n 96 above)

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Protection of Investment Act 22 of 2015, which establishes government policy on foreign investment protection and investor-state arbitration in South Africa. The IAA further highlights that just because a court is authorized by law to decide a particular dispute does not mean that the problem cannot be resolved through arbitration.[99]

Section 6 of the IAA 2017 incorporates the UNCITRAL Model Legislation into South African law, whereas Section 8 deals with the Model Law's interpretation and authorizes an arbitral tribunal or a court to refer to relevant UNCITRAL Model Law or its secretariat reports in this respect. The scope of this legislation is set out in section 7 of the International Arbitration Act, which provides that "any international commercial disputes that the parties have agreed to submit to arbitration in terms of an arbitration agreement may be decided by arbitration, provided that the dispute is arbitrable".[100]

Article 1(5) of the International Arbitration Act, which deals with the scope of application of the UNCITRAL Model Law provides "This law shall not affect any other law of the Republic [of South Africa] by which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this law". This clause has the effect of continuing to apply the Domestic Arbitration Act to international arbitrations insofar as some issues cannot be submitted to arbitration or may only be submitted to arbitration under terms other than the UNCITRAL Model Law.[101]

The IAA 2017 also provides for the recognition and enforcement of arbitration agreements and foreign arbitral awards in accordance with the New York Convention 1958, and it applies to any international commercial dispute that the parties have agreed to submit to arbitration, under an arbitration agreement, and that relates to a matter that the parties are entitled to resolve through arbitration.[102]

On May 3, 1976, South Africa ratified the New York Convention without reservations., except for provisions where the dispute is incapable of resolution under any South African law and the arbitration agreement is contrary to South African public policy.[103] Criminal matters,

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[99] S Mckenzie, E Warmington, K Wolmarans, A De-Meyer, K Pooe, T Dye & J Vassen 'Arbitration in South Africa' (2019) arbitration-in-south-Africa.pdf (webberwentzel.com).
[100] T Mongae, P Pillay-Shaik, J Barnes & J Lafleur 'International Arbitration (South Africa) (2021). https://practiceguides.chambers.com/practice-guides/comparison/433/7286/11794-11800-11803-11808-11814-11822-11826-11831-11835-11837-11841-11845-11849.
[101] William (n 84 above)
[102] E Schoeman 'Cross-Border Commercial Dispute Agreements: Developments in South Africa' (2020). https://www.afronomicslaw.org/2020/02/10/cross-border-commercial-dispute-agreements-developments-in-south-africa
[103] S Mckenzie, E Warmington, K Wolmarans, A De-Meyer, K Pooe, T Dye & J Vassen (n 99 above)

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marriage cases, situations relating to a person's status, problems relating to competition law violations, and claims brought under the South African Promotion of Administrative Justice Act are among the conflicts that cannot be sent to arbitration in South Africa.[104]

Under section 2 of the Arbitration Act, some of the institutions most used to resolve large commercial disputes in South Africa are the: Arbitration Foundation of Southern Africa (AFSA), the International Court of Arbitration of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). The AFSA mostly administers international arbitrations seated in South Africa.[105]

In South Africa, arbitration is initiated by a valid arbitration agreement between parties to refer to all or certain disputes that may arise between them in the context of a defined legal relationship, whether contractual or not.[106] The parties must document their agreement to arbitrate any current or future dispute relating to a matter stated in their agreement in writing. It can be written into a contract as an arbitration clause or as a separate agreement. If the content of the arbitration agreement is documented in any manner, it is presumed to be in writing, if the reference is such that the clause becomes part of the contract.[107]

Arbitration agreements are contractual in nature, and as such must meet the general requirements for contract existence. This comprises an agreement between the parties on the duties they want to create, the parties' purpose to be legally bound by the agreement, and the parties' knowledge of the agreement.[108]

When a party brings an action before a court that is subject to a valid arbitration agreement, the court will either stay the dispute or refer the parties to the arbitration.[109] In South Africa, however, the courts have the authority to ignore the arbitration clause. Such discretion must be used judicially, and the courts will do so in cases where there are charges of fraud, where the arbitrator cannot be trusted or is incapable of deciding, or when the arbitrator has committed misconduct.[110]

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[104] Del-Valle FN & Ripley-Evans J. 'Arbitration in South Africa' (2019). https://www.lexology.com/library/detail.aspx?g=100bf806-aa2e-4a89-ba2d-a0dc3ed05a6d.
[105] T Mongae, P Pillay-Shaik, J Barnes & J Lafleur (n 100 above)
[106] Article 7 of Schedule 1 to the International Arbitration Act, 2017.
[107] K Simpson & M Rossouw *Arbitration (South Africa*) (2019) Arbitration as a viable option to resolve IP disputes in South Africa (svw.co.za)
[108] De Lange V. Presiding Bishop, Methodist Church of Southern Africa 2015 (1) SA 106 (SCA)
[109] Article 8 of Schedule 1 to the IAA 2017.
[110] Section 3 of the Arbitration Act, 1965.

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In South Africa, arbitration disputes are usually heard in private, at a time and location agreed upon by all parties. Parties have the option of selecting a mechanism that guarantees a fair and confidential settlement in the conditions that best suit their interests. The parties benefit from the security of a well-managed system with carefully drafted arbitration rules[111].

Although South African law does not prescribe any specific procedural stages for arbitration, Article 19 of the UNCITRAL Model Law states that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Among these procedures are the selection of the arbitration seat, the appointment/selection of arbitrators, and the termination of arbitrators' appointments.[112] If the parties do not agree on the processes to be followed, the tribunal may conduct the arbitration as it sees fit, according to the rules of the International Arbitration Act and the UNCITRAL Model Law. Apart from the rights granted to the parties (if they fail), the arbitral tribunal has the authority to decide the admissibility, relevance, substance, and weight of any evidence brought to it.[113]

Local Courts can also intervene to assist arbitration proceedings seated in their jurisdiction concerning the appointment of arbitrators, removal of arbitrators, termination of the arbitrator's mandate arising from the arbitrator's inability to act, and the arbitral tribunal's jurisdiction under Schedule 1 of the International Arbitration Act.[114] South African courts also recognize arbitration as a legitimate and constitutionally permissible form of dispute resolution, and they are willing to enforce any valid arbitral award resulting from a valid arbitration agreement on the same basis as a judgment of the High Court of South Africa unless there is a legitimate reason not to.[115]

Arbitration proceedings may be instituted in South Africa for a variety of conflicts; the number of commercial and contractual disputes referred to arbitration in South Africa has increased in recent years.[116] Courts are unlikely to interfere with arbitration procedures once

[111] A Truter 'Arbitration in South Africa' (2017) https://www.polity.org.za/article/arbitration-in-south-africa.
[112] Article 11(2), Schedule 1, IAA 2017; Article 11(2), Model Law.
[113] Article 19(2) of the International Arbitration Act.
[114] Article 11, 13, 14 and 16, Schedule 1 of the IAA 2017
[115] R Bruce & M Prinsloo. Arbitration as a Viable Tool to Resolve IP Disputes (2021). https://www.svw.co.za/arbitration-as-a-viable-option-to-resolve-ip-disputes-in-south-africa/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.
[116] G McInnis 'To Arbitrate or not to arbitrate: That is the question – The development of Jurisprudence in South Africa' (2020) 51(4) *Texas Tech Law Review*, 859-878

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the parties have decided to resolve a dispute through arbitration, and arbitration processes, both in South Africa and worldwide.[117]

Significance of this study

This study will contribute to arbitration by attempting to recognize the various arbitration laws and procedures in Nigeria and South Africa, as well as the competent judicial authorities recognized, the various challenges faced in the enforcement of arbitral awards, the various phases at which the enforcement of arbitral awards may face challenges, and the various grounds on which an arbitral award may face challenges based on non-enforcement. It also investigates and assesses the circumstances and reviews of arbitral award enforcement in both nations, depending on their national laws and all other applicable law.

Apart from demonstrating that arbitration is a trustworthy and practical method of resolving conflicts, the study will also open up a channel for demonstrating that arbitration's future resides in the frequent review of its existing laws.

Limitations of the study.

The limited purpose and scope of this study are to the effect that it doesn't discuss all the problems or challenges faced in the enforcement of arbitration awards in Nigeria and South Africa. The comparisons and reviews too may not also necessitate or require a complete solution to these problems. These reviews may also not apply to other countries or thrive there even though, they may be experiencing the same or related challenges as Nigeria and South Africa. It is rather intended to demonstrate that the conclusions reached regarding these reviews may apply to only the two jurisdictions discussed in this study because of their similarities.

[117] J Ripley-Evans, FN Del Valle 'Court Support for Arbitration in South Africa: Knowing where you stand' 2019. http://arbitrationblog.kluwerarbitration.com/2019/01/30/court-support-for-arbitration-in-south-africa-knowing-where-you-stand/.

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CHAPTER TWO

A REVIEW OF THE ENFORCEMENT OF ARBITRATION AWARDS IN NIGERIA.

2.1. Introduction

This chapter introduces one of the study's main focuses by examining the fundamentals of arbitration, including arbitral decisions and an examination of numerous enforcement regimes that have been found useful in achieving the study's goal. The chapter further discusses the procedure for arbitral award enforcement, the challenges and issues faced by parties, the reasons for the refusal of the enforcement of arbitral awards in Nigeria and how these challenges have hindered the expansion of arbitration in Nigeria. It further reviews the enforcement of arbitration awards in Nigeria and also exposes the inherent flaws in the provisions of Nigeria's arbitration laws and legislation.

2.2. The Arbitration Awards, a General Perspective

Arbitration differs from other types of alternative dispute resolution in that the arbitration award is final and binding, unlike the outcomes of other forms of alternative dispute resolution.[1] As stated earlier in Chapter one (1), one of the similarities between arbitration and litigation is that at the conclusion of the proceedings, the arbitrator(s) or judge usually delivers a binding decision in the form of an award or judgement,[2] thus the description, functional equivalents of Court judgements, in reality and law.[3]

An arbitral award cannot be defined precisely; rather, whether or not a given judgment is to be recognized as an arbitral award is determined by the law of the state in which it is used. To put it another way, the contractual state where recognition and enforcement are sought and

[1] AA Asouzu 'The Adoption of the UNCITRAL Model Law in Nigeria, Implication of the Recognition and Enforcement of Arbitral Awards' (1999) *Journal on Business Law,* 1856
Onwu V. Nka (1996) 7SCNJ 240. The Nigerian Supreme Court emphasized that in a situation in which disputes or matters in difference between two or more parties, are by consent of the disputants submitted to a domestic forum, inclusive of arbitrators or a body of persons who may be invested with judicial authority to hear and determine such disputes and matters in accordance with customary law, and a decision is duly given, it is conclusive and unimpeachable.
[2] IJ Ebokpo 'Limitation Period for the Enforcement of Arbitration Award in Nigeria: The Imperative for Change' (2019) 10(4) *The Gravitas Review of Business and Property Law*, 85, 99
[3] LA Mistellis 'Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement' (2013) 28(1) *International Centre for Settlement of Investment Disputes Review-Foreign Investment Law Journal* 64, 87

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gained determines whether a decision qualifies as an arbitral award.[4] There are different types of awards in the arbitral process, which makes it challenging to come up with an acceptable definition of an arbitral award.[5]

The New York Convention, which is expressly focused on the recognition and enforcement of awards, does not provide an internationally agreed definition of the word "arbitral awards." The closest the New York Convention gets to a definition of an arbitral award is, "arbitral awards shall include not only awards issued by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted".[6]

It is typically a legal document that must unquestionably contain sufficient information to aid the court in enforcing it without further inquiry if necessary. It is recognized as the parties' final and definitive decision of an arbitrator or arbitral tribunal that resolves the disputes submitted to its jurisdiction in whole or in part.[7] As a result, parties are usually expected to abide by the outcome as reached by the arbitrators.[8]

Given the foregoing, it is clear that there is no specific format that an arbitral award should take, especially as the proceedings are primarily guided by the parties' agreement, which serves as the arbitrators' deciding factor.[9]

2.3. Nature and Constituents of Arbitral Awards in Nigeria

Generally, the award is the decision of the tribunal in arbitration, as explained by the Arbitration and Conciliation Act (ACA). It is final and binding on the parties, subject to the terms of the agreement and the issues before the tribunal.[10] In Nigeria, an award is more than just a recommendation; it is a definitive resolution of the issues it addresses.[11] The award may merely announce the parties' rights and such a declaration may resolve disputes and allow the

[4] J Gill, 'The definition of Award under the New York Convention' (2008) 2(1) *Dispute Resolution International* 114
[5] G. Bernini & A Broches, 'Recourse Against the Award; In Recognition and Enforcement of the Award' in Pieter Sanders, *UNCITRAL'S Project for a Model Law on International Commercial Arbitration,* 2 International Council for Commercial Arbitration Congress Series (1984) 208
[6] Article 12 of the New York Convention.
[7] BM Cremades 'The arbitral award' in LW Newman & RD Hill (2nd eds) *The Leading Arbitrators Guide to International arbitration'* (2008) 483
[8] Onwu V. Nka (1996) 7 NWLR (Pt 458) 1
[9] Bremer v. West Bucilear (1981) 2 Lloyds Law Reports Pg. 52. It was held thus. "……No particular form of the award is required that is necessary if the arbitrators should set out what in their view of evidence did or did not happen and should and should explain succinctly why in the light of what happened they have reached their decision and what decision is. This is all that is meant by reason decision".
[10] Raz Pal Gazi Construction Company Limited V. FCDA (2001) 10 NWLR (Pt. 722) 539. The Supreme Court held thus "It is clear and without an iota of doubt, that an arbitral award made by an arbitrator to whom a voluntary submission was made by the parties to the arbitration, is binding between the parties".
[11] MO Adeleke, OA Adewole 'Nature of Arbitral Awards in Nigeria: An Overview' (2019) 15(6) *Canadian Social Science* 74, 79 http://www.flr-journal.org/index.php/css/article/viewFile/11095/11214.

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parties to continue their contracts in peace.[12] Every arbitral award made in Nigeria is to be recognized as binding on the basis that an award acts as a bar to further arbitration or action[13] and is expected to be complied with.[14]

According to the ACA, an award must be in writing and signed by the arbitrator. If there is more than one arbitrator on the tribunal, the signatures of a majority of the members are sufficient, if the reason for the minority's refusal to sign is explained. Unless the parties have agreed that no reasons should be provided or the judgement is a consent award, the award must describe the reasons for its conclusions.

The award must include the date it was issued, and the location of the arbitration and a copy of the decision must be sent to the parties. Only with the approval of all parties can the award be made public.[15] An arbitral award must be comprehensive, certain, and final to be regarded as legitimate in Nigeria. It must finally resolve all the questions that may be referred to another tribunal for additional consideration.[16]

2.4. Categories of Arbitral Awards in Nigeria

In every sense, every award in Nigeria is final in the sense that it resolves one or more of the issues between the parties. However, there are different types of arbitral awards that can be made in a Nigerian arbitration process.[17]

2.4.1 A Partial Award

A partial award resolves only a portion of a monetary or other matter in dispute, leaving the remainder to be resolved later.[18] It is only definitive and enforceable concerning the issues decided upon and may be enforced.[19] It may be a realistic solution for the parties and the arbitral tribunal in a complex arbitration to decide those portions of the issue that may be separated from the other parts by partial awards.[20] This kind of award, as a result of its nature, is

[12] GG Otuturu 'Some Aspects of the Law and the Practice of Commercial Arbitration in Nigeria' (2014) 6(4) *Journal of Law and Conflict Resolution*, 72-73 & Section 24 of the Arbitration and Conciliation Act.
[13] Okpuruwa V. Okpokam (1988) 4 NWLR (Pt 90) 554, 586
[14] Arbico Nigeria Ltd V. Nigerian Machine Tools Ltd (2000) 15 NWLR (Pt 789) 1,32
[15] Section 25 and 26 of the ACA, Article 32 of the Arbitration Rules.
[16] M. Mordi, F Sani & O Olutoye 'Enforcement of Arbitral Awards in Nigeria: Overview (2022) 6 https://uk.practicallaw.thomsonreuters.com/w-034-5855. (Accessed 10 March 2022)
[17] Article 32 (1) of the Arbitration Rules.
[18] EO Ezike 'Lecture Notes on Law of Arbitration 1 & 2' (Unpublished) University of Nigeria, Enugu Campus 9
[19] JO Orojo & MA Ajomo, *'Law and practice of arbitration and conciliation in Nigeria'* (1999) Lagos: Mbeyi and Associates, 241
[20] *Celtel Nigeria BV v. Econet Wireless Ltd* (2014) LPELR – 22430

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sometimes used interchangeably with interim and interlocutory awards, which are majorly procedural decisions.[21]

2.4.2. The Interim Award

The interim award is an award which disposes of a preliminary question while the arbitration is still ongoing. It is an award given to settle an issue, though not in the determination of the entire matter in dispute but in the settlement of a point which, if not properly dealt with at the stage of the proceedings, would affect the recognition and enforcement of the award by a court of competent jurisdiction.[22] An interim award may be made if the arbitrator, during the proceedings, decides matters that are amenable to resolution once determined, may save all parties involved significant time and money.[23]

Such an award may decide the jurisdiction of the tribunal, the applicable law and liability in respect of all or a portion of the dispute or damages while the specific issue is determined definitively.[24] In this case, the award is restricted in that it does not resolve all parts of the dispute, only those that appear to be contentious, pending the final determination of all issues presented to arbitration and has a final and binding effect on those parts of the dispute it tends to resolve.[25]

When an arbitral tribunal, for example, lacks the authority to resolve a dispute, it is in the best interests of all parties concerned to determine this early on in the proceedings in the form of an interim award rather than to discover this after the conclusion of protracted procedures.[26] Even though it relates to the issue of jurisdiction and might be viewed as an interim award in that regard, this type of award is final. This is due to the arbitral tribunal's decision in that award that it lacks the authority to continue the arbitration, which causes it to cease to exist once it is made.[27]

2.4.3. The Interlocutory Award

The Interlocutory award is a decision of the tribunal on a procedural point and would cease to exist with the conclusion of the arbitral procedures, is a comparable award to the interim award.

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[21] BR Adeuti 'The Legal Analysis of the Enforcement of an Arbitral Award' (2020) 65(1) *American Academic Scientific Research Journal for Engineering, Technology and Sciences,* 86
[22] F Ajogwu *Commercial arbitration in Nigeria: Law and Practice* (2013) 133
[23] JO Orojo & MA Ajomo (n 19 above) 238
[24] United Nations Conference on Trade Development, No. 43, 8
[25] Section 12(1) and (4) of the ACA & Article 26(2) of the Arbitration Rules.
[26] GU Okoro 'Arbitral Awards: Types, Forms, Substance, Remedies and Reliefs'. (2015) *A Seminar paper presented to the LL.M class of 2013/2014, Law Faculty, University of Ibadan*, 23
[27] As above

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It is not a final decision that can be enforced.[28] Article 32(1) of the Arbitration Rules also provides for the making of an interlocutory award. In the course of the proceeding, the arbitral tribunal may have to make various interlocutory orders for the smooth running of the proceedings. These orders may include orders for the protection of property; orders for security, orders for deposit of costs; and orders for extension of time.[29]

Interlocutory awards are like interlocutory judgements and orders that are issued by a court while a case is still ongoing. These awards are not meant to be final. They are simply meant to appease a situation within a situation, to resolve an issue temporarily while the case is decided on the whole.[30]

The point of an interlocutory award is to allow the case to progress by addressing an issue that otherwise would have caused the case to stall. For example, interlocutory awards are often made in cases involving real estate. If a property that is a subject matter of arbitration is about to be sold, an arbitrator or an arbitral tribunal can make an interlocutory award, which puts a temporary stop to the sale of the property until the tribunal can make a final decision as to what should happen with the property, thereby protecting either of the parties from irreparable damage.[31]

2.4.4 The Agreed or Consent Award

The agreed or consent award as defined by Section 25(1) of the ACA, is the outcome of the parties' settlement of the issues[32] and complies with Section 26 of the ACA. It is an award resulting from the compromise of the parties regarding the matters brought before the arbitrator for determination.[33] The consent award incorporates the terms of settlement which the parties have negotiated before it reaches a hearing or an award. The purpose of so doing is to define clearly the matters that have been settled and to also define each party's responsibility, thereby enabling one party to take enforcement proceedings when the other party fails to comply with the terms of the settlement.[34]

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[28] MO Adeleke, OA Adewole (n 11 above) 79-80
[29] T Umahi & T Nwano 'Procedural Aspect of Arbitration in Nigeria' (2012) 1 *Enugu State University of Technology Law Journal* 125, 141
[30] JO Orojo & MA Ajomo (n 19 above) 241
[31] RF Bodenheimer & AB Herzberg 'Arbitration; Awards' (2020) Arbitration: Awards - BODENHEIMER (changing-perspectives. legal) (Accessed 27 May 2022)
[32] S. 25(1) of ACA, 2004…. "If during the arbitral tribunal proceedings, the party settles the dispute, the arbitral tribunal shall terminate the arbitral proceeding, and shall if requested by the parties and not objected by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms".
[33] Article 30 of the UNCITRAL Model Law.
[34] WF Keong 'The Arbitration Award' (2020), https://pdf4pro.com/download/the-arbitration-award-myiem-2c8c5.html. (Accessed 26 June 2022).

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An agreed award must be duly recorded and state that it is an award of the tribunal. If these requirements are not complied with, the purported agreed award will not enjoy the status and effect of an award.[35] Thus, where an arbitrator merely records the settlement and the parties sign without more, without the tribunal stating that it is an award, it is submitted that this will not be an agreed award as conceived by the law.[36]

The arbitration proceedings are ended by the issuance of a consent award, which has the same status and effect as any other decision or award on the merits and is enforceable, albeit with the parties' cooperation.[37]

2.4.5. The Default Award

The default award is made when a respondent fails to offer his defence as required by law without providing adequate cause. The arbitral tribunal will continue with the proceedings and eventually make an award in favour of the claimant.[38] The claimant is still required to offer sufficient evidence to support his claims even if the respondent is not present. As long as the respondent has been given sufficient notice and an opportunity to present his case, the default award rendered after arbitration in which the respondent has not participated will be enforced.[39]

When an arbitral tribunal issues a default award in an arbitral proceeding, the tribunal must ensure that the award is effective. The tribunal should also ensure that the award describes the procedure followed and the efforts made to communicate the creditor's case to the defaulting party in great detail.[40] The award must then reflect the fact that the arbitral tribunal genuinely addressed the merits of the case to demonstrate that a reasoned determination of the claims before the tribunal was made.[41] All of this is done to ensure that the creditor's victory is less likely to be overturned by a decision of the national courts.[42]

2.4.6. The Final Award

The final award is a decision reached by an arbitral tribunal after consideration and final determination of all the issues submitted before it by the parties to a dispute after the arbitration proceeding. This type of arbitral award determines the rights, interests and liabilities of the

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[35] Adeuti (n 21 above) 85
[36] G. Ezejiofor. *The Law of Arbitration in Nigeria* (1997) 7
[37] Y Kryvoi & D Davydenko 'Consent Awards in International Arbitration: From Settlement to Enforcement (2015) 40(3) *Brooklyn Journal of International Law* 827, 832
[38] S. 21(b) of the ACA, 2004
[39] United Nations Conference on Trade Development, No. 43, 12
[40] A Redfern, M Hunter *Law and Practice of International Commercial Arbitration* (3rd Eds) '(1999) 8-16
[41] A Redfern & M Hunter (n 40 above)
[42] Okoro (n 26 above) 26

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parties to the arbitration to finality.[43] After the rendition of the final award, the arbitral proceedings terminate[44] and the arbitrator or arbitral tribunal becomes functus officio. The most notable feature of a final award is its binding nature and enforceability on the parties to the arbitral award. Although it lacks the sanction that is naturally inherent in a court judgment, it is binding on parties and can be enforced by the court as its judgment upon application for leave of court.[45]

In the case of *Ras Palgazi Construction Co. Ltd. V. FCDA*,[46] the Supreme Court reaffirmed the above position when it held thus:

> *"An award made pursuant to arbitration proceedings constitutes a final judgement on all matters referred to the arbitrator. It has a binding effect and it shall, upon application to the court in writing, be enforced by the court. What this means is that if an award is not challenged, it becomes a final and binding determination of the matter between the parties."*

2.4.7. The Additional Award

The additional award is made when an arbitral tribunal is asked to make an additional order, correct errors in computation and give an interpretation of a specific point or part of the award to supplement the final award.[47] It is an award made in addition to the already rendered award in order to regularize the original award, which does not cover all of the claims presented before the arbitral tribunal.[48]

A tribunal may, of its own volition, within thirty (30) days of the date of the award, correct any error in the award. A party can also request the tribunal to make an additional award as to the claims presented in the arbitration but omitted from the award. Where the tribunal considers the request justified, it will correct and provide an interpretation and the correction or interpretation will form part of the award.[49]

[43] MO Orojo & JA Ajomo (n 19 above) 238
[44] Section 27(1) of the ACA
[45] S. 31 of the ACA.
[46] (2001) LPELR – 2941
[47] G Elias, L Ijaodola, O Oyekan & V Ibekwe 'Challenging and Enforcing Arbitration Awards: Nigeria' https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/nigeria
[48] A Adeyi 'A Glimpse into the Concept of Award in Commercial Arbitration Award' (2019) https://www.linkedin.com/pulse/glimpse-concept-award-commercial-arbitration-nigeria-abdulwasiu-adeyi.
[49] F Adekoya, I Berenibara 'Arbitration Awards in Nigeria' (2018) Arbitration awards in Nigeria - Lexology.

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An additional award shall be made within sixty (60) days of the request.[50] For example, if evidence has been presented in support of a claim that was not covered by the first final award.[51] While the Model Law[52] allows the arbitral tribunal to make an additional award only upon the request of a party,[53] the ACA also allows the arbitral tribunal to make the additional award suo moto.[54]

In Nigeria, once an award is set, rendered and published, until it is set aside by a court of competent jurisdiction, the said award is final and binding on all the parties in the arbitration. In *Ezerioha & Ors v. Ihezuo*,[55] it was held that

> *"Acceptance of an arbitral award can be proved by evidence other than the parties signing the arbitral award. In the instant case, the evidence of the parties established that the defendants accepted the arbitral award. Therefore, the Trial Court rightly held that they were bound by it".*

2.5. Recognition and Enforcement of Arbitration Awards in Nigeria

The result of an arbitration hearing is a binding and enforceable award, not just an award. In practice, an arbitration agreement or award that lacks an effective enforcement mechanism is practically meaningless.[56] As a result, parties are expected to follow the decision of the arbitrator they have chosen.[57]

By relying on the New York Convention, the ACA validates the implementation of an arbitral award regardless of the country in which it was issued.[58] The practicalities of enforcement may differ based on circumstances such as the jurisdiction in which enforcement is expected to be undertaken, the status of the party against whom enforcement is sought, and the potential for delaying enforcement.[59]

[50] Section 28(4-7) of the ACA, 2004.
[51] Article 35-37 of the Arbitration Rules.
[52] Article 32(1) of the UNCITRAL Model law.
[53] Section 28(5) of the ACA, 2004
[54] Section 28(6) of the ACA, 2004
[55] (2010) All FWLR (Pt 540) Pg. 1259
[56] JDM Lew, LA Mistelis, SM Kroll & S Kroll '*Comparative International Commercial Arbitration* (2003) *Kluwer Law International*, 689
[57] Asouzu (n 1 above) 186
[58] S. 51 of the ACA provides that "An Arbitral award shall, irrespective of the country in which it is made, be recognised as binding….and shall upon application in writing to the court, be enforced by the court.
[59] Stewarts Litigate 'Arbitration Process' https://www.stewartslaw.com/expertise/international-arbitration/arbitration-process. (Accessed 28 February 2022)

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Usually, when one of the parties refuses to voluntarily comply with an arbitral ruling, it then becomes essential to enforce the award. Arbitration, on the other hand, will be of little use if the arbitrator's decision cannot be enforced in state courts when a dispute arises. As a result, by recognizing and enforcing arbitral awards, courts help parties realize their reasonable expectations by not only supporting but also strengthening the arbitral process' efficacy and integrity.[60]

Conventional courts are used to enforce arbitral awards. This is because, once an award is made, an arbitral tribunal becomes functus officio. An arbitral tribunal cannot resume jurisdiction over an award it has already issued unless it is to interpret or correct it. As a result, the courts lack the authority to convert an arbitral award into a judgment. Only the Court has the authority to set aside, remit, or enforce an award.[61]

An arbitration award is enforceable in the same way that a judgment obtained in a court[62] of law is. Therefore, an application to enforce an arbitral award or enter judgment per the award can be brought directly to the judge or court by a motion on notice.[63] The Court does not convene as an appellate court over the arbitral award at this point but rather adopts the award as not the High Court's judgment but rather one to be enforced by the Court.[64] If an application is made, the court's only authority over an award is to enforce it.[65]

Even though the enforcement stage is the most important in the arbitration process, there is a distinction in Nigeria between the recognition and enforcement of an arbitral award. The difference is that an award can be recognized but not enforced, but an award must be recognized by the courts who ordered its enforcement before it can be enforced.[66]

Simply put, recognition is the legal acknowledgement and admission of a deed to give it effect.[67] A brief court action that confirms an award is known as “recognition”. It acknowledges the existence of the arbitration and accepts the arbitral tribunal's ruling.[68] It

[60] Asouzu (n 1 above) 185
[61] CA Obiozor ‘The Machinery for Enforcement of Domestic Arbitral Awards in Nigeria – Prospects for Stay of Execution and Non-Monetary Awards’ (2010) *1 Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 167.
[62] Section 31(2) of the ACA, 2004. By Section 57(1) of the ACA, 2004 “Court” means the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court. “Judge” means a judge of the High Court of a State, The High Court of the Federal Capital Territory, Abuja or the Federal High Court.
[63] Section 20 and 21 of the Sheriffs and Civil Process Act, Cap S6, LFN 2004
[64] Commerce Assurance Ltd V. Alli (1992) 3 NWLR (Pt 232) 710
[65] Ras Pal Gazi Construction Co. Ltd v F.C.D.A. (2001) 5 S.C. (Pt. II) 16 at 26. The Supreme Court of Nigeria confirmed this position when, per Katsina-Aluu JSC held thus “…. nowhere in the Act is the High Court given the power to convert an arbitration award into its own judgement”
[66] A Redfern, M Hunter (n 40 above) 09-10
[67] Tulip (Nig) Ltd V.N.T.M.S.A.S 6 [2011] 4 NWLR (Pt. 1237) 279 paras A-B.
[68] JDM Lew et al (n 56 above) 690

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serves as a deterrent to any attempt to start new actions over problems that have previously been resolved in arbitration, resulting in the awards sought to be recognized.

On the one hand, enforcement ensures that the award has legal effect and that it has been carried out by deploying existing legal sanctions.[69] On the other hand, the goal of enforcing an arbitral award is to act as a sword that is sharp and effective.[70] As a consequence, a court order enforcing an award signifies that the award has been recognized and is executable; the enforcing court ensures that the award debtor complies with the arbitrator's judgment to which he has submitted himself.[71]

The terms recognition and enforcement are often used interchangeably as if they mean the same thing but they do not.[72] An award's recognition is a defensive procedure in and of itself. While enforcement is a practical measure taken by the court to ensure that the unsuccessful party complies with the terms of an arbitral award, it typically occurs when the unsuccessful party commences an action about the same subject matter or acts as if no valid arbitral award has been rendered.[73]

Finally, while assessing the recognition and enforcement of an arbitral award, the high court must analyse the award's legitimacy in light of all of the Act's requirements, but where any of the rules conflict with the ACA's provisions, the Act will take precedence.[74]

2.6. Legal Framework for the Enforcement of Domestic and Foreign Arbitral Awards in Nigeria.

Generally, if parties comply with an arbitral award, the award is enforced amicably. When one of the parties does not voluntarily comply with the award, the other party may seek to recognize and enforce such an award in the other country in which the other party has assets. The losing party in the arbitration has a right to set aside the arbitral award. The challenge of an award

[69] A Redfern, M Hunter *Law and Practice of International Commercial Arbitration* (2nd eds) (1991) 488 “Recognition is an undertaking by a state to respect the bindingness of foreign arbitral awards. Such awards may be relied upon by way of defence or set-off in any legal proceedings concerning the subject- matter of the award commenced in the courts of the state concerned, whereas enforcement is an undertaking by a state to enforce foreign arbitral awards, in accordance with its local procedural rules”.
[70] TH Bahta ‘Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia’ (2011) 5(1) *Mizan Law Review* 105, 107-108
[71] Environmental Dev. Construction v. Umara Associates Nig [2000] 4 NWLR (Pt 652)305-306, paras H-A
[72] GC Nwakoby & CE Aduaka ‘The Recognition and Enforcement of International Arbitral Awards in Nigeria: The Issue of Time Limitation’ (2015) 37 *Journal of Policy and Globalization*, 116 and MR Sammartano ‘International Arbitration Law and Practice’ (2001) *Kluwer Law International*, (2nd Eds) 936
[73]. EN Onyibor ‘The Issue of time limitation in Recognition and Enforcement of Arbitral Awards under the Nigerian Law’ (2022). https://blog.nicarb.org/index.php/2022/05/10/ (Accessed on 30 May 2022).
[74] Section 35 and 43 of the ACA, 2004

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aims to modify or to set aside the award, whereas recognition and enforcement aim to put the award into effect.[75]

The recognition and enforcement of arbitration awards can arise in either a domestic or international legal context.[76] The party against whom the award is made may voluntarily obey the order and comply since the award is binding between the parties and their agents. Every arbitral award duly made is to be recognized as binding[77] and is expected to be complied with as it operates based on a *res judicata,* which means operating as a bar to any fresh arbitration or action.[78] It is when, it is not complied with, that the question of enforcement by the winning party arises.[79]

An award can be domestic or foreign. If an award is made in Nigeria under domestic arbitration, it is classified as a domestic award for the purposes of enforcement in Nigerian courts. A foreign award, on the other hand, is an award rendered outside of Nigeria as a result of international arbitration. An award made in international arbitration with Nigeria as the seat may, however, be enforced in Nigerian courts as a foreign award.[80] As a result, two Nigerians can agree that arbitration to resolve a dispute over a commercial transaction will be handled as international arbitration.[81]

Arbitral awards are an important part of the Nigerian and international legal systems, as they serve as the final legal mechanism for resolving disputes governed by an arbitration clause. The ACA allows domestic and international arbitral awards to be recognized and enforced in Nigeria.[82] The ACA also accepts enforcement procedures based on UNCITRAL arbitration rules or any other international arbitration rules that the parties agree to.[83]

The New York Convention is similar to the ACA in that it applies to awards seeking enforcement that must have resulted from commercial contractual disputes, but it is designed specifically for foreign awards.[84] Section 51 of the ACA, which deals with the recognition and

[75] IAS Amro 'Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice. A Comparative Study in Common Law and Civil Law Countries' (2014) *Cambridge Scholars Publishing*, 4 "The difference between setting aside the award, recognition and enforcement of an award is clear. Domestic awards can be set aside, while foreign awards may or may not be recognised and enforced."
[76] Ajogwu, (n 22 above) 129
[77] Environmental Development Construction v. Umara [2000] 4 NWLR (part 652) 293
[78] Okpurukwu V. Okpokam (1998) 4 NWLR (Pt 90) 554, 586
[79] MO Orojo & JA Ajomo (n 19 above) 4-6
[80] M Mordi, F Sani & O Olutoye (n 16 above)
[81] Section 57(2)(c) and (d) of the ACA.
[82] S. 31 and 51 of the ACA, 2004
[83] CA Okoye 'Enforcement of Arbitration Awards in Nigeria' (1995) 23(1) *International Business Law*, 13-15
[84] Section 54 of the Arbitration and Conciliation Act, 2004

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enforcement of foreign arbitral awards, is based on UNCITRAL Model Law Article 35. It has the same goal as the New York Convention but has a broader scope in that the award is made binding and enforceable, regardless of the country in which it is made.

Sections 31 and 51 of the ACA, respectively, establish provisions for the recognition and enforcement of awards in domestic and foreign arbitral awards. While Section 31(1) of the ACA recognizes an award as binding, it can only be enforced through a written application to the court.[85] The conventional provision for summary enforcement is Section 31(3) of the ACA.

The ACA, on the other hand, makes no provision for the procedure for the recognition and enforcement of an award; this is left to the Federal High Court Rules and High Court Rules, as both courts have jurisdiction to hear applications for the recognition and enforcement of arbitral awards, whether domestic or foreign.[86] However, in respect of an ICSID award, the Supreme Court of Nigeria is the only court with original jurisdiction to entertain enforcement proceedings.[87]

For the court to have jurisdiction over an application for recognition and enforcement of an award, it must have jurisdiction over the award debtor, either by the award debtor being present in Nigeria and being served with the process or, by the award debtor being amenable to service of process outside the jurisdiction under the applicable rules of court for this purpose.[88] To exercise jurisdiction, the court must be satisfied that the recognition and enforcement process has been properly served on the award debtor.

There is, however, no requirement that an applicant must identify assets within the jurisdiction of the Nigerian court that will be the subject of enforcement for recognition proceedings. This matter will only come up after an enforcement order has been granted and the applicant wishes to levy execution. At this stage, specific information on a defendant's assets will be required to enable the issue of execution processes.[89]

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[85] Per Nikki Tobi, JSC in Okechukwu V. Etukokwu (1999) 8 NELR (Pt 562) 513 @ 529-530 held thus "An arbitral award per se lacks enforcement or enforceability and is a toothless dog which cannot bite until a court of law gives teeth to it"
[86] Magbagbeola V Sanni (2002) 4 NWLR (Pt 756) 193
[87] Section 1(1) of the International Centre for Settlement of Dispute (Enforcement of Awards) Act, CAP 120, Laws of the Federation of Nigeria, 2004
[88] G Elias et al (n 47 above).
[89] B Ajibade, K Mayomi 'Challenging and Enforcing Arbitration Awards: Jurisdictional Know-how, Nigeria, (1st Eds) (2019) *Global Arbitration Review* 443

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2.6.1. The Enforcement of Domestic Arbitration Awards in Nigeria

Domestic arbitral awards can be enforced in Nigeria at any high court and the Federal High Court as a court of first instance.[90] The ACA did not make any provisions specifying any mode for the recognition and enforcement of arbitral awards. Only the Civil Procedure Rules of the High Courts can make such rules.[91] The rules of the court have constitutional force and are the only reference point to determine the competence of the court, its jurisdiction and the proper procedure to adopt in the enforcement of an arbitral award.[92]

The party seeking to enforce the award through a writ of summons petitions the High Court in the jurisdiction in which it intends to enforce the award for recognition and enforcement. The applicant pleads his whole case, as well as the arbitration and award he received. The original or a certified true copy of the arbitration agreement and award must be presented by the applicant.[93] If the arbitration award or agreement is not written in English, it must be accompanied by a certified English translation.[94]

There has been a bevy of authors[95] who believe that domestic arbitral awards can be enforced in one of three ways in Nigeria. (i) Enforcement by action on the award; (ii) Enforcement under Section 31(1) of the ACA; and (iii) Enforcement under Section 31(3) of the ACA. However, the second and third methods are also products of the ACA and can be combined into one, thereby reducing the number of methods for domestic arbitral award enforcement to two.[96]

2.6.1.1. Enforcement by Action Upon the Award

The procedure for enforcing domestic awards through action on the award is based on common law. The common law takes the notion that every valid arbitral ruling is a contract binding on the disputing parties ultimately.[97] The assumption that parties agree to be bound by the

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[90] B Ajibade & K Mayomi 'Enforcement of Arbitration Awards in Nigeria, 2017, 1 Enforcement of Arbitration Awards in Nigeria (GAR Know-how) Academia.edu. & A Agboola 'Enforcement of Domestic Arbitral Awards' (2022). ENFORCEMENT OF DOMESTIC ARBITRAL AWARD – NICArb.
[91] Medical & Health Workers Union of Nigeria V Minister of Labour and Productivity (2005) 17 NWLR (Pt. 953) 90, 147-148
[92] K Aina 'Procedure for the Enforcement of Domestic Arbitral Awards in Nigeria' (2014) 27 http://ir.library.ui.edu.ng/handle/123456789/3494.
[93] Ebokan V. Ekwenibe and Sons Trading Co. (2001) 2 NWLR (Pt 696) 32
[94] Section 51(2)(c) of the ACA, 2004
[95] CE Ibe, 'the Machinery for Enforcement of Domestic Arbitral Awards in Nigeria Prospects for Stay of Execution of Non-Monetary Awards: Another View' (2011) 2 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 305-310
[96] Ibe, (n 95 above) 305
[97] Norske V. London General Insurance Co. Ltd (1927) 43 TLR 541

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conclusion of the proceedings in good faith is inherent in an arbitration agreement.[98] Only non-statutory awards, such as customary arbitral awards, can be enforced in this manner because they arise out of other domestic means.[99]

The successful party commences the process of enforcing the award by filing a writ of summons with the court, requesting that the award be recognized and enforced. The successful party must present a cause of action to succeed. In this case, such a party must show the existence of several elements, including that the parties entered into a voluntary submission or arbitration agreement; the parties had a dispute in the contemplation or anticipation of the submission of the arbitration agreement; the parties appointed their arbitrator(s) by the submission or arbitration agreement; the arbitral tribunal took up the dispute and issued an award and finally that the unsuccessful party had neglected, failed or refused to implement the award.[100]

A defence to the action may be accepted or rejected at the discretion of the court. Any defence that demonstrates a fundamental breach of natural justice or that enforcing the arbitral awards would be unfair is a good reason for the court to refuse enforcement.[101] However, once the court has issued a ruling validating an award, the successful party becomes a judgment creditor, while the losing party becomes a judgment debtor.[102]

2.6.1.2 Enforcement Pursuant to the Arbitration and Conciliation Act

When arbitration is conducted in accordance with the ACA, the award must be enforced in accordance with the ACA. In this case, the award may be enforced under Sections 31(1) and 31(3) of the ACA. Under Section 31(1) of the ACA, the applicant in a written application urges the court to enforce the award simpliciter but not as a court judgement.[103] If the court is satisfied that the award merits enforcement, it shall make an order for the award's enforcement.[104]

However, the applicant's request to enforce the award simpliciter may appear problematic, as the court can only enforce the award in the same way that it can enforce a

[98] O Abifarin 'Resolving Domestic Violence through Alternative Dispute Resolution in Nigeria' (2010) 6 *University of Ilorin Law Journal,* 163-164
[99] Ibe (n 95 above) 305
[100] Ebokan V. Ekwenibe & Sons Trading Co. (2001) 2 NWLR (Pt 696) 32, 41-42
[101] A Adebayo 'Recognition and Enforcement of Domestic Award in Nigeria, (2018). NIGERIA: Recognition and Enforcement of Domestic Award in Nigeria (adebayo-nigeria.blogspot.com)
[102] Adeuti (n 21 above) 82-97
[103] Ibe (n 95 above) 306
[104] Obiozor (n 61 above) 169

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judgment or order. This is because the Sheriff, not the court, is in charge of enforcing court judgments. Hence the court cannot directly enforce the award by execution. It must be carried out following the Sheriff and Civil Processes Procedure, which necessitates a court order.[105]

On the other hand, enforcement under Section 31(3) of the ACA provides a rapid procedure for enforcing arbitral awards. Only awards made under formal arbitration agreements are covered by this section of the Act.[106] A successful party's first step is to apply to the court for permission to enforce the award in the same way that the court's judgment is enforced, along with a duly authenticated original award and arbitration agreement or a duly certified award thereof, and if the award or arbitration agreement is not in English, a certified translation in English.[107]

The applicant must also provide full disclosure of any matter about which he or she is aware that could influence the court's decision to grant the application.[108]

The successful party is placed in the position of a judgment creditor in litigation once leave is granted. He may then execute the award using any of the appropriate machinery accessible to a judgment creditor at law.[109]

2.6.2. The Enforcement of Foreign Arbitral Awards in Nigeria

The ease with which foreign arbitral awards can be enforced has increasingly become a benchmark for determining the scope of arbitration in a country, evaluating the level of arbitration practice, and assessing whether a jurisdiction is arbitration-friendly or not.[110] Regardless of the country in which an arbitral award is made, Section 51 of the ACA specifically states that it will be recognized as binding and enforced by the court.[111] Any foreign individual wishing to enforce an arbitral award in Nigeria should be concerned about the willingness of Nigerian courts to do so; the ease or difficulty of doing so; and the expected timeframe of the process of enforcement.[112]

Before foreign arbitral awards may be enforced, they must first be recognized. A party may request an order of recognition without also requesting an order of enforcement of the

[105] Ibe (n 95 above) 305
[106] Obiozor (n 61 above) 169
[107] Imani & Sons Ltd. v. Bill Const. Co. Ltd. [1999]12 NWLR (pt. 630)254, 261
[108] DS Sutton, J Gill & M Gearing *Russell on Arbitration* (2015) Sweet and Maxwell, 138
[109] Shell Trustees Ltd. v. Imani & Sons Ltd. (2000) 6 NWLR (Pt. 662) 639 @ 662
[110] E Dike 'Facts and Myths on the Enforcement of Foreign Arbitral Awards in Nigeria' (2012) https://iclg.com/cdr/arbitration-and-adr/facts-and-myth-on-the-enforcement-of-foreign-arbitral-awards-in-nigeria. (Accessed 23 February 2022)
[111] M Mordi, F Sani & O Olutoye (n 16 above) 6
[112] P Okoronkwo 'Enforcement of Foreign Arbitral Awards in Nigeria' https://www.hg.org/legal-articles/enforcement-of-foreign-arbitral-awards-in-nigeria-6031. (Accessed 23 February 2022)

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award.[113] A court order recognizing the award will prevent the losing party from bringing another action in court based on the same facts.[114] A foreign arbitral award that cannot be recognized and enforced in the jurisdiction where the parties' assets are located is a waste of time and resources.[115]

Parties are urged to search around for a venue to apply for the enforcement of a foreign arbitral award to assess if the failed party has assets sufficient to fulfil the arbitral award's demand. He should also consider the venue's perspective on the enforcement of arbitral awards and public policies. It is not advisable to seek enforcement in a parochial jurisdiction or where the unsuccessful party against whom the award is sought to be executed has few assets.[116]

In deciding whether or not to recognise and enforce a foreign arbitral award in Nigeria, the courts will take into consideration the venue of the arbitration proceedings and not the nationalities of the parties involved. This is because Nigerian courts will only grant recognition to awards made in Nigeria and sought to be enforced in Nigeria; for example, awards made in countries which are contracting states to the 1958 New York Convention.[117] There is therefore a need for parties to consider very carefully the place of arbitration in drafting their arbitration clause or agreement.[118]

Foreign Arbitral Awards are enforceable in Nigeria through the following means;[119]

i. An action on the award
ii. The Foreign Judgement (Reciprocal Enforcement) Act 1990.
iii. The Arbitration and Conciliation Act.
iv. The New York Convention 1958 and,
v. The International Centre for Settlement of Investment Disputes Convention.

2.6.2.1 An Action Upon the Award

A foreign arbitral award can be enforced in Nigeria by an action upon the award at common law. It is irrelevant that the award is domestic or was rendered in a country that has no

[113] LM Daradkeh 'Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law)' unpublished PhD thesis, University of Leeds, 2005, 18 http://etheses.whiterose.ac.uk/494/2/DX231171.pdf.
[114] Daradkeh (n 113 above)
[115] Daradkeh (n 113 above)
[116] GC Nwakoby & CE Aduaka (n 72 above) 117
[117] Okoye (n 83 above) 13-15
[118] Onyibor (n 73 above)
[119] F Adekoya & PA Iwu 'Arbitration Procedure and Practice in Nigeria: An Overview (2017) 16-17

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reciprocal agreement with Nigeria.[120] Where the award is rendered in a country that has no reciprocal arrangement with Nigeria, the party seeking the award's enforcement will file a new action in Nigeria, with the foreign award as the cause of action.[121]

The claim is primarily founded on the idea that international arbitration agreements, like any other contract, are recognized as binding and enforceable by law. The agreement to arbitrate is a binding commitment to carry out the arbitral tribunal's decision, and failure to do so when the decision is made is a breach of the arbitration agreement.[122]

To succeed in the action, the claimant must show the existence of an arbitration agreement, that the dispute arose under the terms of the agreement; that the arbitration was properly conducted in accordance with the agreement, including the appointment of an arbitral tribunal in accordance with the agreement; the making of the award according to the arbitration agreement, the award's validity, and that the award was final and conclusive concerning all the issues referred to the arbitration.[123] Where the documents are made in a language other than English, then a duly certified copy of the translation of all the documents into English is required.[124]

2.6.2.2 Enforcement under the New York Convention

The two cases in which the New York Convention applies to the acceptance and enforcement of arbitral judgements in Nigeria are enumerated in Article 1(1) of the Second Schedule of the ACA, which is impari materia with Article 1(1) of the New York Convention.[125] The Convention will apply where the arbitral award is made in the jurisdiction of a country other than the country where the arbitral award is sought to be enforced, according to the text of article I (1) of the NYC. It will also apply if the enforcing court finds the arbitral award to be non-domestic in the state where recognition and enforcement are sought.[126]

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[120] Toepher Inc. of New York V. Edokpolor(trading as "John Edokpolor & Sons") (1965) All N.L.R 293, 307
[121] E Ojukwu 'Enforcement of Foreign Judgement in Nigeria' (1996), 21(4) *International Legal Practitioner*, 131 – 140
[122] Ezike (n 18 above) 67
[123] O Delano 'Enforcement of awards and foreign judgments in Nigeria' www.akindelano.com. (Accessed 27 February 2022).
[124] Ajibade & Mayomi (n 89 above) 4
[125] "This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such award are sought, arising out of the difference between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".
[126] PNC Olokotor 'Judicial Attitude to Enforcement of Transnational Awards under the New York Convention: A Critical Assessment of the English and Nigerian Courts' (2017) Unpublished PhD Thesis, SOAS University of London, 62-63

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It must be established that a contracting state has reciprocal laws authorizing the recognition and enforcement of arbitral awards rendered in Nigeria, for an arbitral award to be enforced in Nigeria under the New York Convention.[127] This is due to Nigeria's reciprocity reservation, which means that only awards issued in contracting states that agree to accept and enforce awards made in other contracting states as well as Nigeria would be recognized and enforced in Nigeria. The consequence of this stance is that arbitral awards made in a nation that is not a signatory to the Convention or that does not give reciprocal treatment to Nigerian arbitral awards cannot be recognized or enforced in Nigeria.[128]

The New York convention applies mainly to two sets of awards, namely; Arbitral awards made in the territory of a state other than where the recognition and enforcement of such awards are sought and arising out of differences between persons, whether physical or legal; and secondly; arbitral awards not considered domestic awards in the state where their recognition and enforcement are sought.[129]

However, a "non-domestic" arbitral decision might result in three different types of awards.[130] The first is an award made under the arbitration legislation of another nation in the enforcing country; the second is an arbitral award made in the enforcing nation that involves a foreign element and is governed by that country's arbitration legislation; while the third type of award is regarded as "a-national" award since it is not subject to any national arbitration law.

Parties who choose to arbitrate in one nation under the arbitration laws of another country are examples of the first. The second is where an arbitral award was made under foreign law or included parties who are domiciled or do business in a country other than the enforcing country and the third will be that the place where the award is rendered is immaterial.[131]

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[127] Dike (n 110 above) & Section 54(1) of the ACA, 2004
[128] GC Nwakoby & CE Aduaka (n 72 above) 119
[129] G Olokode 'Enforcement of Arbitral Awards in Nigeria: Issues and Challenges' (2021) ENFORCEMENT OF ARBITRAL AWARDS IN NIGERIA: ISSUES AND CHALLENGES*** (linkedin.com)
[130] AJ Van den Berg 'The New York Convention of 1958: An Overview', in Gaillard, E. and Di Pietro, D., (eds.), Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice, (2008) 39 – 68.
[131] Bergesen v Muller (1983) (US No. 54, reported in Yearbook Vol. IX p. 487) where the US Court of Appeal for the Second Circuit in 1983 stated inter alia that: "awards 'not considered as domestic' means awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with a foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction."

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Foreign arbitral awards are recognized and enforced under the New York Convention with the leave of the Judge or Court and by an application to the Court.[132] A party seeking to enforce an arbitral award under the Convention must provide the appropriate court with the duly authenticated original award or a duly certified copy thereof, as well as the original agreement referred to in Article II of the Convention or a duly certified copy of it when filing his application.[133]

When the arbitral award or arbitration agreement sought to be enforced is not in the official language of the country in which the award is sought to be enforced, the party seeking enforcement must obtain a translation of the arbitral award and the arbitration agreement into that country's official language.[134] The party against whom recognition and enforcement are sought may ask the court to withhold recognition and enforcement on the grounds outlined in Article V of the Convention.[135]

As a result of the preceding, it is clear that arbitral decisions must be recognized and enforced in conformity with the norms of procedure of the nation where recognition and enforcement are sought under the Convention. It follows that in Nigeria, foreign arbitral awards are recognized and enforced under the New York Convention only with the permission of the judge or court and upon application to the court.[136]

2.6.2.3 Enforcement through the Foreign Judgements (Reciprocal Enforcement) Act (FJA)

The Foreign Judgements (Reciprocal Enforcement) Act[137] (FJA) allows a foreign arbitral judgement to be implemented in Nigeria. This Act recognizes decisions (which include arbitral awards by definition) issued by nations with which Nigeria has a mutual recognition and enforcement agreement.[138] According to the Foreign Judgements (Reciprocal Enforcement) Act, for a judgment or award obtained in a foreign nation to be implemented in Nigeria, it must have acquired the character of a judgment in the foreign country and would have to be registered in a Nigerian court with the jurisdiction to hear the dispute.[139]

[132] Section 31 and 51 of the ACA.
[133] Article IV of the New York Convention
[134] Article iii of the New York Convention.
[135] Article V of the New York Convention.
[136] Section 31 & 51 of the ACA.
[137] See Cap F35, Laws of the Federation of Nigeria, 2004.
[138] F Adekoya & P Iwu (n 119 above) Pg. 16.
[139] According to Section 2 of the FJA, "Judgment "… shall include an award in proceedings on an arbitration if the award has in pursuance of the law in force in the place where it was made become enforceable in the same manner as judgment given by a court in that place.…" See also Tulip (Nig) Ltd. v. NTM SAS [2011] 4 NWLR (Pt.1237) 259.

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The decision or award must also be registered with the state's high court, the Federal Capital Territory, Abuja, or the Federal High Court which has jurisdiction over the dispute.[140] The Federal High Court Civil Procedure Rules provide for the enforcement of foreign arbitral awards.[141] The judgment or award must be final and conclusive between the parties, and a quantity of money must be payable thereunder, which cannot be a fine or other penalties.[142] Furthermore, the time limit for registering an award for enforcement under Section 4 of this Act has been extended to six years.[143]

The primary factor through which countries will benefit from the Act appears to be a reciprocal agreement with Nigeria. When the Minister of Justice is satisfied that any foreign country will accept decisions issued by Nigeria's superior courts with considerable reciprocity, the Minister of Justice will issue an order allowing judgments or awards issued in that country to be enforced in Nigeria.[144] On the defendant's application, the registered award may be set aside under any of the conditions outlined in section 6 of this Act. The Act allows any party against whom a registered award is to be enforced to apply to the relevant court to have the award set aside.[145]

2.6.2.4 Enforcement of Foreign Arbitral Awards under the Arbitration and Conciliation Act

The Act states that an arbitral award, irrespective of the country in which it was made, is recognized as binding and can be enforced by the court upon written request. This enforcement approach is not based on reciprocity. The awards include non-New York Convention awards excluded by the reciprocity and commercial provisos of the New York Convention or the reservations expressed by Nigeria in the New York Convention.[146]

It is important to note that the phrase "irrespective of the country where the award was made" conveys the appearance that reciprocity has been waived, and hence it is not a necessity for foreign awards to be enforced under section 51 of the ACA. However, the Supreme Court

[140] Afcon Nigeria Ltd. v. Registered Trustees of Ikoyi Club (1996) FHCLR 371
[141] Order 52 Rules 17, Cap F35, Laws of the Federation of Nigeria, 2004
[142] Section 3(2) of the FJA, Cap F35, Laws of the Federation of Nigeria…" where an award is made in proceedings on an arbitration in a foreign territory to which the foreign Judgment (Reciprocal Enforcement) Act extends, if the award was in pursuance of the law in force in the place where it was made; it shall become enforceable in the same manner as a Judgment given by a court in the place and the proceedings of the Foreign Judgments (reciprocal Enforcement) Act shall apply in relation to the award as it applies in relation to a Judgment given by that court".
[143] DH Uba 'Challenges in the Recognition and Enforcement of Foreign Arbitral Awards in Nigeria' (2017) 5. https://www.researchgate.net/publication/326211564_CHALLENGES_IN_THE_RECOGNITION_AND_ENFORCEMENT_OF_FOREIGN_ARBITRAL_AWARDS_IN_NIGERIA.
[144] Ezejiofor (n 36 above) 176.
[145] Section 6 of the FJA, Cap F35, Laws of the Federation of Nigeria. & GC Nwakoby, CE Aduaka (n 72 above) 116
[146] Section 51 of the ACA.

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of Nigeria finds that "reciprocity of treatment" is important when it comes to enforcing foreign arbitral awards in Nigeria.[147] This is also a widely accepted practice around the world. Section 51 mandates enforcement courts to give effect to foreign arbitral awards, though, subject to Section 32 of the same ACA.

A party seeking to enforce a foreign arbitral award under the ACA must submit to the court a written application that includes the original award or a duly certified copy, the original arbitration agreement or a duly certified copy, as well as a copy of the translated version of the award if it was not made in English.[148] The Court has further emphasized the danger of importing additional requirements to the grounds stipulated in Section 52 for resisting enforcement.[149]

The grounds for refusal of enforcement of an award under the ACA appear to be the same as the New York Convention and can be classified into two sets. The first set can be raised by the aggrieved party and is aimed at protecting the parties against private injustice,[150] while the second is meant to protect the interests of the enforcing State.[151] Thus, the Arbitration Act distinguishes between foreign and domestic awards and contains three regimes with respect to the refusal of recognition or enforcement of awards: regime about domestic awards,[152] regime applicable to international awards[153] and the applicability of the New York Convention.[154]

2.6.2.5 Enforcement through the International Centre for Settlement of Investment Disputes (ICSID) Convention

Nigeria ratified the ICSID Convention on the 23rd day of August 1965[155] and entered into force on October 14th, 1966.[156] According to Article 69 of the ICSID, Section 12 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and its commitment to domesticate the

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[147] GC Nwakoby & CE Aduaka (n 72 above) 118
[148] Section 51(2) of the ACA. See also Ali V. Audu (2005) LPELR 11330 on the translation of a document to English Language.
[149] Sundersons Ltd & Milan Nigeria Limited v. Cruiser Shipping PTE Ltd & Universal Navigation PTE Ltd 2 [2015] 17 NWLR (Pt. 1488) 357.
[150] Section 52(2)(a) of the ACA
[151] Section 52(2) (b) of the ACA.
[152] See Section 32 of the ACA.
[153] See Section 52 of the ACA.
[154] See Section 54 (1)(a) and (b) of the ACA.
[155] CE Aduaka, 'The Enforcement Mechanism under the International Centre for Settlement of Investment Dispute (ICSID) Arbitration Award: Issues and Challenges' (2013) 20 *Journal of Law, Policy and Globalization*, 136
[156] O Abiloye 'Enforcement of Foreign Arbitral Awards in Nigeria: Legal Regimes and Challenges' (PDF) ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN NIGERIA: LEGAL REGIMES & CHALLENGES | Olushola Abiloye - Academia.edu.

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ICSID Convention,[157] Nigeria made efforts to give effect to its ICSID duties after signing the Convention by passing the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act on November 29, 1967.[158]

The ICSID Act is principally and expressly designed to ensure that an award made under the auspices of the ICSID is enforced in Nigeria.[159] The Act is divided into two sections. The first section outlines and clarifies a party's entitlement to have an ICSID award executed by registering the award with the Supreme Court, from which it can be enforced like a court judgment. The second part empowers Nigeria's Chief Justice to adopt suitable procedures for the implementation of such awards.[160]

Awards made under the ICSID Convention are directly enforceable in signatory states, and there is no need for a standard of review in national courts.[161] Each contracting State (including Nigeria) should accept an ICSID award as enforceable and enforce the award's financial obligations within its territories.[162] The ICSID has limited jurisdiction and scope both as to parties and subject matters. The subject matter of the proceedings must be an investment matter.[163] Hence, the ICSID Convention provides a unique procedure for recognizing and enforcing arbitral awards made in its proceedings, which is why it is known as an award in its class.[164] This mode of enforcement appears to be the quickest in Nigeria for enforcing an arbitral award, as there appears to be little or no opportunity for objections to the award's enforcement.[165]

In Nigeria, an ICSID award is enforced as if it were a final judgment issued by the Supreme Court of Nigeria.[166] The consequence appears to be that, by allowing enforcement in the Supreme Court of Nigeria, it avoids the obstacles and appeals that come with enforcement

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[157] OA Amiiche 'Enforcement of International Centre for the Settlement of Investment Dispute (ICSID) Award: The Plea of Sovereign Immunity' (2017) 3(1) *Port Harcourt Journal of Business Law*, (2017) 6
[158] Cap 120, Laws of the Federation of Nigeria, 2004.
[159] IS Nwoye 'The Recognition and Enforcement Regime for ICSID Awards in the United States, China and Nigeria: An Analytic Comparison' (2015) 20. https://dx.doi.org/10.2139/ssrn.2595833.
[160] Section 1 of the ICSID (Enforcement of Award) Act provides as follows: "(1) [w]here for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for Settlement of Investment Disputes, a copy of the award duly certified by the Secretary-General of the Centre aforesaid, if filed in the Supreme Court by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgment of the Supreme Court, and the award shall be enforceable accordingly. (2) The Chief Justice of Nigeria may make rules of court or may adapt rule of court necessary to give effect to this section."
[161] Articles 53 & 54 of the ICSID Convention.
[162] Article 54 (1) of the ICSID Convention.
[163] Olokode (n 129 above)
[164] AA Asouzu, (2001) *International Commercial Arbitration and African States* (Cambridge: Cambridge University Press) 368.
[165] Okoronkwo (n 112 above)
[166] Okoronkwo (n 112 above)

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in the High Court and the Court of Appeal.[167] The ICSID Convention is intended to make it easier to resolve a certain set of investment disputes that the parties have agreed to submit to it.[168] When the parties agreed to the ICSID Convention, the provisions of the convention shall apply to the exclusion of all other laws.[169]

When seeking recognition or enforcement of an ICSID award in a contracting state, the party must provide a copy of the award certified by the Secretary-General of ICSID to a competent court or other authority designated by the state for this purpose.[170] Once the creditor has presented a copy of the award that has been duly certified by the Centre's Secretary General, the judgment creditor may proceed with the execution of the now transformed ICSID award (Supreme Court Judgment) under the Federation's Sheriffs and Civil Process Act (SCPA) and the Judgment (Enforcement) Rules,[171] which are identically worded enactments that serve as the primary legislation for the execution of a court judgment, decision, or order.

2.6.2.7. The Lagos State Arbitration Law, 2009 (LSAL)

Section 56(1) of the Lagos State Arbitration Law, 2009 states that an arbitral award shall be recognized as binding, regardless of the jurisdiction or territory in which it is made, and shall, subject to this section and section 58 of this law, be enforced by the Court upon application in writing to the Court by a party.

The High Court of Lagos State is the legal definition of "court" in these circumstances. The first limitation is that it is only applicable in Lagos State, and the second is based on the idea of covering the field, which stipulates that if a federal and state law cover the same subject area, the federal law would take precedence.[172]

2. 7. Issues and Challenges in the Enforcement of Arbitral Awards.

The aim of contesting an award in front of a national court is to have the relevant court modify it in some way, or, more commonly, to have the relevant court declare that the decision is to be disregarded in whole or in part. In Nigeria, an arbitral award is final and cannot be appealed. Nevertheless, an arbitral award can be challenged.[173]

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[167] Dike (n 110 above)
[168] Article 25(1) of the ICSID Convention.
[169] Article 44 of the ICSID Convention.
[170] Article 54(2) of the ICSID Convention.
[171] Made pursuant to Section 94 of the Sheriffs and Civil Process Act of the Laws of the Federation of Nigeria, 2004.
[172] OO Oke 'The Enforcement and Challenge of International Arbitration Awards in Nigeria' (2015) 12. http://dx.doi.org/10.2139/ssrn.2621046.
[173] F Adekoya & P Iwu (n 119 above) 13-14

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This is because an appeal may challenge the award's merits and complain about flaws in the award's content, whereas a setting aside application is simply a complaint about the procedure used to make the award or to the effect that the award's content is not only erroneous but also perverse.[174] The implication is that the substantive questions decided by the arbitral panel will not be open to judicial review because, as previously said, arbitration is by its nature final.[175]

An award can be challenged by filing an application in any of the High Courts or the Federal High Court within the applicant's jurisdiction.

2.7.1. Setting Aside Arbitral Awards.

The circumstances under which a party can challenge an award under the ACA and have it set aside are limited but must show one or more of the following:[176]

i. That a party to the award was under some incapacity.
ii. That the arbitration agreement is not valid under the law which the parties have indicated should be applied, or that the arbitration agreement is not valid under Nigerian law.
iii. That proper notice of the appointment of an arbitrator or the arbitral proceedings was not given to the applicant, to be able to present a case.
iv. That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.[177]
v. That the award contains decisions on matters that are beyond the scope of the arbitration. However, if decisions on matters submitted to arbitration can be separated from those not submitted, only the part of the award containing decisions on matters not submitted to arbitration can be set aside.
vi. That the composition of the arbitral tribunal, or the arbitral procedure, was not by the agreement of the parties unless the agreement conflicted with an ACA provision.
vii. Where there is no agreement between the parties under subparagraph (vi) of this paragraph that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Act

[174] G Elias et al (n 47 above).
[175] R Obidegwu & L Edozien 'The Regime of Setting Aside Arbitral Awards: Efficacious or Antithetical to the Arbitral Process' (2020) https://www.mondaq.com/nigeria/arbitration-dispute-resolution/966492/the-regime-of-setting-aside-arbitral-awards-efficacious-or-antithetical-to-the-arbitral-process.
[176] Section 48 of the ACA.
[177] Araka V. Ejeagwu 1 (2000) 12 S.C. (Pt I) 99 & Arbico (Nig.) Ltd v Nigerian Machine Tools Limited (2002) 15 NWLR (Pt 789) 7

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viii. That the subject matter of the dispute is not capable of settlement by arbitration under Nigerian law.

ix. That the award is contrary to Nigeria's public policy.

Apart from the statutory grounds, the courts have also ruled that an arbitral award will not be recognised or enforced if it is statute-barred.[178]

Section 30 of the ACA also provides that:

i. Where the arbitrator has misconducted himself or where the arbitral tribunal proceedings or award has been improperly procured, the court may on the application of a party set aside the award.

ii. An arbitrator who has misconducted himself may, on the application of any party, be removed by the court.

Regardless of whether the claim is based on section 48 or 30 of the ACA, the application to set aside an award must be filed within three months after the date of the award.[179] The ACA does not specify the method for applying to set aside an award, so the rules of the court before which the application is made must be followed.[180] The judgment creditor loses the right to enforce the award when it is set aside. The award set aside can then be challenged in court.[181]

Nigerian courts have a record of being intolerant to meritless and frivolous set-aside applications claiming a lack of due process. The courts do not appear to ordinarily set aside or refuse to enforce a judgment if the alleged action (procedural unfairness) does not deny the parties equal and appropriate opportunities to present their case. It may be difficult for the court to identify a breach of due process rights if the tribunal has adequately weighed the issues and found a balance between the responsibility to conduct proceedings efficiently and the duty to deal equally amongst the parties.[182]

When an arbitration award is set aside, the award becomes null and void, and the parties are no longer bound by it. Where the award was set aside owing to misconduct, the parties may reactivate the arbitration agreement. Although the parties have the authority to do so, setting

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[178] SPA Ajibade & Co. 'Challenging and Enforcing Arbitration Awards in Nigeria'(2020) https://spaajibade.com/challenging-and-enforcing-arbitration-awards-in-nigeria/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.
[179] S (29) of the ACA, 2004 & Araka V. Ejeagwu (2000) 15 NWLR (Pt 629) Pg. 684
[180] An example of one of these rules is Order 52, Rule 15 of the Federal High Court Rules, 2019.
[181] A Redfern & M Hunter (n 40 above) 447.
[182] PO Idornigie, EU Moneke & OJ Mgbakogu 'Due Process Paranoia in Arbitral Proceedings: Myth or Reality?' (2020) 39(2) *The Arbitrator and Mediator*. 9-28

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aside an award for misconduct does not imply the removal of an arbitrator. The parties will, however, be released from their responsibilities under the arbitration agreement if the basis for setting aside an award is that the arbitration agreement itself is invalid.[183]

2.7.2. Refusal to Recognise and Enforce Arbitral Awards in Nigeria

The same grounds that apply to set aside an arbitral award apply here, with the exception that section 52 (a)(viii) provides for additional grounds relating to the award's finality. The reasons for refusing to enforce foreign arbitral awards are spelt out in Section 52 of the Arbitration and Conciliation Act, which are similar to the provisions of Article V of the New York Convention. An application for refusal to recognize an award puts the application for recognition and enforcement of the award on hold until the refusal application is decided.[184]

The grounds listed under section 52 of the ACA are extremely important since they represent a globally recognized standard that is equivalent to the requirements of the ACA's Second Schedule[185] and the UNCITRAL Model Law.[186] The party opposing the enforcement application bears the burden of proof. As a result, courts must consider each of the grounds outlined in Section 52 of the ACA in light of the facts of each case to determine the judicial attitude in this regard.[187]

Under section 52(2) of the ACA, an award can be denied recognition if the party against whom it is sought to be enforced furnishes proof of the presence of vitiating elements or that the award has been set aside by a court at the seat of arbitration, or the court finds that the subject matter of the dispute is not arbitrable under Nigerian law, or that the enforcement of the award would be against public policy.[188]

However, if an award is set aside after the decision recognizing the award is issued, the award debtor might move to the court to vary the order or appeal it based on fresh evidence. In such a circumstance, the award debtor must have a legal remedy.[189] An appeal can be filed

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[183] C Attamah 'The Challenge of Arbitral Awards in Nigeria–Its Procedure and Impact on the Effectiveness of Arbitration as a Dispute Resolution Mechanism' (2019) 5(2) *Journal of Commercial Law*, 801-815
[184] *Shell Trustees (Nig) Ltd v. Imani Sons Ltd (*2000) 6 NWLR (Pt. 662) 639*)*
[185] Second Schedule of the ACA contains provisions of the New York Convention.
[186] UNCITRAL Model Law 2006, (United Nation documents A/40/17, annex I and A/61/17, annex), Article 36
[187] K Magajj 'Legal Challenges in the Enforcement of Foreign Arbitral Awards in Nigeria' unpublished PhD thesis, University of Ilorin, 2021, 61
[188] In Total Nigeria Plc v. Ajayi 2003) LPELR-6174(CA) P.28-29, paras. G-B the Court of Appeal considering the meaning of "Public Policy" held that "the phrase public policy, therefore, means that policy of the law of not sanctioning an act which is against the public interest in the sense that it is injurious to public welfare or public good. But public policy, like a chameleon, changes from time to time and from place to place. For a court to contend that an act or transaction is against public policy it must go further to show in what respect the act or transaction is against public policy."
[189] G. Elias et al (n 47 above)

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against a decision that denies recognition of an award. Preservative orders may be issued by the court awaiting the outcome of the appeal.[190]

2.7.3. Court Intervention

Section 34 of the ACA limits the court's ability to interfere in arbitral procedures. The restriction in Section 34 of the ACA is a derivative of the UNCITRAL Model Law Article V.[191] This limitation on the way, manner, and extent to which courts can intervene in arbitral proceedings have been the subject of extensive scholarly scrutiny, with some arguing that it is an affront to the inherent power and jurisdiction of Nigerian courts established under section 6(1)(2) of the 1999 Constitution,[192] while others have argued that it is not.[193] Despite the ACA's section 34 provision, Nigerian courts have intervened in arbitral proceedings beyond the statutory limits.[194]

The experience is universal, and in Nigeria, court interventions, though slow and painful, have occasionally been justified.[195] There have been cases where a challenge to the enforcement of an arbitral award has dragged on for years in court.[196] So far, the fear is that as a result of the numerous challenges to the enforcement of arbitral awards, the status of arbitration is dwindling, as is Nigeria's status as an arbitration destination.[197]

2.7.4. Third-Party Intervention

The essence of the arbitration system in Nigeria is derived from the parties' arbitration agreement, just as the power of the arbitrators is derived from the agreement. This is why parties normally specify the relevant subjects likely to emerge and the arbitration procedure through their arbitration agreements.[198]

In most cases, there should be a link between the parties to the arbitration, the arbitration agreement, and the rights and obligations that arise from it. These rights include the ability to

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[190] R Galvez, L Ijaodola, A Akor & O Oyekan 'Applicable Requirements as to the Form of Arbitral Awards' (2021) https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/nigeria.
[191] Article V of the UNCITRAL Model Law ...." In matters governed by this law, no court shall intervene, except where so provided in this law".
[192] D Ike 'Arbitration in Nigeria: A Review of Law and Practice' (2016) 7(3) *Gravitas Review of Business and Property Law*, 57, 62
[193] DT Eyongndi, AO Oluwadaisi 'An Appraisal of Section 34 of Arbitration and Conciliation Act and the Role of the Court in Arbitral Proceedings in Nigeria' (2018) *Rivers State University Journal of Jurisprudence and International Law*, 102, 118
[194] Statoil (Nig) Ltd & Anor V. Federal Inland Revenue Service and Anor (2014) LPELR 23144
[195] T.E.S.T V. Chevron Nig. Ltd. (2017) 11 NWLR (Part 1576) 187
[196] IPCO (Nig.) Ltd. V. Nigerian National Petroleum Corporation Ltd. (2014) ECWH 576.
[197] A Adenipekun 'Finality of Arbitral Awards in Nigeria – Separating Harm from Hubris (Part 1)' (2018) http://arbitrationblog.kluwerarbitration.com/2018/01/18/finality-arbitral-awards-nigeria-separating-harm-hubris-part-1/
[198] Section 2(2) of the ACA 2004

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appeal the award if you believe you have been wronged. This is because arbitration is a bilateral and private agreement between the parties that is mostly governed by the arbitration agreement signed by the parties.[199]

2.7.5. Delays

The Nigerian legal system is viewed and perceived as a slow and inefficient system.[200] The arbitration system is no exception. Due to the general delays faced in the enforcing court, the enforcement proceedings take longer to complete.[201] This could also be due to the fact that an award can accommodate an unlimited number of appeals.[202] An aggrieved party can challenge an arbitral award up to the Supreme Court from the High Court or Federal High Court.[203] The enforcement procedure is more or less post-arbitration litigation because of the ineffective nature of the Nigerian legal framework.

2.7.6. The Issue of Time Limitation in the Enforcement of Arbitral Awards in Nigeria

In general, whether a person has a legal right or has been wronged, the law allows the aggrieved party to seek redress because a wrong cannot exist without a corresponding remedy[204] and this redress must be sought as soon as possible so that the right to redress does not expire due to a limitation period.[205]

As a result, the limitation period ensures that an aggrieved party seeks remedies from the court within a reasonable time frame and does not give the impression of condonation.[206] A cause of action becomes stale or statute-barred[207] when it is allowed to linger beyond the time limit for obtaining relief. The limitation statute has properly protected parties who decline to act within a reasonable amount of time from the date the cause of action arose, as allowed by the law.[208]

The goal of statutes of limitation laws is to provide a time limit for the commencement of legal actions in relation to a certain claim.[209] The essence of limitation law is that the legal

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[199] Folarin Rotimi Abiola Williams V. Chief Oladipupo Akanni Olumuyiwa Williams & Ors 2014) LPELR-22642.
[200] IPCO (Nigeria) Ltd. v Nigerian National Petroleum Corporation [2008] APP.L.R. 04/17
[201] KV Nzelu 'International Commercial Arbitration-An Examination of the Efficacy and Challenges of International Commercial Dispute Bodies in Recognition and Enforcement of Arbitral Awards- Nigeria as a Case Study' (2021) https://dx.doi.org/10.2139/ssrn.4015663.
[202] Sundersons Ltd & Anor v. Cruiser Shipping PTE LTD & Anor (2014) LPELR-22561
[203] A Atake 'Beating The System: Enforcement of Arbitral Awards Against State-Owned Entities' (2012) Lagos Nigeria http://www.templars-law.com/413-2/. & NNPC v. Clifco Nigeria Limited 9 (2011) LPELR-2022(SC).
[204] Bello V. A.G. Oyo State & Anor (1986) NWLR (Pt 45) 828.
[205] Elebanjo V. Dawodu (2006) 15 NWLR (Pt 1001) 76
[206] Chukwu V. Amadi (2009) 3 NWLR (Pt 1127) 56 @ 75 Para B-D.
[207] JA Dada 'Administrative Law in Nigeria' (Calabar, University of Calabar Press) (2011) 260-262
[208] P. N. Udoh Trading Company Ltd V. Abere (2001) 11 NWLR (Pt 723) 114
[209] Texaco Panama Incorporation V. S.P.D.C (Nig) Ltd (2002) FWLR (Pt 96) Pg. 579

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right to enforce an action is not perpetual, but rather a right that is generally limited by statute. For example, where a statute of limitation prescribes a period within which an action must be brought, legal proceedings cannot be properly or validly instituted after that period has expired. As a result, a cause of action will be statute barred if legal actions in connection with the claim are not commenced within the limitation period stated in the limitation law.[210]

The time from which the limitation period for the commencement of an action for the enforcement of arbitral awards in Nigeria begins to run has been the subject of considerable concern to both practitioners and academics in Nigeria.[211] The ACA and the New York Convention did not indicate a timeframe by which an application for execution of its award must be filed. The emphasis will be placed on the Limitation Act of Nigeria and the Statute of Limitation Laws of the several States of Nigeria due to the absence of time limitation provisions in the ACA.[212]

An application for the enforcement of an arbitral award must be filed within six years of the date on which the cause of action accrued unless the arbitration agreement is under seal or governed by an enactment other than the Arbitration and Conciliation Act[213] as stipulated in Section 7(1)(b) of the Limitation Act,[214] which is impari materia with Section 8(1)(d) of Lagos State.[215] The provision fails to distinguish between a simple contract and arbitration agreements that may arise from the specified contract in the form of an arbitration clause.[216]

The question then becomes, when does the six-year period of limitation begin to run? This was the thrust of the decision of the Supreme Court in *City Engineering Nig. Ltd. V. Federal Housing Authority.*[217] The parties agreed to build housing units at Festac Town, Badagry

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[210] Union Bank of Nigeria Ltd v Oki 1 (1999) 8 NWLR (pt. 614) 244.
[211] A Adaralegbe, 'Limitation Period for the Enforcement of Arbitral Awards in Nigeria' (2006) (22) 4 *Arbitration International, Journal of the London Court of International Arbitration,* 613, 626
[212] States in Nigeria have made legislations on limitation of action and as such recourse is made to the various State limitation laws in determining the time limit for enforcement of arbitral awards in Nigeria. However, it is the statute of limitation applied in each jurisdiction where an arbitral award is sought to be enforced that will determine the time limit allowed
[213] City Engineering (Nig) Limited v. Federal Housing Authority (1997) 9 NWLR (Pt 520) Pg. 224…. The Supreme Court held that" an arbitration agreement that is not under seal or made under any other enactment other than the Arbitration Law, the limitation period applicable to it is six years. The court also held that the limitation period for the purpose of an action subject to an arbitration agreement begins to run from the date of the accrual of the cause of action in the arbitration agreement and not from the date of making the arbitral award."
[214] Limitation Act, Cap. 522 Laws of the Federation of Nigeria, (1990)
[215] Cap L84 Laws of Lagos State 2015. This provision is in pari material with the Limitation Laws of other States in Nigeria as well as the Federal Capital Territory of Abuja
[216] PO Idornigie 'Statutes of Limitation and ADR Processes' (2004) 23(2) Journal of the Institution of Arbitration and Mediation, 5 http://www5.austlii.edu.au/au/journals/ANZRIArbMedr/2004/27.pdf
[217] (1997) 9 NWLR (Part 520), 224 & O Akoni 'Limitation period For the Enforcement of Arbitration Awards in Nigeria – City Engineering Nig. Ltd V. Federal Housing Authority' 5. http://www.nigerianlawguru.com/articles/arbitration/LIMITATION. "The Interpretation given by the Supreme Court in City Engineering v. Federal Housing Authority portends palpable difficulties not only for the contracting parties but also for the

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Road, Lagos. The agreement contained a provision to submit all matters in dispute in connection with the execution of the contract to arbitration. A dispute arose in the course of the execution of the contract which resulted in the contract being terminated on December 12th 1980. The matter was referred to arbitration and proceedings commenced on December 11th, 1981 and ended in November 1985 when the arbitrator made his award in the sum of N3, 772, 118.75 in favour of City Engineering. The City Engineering sought to enforce the award in the High Court sometime in 1988 and the trial judge held that by virtue of section 6 of the Limitation Law of Lagos State, the action for enforcement had become statute-barred, having been brought over 6 (six) years after December 12th, 1980 when the cause of action arose. Dissatisfied with the judgements of the High Court and Court of Appeal, City Engineering appealed all the way to the Supreme Court.

The Supreme Court in the appeal of City Engineering had no hesitation in relying on its decision in *Murmansk State Steamship Line vs. Kano Oil Millers Limited.*[218] In this case, the respondent entered into a charter-party agreement in Kano, Nigeria with the appellant. Under the agreement, the respondent was to provide a cargo of groundnuts for shipment on a ship to be provided by the respondent in Nigeria. The respondent defaulted under the agreement by failing to load the cargo of groundnuts when the ship was presented by the appellant within time at the Apapa port. The charter party agreement had a clause to refer any dispute to arbitration under Russian law. The breach occurred in Nigeria in February 1964. The parties referred the dispute to arbitration as stipulated in the agreement.

The award was made in 1966 in Moscow in favour of the appellant and the appellant then brought an action in Kano, Nigeria for the enforcement of the Moscow award. The learned trial Judge dismissed the action for the enforcement of the award in Nigeria on the ground that it was statute-barred. Dissatisfied with the decision of the High Court, the

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future of arbitration. It is very likely that the limitation period could have expired before the award is actually rendered. What then will be the use of an arbitral award if the party seeking to enforce it is unable to benefit from the fruits of his victory?"

[218] (1974) 5 SC 115 … The reasoning of the Supreme Court in this case was, inter alia, that except in cases where the making of an award is made a condition precedent to the institution of an action, otherwise known as the Scott v. Avery clause, time starts running from the date of breach of the agreement of the parties activating the arbitration clause and not when the award is made. This is made clear from the words of the Court when it held thus…. "We have underlined the portions in the passage just quoted in order to emphasis the fact that the period of limitation is deemed to run after the date of the award only when a party has by his own contract expressly waived his right to sue as the cause of action has occurred. If there is no such Scott v. Avery clause, the limitation period begins to run immediately. A party is, however, precluded from setting up such an agreement as a defence if he had waived his right to insist on arbitration as a condition precedent".
-A Scott v. Avery clause reads thus; "Neither party hereto, nor any persons claiming under either of them shall bring any action or other legal proceedings against the other of them in respect of any such dispute, until such dispute shall first have been heard and determined by the Arbitrator(s) in accordance with the Arbitration Rules and the obtaining of an award from the Arbitrators, shall be a condition precedent to the right of either party hereto to bring any action or other legal proceedings against the other of them in respect of any such dispute"

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appellant appealed to the Supreme Court contending that the action was on the Moscow award and not on the charter party agreement; and that since the award was made in 1966, the period of limitation should be reckoned from that date and not from the date of the agreement. On the issue of whether the action for the enforcement in Nigeria of the Moscow award commenced in 1972 was statute-barred, the Supreme Court held that the suit was caught up with the statute of limitation, as time began to run from the date of the breach of the charter party agreement and not from the date of the making of the award. The implication of this is that time begins to run from the date of the accrual of the original cause of action in the arbitral agreement and not from the date of the arbitral award.

In the words of Elias CJN, it was held thus'

> *"It follows, therefore, that if the action in such a case is really one on the charter party and not on the award, which we think is the case in the present appeal, the statutory period of limitation must begin to run from the breach of the charter party in 1964 and not from the making of the award in Moscow in 1966."*[219]

It was also contended that the *Murmansk* case was in conflict with *Obi Obembe vs. Wemabod Estates Limited*[220] and *Kano State Urban Development Board vs. Fanz Construction Co. Limited*[221] two Supreme Court decisions rendered subsequent to the Murmansk case. The *Obembe* and *KSUDB* cases imply that the effect of an arbitrator's award establishes a separate cause of action based on the parties' agreement to honour it, and thus extinguishes any right that the parties could have had prior.

The arbitral award becomes the only binding force between the parties when this concept is applied to the limitation period, and the cause of action is extinguished. This means that an arbitration award constitutes a separate cause of action.[222] The Supreme Court,

[219] Murmansk State Steamship Line v. Kano Oil Millers Ltd, supra, p. 899
[220] (1977) 5 SC 115. The Supreme court in considering this case held thus…. arbitration clauses, speaking generally fall into two classes. One class is where the provision for arbitration is a mere matter of procedure for ascertaining the rights of the parties with nothing to exclude a right of action on the contract itself but leaving it to the party against whom an action may be brought to apply to the discretionary power of the court to stay proceedings in the action in order that the parties may resort to the procedure to which they have agreed. The other class is where arbitration followed by an award is a condition precedent to any proceedings being taken, any further proceedings than being, strictly speaking, not upon the original contract but upon the award made under the arbitration clause"
[221] (1990) 4 NWLR (Part 142) 1…Agbaje J.S.C held Obiter that "[an] award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement
[222] Oke (n 172 above) 14

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however, took the view that this reference to the *KSUBD* case was irrelevant to the limitation period under consideration as it did not deal with the issue in controversy.[223]

The decision in *City Engineering Nig. Ltd v. Federal Housing Authority* creates significant difficulty for Nigeria in that a party cannot successfully commence an action for the enforcement of an arbitral award after the statutory six-year period has passed.[224] It is clear that judicial interpretation and enforcement of the limitation Law provisions in Nigeria present challenges in determining when time begins to run for the purposes of computing the "six years from the day the cause of action accrued".[225]

To begin, an arbitration agreement consists of two contracts: the contract to submit a dispute to arbitration if one arises, and the contract or agreement to comply with the arbitrator's decision[226]. There is a distinction between a cause of action and a cause of arbitration, or at least there should be. Cause of arbitration, as the word implies, refers to the reason for the arbitration. That is the breach or violation that necessitates the use of arbitration. To put it another way, the arbitration cause is simply the breach or error that necessitates the utilization of the arbitration clause.[227]

On the other hand, a cause of action is a combination of facts, that gives a person the right to remedy against another person.[228] The cause of action does not crystallize until all the material facts which, if established by an aggrieved person, would entitle such a person to a remedy as provided by law, become complete.[229] There will be nothing for a party to seek to enforce unless an award is granted. The fact that the award was made completes the set of facts that will allow a claimant to seek court enforcement of an award.[230]

Even though the case of *City Engineering* was determined several years ago and various other decisions have been made in other instances since then, the Supreme Court ruling in the case still represents the current state of the law in Nigeria.[231] It implies that the

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[223] O. Akoni (n 217 above) 5
[224] O. Akoni (n 217 above) 6
[225] F Adefarati, C Osisioma 'Enforcement of Arbitration Awards in Nigeria vis-à-vis the limitation period under the limitation laws' (2015) http://www.spaajibade.com/resources/enforcement-of-arbitration-awards-in-nigeria-vis-a-vis-the-limitation-period-under-the-limitation-laws/. (Accessed 4 February 2022).
[226] GC Nwakoby & CE Aduaka (n 72 above) 124
[227] O Ikpeazu & CB Anyigbo 'Is Cause of Action in Commercial Arbitrations Sui Generis? A review of the Application of Limitation of Action to the Enforcement in Nigeria of an Arbitral Award' (2019) 1(2) International Review of Law and Jurisprudence 137
[228] Adimora V. Ajufo (1988) 3 NWLR (Pt. 80) 1
[229] Sifax Nigeria Limited & Others v. Migfo Nigeria limited [2018] 9NWLR (Pt. 1623) 138, 191 Paras. A - B
[230] Ikpeazu & Anyigbo (n 227 above) 138
[231] Ikpeazu & Anyigbo (n 227 above) 139

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arbitration proceedings and the decision's execution constitute a single cause of action that must be prosecuted and executed within the statutory limitations period.[232] When it comes to determining the statutory time limit in arbitration, Nigerian courts are enjoined to follow the Supreme Court's lead. As a result, the issue of time limitation continues to impede the growth of commercial arbitration in Nigeria, as it allows parties to neglect their obligations to carry out the award.[233]

Arbitration and enforcement proceedings are unavoidable under the arbitration system. For the purposes of the statutory time limit, court decisions have established that these two processes in an arbitration system are a single action.[234] A single provision for arbitration procedures and enforcement processes is not a good law, so separate statutory time limits are required. It is worth noting, however, that the new Lagos State Arbitration Law (LSAL) has significantly altered the impact of the Limitation Act in Nigeria.[235]

Section 35 (2) (a) of the LSAL specifically excludes the period of proceedings and the day the court issues an order to determine the statutory time limit for bringing an action before the court, whether in arbitration or any other proceeding.[236] The LSAL further separates the cause of action in arbitration and enforcement actions; the time limit in enforcement proceedings begins to run when the party breaches the award.[237]

This perilous situation is further compounded by the fact that since there is no time limit statutorily provided for under the ACA for the conduct of arbitration, it becomes a matter at the whims and caprices of the parties and the cooperation of their arbitrator.[238]

2.7.7. Jurisdiction of the Court.

Jurisdiction is critical when it comes to the enforcement of arbitral awards in Nigerian courts. There have been some difficulties as a result of the fact that the legislation governing the enforcement of arbitral awards uses the term "court," which can refer to either the High Court or the Federal High Court.[239]

[232] O Akoni (n 217 above) 5
[233] DTA Eyongndi 'Enforcement of Arbitral Awards in Nigeria and the Jigsaw of Limitation Period: The Need for Compliance with Global Best Practices (2021) 15(1) *Mizan Law Review* 137
[234] I Berenibara 'Enforcement of Arbitral Awards – The Time Factor' (2018) [Enforcement of arbitral awards – the time factor - Commentary - Lexology]
[235] Law No 10 of 2009 now Cap A11 of the Laws of Lagos State 2015
[236] Section 35(2) (a)–(b) Cap A11 Laws of Lagos State 2015
[237] Section 35(5) Cap A11 Laws of Lagos State 2015
[238] EIO Akpata The *Nigerian Arbitration Law in Focus* (Lagos, West African Book Publishers Ltd. (1997) 19.
[239] Section 57 of the ACA, Section 3(1) of the FJA

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The main question has been whether the Federal High Courts and state High Courts have concurrent jurisdiction over the same matter. In the case of *Magbagbeola v Sanni*, the Supreme Court answers this question. [240] The Supreme Court was asked to rule on whether the Federal High Court has exclusive jurisdiction under the Nigerian Constitution,[241] including matters on the list which become the subject matter of the arbitration. The Court ruled that the ACA's definition of High Court applies to arbitration proceedings and includes the Federal High Court.[242]

The main challenge for parties then is determining and ensuring that the relevant courts to which they make applications have the necessary jurisdiction to hear such an application for the enforcement of an arbitral award.

2.7.8. Obsolete Arbitration Legislation

Arbitration laws in Nigeria have long been in need of reform. The most recent was the Arbitration and Conciliation Act of 1988. However, with the adoption of the Lagos State Arbitration Law in 2009, an attempt was made to address some of the issues that had arisen in the enforcement of foreign arbitral awards in Nigeria. However, Nigerian arbitration laws as a whole still have room for improvement.[243]

These obsolete laws are way behind considering the continuous emerging trends and improvements in the process of arbitration and the enforcement of arbitral awards.

2.7.9. Unrestricted Appeals

One of the most difficult challenges in enforcing arbitral awards is the tendency of unsuccessful parties to appeal orders of the enforcing court. This right to appeal may open the floodgates to protracted litigation from the High Court to the Supreme Court. Even though the right of appeal against the decisions of the High Court is provided for under the Constitution,[244] however, this right of appeal would defeat the entire purpose and nature of an arbitral award as being final and binding on the parties and as an efficient means of resolving disputes.[245]

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[240] (2005) 11 NWLR (Pt 936) 239, 253
[241] Section 251 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) Cap C23, Laws of the Federation of Nigeria, 2004
[242] Section 57(1) of the ACA
[243] AT Bello 'Enforcement of Energy Arbitral Awards: A Judicial Practice in the United States of America and Nigeria' (2017) https://dx.doi.org/10.2139/ssrn.3006509.
[244] Section 241 of the 1999 Constitution of the Federal Republic of Nigeria.
[245] Sundersons Limited and Anor V. Cruiser Shipping PTE Limited and Anor. (2014) LPELR - 22561

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2.7.10. Public Policy considerations.

Despite the fact that the concept of public policy is difficult to define due to its vague confines and characteristics of uncertainty, it has played a significant role in both the enforcement of arbitral awards.[246] This determination is country specific; it is up to each country to draw its own boundary based on its economic and social policies.[247] What constitutes public policy may differ from country to country, first because of different policy considerations, and second, because of how open a state is to arbitration. However, one of the most contentious issues in public policy is the applicable law.[248]

The ACA's failure to provide an acceptable definition of public policy has resulted in various definitions being proposed, making the determination of matters in this circumstance usually contentious by case law definition.[249] To examine the grounds on which a Nigerian Court may refuse to recognize and enforce an arbitral award and set it aside because it is contrary to Nigerian public policy,[250] it is necessary to first understand the concept as well as the judicial interpretation.[251] The Supreme Court in the case of *Okonkwo V. Okagbue*[252] defined public policy as;

> *"The ideals which for the time being prevail in any community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is generally injurious to the public interest."*

It is clear from the examples given that in order for an act to be against public policy, it must also be against the public interest. Examining this premise in the context of Sections 48(b)(ii) and 52(b)(ii) of the ACA, a Nigerian court may set aside or refuse to recognize and enforce arbitral awards if it finds that such an award is against Nigerian public policy, i.e., if the award is against, or injurious to, Nigerian public interest.

[246] J Mante'Arbirability and Public Policy: An African Perspective' (2017) 33(2) *Arbitration International* 6
[247] N Blackaby, C Partasides, A Redfern, M Hunter *International Arbitration* (2009) Oxford University Press, 124
[248] SW Makau 'The application of the Principle of Arbitrability and Public Policy in International Commercial Arbitration' (2022) 1 https://dx.doi.org/10.2139/ssrn.4176183.
[249] Macaulay V. FZB of Austria (1999) 4 NWLR (Pt 600) 599, Dale Power Systems Plc V. Witt & Busch Ltd (2001) 8 NWLR (Pt 716) 699
[250] Section 48(b)(ii) and 52 (b)(ii) of the ACA
[251] M Abiru 'Setting Aside International Arbitral Awards in Nigeria: Public Policy Considerations' (2020) 3 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715396
[252] (1994) 9 NWLR (Pt 368) Pg. 301

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As a result, where the award is of such a nature that it would result in a glaring inconsistency with Nigerian law, or where enforcing the award would violate the very fabric of the Nigerian legal system, the Court may set aside or refuse to enforce the award.

2.7.11. Enforcement Against State Owned Entities

In Nigeria, state entities are usually the creation of statutes. In some cases, the enabling statutes include provisions that limit these entities' exposure to enforcement proceedings arising from adverse judgments or arbitral awards.[253] There is still widespread concern, albeit largely unstated, that Nigerian courts will adopt a protectionist stance toward state-owned enterprises.[254]

The potential negative impact of these provisions on award enforcement against State entities cannot be overstated, as enforcement against state-owned entities has become overwhelming and generally difficult, if not impossible.[255]

[253] Section 14 of the Nigerian National Petroleum Corporation Act, Section 84 of the Sheriffs and Civil Processes Act, Order 5 Rules 5 of the Judgement Enforcement Rules

[254] A Atake, I Whyte & V Okpara 'Beating the System: Enforcement of Arbitral Awards Against State-Owned Entities (2013) https://www.templars-law.com/413-2/.

[255] SU Nweke-Eze 'Protectionism in the Enforcement of Arbitral Awards in Nigeria against State Owned Entities. A Case Study of the Nigerian National Petroleum Corporation' (2022) 4(2) *International Review of Law and Jurisprudence* 135

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CHAPTER THREE

A REVIEW OF THE ENFORCEMENT OF ARBITRATION AWARDS IN SOUTH AFRICA.

3.1. Introduction.

Arbitration is becoming more popular in South Africa, owing to the inclusion of arbitration clauses in domestic and international commercial contracts. As international trade and business become more globalized, legislation like the Arbitration Act No. 42 of 1965 and the International Arbitration Act No. 15 of 2017 are being used more frequently. The significance of having legislation that specifically addresses the acceptance and ultimate enforcement of foreign arbitral awards cannot be overstated.[1]

3.2. Arbitral Awards in South Africa

When used broadly, an award includes the decision of the arbitrator or a tribunal in arbitration proceedings, made by submission or other appropriate references.[2] It summarizes the arbitration proceedings.[3] In South Africa, after the proceedings are completed, the arbitrator considers the evidence and submissions of both parties to make a decision. According to Section 1 of the Arbitration Act, an Award includes an interim Award.[4] A foreign arbitral award is one made outside of South Africa that cannot be enforced under the Arbitration Act but is not in conflict with it.[5]

The decision of the arbitration tribunal is the decision of the majority of the arbitrators, where there is more than one arbitrator.[6] Unless otherwise specified in the arbitration agreement, a tribunal may issue an interim award at any time during the relevant period.[7] Unless otherwise specified in the arbitration agreement, the arbitrator(s) may order specific performance of any contract in any circumstances where the supreme court has the authority

[1] S Macqueen 'Enforcing Disputed Foreign Arbitral Awards' Enforcing disputed foreign arbitral awards (polity.org.za). (2015) (Accessed 24 February 2022)
[2] P Holloway & A October 'Enforcement of Arbitral Awards in South Africa: Overview (2015) https://content.next.westlaw.com/9-619-5657.
[3] D Butler & E Finsen *Arbitration in South Africa: Law and Practice* (1993) Juta 256
[4] Section 1 of the Arbitration Act 42 of 1965
[5] Section 1 of the Recognition of Foreign Arbitral Awards Act 40 of 1977, Section 14(d) of the International Arbitration Act, 2017
[6] Section 14(3) and 14(4) of the Arbitration Act 42 of 1965
[7] Section 26 of the Arbitration Act 42 of 1965

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to do so.[8] The arbitrator(s) must deliver the award in the presence of the parties and their representatives at an agreed-upon time and location.[9]

The award is the most important aspect of arbitration because it represents the resolution of the dispute. If the award is incomplete, the courts may be willing to either enforce the remainder of the award or send the entire award back to the arbitrator to finalize the matter.[10]

It is a well-established principle of arbitration law that awards are final because they address all of the issues submitted to the arbitrator in a way that achieves finality and certainty.[11] Only the issues that have been submitted must be determined.[12] Unless otherwise specified in the arbitration agreement, an award shall, subject to the provisions of the Arbitration Act, be final and not subject to appeal, and each party to the reference shall abide by and comply with the award.[13] The most important legal consequence of a valid and final award is that it brings the parties' dispute to an irreversible end because the arbitrator's decision is final and there is no recourse to the courts.[14]

In practice, however, parties are increasingly agreeing that the award will be subject to appeal following, for example, the Arbitration of Southern Africa (AFSA) rules, which provide for appeals to be heard by an AFSA appeal tribunal. Although this is an appeal in an AFSA-administered matter against a sole arbitrator's award.[15] AFSA is a private dispute resolution authority which manages and administers the confidential resolution of a wide range of local and international disputes by way of mediation, adjudication, arbitration and related processes.[16] AFSA commonly administers international arbitrations seated in South Africa.[17]

3.3. Substantive requirements of an award

The arbitration award must be in writing and signed by all members of the arbitration tribunal; however, the fact that a minority of the arbitration tribunal members disagree with the majority

[8] Section 27 of the Arbitration Act 42 of 1965
[9] Section 25(1) of the Arbitration Act 42 of 1965
[10] Pasa Construction (Pty) Ltd v Roofing Guarantee Co. (Pty) Ltd (12243/83) 1989 97 WLD
[11] Seton Co v Silveroak Industries Ltd 2000 2 SA 215 (TPD)
[12] SA Breweries Ltd v. Shoprite Holdings Ltd 2008 1 SA 203 (SCA)
[13] Section 28 of the Arbitration Act 42 of 1965
[14] Walker and Another v Mosdel and Another (2009/53147) 2012 ZAGP JHC 171
[15] D Williams 'South Africa, Arbitration Guide' (2013) 13 (IBA Arbitration Committee) https://www.werksmans.com/wp-content/uploads/2013/05/South-Africa-chapter-in-the-IBA-Arbitration-Guide.pdf.
[16] See The Preamble and Article 1 of the AFSA Rules of 2021
[17] D Williams 'Arbitration Procedures and Practice in South Africa: Overview' (2020) 5 https://uk.practicallaw.thomsonreuters.com/4-502-0878.

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decision and refuse to sign does not invalidate the award.[18] However, this must be noted in the award as there will be a majority and minority award.[19]

The arbitrator is not required to couch the award in any particular manner but must make every effort to ensure that the award is clear, explicit, and non-ambiguous.[20] The award must specify who must do what[21] and the act must be legal[22] and capable of being carried out.[23] Finally, the award must be final and complete in the sense that it must address all of the issues raised by the arbitrator and leave no issues unresolved. The award is the most important aspect of arbitration because it represents the resolution of the dispute.[24]

A typical arbitration award includes confirmation of the terms of reference, or the parties' mandate to the arbitrators, a summary of the issues in dispute or not in dispute, an analysis of the evidence and arguments presented by both parties, including a finding on the credibility of each witness, a finding on the factual questions and analysis, and a finding on the question of law, and a resolution of the dispute well within specifications of the powers granted to the arbitrator in the arbitration agreement.[25]

The Arbitration Act requires the arbitrator to make the award within four months of entering on the reference or within four months of being called to act by written notice from either party, whichever comes first.[26] A written agreement signed by both parties may, however, extend the time within which the arbitrator is expected to make the award.[27] The court may also exercise this discretionary power on good cause shown, whether or not the time for making the award has expired.[28] The Arbitration Act, on the other hand, is silent on the consequences of the expiration of the time for making the award, whether that time is stipulated

[18] Section 24(2) of the Arbitration Act 42 of 1965
[19] S Mckenzie, E Warmington, K Wolmarans, A Meyer, K Pooe, T Dye & J Vassen 'Arbitration in South Africa' (2019) 11 https://www.webberwentzel.com/Documents/arbitration-in-south-Africa.pdf.
[20] Administrator, Cape v Ntshwaqela 1990 1 SA 705 (A) 715G, Where Nicholas AJA stated regarding the interpretation of a judgement: "As in the case of any document, a judgement or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgement or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. Indeed, in such a case not even the court that gave the judgement or order can be asked to state what its subjective intention was in giving it. But if any uncertainty does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgement or order may be investigated and regarded in order to clarify it".
[21] D Butler & E Finsen (n 3 above) 261
[22] Veldspun (Pty) Ltd v Amalgamated Clothing and Textile Workers Union of South Africa 1992 3 SA 880 (E) 894 H-J
[23] D Butler & E Finsen (n 3 above) 263
[24] P. Ramsden *The law of Arbitration, South African and International Arbitration* (2018) 163
[25] R Heunis 'The Structure of an Arbitration Award in Misconduct Proceedings' (2021) https://ceosa.org.za/the-structure-of-an-arbitration-award-in-misconduct-proceedings/. (Accessed 15 May 2022) and F Steadman, J Brand, C Lotter, & T Ngcukaitobi *Labour Dispute Resolution* Juta, (2017) 223
[26] Section 23(a) of the Arbitration Act 42 of 1965
[27] Section 19(c) of the Arbitration Act 42 of 1965
[28] Section 23 of the Arbitration Act 42 of 1965

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by law, extended by the parties, or set by the court. The parties are not obligated to restart the arbitration after the period has lapsed.[29]

The effect of this is that the reference to arbitration expires, the arbitrator's office is terminated, and neither of the parties is bound by any subsequent award made by the arbitrator, unless the parties notify the arbitrator that they intend to grant an extension of time or apply to the court for one.[30] Hence, parties must ensure that they regulate, to the greatest extent possible, the following issues concerning the award: the timing of the award, the reasons for the award, and the costs of the award.[31]

3.4 Types of Arbitral Awards in South Africa

The following are examples of enforceable awards in South Africa:[32]

a. Partial Awards: Parties may seek to enforce only a portion of an award if the invalid portions are severable from the rest. In this case, the court may issue an order enforcing the remaining portion of the award.[33] In this case, it must be demonstrated that the partial award is separable from the remainder of the award.[34]
b. Awards on agreed terms, also known as consent awards: Parties may reach an agreement on an award after the hearings have concluded but before an award is made and have it declared an award on agreed terms.[35] There are no specific rules governing consent awards; however, the arbitrator will require the consent to be in writing or on the record in the hearing.[36]
c. Money awards: Unless otherwise specified in the award, the sum must bear interest from the date of the award at the same rate as a judgment debt.[37]
d. Awards containing injunctions ordering or prohibiting the performance of a specific act.

[29] Whether it is time stipulated by the law, the time as enlarged by the parties or the court.
[30] Section 19(c) of the Arbitration Act 42 of 1965
[31] F Steadman et al (n 25 above) 172
[32] Williams (n 15 above)
[33] Section 4(1)(b) (iii) of the Recognition of Foreign Arbitral Awards Act.
[34] T fletcher & L Waal 'Enforcement of Arbitral Awards in South Africa: Overview (2022) https://uk.practicallaw.thomsonreuters.com/w-035-3624?transitionType=Default&contextData=(sc.Default)&firstPage=true
[35] Bidoli V. Bidoli (2982/08) (2010) ZAWCHC 39 …. the settlement agreement concluded between the parties was made an arbitration award by the arbitrator. However, the High Court declared the award void ab initio
[36] Bidoli v Bidoli & Another 2011 (5) SALR 247 (SCA) para 15…. On appeal, it was held that the arbitrator was entitled to make such an award and that the mandate had not ended.63 The appeal court accordingly upheld the award as valid.
[37] P Holloway & A October (n 2 above)

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e. Interim awards[38] are decisions or awards made by arbitral tribunals that grant interim relief. To be enforceable, this type of award must be classified as interim measures or as securing potential claims, and it must be rendered by an arbitral tribunal.[39] Unless the arbitration agreement states otherwise, they can be granted within the time frame for making the award.[40]

f. A declaratory award is a statement made by an arbitral tribunal regarding the existence or non-existence of a state of affairs.[41] A declaratory award creates legal certainty by determining and recording a situation of law or fact, thereby establishing the legal position definitively and binding the parties.[42] An Arbitrator or Commissioner can make an appropriate award, including a declaratory award, in labour law arbitrations.[43] An award that orders a party to make a declaration or grant permission, such as consent to transferring property, has a declaratory meaning because the award replaces the defendant's consent and requires no further expression of will from the defendant.[44]

Certain awards, however, are precluded from being enforced in South Africa, such as awards for punitive or revenue damages, foreign decisions granting preliminary or provisional awards that have been suspended pending an appeal, foreign awards relating to immovable property in South Africa[45] and a foreign warrant of execution unless the warrant and award are the same in the foreign law and are equivalent to a judgement under South African law.[46]

3.5. General Approach Toward the Recognition and Enforcement of Arbitral Awards in South Africa

South Africa is quickly becoming one of the most dependable African legal systems for parties seeking to enforce domestic and international arbitration awards.[47] One of the reasons for the

[38] Section 1 of the Arbitration Act 42 of 1962
[39] Ramsden (n 24 above) 209
[40] Section 26 of the Arbitration Act, Article 17 of the UNCITRAL Law.
[41] ME Schneider & J Knoll 'Performance as a Remedy: Non-monetary Relief in International Arbitration' (2011) 30 *Juris Publishing Inc*. 24
[42] S Leimgruber, 'Declaratory Relief in International Commercial Arbitration', (2014) 32(3) *ASA Bulletin*, 467-489 https://kluwerlawonline.com/journalarticle/ASA+Bulletin/32.3/ASAB2014053
[43] B Swanepoel, B Erasmus & H Schenk *South African human resource management: Theory & Practice* (2008) Juta and Company Ltd, 616 https://www.researchgate.net/publication/324965911_South_African_human_resource_management_Theory_practice.
[44] Ramsden (n 24 above) 219.
[45] T Fletcher & L De Waal 'Enforcement of Arbitral Awards in South Africa: Overview' (2022) 4, Enforcement of Arbitral Awards in South Africa: Overview | Practical Law (thomsonreuters.com).
[46] P Holloway & A October (n 2 above)
[47] J Smith 'Enforcement of Local and Foreign Arbitral Awards in South Africa' (2021) Enforcement of local and foreign arbitral awards in South Africa (pinsentmasons.com)

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growing popularity of international commercial arbitration is the ease with which an award can be enforced.[48]

When an arbitration award is made, the successful party expects the award to be carried out as soon as possible. It is an implied term of every arbitration agreement that the parties will carry out the award once it has been made.[49] After all, that is why the parties sought arbitration in the first place. Inevitably, the unsuccessful party will refuse or fail to honour the outcome of the arbitration process. Armed with an arbitral award in its favour, the successful party will seek to enforce the award.[50]

The principles of a domestic or foreign arbitration process are all that are required for the recognition and enforcement[51] of an award in the country that serves as the seat[52] of arbitration. However, enforcement may be required in a jurisdiction unfamiliar to the award creditor, with an unfamiliar enforcement mechanism and unique challenges.[53]

However, the enforcement of a foreign award becomes intricate because it was made outside the territory of the state seeking recognition or enforcement.[54] This difficulty is exacerbated by the fact that award enforcement can be subject to a wide range of legal systems and traditions.[55] The International Arbitration Act provides that the juridical seat where the arbitral award is deemed to have been made is determined by the UNCITRAL Model Law for the enforcement of foreign arbitral awards.[56] The majority of legal systems hold that neither the nationality nor the domicile of the parties to arbitration proceedings is relevant in determining the enforcement of an arbitral award.[57]

The court's ability to recognize and enforce an arbitral award is critical to the execution process.[58] Arbitration has strong court support in South Africa, and courts will generally enforce domestic and foreign arbitration awards, subject to the provisions of South Africa's

[48] United Nations Conference on Trade and Development – Dispute Settlement Commercial Arbitration (2005) (Accessed May 2022)
[49] A Redfern, M Hunter *Law and Practice of International Commercial Arbitration* (3rd ed) (1999) 443
[50] S Siddiqi 'Getting Sorted Out in Southern Africa: How to enforce Foreign Arbitral Award' (2019) http://arbitrationblog.practicallaw.com/getting-sorted-in-southern-africa-how-to-enforce-foreign-arbitral-awards/
[51] A Redfern & M Hunter (n 49 above) 183-184
[52] The "seat" of arbitration refers to the country in which the arbitration proceedings take place. Articles 20(1) and 31(3) of Schedule 1 to the IAA 2017, Section 15 of the IAA, 2017
[53] Siddiqi (n 50 above)
[54] A Redfern and M Hunter (n 49 above) 447-448
[55] R Opiya 'Recognition and Enforcement of International Arbitral Awards: A Comparative Study of Ugandan and UK law and Practice' Unpublished LL.M Thesis, Oxford Brookes University, 2012, 14
[56] Section 15 of the International Arbitration Act.
[57] I Szaszy (1965) 'International Civil Procedure: A Comparative Study' 14 (4) *The American Journal of Comparative Law*, 660
[58] D Butler 'South African Legislation – The Need for Reform' (1994) 27(2) *Comparative and International Law Journal of South Africa* 124

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applicable arbitration laws.[59] However, foreign awards set aside by the courts at the place of arbitration will not be enforced.[60] The procedure to be followed when an award made in South Africa is sought to be enforced outside of South Africa will be determined by the requirements of the jurisdiction in which the award is sought to be enforced.[61]

3.5.1. Recognition

The procedure by which a court is asked to grant redress to a dispute that has previously been the subject of arbitral proceedings is known as recognition. The successful party in the arbitration will claim that the dispute has already been resolved. The award will then be presented to the court as evidence so that it can be recognized as valid and binding on the parties.[62]

An arbitral award must not conflict with the Arbitration Act to be recognized in South Africa. Difficulties arise, however, when an application for recognition of a foreign arbitral award is made but the outcome of the arbitration is contested by one of the parties.[63] In most cases, the successful defendant in arbitration proceedings held in another contracting state will seek recognition on its own. Recognizing an award alone without enforcement can thus be viewed as a defence mechanism for the successful party, if the unsuccessful party wishes to pursue its claim in the future.[64]

3.5.2. Enforcement

The enforcement of an arbitral award is made following the parties' agreement to arbitrate their dispute. As a result of the implied contractual promise to pay the arbitral award, an arbitral award is enforceable.[65] In South Africa, recognition without enforcement is possible;[66] however, an arbitration award is not automatically enforceable under South African law and must first be made an order of the court before it can be enforced.[67]

[59] Zhongji Development Construction Engineering Company (Ltd) V. Kamoto Copper Company SARL 2015 (1) SA 345 (SCA).
[60] J Ripley-Evans & FN Del Valle 'Court Support For Arbitration in South Africa: Knowing Where You Stand' (2019) Court Support For Arbitration In South Africa: Knowing Where You Stand | Arbitration notes (hsfnotes.com)
[61] Foreign Judgements V. Arbitral Awards (2015) Foreign judgments v arbitral awards (hoganlovells.com)
[62] PW Becker 'The Recognition and Enforcement of International Commercial Arbitration Awards in a South African Context' Unpublished PhD Thesis, North-West University, 2005 3
[63] S Macqueen (n 1 above) 2
[64] Becker (n 62 above) 4
[65] Ramsden (n 21 above) 230-231
[66] South African Law Commission Report (1988) 108
[67] S. 31 of the Arbitration Act 42 of 1965.

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Depending on whether the award is domestic or foreign, a South African Court will apply different laws in an application to enforce an arbitral award.[68] The Arbitration Act governs the enforcement of arbitration awards rendered in South Africa, regardless of the participants or subject matter. However, if a party seeks to enforce an arbitral award granted in a foreign jurisdiction in South Africa, the International Arbitration Act 15 of 2017 will apply.[69]

The action to declare an award enforceable is not part of the actual enforcement or the enforcement proceedings, but rather a prerequisite for the latter, as it gives the award the same status as a court judgment and thus can be enforced or executed in the same way as any other Court judgement. The judgment enforcing a foreign arbitral award should not deviate from the arbitrators' award. An appeal court may make changes to a judgment enforcing a foreign arbitral award under the New York Convention if the execution of the judgment deviates too much from the arbitrators' award.[70]

The examination of documents in an application to enforce an arbitral award by the court is a formal requirement and does not necessarily require a judicial investigation by the court into whether the arbitral tribunal's findings were correct. It also does not include a verification of the correct application of substantive or procedural law norms.[71] When enforcing an award, the court should not consider what happened after the award was made.[72]

To succeed with the enforcement action, the party enforcing the award should consider whether the agreement upon which the arbitral award was made is valid,[73] that the dispute arose within the terms of the submission, that the arbitrator(s) were appointed following the clause containing the submission, the making of the award, and that the award has not been paid.[74] The party seeking to enforce an award bears the sole burden of proof in these matters.

Time is of the essence when it comes to enforcing arbitration awards.[75] If unopposed proceedings for the enforcement of the arbitral awards can take between two to three months and if opposed, up to a year[76]

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[68] J Andropoulos, C Mkiva, J Barnes, J Lafleur 'International Arbitration-South Africa' (2022) International Arbitration 2022 - South Africa | Global Practice Guides | Chambers and Partners.
[69] Section 31 of the Arbitration Act 42 of 1965 and Section 16 of the International Arbitration Act 15 of 2017
[70] Ramsden (n 24 above) 231
[71] Aloe Vera of America Inc V. Asianic Food (S) Pte Ltd & Chiew Chee Boon Singapore 2006 3 SLR 174
[72] Ramsden (n 24 above) 232
[73] Pheonix Shipping Corporation V. DHL Global Forwarding SA (Pty) Ltd & Another 2012 3 SA 381 (WCC)
[74] Ramsden (n 24 above) 234
[75] 'Time is of the essence' simply means that timing is material to the arbitration.
[76] P Holloway & A October (n 2 above)

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3.6. Legal framework for the Enforcement of Arbitration Awards in South Africa

Depending on whether the award is domestic[77] or foreign,[78] a South African court will grant or dismiss an application to enforce an arbitral award. It is also necessary to consider whether it is preferable to enforce a domestic or foreign arbitral award, as the various applicable laws specify different requirements for its recognition and enforcement.[79]

3.6.1. Enforcement Pursuant to the Arbitration Act No. 62 of 1965 (The Arbitration Act)

The Arbitration Act governs all domestic arbitrations in South Africa, including the enforcement of domestic arbitral awards, but it makes no mention of international commercial arbitration. As a result, foreign arbitral awards cannot be enforced under the Arbitration Act.[80] If the award meets the requirements of the Arbitration Act and is based on the 'arbitration agreement' as defined in the Arbitration Act, the successful party may apply to the High Court to have their domestic arbitral awards recognized and enforced, and the award made an order of the court.[81] The need for this usually arises when the opposing party in arbitration against whom the award has been issued refuses to comply with the decision of the arbitral tribunal. If the losing party does not voluntarily comply with the award, the successful party, armed with an arbitral award in its favour, will seek to enforce the award with the court's assistance.[82]

South African motion courts hear applications to enforce arbitration awards.[83] Domestic arbitral awards are enforced through a quick and effective procedure; this means that the court will not consider the merits of the dispute. All that the applicant is required to prove is that the dispute was submitted to arbitration according to the terms of an arbitration agreement, that the arbitrator was appointed and that there was a valid award in terms of the reference.[84]

Unless the arbitration agreement expressly states otherwise, the aggrieved party in this case does not have an automatic right to appeal once the award has been made an order of the court. The facts of the case are not brought to the High Court's attention in any detail during

[77] The Arbitration Act 42 of 1965 regulates the enforcement of domestic arbitral awards.
[78] Foreign awards are regulated and enforced by The International Arbitration Act 15 of 2017
[79] John Brand and Emmylou Wewege 'Is it Safe to Arbitrate in South Africa' (2009) https://www.conflictdynamics.co.za/Blog/Is-it-safe-to-arbitrate-in-South-Africa.
[80] Unpublished: BU Unegbu 'South Africa as an Arbitration Seat for International Commercial Arbitration' Unpublished PhD Thesis, North West University, 2018 I
[81] Section 31(1) of the Arbitration Act 40 of 1965
[82] Smith (n 47 above)
[83] Rule 6(5)(a) of the Uniform Rules of Court
[84] Williams (n 15 above)

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this application because the basis for the determination is only whether the award was made following the required arbitration agreement and the Arbitration Act.[85]

The merits of the dispute will not be considered by the court. All the applicant needs to show is that the dispute was submitted to arbitration following the terms of an arbitration agreement, that an arbitrator was appointed, and that a valid award was issued per the reference.[86] The Court will then treat the arbitrator's decisions as its own. When making an award an order of the court, the court has the authority to correct any clerical error or patent error caused by an unintentional slip or omission.[87]

The purpose of this provision is to allow the court to give effect to the arbitrator's express intent when the award fails to do so due to an error or omission. The court, on the other hand, has no authority to alter the award's intended effect in any way.[88]

3.6.2. Enforcement Pursuant to the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977(The REFAA)

The REFAA was designed to put into effect the New York Convention of 1958, to which South Africa is a signatory.[89] South Africa became a party to the New York Convention in 1976 and its provisions were implemented through the Recognition and Enforcement of Foreign Arbitral Awards Act (the REFAA).[90] The New York Convention is critical in facilitating international trade, harmonising arbitration practices, and making foreign arbitral awards more easily recognized and enforced.[91]

The Convention was in effect at the time, and contracting states such as South Africa had ratified it and thus incorporated the principles contained in the Convention into their law. Although the Convention requires contracting states to recognize and enforce valid foreign arbitral awards, no reciprocity in the country where the award was made is required. As a result, because South Africa is a Convention contracting state, her courts recognized and enforced valid foreign arbitral awards, regardless of the country in which such arbitral award was made or whether that country recognized and enforced South African arbitral awards.[92]

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[85] J Ripley-Evans & FN Del Valle (n 60 above)
[86] D Butler & E Finsen (n 3 above) at 273
[87] Section 31 (2) of the Arbitration Act 40 of 1965
[88] D Butler & E Finsen (n 3 above) 275
[89] C Bredenhann 'Enforcing Arbitration in South Africa- Without Prejudice' (2012) https://journals.co.za/doi/10.10520/EJC130142.
[90] Act 40 of 1977, P Holloway & A October (n 2 above)
[91] GB Born 'The New York Convention: A Self-Executing Treaty' (2018) 40 *Michigan Journal of International Law* 115
[92] C Schulze (2005) 'International Commercial Arbitration: An Overview' 46(2) *Codicillus*, 56-57

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The REFAA governed the enforcement of foreign arbitral awards in South Africa until 2017. The REFAA dealt with arbitral awards made outside of South Africa that could not be enforced under the Arbitration Act 42 of 1965.[93] The purpose of the REFAA was to make foreign arbitral awards order of the court in South Africa, making them enforceable within the jurisdiction of South African courts.[94]

Prior to the passage of the Recognition Act, the position of foreign arbitral awards in South Africa was uncertain and doubtful.[95] A party seeking to enforce a foreign arbitral award may, of course, obtain a judgment or have the award made an order of the court in the foreign country where the award was made, and then seek to have such judgment or order recognized and enforced in South Africa under the Enforcement of Foreign Civil Judgments Act 32 of 1988. This procedure, however, was discovered to be time-consuming and costly. A successful party in foreign arbitral proceedings was thus enjoined to have the award directly recognized and enforced under the REFAA.[96]

The REFAA focused on three critical issues that were well-structured to improve the effectiveness of arbitral proceedings. First, it provides that a foreign arbitral award can be made an order of the court and enforced in the same way as any other court order; second, it focuses on the procedure required to have the award made an order of the court as envisaged in section 1[97] and third, it specifies the circumstances under which the court may refuse to make an arbitral award an order of the court.[98]

The South African Law Commission's Arbitration Committee, on the other hand, identified several flaws in the REFAA, such as the following:[99]

a. The definition of a foreign arbitral award in the Act. [100]
b. The absence of a comparable provision relating to Article II of the New York Convention, which links the Act to the Convention. The omission renders the award

[93] Smith (n 47 above)
[94] Macqueen (n 1 above)
[95] Benidai Trading Co v Gouu's & Gouws Ltd 1977 (3) SA 1020 (T)
[96] H Schulze, 'The Recognition and Enforcement of Arbitral Awards in South Africa, (2000) 8(2*) Juta's Business Law* 66-69
[97] Provisions of article 1 of the New York Convention, provide guidelines on the procedure that has to be followed to have the arbitral award made an order of the court. The advantage of such a procedure is that the machinery that can be used to enforce any court judgment is placed at the disposal of the party who successfully made the application to enable her to enforce the award. The pertinent provision reads as follows: —2 Foreign arbitral award may be made an order of the court and enforced as such
[98] Section 4 of the REFAA
[99] South African Law Commission (SALC) Report 1998 & Becker (n 62 above) 14-17
[100] Section 1 of the REFAA.

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null and void because it is required for the convention to comply with South Africa's treaty obligations.[101]

c. The wording of section 4 regarding the grounds for refusing enforcement of a foreign arbitral award. The wording of the said section gives the impression that South African courts have the discretion to recognize the award or not.[102]

d. Inadequate provisions for the enforcement of foreign currency awards.[103] In this case, the applicant faces the risk of devaluation between the time of award and the time of payment order.[104]

e. Failure to expressly provide for the recognition of foreign arbitral awards rather than their enforcement. The act's short and long titles only mention "recognition" of awards, with no mention of "enforcement," even though the act's body only deals with award enforcement.[105]

However, with the passage of the International Arbitration Act 15 of 2017, this REFAA was repealed.

3.6.3. Enforcement Pursuant to the Protection of Business Act 99 of 1978 (PBA)

The Protection of Business Act (PBA) is important because it is primarily intended to protect South African businesses operating abroad from strict product-liability laws and multiple or punitive damages awards.106 When seeking to enforce a foreign arbitral award in South Africa, the PBA must also be considered.107 According to the Act, an arbitration award issued outside of South Africa may only be enforced in South Africa with the Minister's permission.[108]

This PBA also states that no arbitral awards made within and outside South Africa may be recognized or enforced within South Africa without the Minister of Economic Affairs' consent if the award arose from an act or transaction "connected with the mining, production, importation, exportation, refinement, possession, use, or sale of or ownership to any matter or

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[101] South African Law Commission Report 1998 Pg. 122
[102] South African Law Commission Report 1998 Pg. 124
[103] Section 2(2) of the REFAA
[104] D Butler & E Finsen (n 3 above) 318
[105] AA Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*' (2001) Cambridge University Press, 203
[106] JP Van Niekerk & WG Schulze *The South African Law of International Trade: Selected Topics* (2016) Saga Legal Publications 309
[107] J Brand, E Wewege (n 79 above)
[108] Section 1(a) of PBA provides ……no judgement, order, direction, arbitration award, interrogatory, commission rogatoire (or) letters of request or any other request delivered, given or issued or emanating from outside the Republic and arising from any act or transaction. contemplated in subsection (3) shall be enforced in the republic

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material, of whatever nature, whether within, outside, into or from South Africa.[109] The purpose of this PBA was to protect the state's mineral rights, and its scope was narrower than suggested by the language.[110]

The PBA further provides that no arbitration award of the type described above can be enforced, with or without the Minister's consent, if it is related to any liability arising from any bodily injury to any person caused by the consumption, use, or exposure to any South African natural resource unless the same liability would have arisen under South African law.[111] Multiple punitive damages cannot be recovered under this section, but compensatory damages are enforceable with the Minister's consent.[112]

The South African Law Reform Commission recommended that the Protection of Businesses Act be amended. It stated unequivocally in its report on Consolidated Legislation on International Judicial Cooperation in Civil Matters that the Act should be repealed. It was proposed that new legislation be enacted prohibiting the enforcement of awards granting punitive damages while expressing South African judicial cooperation in other areas.[113]

The International Arbitration Act of 2017 amends the scope of application of the Protection of Business Act significantly by ending its application to arbitration awards.[114] This means that the PBA is no longer applicable in South Africa for the enforcement of foreign arbitration awards.[115]

3.6.4. Enforcement Pursuant to the International Arbitration Act No 15 of 2017 (The IAA).

The International Arbitration Act of 2017 amended South African law regarding the enforcement of foreign arbitral awards.[116] The IAA, which went into effect on December 20, 2017, governs all international arbitrations held in South Africa, as well as the enforcement of foreign arbitral awards.[117] The IAA excludes the Arbitration Act No. 42 of 1965,[118] repeals the

[109] Section 1(3) of the PBA.
[110] Smith (n 4 above)
[111] Section 1(d) of the PBA
[112] J Brand & E Wewege (n 79 above)
[113] South African Law Reform Commission, Project 121 (2008)
[114] Schedule 4 of the IAA.
[115] T Chidede 'International Arbitration Legislation now in Force- Implication for South Africa and Cross-border Businesses' (2018) https://www.tralac.org/blog/article/12663-international-arbitration-legislation-now-in-force-implications-for-south-africa-and-cross-border-businesses.html
[116] M Wethmar-Lemmer 'The Recognition and Enforcement of Foreign Arbitral Awards under the International Arbitration Act 15 of 2017' (2019) 31(3) *South African Mercantile Law Journal* 378-398
[117] Section 4(2) of the IAA.
[118] Section 4(2) of the IAA.

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Recognition and Enforcement of Foreign Arbitral Awards Act No. 40 of 1977 in its entirety[119] and amends the Protection of Business Act No. 99 of 1978 by removing its application to arbitration awards.[120]

The IAA incorporates into South African law the UNCITRAL Model Law on International Commercial Arbitration.[121] It formally encourages and recognizes arbitration as a method of resolving international commercial disputes.[122] The IAA contains two sets of provisions on recognition and enforcement, one based on the UNCITRAL Model Law and the other on the New York Convention. Chapter 3 of the Act deals with the recognition and enforcement of foreign arbitral awards, which is in accordance with Schedule 1 of the UNCITRAL Model Law on International Commercial Arbitration and Schedule 3 of the New York Convention.[123]

The IAA requires arbitration agreements and foreign arbitral awards[124] to be recognized by South African courts; however, this is subject to section 18 of the Act.[125] Once the award has been made a court order[126] and recognized, it can be enforced in South Africa.[127] The award then becomes legally binding between the parties, bolstering the case for parties seeking to enforce arbitral awards in the country.[128] An arbitration agreement and a foreign arbitral award must be recognized and enforced in South Africa under Article 35 of Schedule 1 to the IAA, as required by the New York Convention, to which South Africa is a party.[129] As a result, these provisions apply regardless of the country in which the arbitral award was made, and they apply not only to foreign arbitration awards but also to international arbitration awards made in South Africa.[130]

[119] P Daya & T Versfeld, 'New Arbitration Act Promotes South Africa as a Prime Arbitration and Investment Hub' (2018) https://www.webberwentzel.com/News/Pages/new-arbitration-act-promotes-south-africa-as-a-prime-arbitration-and-investment-hub.
[120] Schedule 4 of the IAA
[121] Section 6 of the IAA, Schedule 1 to the IAA is in effect a restatement of the UNCITRAL Model Law
[122] K Bowles 'The International Arbitration Act: A step in the Right Direction' (2018) https://www.hoganlovells.com/en/publications/the-international-arbitration-act
[123] Sections 14-19 of the IAA & P Lane 'The New Dawn in International Arbitration in South Africa' THE-NEW-DAWN-in-int-arb-in-SA.pdf (netdna-ssl.com) (Accessed on the 4th day of May 2022)
[124] Section 14 of the IAA defines a foreign arbitral award as…'An arbitral award made in the territory of the state other than the Republic'
[125] Section 16(1) of the IAA.
[126] Section 14(c) of the IAA… 'Court means any Division of the High Court referred to in Section 6(1) of the Superior Courts Act 10 of 2013 or any local court thereof having jurisdiction'
[127] Siddiqi (n 50 above)
[128] Section 16(2) of the IAA.
[129] Schedule 1 provides that an arbitral award will be recognised as binding and, on application in writing to the competent court, will be enforced subject to the provisions of Schedule 1, irrespective of the country in which it was made.
[130] D Williams (n 17 above)

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The successful party applies to the Court via a notice of motion.[131] The High Court within the area of jurisdiction of which the arbitration was held or the High Court division with jurisdiction over a South African party to the arbitration must hear the application for recognition and enforcement.[132] Because the Act does not specify the formalities or procedure required for this type of application, the applicant must refer to the Uniform Rules of Court (the Rules) for guidance.[133]

The affidavit, arbitration agreement, and original award will be authenticated and attached to the motion on notice. Furthermore, if the agreement and/or the award are not in a South African official language (which includes Afrikaans, English, Xhosa, Zulu, Sotho, Tswana, Northern Sotho, Venda, Tsonga, Swati, and Ndebele), a sworn translation must be appended to the founding affidavit and authenticated. The Court may also accept other documentary evidence as sufficient proof of the existence of the foreign arbitral award or arbitration agreement at its discretion.[134]

The Registrar of the High Court issues the application, which is served on the Respondent by the Sheriff of the court. The Respondent can then choose whether or not to oppose the application. If the Respondent chooses to oppose the application, it must file a Notice of Intention to Oppose within the time frame specified in the Notice of Motion between five to ten days). Following that, the Respondent must file an answering affidavit with the Applicant within 15 days of receiving its Notice of Intention to Oppose. Within ten days of receiving the Respondent's Answering Affidavit, the Applicant may file a Replying Affidavit.[135]

According to the High Court Rules, an Applicant may make an urgent application to the court. In this case, the timeframes are reduced, and the general procedure for applications is shortened.[136] However, the Applicant would be required to justify why the matter is urgent, such as the Respondent's intention to sell all of its assets in South Africa. If the court determines

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[131] Section 16(3) of the IAA.
[132] Williams (n 17 above) …. Jurisdiction is usually determined with reference to the principal place of business or the location of the assets of the party against whom the award is being enforced.
[133] Rule 6 of the Uniform Rules of Court
[134] Section 17 of the IAA.
[135]. D Balusik 'The Know How to Enforcing Foreign Arbitration Awards in South Africa' (2019) http://arbitrationblog.kluwerarbitration.com/2019/02/17/the-know-how-to-enforcing-foreign-arbitration-awards-in-south-africa/
[136] Rule 6(12) of the Uniform Rules of Court

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that there are no grounds for urgency, the case will be assigned to the regular motion court roll.[137]

For a foreign arbitral award ordering money to be paid and expressed in a foreign currency to be enforceable in South Africa, it must first be converted to rand value. The award must be made a court order as if it were an award for payment of the equivalent amount in rand, based on the exchange rate at the time of the award, not the date of the order of enforcement.[138]

The significance of a foreign arbitral award being recognized and enforced in a court is fundamental to both domestic and international arbitration. Without such recognition and enforcement, the losing party may obstruct the award's enforcement, reducing the arbitral award's value to a mere moral victory for the winner. By recognizing and enforcing the award in a foreign country, the winner can have the arbitral award made an order of the court in the country where the loser resides and, more importantly, has its assets. Failure by the loser to comply with the arbitral award that has been made a court order will result in an attachment and sale of its assets in execution.[139]

In general, the courts of one country have no jurisdiction over the citizens and property of another country. Such attachment and sale in execution will be impossible without the foreign arbitral award's recognition and enforcement. [140]The enforcement of foreign arbitral awards presents several challenges, and it is only the successful enforcement of such awards that brings the efforts of the party using arbitration to fruition.[141]

3.7. Issues and Challenges in the Enforcement of Arbitral Awards in South Africa.

The reality of arbitration is that the tribunal's award is not always the final part of the dispute. Since the losing party would attempt to obstruct the creditor's enforcement of the award, the Arbitration Act and the IAA include various mechanisms for challenging the outcome of the arbitration.[142]

[137] D Balusik (n 135 above)
[138] P Holloway & A October (n 2 above)
[139] T Fletcher & G Ford 'International Arbitration: The Enforcement of Foreign Arbitral Awards Amongst Brics Nations: Double Standards or Oversights' (2017) https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2017/dispute/downloads/Dispute-Resolution-Alert-29-March-2017.pdf
[140] H Schulze (n 96 above) 67
[141] A Sharif & S Ali 'Public Policy in Pakistan, A Roadblock to the Execution of Foreign Arbitral Award' (2022) 4(2) *Pakistan Journal of Social Research* 893
[142] V Manko & S Arends 'Arbitration act: The Intersection between Remittal and Review' (2021) Cliffe Dekker Hofmeyr - Arbitration Act: The Intersection between Remittal and Review

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3.7.1. Refusal to Recognise and Enforce an Arbitral Award in South Africa

When considering opposing the enforcement of a foreign arbitral award, the various laws applicable to either a domestic or foreign arbitral award are important because they set out the various grounds on which enforcement of a foreign arbitral award will be refused.[143] The section and articles of the legislation governing the grounds for the refusal of enforcement of arbitration awards are divided into two parts: the first lists the grounds on which enforcement may be refused by a court, and the second lists the grounds on which the party seeking enforcement may to the court.[144]

The Court may refuse to enforce an arbitral award for the following reasons, which are also grounds for refusing enforcement under the New York Convention.[145]

a. Arbitration is not permitted under South African law for the subject matter of the dispute.
b. Recognizing or enforcing the award would be against South African public policy.

When the party seeking enforcement applies to the court for refusal to recognize the award, the following must be proven:[146]

a. That the parties lacked the legal capacity to enter into a contract.
b. the agreement was invalid under the law of the country in which the award was made or the law to which the parties had subjected it.
c. The party seeking enforcement did not receive the required notice of the arbitrator's appointment or the arbitration proceedings in question or was otherwise unable to present their case.
d. The award addresses a dispute that is not contemplated by or falls within the provisions of the relevant reference to arbitration, or it contains decisions on matters that are beyond the scope of the reference to arbitration. However, if the decisions that fall outside the scope of the reference can be distinguished from those that fall within it, the portion of the award containing decisions on matters referred to arbitration may be enforced.[147]

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[143] Balusik (n 135 above)
[144] AJ Van Den Berg 'New York Convention of 1958: Refusals of Enforcement' (2007) 18(2) ICC International Court of Arbitration Bulletin
[145] Section 18(1)(a) of the IAA, Article 36 of the UNCITRAL Model Law, Article V of the New York Convention
[146] Section 18(1)(b) of the IAA.
[147] Section 18 (2) of the IAA

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e. The tribunal's constitution or the arbitration proceedings were not in accordance with the arbitration agreement or the law of the country where the arbitration took place.
f. The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made. If the court is satisfied that an application to set aside the award is pending before the competent authority of the country in which or under which the award was made, the court may adjourn the application for enforcement. If it does, it may order the party seeking enforcement to provide adequate security.[148]

Unless one of the defences referred above established, the foreign arbitral award may be made an order of the court and is then enforced in the same manner as a judgement of the court.[149]

The three key characteristics that describe the grounds for refusing to enforce arbitral awards are as follows:[150]

a. The grounds are comprehensive.
b. A court may not reconsider the arbitral award's merits.
c. The respondent bears the burden of proof.

The applicable laws governing the recognition and enforcement of foreign arbitral awards do not grant the court the authority to review the merits and substance of such an award and alter or interfere with its terms.[151] The court must state unequivocally whether the unsuccessful party disagrees with the arbitration award, and the specific grounds on which it does so must be stated.[152] Courts have generally endorsed these features, though there have been a few notable exceptions where enforcement has been refused.[153]

3.7.2. Public Policy

One of the irregularities listed by the New York Convention as preventing the enforcement of arbitral awards is public policy. This is because it permits national courts to refuse to implement

[148] Section 18 (3) of the IAA
[149] Williams (n 15 above) 6.
[150] S Petit & E Kajkowska ' The Grounds to Challenging and Enforcing Arbitration Awards – Grounds to Refuse Enforcement' (2021) https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/grounds-refuse-enforcement.
[151] Ramsden (n 24 above) 239
[152] A Fawcet & KG Dempsey 'South African Court Reaffirms Stance on Enforcement of Arbitral Awards' https://www.pinsentmasons.com/out-law/analysis/south-african-court-reaffirms-stance-on-enforcement-of-arbitral-awards. In Industrious D.O.O V. IDS Industry Service and Plant Construction South Africa (Pty) Ltd (2020/1586) [2021] ZAGP JHC 350 the Court held that ….'IDS failed to raise or prove any of the grounds set out in Section 18 of the IAA to persuade the court to refuse the application recognized and made an order of court'
[153] Van Den Berg (n 145 above) 2

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an award that conflicts with the core values of the legal system of the host state.[154] Public policy is not defined in either the Model Law or the New York Convention.

However, the New York Convention and the Model Law refer to "the public policy of that country," indicating that a decision on what "public policy" means from the perspective of the jurisdiction where recognition or enforcement is sought must be made.[155] As a result, states have developed and adopted their own definitions of public policy through legislation or jurisprudence. Public policy is now defined by the same fundamental economic, religious, social, and political norms that each state uses to define its legal system.[156]

Public policy generally refers to the fundamental notions of honesty, fairness and justice that underpin the South African legal system. It has been referred to as a notoriously difficult concept to give content to.[157] The IAA has gone a step further by stating two instances in which the recognition and enforcement of an award would be contrary to public policy. It states that the following situations would be against public policy: Firstly, a breach of the tribunal's duty to act fairly occurred in connection with the making of the award, causing or likely to cause significant injustice to the party opposing recognition or enforcement and secondly that the award was influenced by fraud or corruption.[158]

In *Sasfin (Pty) Ltd V. Beukes*, Smalberger J.A defined public policy is “An expression of vague import”. It includes an act which is contrary to the interests of the community, the common law or the moral sense of the community. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.[159]

Courts are required to interpret public policy defences narrowly in order to uphold and recognize the fundamental goal of finality in all arbitrations and to hold that such defences are only applicable if some fundamental legal principle has been broken. As a result, a court cannot deny recognition of an arbitral award on the grounds of fraud when the defendant has not yet

[154] HA Tosun ‘Public Policy Concept in International Arbitration’ (2019) https://escholarship.org/uc/item/4xj024n0.
[155] Article V(2)(b) of the New York Convention, Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law.
[156] P Madden, C Knoebel & B Grifat-Spackman ‘The guide to Challenging and Enforcing Arbitration Awards – Arbitrability and Public Policy Challenges’ (2021) https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/arbitrability-and-public-policy-challenges.
[157] Casie Badenhorst SC & Penny Bosman ‘ International Arbitration, Waiver of the Right to Review an Arbitration Award’ (2002) https://www.arbitrators.co.za/tools-of-the-trade_cassie-badenhorst-s-c-and-penny-bosman-waiver-of-the-right-to-review-an-arbitration-award-march-2022/.
[158] Article 36 of Schedule 1 to the IAA 2017, Section 18 of the IAA
[159] (1989) 1 All SA 347 (A) 350-352

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used all of its available options in the appropriate forum. However, if on the face of the award and the arbitration agreement, it is clear that it is against public policy, the court will deny recognition of the award. Additionally, where matters of public policy are concerned, the interposition of an arbitration award does not separate the successful party's claim from the illegality that gave rise to it.[160]

In *Seton Co. v. Silver Oak Industries Ltd*,[161] the Respondent opposed an application to have a French arbitral tribunal's award of damages in favour of the Applicant recognized by the High Court, claiming that the award was tainted by the Applicant's fraud on the tribunal. The Respondent argued that the South African High Court should refuse to enforce the award under the provisions of Section 18(1)(a)(ii) of the Act because it was against public policy to recognize an award obtained through fraud. The Respondent admitted that it did not have evidence to substantiate the allegation of fraud on the affidavit, but that there was someone who, if subpoenaed to give viva voce evidence, would provide the necessary evidence.

According to the court, section 18(1)(a)(ii) of the IAA stated that a court would only refuse to recognize a foreign arbitral award if it was clear from the award and the arbitration agreement that the agreement was contrary to public policy.

There should be no extraneous evidence to persuade the court that the agreement in question was illegal to successfully claim that the award was obtained through fraudulent means (and thus against public policy). The Respondent was required to apply to a French court to have the award set aside based on alleged fraud, as well as to apply for a stay of the Applicant's application to have the arbitral award enforced, pending the outcome of the Respondent's application to have the arbitral award set aside in France. The South African High Court saw no reason not to recognize the award, the Applicant's application for recognition and enforcement was granted.

3.7.3 Remittal

Within six weeks of the award, the parties in arbitration may remit an award to the arbitrator for reconsideration through a written agreement or an application to the court.[162] On good cause shown,[163] the court may remit any matter referred to arbitration to the arbitrator for reconsideration to make a further award, a fresh award, or for such other purpose as the court

[160] Ramsden (n 24 above) 240 and 241
[161] 2000 2 A 215 (T)
[162] Section 32(1) and (2) of the Arbitration Act
[163] "Good cause" is generally understood to be a phrase of wide import that requires a court to consider each case on its merit in order to achieve a just and equitable result in the particular circumstance.

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may direct.[164] The court has broad discretion to remit a matter to the arbitrator; however, the court must exercise its discretion judiciously. Although the court's power to remit matters to the arbitrator is not limited to cases of alleged invalidity, a broader power should not be exercised without good cause.[165]

The statutory powers to remit matters to the arbitrators for reconsideration exist to allow the arbitrator(s) who would otherwise have been functus officio due to the conclusion of the arbitration proceedings and publication of the award to address issues that were part of the submission to arbitration but were not resolved, or were not resolved properly, in the award.[166]

Unless the parties or the court direct otherwise, the arbitration tribunal must resolve a matter within three months of reconsideration.[167] It is crucial, however, to remember that remittal is not a veiled appeal or review, but rather a remedy to ensure that the arbitrator or tribunal resolves the disputes that unambiguously fall for adjudication, thereby avoiding prejudice to the parties.[168]

An arbitral award may be remitted in the following circumstances: where the arbitrator has failed to award costs, to enable the arbitrator to put the award in an enforceable form, where there is a mistake or error admitted by the arbitrator on the face of the award, where there has been a procedural mishap that affects the award, and where additional evidence is discovered after the award has been published.[169]

In South Africa, it is understood that when any of the matters in an award are remitted, the first award is suspended and no longer serves as a binding adjudication on any of the matters referred during the period of suspension. When the second award, which must include the unremitted parts of the first award, is published, the first award becomes null and void because two concurrent awards are not permitted.[170]

In the case of remittal, the matter is returned to the same arbitrator so that he can correct a flaw in the award, whereas in the case of setting aside, the award is set aside but the parties' dispute remains subject to binding arbitration. It has been stated that remittal is an alternative to setting aside where the defect can be corrected simply by having the arbitrator correct it

[164] Section 32 of the Arbitration Act, Article 33(1)(2)(3), Schedule 1, IAA 2017
[165] P Ramsden (2009) 'The Law of Arbitration- South African & International Arbitration' (Pg. 205)
[166] Ramsden (n 24 above) 258 & *Quality Products (Pty) Ltd v MAMCSA Security Consultants CC and Another* (12447/2017) [2020] ZAKZDHC 13
[167] Section 32(3) of the Arbitration Act.
[168] V Manko & S Arends (n 143 above)
[169] Ramsden (n 24 above) 260
[170] Ramsden (n 24 above) 261

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rather than using the sledgehammer approach of setting aside which sends the parties back to the beginning.[171]

3.7.4 Set-Off

If an applicant is enforcing an award, he or she must disclose fully whether the award has been set aside or settled in full. When full disclosure is not made, the court finds it difficult to enforce the arbitral award. A court enforcing an award should not consider a party's attempt to avoid enforcement by raising a set-off that was not addressed by the arbitration tribunal as a defence. The set-off should not be allowed to hamper the enforcement proceedings as a whole. An appropriate trial can recognize any set-offs after an arbitration award has been made.[172]

3.7.5 Setting aside

An action to set aside an arbitral award is a procedure used to determine the existence and validity of the arbitral award itself, rather than as a remedy against the award.[173] Due to the peremptory language of the Arbitration Act,[174] a court lacks the discretion to substitute the arbitrator's order with its own, and the only appropriate course of action is for the court to set aside the award and refer the matter to a new arbitrator or arbitral tribunal to be formed per the parties' arbitration agreement.[175] An order to set aside an award has the effect of removing all legal effects from the award, leaving the situation as if the award had never been made.[176]

The circumstances under which an arbitration award can be set aside are extremely limited; [177]however, the Arbitration Act in South Africa provides the following grounds for setting aside an arbitration award:[178]

a. Where the arbitrator commits misconduct in the performance of his duties: An error does not constitute misconduct unless the error was so obvious that it could not have been made without some degree of misconduct or partiality. A genuine error of law or fact cannot be characterized as misconduct.[179]

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[171] Article 34 of the Model Law.
[172] Ramsden (n 24 above) 234 and 235
[173] Ramsden (n 24 above) 249)
[174] Section 33(4) of the Arbitration Act.
[175] Hos+Med Medical Aid Scheme V. Thebe Ya Bophelo Healthcare Marketing and Consulting (Pty) Ltd and Others 2008 2 SA 608 (SCA)
[176] Ramsden (n 24 above) 249
[177] The Amalgamated Clothing and Textile Union SA V. Veldspun (Pty) Ltd 1994 1 SA 162 (A) at 169B
[178] Section 33(1) (a-c) of the Arbitration Act.
[179] Telcordia Technologies Inc V. Telcom SA Ltd 2007 3 SA 266 (SCA) Para. 85. The Court held thus….” The fact that the arbitrator may have either misrepresented the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence, does not mean that he misconceived the nature of his inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An Arbitrator 'has the right to be wrong' on the merits of the case”

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b. Where the arbitrator commits any gross irregularity in the conduct of the arbitration or exceeds his powers: For a defect in the proceedings to be considered a gross irregularity under the Arbitration Act, the arbitrator must have misunderstood the nature of the inquiry or reached an unreasonable result.[180] To justify a set aside on this basis, the irregularity must have been so serious that it resulted in the aggrieved party's case not being fully and fairly resolved.[181] As his jurisdiction is derived from the agreement, the arbitrator must also ensure that he works within the confines of the arbitration agreement between the parties. The arbitrator must not go beyond or exceed the powers expressly defined by the parties, as doing so may result in the award being set aside.[182]
c. Where an arbitral award was obtained improperly.

An application to vacate an arbitration award must be filed within six weeks of the award's publication.[183] The grounds for setting aside an arbitral award are found in the national legislation of each jurisdiction, and an award must be set aside in the country where it was made.[184] This is because the country in which the award is made establishes the link between an arbitration procedure and the award or legal order issued.[185]The Arbitration Act states that if an award is overturned, the dispute must be referred to a new arbitration tribunal established by the Court's instructions.[186] Where only a portion of the award is set aside, the valid portion can still be enforced.[187]

When a losing party in an arbitration wishes to have the arbitral award set aside or appealed, the party must exercise caution in applying the appropriate law and avoid any attempt to delay the enforcement of the arbitration awards.[188] A court may impose sanctions on a party

[180] Herholdt V. Nedbank Ltd 2013 6 SA 224
[181] Khum MK Investment and Bie Joint Venture (Pty) Limited V. Eskom Holdings SOC and Another (30169/2018) [2020] ZAGPJHC 7…. the Court found that the applicant had not established any irregularities in the proceedings. The arbitrator's determination that the claims had been prescribed, invariably had the effect that those claims became excluded from the rest of the arbitration. This is the consequence of the nature of the legal question that the arbitrator was called upon to determine. It is not consequent upon the arbitrator's conduct. The applicant's attempt to attribute the exclusion of the claims to the conduct of the arbitrator is disingenuous. The court, therefore, held that the application had therefore been brought on spurious grounds, which warranted a punitive costs order.
[182] Hos+Med Medical Aid Scheme V. Thebe Ya Bophelo Healthcare Marketing and Consulting (Pty) Ltd and Others 2008 2 SA 608 (SCA)
[183] Section 33(2) of the Arbitration Act.
[184] Articles lll and V(1)(e) of the New York Convention makes it clear that only courts of the state where the award was issued has jurisdiction to rule on requests for its setting aside.
[185] T Giovannini 'The Making and Enforcement of the Arbitral Award – What are the grounds on which awards are most often set aside?' (2000) https://www.lalive.law/wp-content/uploads/2019/10/tgi_what_are_the_grounds.pdf.
[186] Section 33(4) of the Arbitration Act.
[187] Croock V. Lipschitz & others (2019/18319) 2020 ZAGPJHC 80
[188] A Fawcett & K Gilbert-Dempsey (n 152 above)

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who attempts to set aside an award for frivolous or vexatious reasons that have no merit and who litigates solely to delay enforcement of the award.[189]

3.7.6 Prescription of Arbitral Awards

Arbitration awards are treated as debts under the Prescription Act (which is considered adjectival law under South African Law).[190] They only acquire the status of a judgment debt after the court issues an order. According to the Prescription Act, once an award is made a court order, it expires after thirty (30) years.[191] If the award has not been made an order of the Court, it must be enforced within three years of receipt or a period within which the party could have acquired knowledge of the award if reasonable care was exercised.[192]

The three (3) year prescription period is calculated and starts on the date the debt becomes due. Debt is only deemed due under the Prescription Act when a creditor knows both the identity of the debtor and all of the facts underlying the debt.[193] A creditor must interrupt prescription by instituting proceedings against a debtor before the end of the three (3) year period to avoid losing the legal right to enforce a claim.[194]

It is thus necessary to distinguish between situations in which, due to an agreement between the parties, arbitration must occur as a pre-requisite to any claim arising, and the prescription period for such a claim only begins to run once the pre-requisite is met. The obtaining of the arbitration award and situations in which, due to an agreement between the parties, the debt (claim) arises immediately and some procedural step is needed merely to determine the extent or validity of such a claim, in this instance the presence of the arbitration clause does not delay the running of prescription in any way.[195]

However, the position has shifted because the IAA and the Arbitration Act do not specify a time limit for applying for the recognition and enforcement of an arbitral award.[196] Furthermore, the Constitutional Court has ruled that the Prescription Act does not apply to arbitral awards made by arbitration forums in the context of labour law.[197] The Supreme Court

[189] Ramsden (n 24 above) 249-250.
[190] Prescription Act 68 of 1969
[191] Section 11 of the Prescription Act & Goliath V. Rocklands Poultry Loss Control/ Sovereign Foods (2019) JOL 46244 (LC)
[192] P Holloway & A October (n 2 above)
[193] Section 12 of the Prescription Act
[194] Section 14 of the Prescription Act... The running of prescription is interrupted by an “express or tacit acknowledgement of Liability by a debtor”.
[195] NGL Gumede ‘Prescription Revisited – A Brief Overview of the Latest Case Law Developments in Terms of the Prescription Act 68 of 1969’ (2016). https://www.lexology.com/library/detail.aspx?g=0a7afcbf-91a5-400d-867e-140bb7c5e4b4.
[196] T Fletcher & L De Waal (n 34 above)
[197] Mogalia V. Coca Cola Fortune (Pty) Ltd 2018 1 SA 82

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has also ruled that arbitral awards do not generally constitute a new debt and, as such, are not subject to the Prescription Act's limitation period.[198]

3.7.7 The PBA

The PBA 1978 prohibits or places conditions on the enforcement of certain foreign awards in South Africa arising from any act or transaction that occurred before or after the commencement of the PBA 1978 and is related to mining, production, importation, exportation, refinement, possession, use, or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into, or from South Africa.[199]

According to the PBA, no foreign judgment, order, direction, interrogatory, commission rogatoire, letter of request, or other request relating to any civil proceedings and arising from the aforementioned acts or transactions may be enforced in South Africa unless the party seeking enforcement obtains the Minister of Economic Affairs' permission.[200] The PBA also prohibits the recognition or enforcement of foreign awards ordering the payment of multiple or punitive damages, regardless of whether permission has been obtained from the Minister.[201]

The PBA's wording is broad and could potentially be used to prevent enforcement of foreign arbitral awards beyond its intended scope. This is because most awards deal with "matter or material," and the Minister's approval is required in nearly every action for the recognition and enforcement of a foreign arbitral award.[202]

3.7.8 Court Interference and Intervention

The process of either recognizing and upholding the arbitral award or rejecting it is one of the duties of the court with regard to arbitration awards;[203] South Africa is no exception. Although South African courts have supported the enforcement of arbitration awards, it has been demonstrated that interference issues have occasionally arisen, creating difficulties in this area.[204]

While it might take some time for a foreign arbitral award to become a court order in South Africa, parties can rest assured that the country's courts will uphold public policy principles

[198] Brompton Court Body Corporate V. Khumalo (397/2017) 2018 ZASCA 27)
[199] Section 1D of the PBA
[200] Section 1(1)(a) of the PBA.
[201] Section 1A (1) and (2) of the PBA.
[202] J Brand & E Wewege (n 79 above)
[203] C Roodt 'Conflicts of Procedure Between Courts and Arbitral tribunals in Africa: An Argument for Harmonization (2010) 25 Tulane European. & Civil Law Forum 67
[204] J Ripley Evans & FN Del Valle (n 60 above)

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and be reasonable and impartial when deciding whether to recognize and enforce a foreign arbitral award.[205]

[205] D Balusik & N Owusu-Ankomah Enforcement of Foreign Arbitral Awards in Africa: An Analysis of the Regime in South Africa and Ghana Enforcement of foreign arbitral awards in Africa: an analysis of the regime in South Africa and Ghana - Lexology

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CHAPTER 4.

A Comparative Study of Nigeria and South Africa's Enforcement of Arbitration Awards

4.1. Introduction

As earlier mentioned, the parties in any arbitration process assume that, unless a settlement is made along the way, the procedures will conclude with an award and that the opposing party will comply with the award.[1] An unsatisfied party to the proceedings may appeal an arbitral award, making it harder for the successful party to enforce it.[2] However, questions about the appropriateness or otherwise of challenging and enforcing an arbitral award continue to elicit a wide range of comments.[3]

While it is difficult to generalize the difficulties in recognizing and enforcing arbitral awards across the region, it is arguably a common theme that the difficulties stem from the various levels of development of arbitration regimes in the various unharmonized African countries. Where similar regimes exist, local courts' decisions on the recognition and enforceability of arbitral awards may differ.[4]

The goal of this chapter is to compare the Nigerian and South African positions on the enforcement of arbitration awards by examining the various applicable mechanisms in light of their unique characteristics, strengths, and weaknesses.

4.2. Legal Framework for Recognition and Enforcement of Arbitral Awards

One of the most influential factors that make arbitration appealing in any jurisdiction is a strong legislative framework. The legal system of the arbitration state has a significant impact on the arbitration process.[5] Provisions for the recognition and enforcement of arbitral awards are made under local and international instruments in Nigeria and South Africa. While these instruments

[1] N Blackaby & C Partasides, A Redfern & M Hunter *Redfern and Hunter on International Arbi*tration (2009) Oxford University Press, 5th ed., p. 513.
[2] DT Eyongndi & OO Ojuade "Applicability of Immunity Clause to Arbitration in Nigeria" (2019) 1(2) *International Review of Law and Jurisprudence, Afe Babalola University*, 29-37.
[3] A Adedoyin 'Arbitral Awards in International Commercial Arbitration: Appropriateness of Review by National Courts' (2022) Arbitral Awards in International Commercial Arbitration: Appropriateness of Review by National Courts – NICArb
[4] A Abdallah, AA Esmail 'Challenges with Recognition and Enforcement of Arbitral Awards in Africa' (2021) https://www.ibanet.org/challenges-with-recognition-enforcement-arbitral-awards-Africa
[5] M Loukas 'Seat of Arbitration and Indian Arbitration Law' (2016) *Indian Journal of Arbitration Law* 1

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facilitate the smooth enforcement of awards in some ways, the process is sometimes hampered in other ways by flaws in these laws.[6]

4.2.1. Enforcement Statutes

The legal systems of African countries differ in many ways. The difficulty in navigating these differences is heightened by the lack of regional harmonisation of laws and policies, as well as a general tendency toward dynamism in the socio-political landscape, which may affect the effectiveness of judicial processes and enforcement.[7]

In Nigeria, the Arbitration and Conciliation Act is the applicable procedural statute for the recognition and enforcement of arbitral awards.[8] Apart from the arbitration statutes which provide for the enforcement of arbitral awards, foreign arbitral awards are also enforceable by registration under statutes dealing with the enforcement of judgments, as judgments are defined as including arbitral awards.[9] The statutes include the Reciprocal Enforcement of Judgements Ordinance 1922 (REJO) and the Foreign Judgments (Reciprocal Enforcement) Act of 1960 (FJREA).[10] An award made by the International Centre for Settlement of Investment Disputes (ICSID) is enforceable in Nigeria under the ICSID (Enforcement of Awards) Act.[11]

The New York Convention applies to any award made in Nigeria or any contracting state where recognition and enforcement of any award arising out of international commercial arbitration are sought under the ACA.[12] However, the contracting state must have reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria following the Convention's provisions.[13]

Domestic arbitral awards in South Africa can only be recognized and enforced under the Arbitration Act.[14] The International Arbitration Act establishes a legal framework in South

[6] E Moneke 'Strengthening the Legal Regime for the Recognition and Enforcement of Arbitral Awards in Nigeria' (2018) 9(3) *The Gravitas Review of Business and Property Law* 3
[7] S Safeez-Naaz 'Getting sorted in Southern Africa: How to enforce Foreign Arbitral Awards' (2019) http://arbitrationblog.practicallaw.com/getting-sorted-in-southern-africa-how-to-enforce-foreign-arbitral-awards/.
[8] G Elias, L Ijaodola, O Oyekan & V Ibekwe 'Challenging and Enforcing Arbitration Awards: Nigeria' https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/nigeria.
[9] A Rhodes-Vivour 'Enforcement of Arbitral Awards in Nigeria' (2021) https://nji.gov.ng/wp-content/uploads/2021/12/ENFORCEMENT-OF-ARBITRAL-AWARDS-BY-MRS-ADEDOYIN-RHODES-VIVOUR-SAN-C.ARB-FINAL.docx.
[10] A Rhodes-Vivour *Commercial Arbitration Law and Practice in Nigeria through the Cases* (1st eds), Lexis Nexis (2015) 544. See also Order 52 Rule 17 of the Federal High Court Civil Procedure Rules, Order 19 Rule 14 of the Federal Capital Territory High Court Rules
[11] G Elias et al (n 8 above)
[12] Section 54 (1) of the ACA
[13] M Mordi, F Sani & O Olutoye 'Enforcement of Arbitral Awards in Nigeria: Overview' (2022) https://uk.practicallaw.thomsonreuters.com/w-034-5855 2
[14] Section 31 of the Arbitration Act 42 of 1965.

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Africa for the regulation and enforcement of foreign arbitral awards.[15] The International Arbitration Act also incorporates the UNCITRAL Model Law and the New York Convention into South African law, with minor modifications and adaptations.[16]

4.2.2. The Issue of Time Limitation

The time limit within which an award creditor may enforce an arbitral award varies by jurisdiction; there is no uniform regulation on the subject. There is considerable variation in when the time begins to run, in addition to differences in the length of the period. There are also significant differences between limitation period provisions that are expressly applicable or commonly applied to the enforcement of arbitral awards.[17]

The beginning of the limitation period for the enforcement of arbitral awards in Nigeria has been a source of considerable concern.[18] The ACA, for example, does not specify a time limit for filing a court action to enforce arbitration awards, and reliance on federal and state limitation laws may sometimes result in an award creditor not receiving the expected result.[19]

The Limitation Act and the Foreign Judgements (Reciprocal Enforcement) Act are the applicable laws in Nigeria for the limitation of action and the enforcement of awards.[20] States in Nigeria have also enacted legislation on the limitation of action. As a result, the various states' limitation laws are used to determine the time limit for the enforcement of arbitral awards in Nigeria. The time limit will thus be determined by the statute of limitations in each jurisdiction (state) where an arbitral award is sought to be enforced.[21]

It should be noted that, while the majority of these state laws make no mention of their applicability to the enforcement of arbitral awards, they do refer to contractual actions. However, because arbitration is a contract in and of itself, and because it is made a court order, it is enforced as a court judgment, making the provisions of the law applicable to the

[15] Section 16 of the International Arbitration Act 15 of 2017
[16]. J Smith 'Enforcement of Local and Foreign Arbitral Awards in South Africa' (2021) https://www.pinsentmasons.com/out-law/guides/enforcement-of-local-foreign-arbitral-awards-south-africa
[17] A Stier 'Don't be late – The Risk of Arbitral Awards Becoming Unenforceable due to Limitation Periods' (2021) https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2021/02/24/don-t-be-late-the-risk-of-arbitral-awards-becoming-unenforceable-due-to-limitation-periods.
[18]. O Akoni 'Limitation period For the Enforcement of Arbitration Awards in Nigeria – City Engineering Nig. Ltd V. Federal Housing Authority'1. http://www.nigerianlawguru.com/articles/arbitration/LIMITATION.
[19]. U Azikiwe & F Onyia 'Global Arbitration Review – Nigeria' (2019) The Middle Eastern and African Arbitration Review, https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2019/article/nigeria
[20]. Cap. 522, Laws of the Federation of Nigeria, 2004, Cap F35, Laws of the Federation of Nigeria, 2004
[21]. OO Awoyale 'A Critique of the Limitation Period for Enforcement of Arbitral Awards in Nigeria' (2019) 92 https://phd-dissertations.unizik.edu.ng/repos/81176983800_102282999588.pdf. Section 52 and 8(1)(d) of the Limitation laws Cap L84 of Lagos State 2015, Section 7(1)(d) of the Limitation Law of the Federal Capital Territory Abuja, Section 4(1)(c) and Section 4(1)(c) and 18 of the Limitation Law of Benue State 1988, Section 34 and 16 of the Limitation Law of Rivers State 1988, Section 18 of the Limitation Law of Bauchi State 1991.

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enforcement of arbitral awards.[22] In this regard, the enforcement mechanism available for judgments obtained through civil proceedings is equally applicable to arbitral awards obtained through any applicable legislation.[23]

After an award is made, there are no statutory time limits in South Africa under the Arbitration Act and the IAA,[24] which provide the statutory framework for the enforcement of domestic and foreign arbitral awards, respectively.[25] The Constitutional Court has held and subsequently confirmed, that the Prescription Act,[26] which provides for the limitation of periods, does not apply to employment law arbitral awards rendered by arbitration tribunals.[27] The Supreme Court of Appeal added to the finality of this issue by generalizing all arbitral awards as not constituting a debt and thus not subject to the Prescription Act's limitation period.[28]

4.2.3. Jurisdiction of the Enforcing Court.

In Nigeria and South Africa, the approach to the recognition and enforcement of arbitral awards is generally consistent, though each country requires that an application for recognition and enforcement of the award be made to the relevant domestic court with jurisdiction over the particular arbitral award.[29] It is, however, prudent to seek recognition and enforcement of an arbitral award in the specific court that would have had jurisdiction over the subject matter of the dispute resolved in arbitration.[30]

The competent authority in Nigeria to recognize and enforce an arbitral award is determined by the statute under which the application is made. The Federal High Court and the various State High Courts are the competent courts with jurisdiction to recognize and enforce arbitral awards, whether domestic or foreign, under the Arbitration and Conciliation Act.[31] The

[22]. Awoyale (n 21 above) 195
[23] A Adaralegbe “Limitation Period for the Enforcement of Arbitral Awards in Nigeria’ (2006) 22(4) *Journal of the London Court of International Arbitration*. https://doi.org/10.1093/arbitration/22.4.613.
[24] Arbitration Act 42 of 1965 and The International Arbitration Act 15 of 2017
[25] T Fletcher & L De-Waal ‘Enforcement of Arbitral Awards in South Africa: Overview’ (2022) https://uk.practicallaw.thomsonreuters.com/w-035-3624
[26] Act 69 of 1969. ‘Under section 11 of the Prescription Act, Arbitration Awards are treated as debts. Where the award is made an order of the court, it expires after thirty (30) years but where not made an order of court expires after three (3) years.
[27] Mogaila V. Coca-Cola Fortune (Pty) Ltd 2018 1 SA.
[28] Brompton Court Body Corporate V. Khumalo (398/2017) 2018 ZASCA 27
[29] J Lafleur ‘Africa: Enforcement of Foreign Arbitral Awards’ (2021) https://www.bowmanslaw.com/insights/litigation-and-arbitration/enforcement-of-foreign-arbitral-awards/.
[30] Kabo Air Limited V. The O’ Corporation Limited (2014) LPELR 23616
[31] SPA Ajibade & Co. ‘Challenging and Enforcing Arbitration Awards in Nigeria’ https://spaajibade.com/challenging-and-enforcing-arbitration-awards-in-nigeria/. (Accessed 24 August 2022) and Section 57 of the ACA

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supreme court has resolved the major question of whether both courts have concurrent jurisdiction over the same matter.[32]

It is recommended, however, that a party seeking to enforce an arbitral award in Nigeria under the ACA approach the Federal High Court because it has federal jurisdiction, which means that an execution order against the award debtor's assets can be enforced in any state of the Federation.[33] The territorial restrictions that apply to state high courts do not apply to the Federal High Court, making the execution process less burdensome.[34]

The Supreme Court of Nigeria has original jurisdiction to hear ICSID enforcement proceedings.[35] This is possibly the quickest procedure in Nigeria for enforcing an arbitral award because there is little or no room for objections to the award's enforcement.[36] These types of awards are not covered by the ACA.

Generally, an arbitration award is not automatically enforced under South African arbitration laws unless it is first recognized and made an order of the court.[37] A court with jurisdiction to recognize or enforce arbitral awards is defined in the Arbitration Act as "any court of a provincial or local division of the Supreme Court of South Africa having jurisdiction."[38]

Even though it is not expressly stated, practice over the years has shown that arbitral awards in South Africa have been enforced through application/motion proceedings in the high court[39] and the motion court.[40] As a result, once the arbitral award is made a court order, it takes on the status of any court judgment or award and can be enforced in the same manner as described above in the Arbitration Act.[41]

[32] Adeoye Magbagbeola V. Temitope Sanni (2002) 4 NWLR (Pt 756) 193…. The Court held that the definition of "high court" under the Arbitration and Conciliation Act is applicable to arbitral proceedings. They referred to Section 57(1) which defines "court" as the High Court of a State, the Federal Capital Territory or the Federal High Court and a "judge" as any judge of such courts'
[33] Ahaji Albishir & Sons Ltd V. Bayero University, Kano (1996) LPELR-13928
[34] O Ayeni 'Arbitration in Nigeria - A Closer Look' https://www.alp.company/resources/arbitration/arbitration-nigeria-%E2%80%93-closer-look.
[35] Section 1 of the ICSID Act, Cap 120, Laws of the Federation of Nigeria, 2004
[36] P Okoronkwo 'Enforcement of Foreign Arbitral Awards in Nigeria' https://www.hg.org/legal-articles/enforcement-of-foreign-arbitral-awards-in-nigeria-6031.
[37] Section 31 of the Arbitration Act 42 of 1965 & Section 16(3) of the International Arbitration Act
[38] Section 1 of the Arbitration Act 42 of 1965
[39] P Holloway & A October 'Enforcement of Arbitral Awards in South Africa: Overview' (2015) https://content.next.westlaw.com/9-619-5657.
[40] Rule 6(5)(a) of the Uniform Rules of Court
[41] T Fletcher & L Waal (n 25 above)

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4.2.4. Vagueness of the term Public Policy.

The concept of public policy is so broad that it may appear difficult to distinguish what is and is not a matter of public policy.[42] The international community has expressed concern that the ambiguity of the term Public Policy allows states to refuse recognition and enforcement of arbitral awards on regional and possibly unexpected grounds when it suits them.[43] Public policy has been described as multifaceted, open-textured, and flexible, with many guises and thus a wide range of vocabulary and ambiguities. Legislators and courts are understandably hesitant to describe public policy in detail.[44]

Domestic and international elements are included in public policy. On the one hand, public policy operates entirely within a domestic relationship, but when applied to international arbitration, it serves as a constraint on foreign law's access to the domestic system.[45] Public policy is also one of the irregularities listed by the New York Convention as grounds for refusing to enforce arbitral awards. It allows national courts to refuse to enforce an award that contradicts fundamental principles of the forum state's legal system.[46]

In comparison to all other grounds for refusing enforcement of foreign arbitral awards, the public policy ground is highly vulnerable to abuse due to its imprecise definition and the fact that what constitutes public policy varies from country to country. The meaning of public policy in the enforcement of arbitral awards is heavily dependent on the court's interpretation of what constitutes public policy.[47]

The term "public policy" is not defined in the ACA or other statutes governing the enforcement of arbitral awards in Nigeria.[48] However, the courts in Nigeria have attempted to define the concept of public policy.[49] The court where recognition or enforcement of an award

[42] E Kleiman & C Pauly 'Arbitrability and Public Policy Challenges' (2019) https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/1st-edition/article/arbitrability-and-public-policy-challenges
[43] M Ostrove, J Carter & Ben Sanderson 'Awards: Challenges - The Guide to Challenging and Enforcing Arbitration Awards' (2021) The Guide to Challenging and Enforcing Arbitration Awards - Second Edition - Global Arbitration Review
[44] RA Cole 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Award (1985) 1 *Ohio State Journal on Dispute Resolution* 365, 366.
[45] MR Sammartano *International Arbitration Law and Practice* (3rd eds) (2014) 506
[46] HA Tosun 'Public Policy Concepts in International Arbitration' PhD. Dissertation, University of California, Berkeley, 2019 https://escholarship.org/uc/item/4xj024n0
[47] UP Emelonye & U Emelonye 'Public Policy Exception in the Enforcement of Arbitral Awards in Nigeria' (2021) 12(1) *Beijing Law Review* 276
[48] GC Nwakoby & CE Aduaka 'The Recognition and Enforcement of International Arbitral Awards in Nigeria: The Issue of Time Limitation' (2015) 37 *Journal of Law, Policy and Globalization* 123
[49] In Macaulay V. FZB of Austria (1999) 4 NWLR (Pt 600) 599 the Court defined public policy as principles under which the freedom of contract and private dealings is restricted by law for the good of the community.
Also, in Dale Power Systems Plc V. Witt & Busch Ltd (2001) 8 NWLR (Pt 716) 699 the Court of Appeal defined a public policy to mean community sense and common conscience extended and applied throughout the state to matters of public morals, health, safety, welfare and the like.

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is sought may, regardless of the country in which the award is made, refuse to recognize or enforce that award if the court determines that such recognition or enforcement is contrary to Nigerian public policy.[50]

In enforcing or refusing awards, Nigerian courts typically take a conservative approach to the application of public policy.[51] The Nigerian Courts will almost certainly only find that an arbitral award (particularly a foreign arbitral award) is contrary to public policy in Nigeria, that the award is of such a nature that it causes a glaring inconsistency with Nigerian law, or that enforcing the award would violate the very fabric of the Nigerian legal system.[52]

South African public policy applies to both domestic and foreign awards, so the court does not approach the issue differently.[53] In South Africa, the question of public policy has been whether the courts will follow the dictates of domestic law as guided by the constitution or follow the international trend.[54] There is little certainty about how South African courts will approach the enforcement of international awards. Public policy is a matter of fact, not law, and it evolves in response to "the general sense of the community, good morals, manifested in public opinion."[55]

Although there is no agreed definition of public policy in South Africa, it has been suggested that when considering the enforcement of arbitral awards, public policy should be construed narrowly and limited to violations of fundamental principles of justice or morality.[56] In a few cases, South African courts considered the public policy exception to the enforcement

The Supreme Court in Okonkwo V. Okagbue (1994) 9 NWLR (Pt 368) 301 also defined 'public policy' as "the ideals which for the time being prevail in any community a to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is generally injurious to the public interest."

[50] Section 52(2)(b)(ii) and Section 48(c) of the ACA

[51] M Eme 'Third Party Funding Vis-à-vis Public Policy Considerations In Arbitral Awards Enforcement in Nigeria' (2021) https://www.mondaq.com/nigeria/trials-appeals-compensation/1142638/third-party-funding-vis-a-vis-public-policy-considerations-in-arbitral-awards-enforcement-in-nigeria

[52] MM. Abiru 'Setting Aside International Arbitral awards in Nigeria: Public Policy Considerations' (2020) https://dx.doi.org/10.2139/ssrn.3715396.

[53] P Holloway & A October (n 41 above)

[54] P Lane 'The new dawn of International Arbitration in South Africa' (2019) https://www.39essex.com/the-new-dawn-in-international-arbitration-in-south-africa/

[55] Amod V. Multilateral Motor Vehicle Accident Fund (1999) 1 SA 319

[56] E Kahn 'Conflict of Laws' Annual Survey of SA Law (1977) 564, 570

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of foreign and/or domestic arbitral awards.[57] In those cases, the court considered whether the party opposing enforcement could successfully invoke the public policy defence.[58]

In South Africa, it is the responsibility of the courts to determine what is meant by the term "public policy" or what is considered to be against good morals in any given case, and such power should not be exercised hastily or rashly. It should be used sparingly and only in the clearest of cases, lest arbitrary and indiscriminate use of the power results in uncertainty about the validity of contracts. This is especially true when individual judges attempt to apply their perceptions of the moral sense of the community.[59]

While it may take some time for a foreign arbitral award to be made an order of a South African court, parties can be confident that South African courts will continue to uphold public policy principles while remaining practical and impartial when deciding to recognize and enforce a foreign arbitral award.[60]

4.2.5. Provisions of the grounds for setting aside arbitral awards.

Sections 29 and 30 of the ACA outline the very limited grounds on which a court in Nigeria can vacate an arbitral award at the request of an aggrieved award debtor.[61] due to its open-ended effect,[62] it allows a party to challenge an arbitral tribunal's award on grounds of misconduct.[63] The crux of the issue is defining what constitutes misconduct on the part of the arbitrator, as the courts have always given this matter a wide interpretation.[64]

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[57] Gutsche Family Investments (Pty) Ltd and Others v Mattia Equity Group (Pty) Ltd and Others 2007 5 SA 491; Seton Co v Silveroak Industries Ltd 2000 2 SA 215; Telcordia Technologies Inc v Telkom SA Ltd 2007 3 SA 266 (SCA).
In the Seton company case, the court held that …. 'The court will refuse to recognise an arbitral award, where on the face of the award and the arbitration agreement it is clear that the award is contrary to public policy without the need to consider extraneous evidence, for example where it is clear that the arbitration was based on an illegal contract'.

[58] JB Robertson 'Public Policy as a ground for the Refusal to Enforce International Commercial Arbitral Awards' Unpublished PhD Thesis, North-West University 2011, 14

[59] Sasfin (Pty) Ltd V. Beukes [1989] 1 All SA 347 (A) at 350 – 352

[60] D Balusik 'The Know How to Enforcing Foreign Arbitration Awards in South Africa' (2019) http://arbitrationblog.kluwerarbitration.com/2019/02/17/the-know-how-to-enforcing-foreign-arbitration-awards-in-south-africa/

[61] GC Nwakoby 'Arbitration and Conciliation Act, Cap A18 Laws of the Federation of Nigeria 2004 – Call for Amendment' (2010) 1 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 3

[62] The Court may set aside an arbitral award pursuant to Section 30(1) of the ACA 'Where an arbitrator has misconducted himself, or where the arbitral proceedings have been improperly procured

[63] MM Akanbi 'Challenges of Arbitration Practice under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations' (2012) 78(4) *The International Journal of Arbitration, Mediation and Dispute Management*, 325

[64] Baker Marine Nig. Ltd V. Chevron Nig. Ltd. (2000) 12 NWLR (Pt 681) 404. Para. 5. Lists over 100 forms of conduct which may constitute misconduct by an arbitrator

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The term misconduct, for example, is not defined in the ACA, and as a result of this omission, Nigerian courts have resorted to several definitions.[65] . The Supreme Court in the case of held Taylor Woodrow Nig. Ltd V. Suddeutsche Etna-Werk Gmbh held thus

> "It is difficult to give an exhaustive definition of what may amount to misconduct on the part of an arbitrator or umpire. The expression is of wide import, for an arbitrator's award, unless set aside, entitles the beneficiary to call on the executive power of the state to enforce it, and it is the court's function to ensure that the executive power of the court is not abused. It is accordingly misconduct for an arbitrator to fail to comply with the terms, express or implied, of the arbitration agreement. But even if the arbitrator fully complies with those terms, he will be guilty of misconduct if he makes an award which on grounds of public policy ought not to be enforced. Much confusion has been caused by the fact that the expression 'misconduct' is used to describe both these quite separate grounds for setting aside an award, and it is not wholly clear in some of the decided cases on which of these two grounds the award has been set aside. However, on one or other of these grounds the expression includes on the one hand that which is misconduct by any standard, such as being bribed or corrupted, and on the other hand mere 'technical' misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement of reference. That does not mean that every irregularity of procedure amounts to misconduct."

Since the ACA does not define what constitutes misconduct, parties to arbitral proceedings have frequently used the concept to file frivolous and unfounded allegations and complaints against an arbitrator, stifling the enforcement of awards.[66] Nigerian courts have also become wary of granting such frivolous applications without due and thorough consideration of all the facts before the court.[67]

In South Africa, the problem remains the same in terms of the Arbitration Act's lack of definition of the terms for the ground of setting aside.[68] Even though the guiding principle of

[65] Taylor Woodrow Nig. Ltd V. Suddeutsche Etna-Werk Gmbh (1993) 4 NWLR (Pt 285) 127)
[66] Guinness Nig. Plc V. Nibol Properties Ltd (2015) 5 CLRN 65, Triana Ltd V. Universal Trust Bank PLC (2009) 12 NWLR (Pt. 1155) 313
[67] Arbico Nig. Ltd V. Nigeria Machine Tools Ltd. (2002) 15 NWLR (Pt 1)
[68] Section 33(1) of the Arbitration Act provides that the court can set aside an arbitral award where:

a. Any member of the arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire;

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consensual arbitration is finality, the arbitration Act and the IAA contain several mechanisms for challenging an arbitral award.[69]

The grounds for setting aside an arbitration award are not simply there for the taking in South Africa.[70] This is due to the omnibus nature of the evidence required to prove these grounds, as there is no specific definition of the terms as stated in the arbitration laws.[71] Parties seeking to resolve disputes through arbitration should keep in mind that an arbitrator's role is to strike a balance between competing issues based on the facts and evidence before them.[72]

4.3. The Judicial System (Court Intervention and Interference)

It is impossible to emphasize enough the importance of an effective judicial system in arbitration, particularly in the enforcement of arbitration awards.[73] A functioning judiciary is an essential component of any civil society.[74] Backlogs, delays, and corruption plague the judiciaries of many African countries, including Nigeria and South Africa thereby making the rapid resolution of disputes is becoming increasingly difficult.[75]

Arbitration's effectiveness as a commercial dispute resolution mechanism is measured by the ease with which the resulting arbitral award is enforced through the courts if the award debtor does not voluntarily comply with the award.[76] The desirability of a jurisdiction as a seat of arbitration is determined by the quality of judicial support and the respect for minimal judicial intervention.[77]

Nigerian courts have generally, particularly in recent times, taken a pro-arbitration stance in deciding arbitration-related cases, including the enforcement of arbitral awards.[78] The

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b. An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers.

[69] V Manko and S Arends 'Arbitration Act: The Intersection between Remittal and Review' (2021) https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/Dispute/Downloads/Dispute-Resolution-Alert-4-May-2021.pdf.

[70] State Information Technology Agency SOC Limited (SITA) V. ELCB Information Services (Pty) Ltd and Another (995/16) 2017 ZASCA 120

[71] Section 33(1) of the Arbitration Act.

[72] M Mpahlwa 'Challenging an Arbitration Award: Is it there for the taking?' (2017) https://www.cliffedekkerhofmeyr.com/en/news/publications/2017/dispute/dispute-resolution-alert-25-october-Challenging-an-arbitration-award-is-it-there-for-the-taking.html

[73] E Moneke (n 6 above) 4

[74] N Tobi 'Delay in the Administration of Justice, in C Nweze: Essays in Honour of Hon. Justice Eugene Ubaezona (1997) 21

[75] OI ObiOkoye 'Eradicating Delay in the Administration of Justice in African Courts: A Comparative Analysis of South African and Nigerian Courts' unpublished LLM Dissertation, University of Pretoria, 2005 11

[76] U Azikiwe & F Onyia (n 19 above)

[77] O Aje-Famuyide & N Akano (2021) Challenges of Nigeria as a Preferable Seat of International Commercial Arbitration' 18 *Reality of Politics* 24

[78] O Shasore & OA Uka 'International Arbitration- Nigeria, Trends and Developments' (2022) https://practiceguides.chambers.com/practice-guides/international-arbitration-2022/nigeria/trends-and-developments/O11462

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case law in Nigeria is replete with examples of Nigerian courts giving effect to the parties' agreement by refusing to consider actions that may interfere with the outcome of the arbitration process.[79] Unfortunately, this is not always the case, as parties continue to file frivolous grounds to challenge unfavourable awards. On these frivolous grounds, Nigerian courts have repeatedly delayed the enforcement of arbitration awards.[80]

The enforcement process is also hampered by the Nigerian courts' slowness in resolving cases.[81] The losing party in arbitration frequently attempts to use the court as a tool to prevent the winning party from benefiting from the arbitration's outcome, usually with no effort made by the court to discourage such antics.[82] Every application to enforce an arbitral award in Nigeria is potentially appealable to the court of first instance, the court of appeal, and the Supreme Court. Due to this difficulty, the enforcement of arbitral awards has continued to drag on for years[83]

Without a doubt, the right to appeal a High Court decision is protected by the Constitution.[84] Nonetheless, the exercise of this right of appeal appears to mock the nature of arbitration as a final and binding means of resolving disputes. Arbitration, rather than being an alternative to litigation, becomes the first step toward litigation in the end.[85]

Even though there have been instances where the court interfered in the enforcement of awards by not considering arbitration awards to be valid,[86] there is virtually no risk of a South African Court intervening to frustrate the enforcement of arbitral awards in South Africa.[87] South African courts have recently expressed strong support for arbitration and the

[79] Metroline (Nig.) Ltd. V. Dikko (2021) 2 NWLR (Pt. 1761) 422, Baker Marine Nigeria Ltd V. Chevron Nigeria Ltd (2003) 13 NWLR (Pt. 997) 276

[80] Limak Yatirim Enerji Uretim Isletme Hizmetleri Ve Insaat A. S. & Ors V. Sahelian Energy & Integrated Services Ltd, ICC Case No. 21617/ZF/AYZ …. The Court of Appeal upheld the decision of the Federal High Court, Abuja, which set aside a final arbitral award published on 28 June 2018 by a Tribunal of the International Chamber of Commerce (ICC) International Court of Arbitration seated in Geneva, Switzerland.

[81] IPCO (Nig.) Ltd. V. Nigerian National Petroleum Corporation Ltd. (2014) ECWH 576, where Gross J. held "…… the mill of justice grinds slowly in Nigeria. In particular, Nigeria is not geared toward arbitration in a manner which meets the international standards it agreed to"

[82] UH Uba 'Challenges in the Recognition and Enforcement of Foreign Arbitral Awards in Nigeria' unpublished LLM thesis, University of Malaya 2017, 12-13

[83] A Adewale & V Okpara 'Beating the System: Enforcement of Arbitral Awards Against State-owned Entities' (2013) https://www.templars-law.com/413-2/.

[84] Section 241 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

[85] Sundersons Ltd & Anor V. Cruiser Shipping PTE Ltd & Anor (2015) 17 NWLR (Pt 1488) 357

[86] R. Baboolal-Frank 'Judicial Hostility Towards International Arbitration Disputes in South Africa: Case Reflections' (2019) 31(3) *South African Mercantile Law Journal 366* and Telecordia Technologies Inc. V. Telcom SA Ltd 2007 5 BCLR 503 (SCA).

[87] D Williams 'Arbitration Procedures and Practice in South Africa: Overview' (2020) 14 https://uk.practicallaw.thomsonreuters.com/4-502-0878 and Article 5, Schedule 1 of the IAA.

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enforcement of arbitration awards.[88] The Supreme Court of Appeal[89] and Constitutional Court[90] decisions recognize the principle of party autonomy[91] and confirm that court intervention in arbitration and the enforcement of arbitral awards should be limited.[92] South African courts regard the principle of party autonomy as a manifestation of the parties' freedom to enter into and carry out private arbitration agreements.[93]

Parties may, however, seek to delay arbitration proceedings and enforcement through frequent court applications; however, due to the court's supportive approach, attempts to delay proceedings through frequent court applications generally fail in South Africa.[94]

4.4. Conversion of Money Award to Local Currency

The award does not need to be converted into local currency in Nigeria. If payment was made in that currency, a court can enter judgment in that currency. A Nigerian court can make a foreign currency award. If the claim was made in a foreign currency and the judgment was also rendered in that currency, execution should also be carried out in that currency.[95] In rare cases and with special permission, an arbitral award debtor in Nigeria may be allowed to pay the foreign arbitral award debt in local currency. If so, it must be at the current exchange rate on the date of execution.[96]

To be enforceable in South Africa, a foreign arbitral award ordering money to be paid and expressed in a foreign currency must first be converted to rand, the local currency. The

[88] Khum MK Investments and Bie Joint Venture (Pty) Limited V. Escom Holdings SOC and Another (30169/2018) 2020 ZAGP JHC 7.
[89] Eskom holdings Ltd V. The Joint Venture of Edison Jehamo (Pty) Ltd and KEC and KEC International Limited and Others (177/2020) 2021 ZASCA 138
[90] Myathaza V. Johannesburg Metropolitan Bus Services SOC Limited t/a Metrobus and Others 2018 1 SA 38
[91] Y Gao 'A brief analysis of Party Autonomy in International Commercial Arbitration' (2021) International Conference on Social Science: Public Administration, Law and International Relations. Atlantis Press 123 ….
"The party autonomy principle permits parties to any international commercial agreement to determine which laws apply to their agreement.[2] The party autonomy theory was initially proposed by academics, but now enjoys wide acceptance in domestic law. This principle is recognized on a voluntary basis in many countries. It is forced neither by alliance nor by international bodies. Despite obvious differences in the nature and application of case law and statutes, each nation is impacted in a similar way by the notion of party autonomy since it permits parties to opt for relevant laws when encountering commercial relations."
[92] J Kron & S Forshaw ' An Arbitrator is Allowed to be Wrong: Setting Aside an Award under Section 33(1) (b) of the Arbitration Act 1965' (2020) https://www.financialinstitutionslegalsnapshot.com/2020/04/an-arbitrator-is-allowed-to-be-wrong-setting-aside-an-award-under-section-331b-of-the-arbitration-act-1965/.
[93] J Rajpal, B Da Costa & M Moti ' Review of an Arbitrators Award Based on 'Gross Irregularity' or Exceeding of Powers' (2002) https://www.fasken.com/en/knowledge/2022/02/25-review-of-an-arbitrator-award?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration
[94] Williams (n 87 above) 14
[95] M Mordi et al (n 13 above)
[96] As above

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award must be made a court order as if it were a payment award in rand, based on the exchange rate at the time of the award, not the date of the order of enforcement.[97]

4.5. Reciprocity

The enforcement of arbitral awards also includes the critical preliminary decision of whether an arbitral award should be classified as a foreign or domestic award. If it qualifies as a foreign award, its recognition and enforcement are subject to different conditions in different countries. The reciprocity of arbitral awards is one such condition.[98]

The reciprocity reservation states that a state may recognize and enforce awards made in another contracting state's territory. The primary goal of the New York Convention is to ensure that contracting states implement both foreign and non-domestic arbitral awards.[99] This provision has a significant impact on the New York Convention and, if states choose, narrows the scope of application.[100]

As a result, these countries will only recognize and enforce Convention awards. This reservation can be interpreted negatively, but there is currently a rapidly growing number of signatories, particularly in Africa, including South Africa and Nigeria.[101]

The UNCITRAL Model Law,[102] which provides universal enforceability of awards, supplements the New York Convention.[103] It requires member states to ensure that such awards are recognized and enforced like domestic awards.[104]

Since the ACA domesticated the New York Convention and the UNCITRAL Model Law foreign arbitral awards can be enforced in Nigeria under the ACA, the New York Convention, or the UNCITRAL Model Law.[105] The ACA ensures that an award is recognized

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[97] P Holloway & A October (n 39 above)
[98] I Szászy "Recognition and enforcement of foreign arbitral awards." (1965) 14(4) The American Journal of Comparative Law, 658.
[99] Article II (1) and (3) of the New York Convention
[100] PW Becker 'The Recognition and enforcement of International Commercial Arbitration Awards in a South African Context' unpublished PhD Dissertation, North-West University, 2005 9
[101] AA Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* Cambridge University Press (2001) 188
[102] Article III of the New York Convention
[103] Article 35 and 36 of the UNCITRAL Model Law
[104] A Baykitch & L Hui 'Celebrating 50 Years of New York Convention' (2008) 31 University of New South Wales Law Journal, 364-371
[105] 2nd Schedule of the ACA

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regardless of the jurisdiction in which it was granted.[106] The conditionality of reciprocity of arbitral award enforcement is not a requirement for the enforcement of an arbitral award.[107]

As a member state of the Commonwealth of Nations, foreign awards may also be enforced in Nigeria through the Foreign Judgements (Reciprocal Enforcement) Act,[108] which was created to ensure fluidity in the registration and enforcement of court judgments obtained in the United Kingdom, including arbitral awards, so long as the award is enforceable in the country in which the award was handed down. The implication is that awards from countries that do not guarantee substantial reciprocity in the enforcement of Nigerian awards will also be refused enforcement.[109]

South Africa, like Nigeria, has ratified the New York Convention and the UNCITRAL Model Law, and the principles contained therein are incorporated into their national laws. In South Africa, the IAA[110] provides for the recognition and enforcement of arbitration agreements and foreign arbitral awards.

These provisions give effect to South Africa's international law obligations as a New York Convention and UNCITRAL Model Law contracting state.[111] As a result, because South Africa is a signatory to the Convention, the courts will recognize and enforce valid foreign arbitral awards, regardless of the country in which they were made or whether that country recognizes and enforces South African arbitral awards.[112]

4.6. The ICSID Awards

The World Bank created the ICSID Convention to promote sustainable economic growth and eradicate poverty throughout the world. To that end, the bank established a convention for resolving investment disputes between states and nationals of other states.[113] The goal of establishing the ICSID system was to encourage much-needed international investment by offering or providing neutral dispute resolution from both investors, who are (rightly or

[106] Section 51 of the ACA
[107] Topher Inc of New York V. Edokpolor (Trading as John Edokpolor & Sons) (1965) 1 ANLR Pg. 307
[108] Cap F35, LFN 2004
[109] Section 12 of the FRJE Act renders unenforceable in Nigeria, any judgment or award from jurisdictions that do not recognize judgments of Nigerian courts or awards from arbitrations seated in Nigeria.
[110] Section 16 of the IAA
[111] M Wethmar-Lemmer 'The Recognition and Enforcement of Foreign Arbitral Awards under the International Arbitration Act 15 of 2017' (2019) 31(3) *South African Mercantile Law Journal* 382
[112] H Schulze 'The Recognition and Enforcement of Foreign Arbitral Awards in South Africa' (2000) 8(2*) Juta's Business Law,* 66
[113] OA Amiiche 'Enforcement of International Center for the Settlement of Investment Dispute (ICSID) Awards: The Plea of Sovereign Immunity' (2017) 3(1) *Port Harcourt Journal of Business Law* 2

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wrongly) concerned about nationalistic decisions made by local courts and host states who are (rightly or wrongly) concerned about self-interested actions by foreign investors.[114] According to the ICSID convention, ICSID awards are automatically recognized by all signatory states and are enforced by local laws, including laws governing sovereign immunity.[115]

Nigeria took steps to give effect to its ICSID obligations after signing the ICSID Convention by enacting the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act on November 29, 1967.[116] The ICSID Act is primarily and specifically intended to provide for the enforcement of an award rendered under the auspices of the ICSID in Nigeria. Nigeria fully complies and adheres to the Washington Convention's obligations.[117]

South Africa is not a party to the ICSID Convention and, as a result, does not recognize or enforce ICSID-awarded arbitral awards.[118] South Africa is a jurisdiction opposed to ICSID proceedings, since the matter of *Piero Foresti, Laura de Carli v Republic of South Africa ICSID*,[119] which challenged transformative constitutional and statutory provisions in South African law and resulted in the termination of its European Bilateral Investment Treaties and the promulgation of the Protection of Investment Act 22 of 2015.[120]

[114] L Reed, I Paulson, and N. Blackaby, "Recognition, Enforcement and Execution of ICSID Awards", in Guide to ICSID Arbitration, *Kluwer Law International*, 2004, 4-5
[115] Amiiche (n 113 above)
[116] Cap 19, LFN 2004
[117] IS Nwoye 'The Recognition and Enforcement Regime for ICSID Awards in the United States, China and Nigeria: An Analytical Comparison' (2015) 20 https://dx.doi.org/10.2139/ssrn.2595833.
[118] S Finizio, D Morris & K Drage 'Enforcing Arbitral Awards in Sub Saharan Africa-Part 2' (2015) 2
[119] ICSID Case No. ARB(AF)/07/01. In this case, a group of European mining investors submitted a request to the International Centre for Settlement of Investment Disputes (ICSID) for international arbitration against the South African government concerning the Italy-South Africa BIT and Belgium and Luxembourg South Africa BIT. The claimants' submissions *in Piero Foresti* included an allegation that they had been denied fair and equitable treatment when required to divest 26 per cent of their investments to historically disadvantaged South Africans following the enactment of the Mineral and Petroleum Resources Development Act, as part of South Africa's Black Economic Empowerment requirements on the issuing of mining rights. The claimants asserted that this threatened their economic interests in South Africa and breached each of the BITs' prohibitions on expropriation. The ICSID issued an arbitral award dismissing the claims against the South African government on a "with prejudice" basis and ordered the claimants to pay part of the South African government's legal fees and costs.
[120] K Slambert 'The State of ICSID Arbitration in Africa' (2022) https://www.polity.org.za/article/the-state-of-icsid-arbitration-in-africa-2022-09-23.

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CHAPTER 5.

Conclusion and Recommendations

5.1. Introduction

Despite a few instances of opposition to arbitration and the execution of arbitration rulings, Nigeria and South Africa both have expanding economies and pro-arbitration legal systems. This chapter will look at the enforcement of arbitral judgements in Nigeria and South Africa and provide recommendations to improve them.

5.2 Summary

The purpose of this paper was to review some of the challenges in the enforcement of arbitration awards in Nigeria and South Africa. The study first considered the background of arbitration generally and the applicability to both countries beginning from its origin to its present state, the applicable laws, legislations and institutions.

The study further considered more specifically the challenges in the enforcement of arbitral awards in Nigeria and thereafter South Africa. These include a general perspective of arbitral awards, the nature and constituents of arbitral awards, categories of arbitral awards, recognition and enforcement of arbitral awards, the legal framework for the enforcement of both domestic and international awards, the issues and challenges in the enforcement of these awards.

The study went on to look at a review of these challenges in the enforcement of arbitral awards, in a comparison of Nigeria and South Africa. The study finally made some recommendations that could be helpful to both countries.

5.3 Conclusion

Transnational agreements with arbitration clauses are now more popular among businessmen due to the relative benefits of arbitration over litigation in modern times. The certainty in the application of arbitration agreements and awards affects the effectiveness of international commercial arbitration. Consequently, investors and businesspeople are more eager to invest

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in nations with unwavering legal systems that will ensure the execution of agreements, judgments, and awards.

However, the early simplicity of the arbitral process has been lost in modern times. It has become more institutionalized, complex, and legalistic. It is now widely believed that arbitration increasingly resembles litigation, in part because arbitral institutions have developed procedural rules over time that resemble those of the courts. Today, form is valued more highly than content.[1]

An award's enforcement against a stubborn opponent can be difficult for a successful party. However, opposition to the execution and enforcement of a favourable award is not specific to arbitration as successful litigants also face issues with the actual execution and enforcement of judgments. The court trial, judgment delivery, issuance of an enforcement decree, and levying of execution all take place in one continuous process for the successful litigant, under the comprehensive line of state authority. For the successful arbitral party, what appears to be the conclusion of one often stretched process, with the arbitral tribunal producing a favourable award, is the beginning of another in a different courtroom. This raises the prospect of additional expenses and the danger of losing the advantages of the favourable award if a challenge is successful.

Although the enforcement of arbitral awards is increasingly like litigation, its importance in domestic and international business transactions cannot be overstated.[2] The choice of arbitration as a preferred, competent, and thorough mode of dispute resolution is affected by enforcement and execution procedures' effectiveness or lack thereof.[3] The nationalization of international arbitration procedures carries risks as well, including the potential for misunderstandings and incorrect application of international processes in domestic contexts. The interests of parties looking for novel or creative dispute resolution methods are likely to suffer rather than advance due to these issues.

Furthermore, it has been demonstrated over time that parties will, in practice, voluntarily abide by arbitration awards if valid arbitration clauses are drafted with care in

[1] P Mgbeomena 'Critical Analysis: Arbitral Proceedings Viz-a-viz the Enforcement of Arbitral Awards in Nigerian Courts (2019) https://www.aaachambers.com/articles/critical-analysis-arbitral-proceedings-viz-a-viz-the-enforcement-of-arbitral-awards-in-nigerian-courts/. (Accessed 3 October 2022)
[2] As above
[3] ENA Torgbor 'A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe with Particular Reference to Current Problems in Kenya' Unpublished PhD thesis, Stellenbosch University, 2013

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arbitration agreements, making enforcement relatively straightforward. Complications only occur when disobedient losers refuse to accept their awards. From the start of the arbitration process, until an arbitral award is enforced, the rights, powers, and obligations of the arbitral tribunal are derived primarily from a valid arbitration agreement.[4]

The seat of arbitration is important in international commercial arbitration because the efficacy and efficiency of the arbitration proceedings, as well as the outcome, are heavily reliant on the pro-arbitration approach of both national arbitration laws and courts. The choice of a specific location is fundamental and critical, as an arbitral seat can have profound legal and practical consequences for the parties to international arbitration and can materially alter the course and outcome of the arbitral process.

A country's laws must demonstrate its willingness to encourage the use of arbitration through its domestic laws in order to attract citizens and foreigners to use arbitration as a means of resolving disputes. The certainty with which an arbitral award is implemented influences the efficacy of arbitration. Investors are more willing to invest in states with consistent legal systems that ensure award implementation success.

It has been shown from the totality of this study, that certain challenges may affect the speedy and efficient enforcement of arbitral awards in Nigeria and South Africa

Prior to the enactment of the Arbitration and Conciliation Act of Nigeria in 1998, the Arbitration Act 42 of 1965, and, later, the International Arbitration Act 15 of 2017 of South Africa, investors were concerned about the enforcement of both domestic and foreign arbitral awards. This was due to the fact that the applicable laws at the time did not address and had insufficient provisions to address the daily concerns of investors, despite the fact that both countries are signatories to the New York Convention[5] as well as the UNCITRAL Model Law.[6]

According to the findings of this study, judicial intervention, the statutory time limit, the concept of arbitrability, public policy exceptions, grounds for setting aside awards, judicial review of the award, third-party intervention, and delay are some of the challenges that affect the efficient and effective enforcement of arbitration awards. Even though not all of these

[4] Jane L Volz & Robert S Haydock 'Foreign Arbitral Award: Enforcing the Award against the Recalcitrant Loser' (1995) 21 William Mitchell Law Review, 867 911
[5] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
[6] The United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration, 1985

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challenges apply in both countries, it has been demonstrated that both countries share very similar circumstances in regard to some of these challenges.

Nigeria and South Africa appear to have satisfied the criteria of both countries being viable seats of arbitration. However, the general attitude of the courts in both countries has varied over time ranging from opposition to support for arbitration. The courts must be knowledgeable about arbitration and demonstrate their expertise for judicial support of arbitration to be effective. Judges in both countries must receive training in arbitration law and procedure.

The approach of Nigerian and South African courts, for example, to the issue of arbitrability is restrictive, so there is no liberal interpretation. This has limited the scope of arbitrability on certain disputes and has become a flaw in both laws, as parties can easily recognize arbitrators' jurisdiction on this subject.

This study also revealed that neither the Arbitration and Conciliation Act, the Arbitration Act, the International Arbitration Act, the New York Convention, nor the UNCITRAL Model Law provide useful solutions to the definition of the concept of public policy, as both countries have a broad, unrestricted definition of the concept. There is no recognized standard establishing how and in what ways public policy exceptions should function as a ground for resisting enforcement. As a result, jurisprudence in this area is still developing, and it is hoped that with time, Nigerian and South African laws will be able to develop comprehensive public policy rules in this regard.

The fluidity of the provisions of the laws of both countries regarding this has opened its determination to either other non-arbitration laws or to case law by the courts. The issue of leaving the courts to define arbitrability and public policy and regulate their application has generated unending suggestions on both topics.

Judicial interference is another legal challenge in both countries, despite the fact that judicial review has remained an important part of the arbitration process and award enforcement. Judicial cases in Nigeria and South Africa have demonstrated that the two important factors of the finality of the award for the successful party and fairness for the losing party who seeks that an award is set aside or refused recognition and enforcement are irreconcilable.

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Aside from procedural irregularities, setting aside, and refusal to enforce an arbitral award, both countries' courts have created other reasons to extend the review power to sometimes cover the merits of arbitral awards. These current award review systems put arbitration parties in a vulnerable position because there is no guarantee that they will receive what they bargained for and agreed to in the arbitration agreement.

One very important factor that has led to most of these challenges is the inherent vagueness of some inelegantly drafted provisions of the various arbitration laws in Nigeria and South Africa. These lacunas have further created a wide gap between these laws and the realities of the enforcement of arbitration awards.

These challenges have been shown to create tension between parties and have on so many occasions created an avenue for a lack of trust and reliance on the arbitration system. Despite all of the challenges discussed in this study, arbitration has continued to gain prominence in Nigeria and South Africa, where there has been a significant push to reform existing laws.

5.4 Recommendations

In consideration of these challenges, the study makes the following recommendation.

Nigeria

5.4.1. The Need to Amend the Arbitration and Conciliation Act

Despite being based on the UNCITRAL Model Law, the Arbitration and Conciliation Act[7](ACA) has issues that need to be addressed because they pose difficult problems and have shown to be insufficient for the effective enforcement of arbitral awards in the modern era.[8] Since the Act's passage more than 30 years ago, new problems have surfaced that, ideally, call for the ACA's amendment. The ACA's provisions and those of the UNCITRAL Model Law differ significantly due to some poorly written provisions.

Despite its growing trend, it is clear that Nigeria still has a lot to do when it comes to the enforcement of arbitral awards. To ensure a smooth process, laws that facilitate direct enforcement of arbitration awards must be put in place.

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[7] The Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004
[8] O Aje-Famuyide & N Akano 'Challenges of Nigeria as a Preferable Seat of International Arbitration' (2021) 18 Reality of Politics, 10

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There are ACA provisions that generally need to be changed or added to, but this chapter will review those provisions that have an impact on the enforcement and recognition of arbitral awards and offer recommendations. An effort had been made in the areas of the Act that needed amendment before the ACA was changed in 1990. Nevertheless, the legislators only changed the year 1990 to 2004, as if the law's year of passage and not its provisions were the issue.[9]

The Nigerian National Assembly is currently considering a bill to update the current ACA[10] to reflect the most recent UNCITRAL Model Law.[11] The variety of provisions included in the Bill is likely to make Nigeria more alluring as a significant arbitration hub in Africa and internationally. The majority of these new clauses take into account significant advancements in international arbitration and best practices from around the world that have been incorporated into the UNCITRAL Model Law and numerous other top arbitral institutions.[12]

5.4.2. Grounds for Setting aside and Refusal of the Recognition and Enforcement of Arbitral Awards.

The ACA does not specify what constitutes any of these grounds, but Section 30 of the ACA allows a party to request that an award be set aside if the arbitrator engaged in misconduct or if the arbitral proceedings or award were improperly obtained. It is necessary to amend the ACA to provide a clear definition of these terms to prevent conflicting court interpretations when such an application is made and to allow for nearly comprehensive merit reviews of arbitral awards.

Given that they affect the decision to choose Nigeria as the venue of arbitration, the issues of arbitrability[13] and public policy[14] also need to be given a great deal of consideration. These conditions have served as the basis on which a court can either refuse to enforce an arbitral award or set it aside. Due to the gap created in the ACA, the courts and arbitral tribunals in Nigeria have under various circumstances applied different definitions of these terms.

To give parties better opportunities to proceed with the arbitration without worrying about whether the nature of the disputes falls within the categories capable of the arbitrator's

[9] GC Nwakoby 'Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004, Call for Amendment (2010) 1 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 6
[10] The Arbitration and Concilliation Act (Repeal and Re-Enactment) Bill 2022
[11] UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006.
[12] R Wheal, O Longe & Oliver Dean 'Recent Arbitration Reforms in Nigeria' (2022) https://www.whitecase.com/insight-alert/recent-arbitration-reforms-nigeria. (Accessed 3 October 2022)
[13] Section 48(b)(i) of the ACA
[14] Section 48(b)(ii) of the ACA, Section 52(b)(ii) of the ACA

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jurisdiction, a liberal interpretation of these terms should be provided for in the ACA. This will ensure consistency and provide certainty that will serve as a roadmap for the parties and the courts.

5.4.3. Reconciliation of Sections 51 and 54 of the ACA.

The provisions of Sections 51 and 54 of the ACA conflicts with one another. The enforcement clauses in the ACA were noted to be Sections 51 and 54. Section 32 of the Act governs enforcement under Section 51. Nigeria may enforce the New York Convention through Section 54, which is incorporated into the ACA's Second Schedule. The Nigerian government's adoption of contractual reservations and the principle of reciprocity is thus subject to this.[15]

The reservations in section 51 restrict the legal applicability of the provision of section 54 of the ACA, which makes it difficult for parties intending to enforce foreign arbitral awards in Nigeria. As a result, these sections need to be reconciled. There is therefore a need to clarify this contradiction in the ACA.

5.4.4. Provision for the guidelines for recognition and enforcement of Arbitral

A strong recommendation is that arbitration should not end with the creation of an award that only presents the winning party with the award's fruit and then forces them to engage in a new, frequently terrifying process to carry out the decision. To facilitate the prompt delivery of the verdict to the deserving party in line with the vision of arbitration as a capable, complete, and independent system, arbitration law should cover the entire field, from the beginning of proceedings to the execution of the award.

It is advised that the ACA could and should offer procedural guidelines in place of court rules to hasten and facilitate the last stage of the arbitration process because the recognition and enforcement of arbitral awards are matters of urgency and importance to a successful party. This should be especially true in cases where the losing party doesn't contest the award. This is due to the possibility of unforeseen problems making the process for making an arbitral award into a court order before it is enforced overwhelming. Even the simplest application may take several months to be addressed by the court registry, not to mention the variety of justifications an opponent may use to further delay the decision.

[15] K. Magaji 'Legal Challenges in the Enforcement of Foreign Arbitral Awards in Nigeria' (2021) Unpublished PhD Thesis 192

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The enforcement procedures are more of a concern to the parties in arbitration because arbitration procedures extend beyond just the dispute's final resolution. Concerns also include how quickly the awarded money will be recovered. A uniform execution procedure will be streamlined as much as is practical for ease of enforcement, the benefit of the parties, and the benefit of the contracting states with the inclusion of the guidelines for the recognition and enforcement of arbitral awards in the ACA.

5.4.5. Flexibility on Time Limitation

The ACA does not specify a time frame for when an award may be enforced; instead, national and state limitation laws have largely been used.[16] Instead of relying on external non-arbitration laws, there is a need for the inclusion of a specific provision in the ACA for the time frame during which a successful party can enforce an arbitral award.

In addition, an action to enforce an arbitration award in Nigeria is subject to a six-year statute of limitations, starting from the date the cause of action arose. As was already mentioned, the position implies that, concerning arbitration cases handled following the ACA, the statute of limitations continues to run throughout the arbitration process.[17] The right of a successful party to enforce an award may be lost in lengthy arbitration proceedings.

Given what is obtainable in some other jurisdictions and Lagos State, the Nigerian legal system regarding the limitation of time should be more lenient.[18] Therefore, it will be more convenient if the statute of limitations for enforcing an arbitral award starts when the arbitrator(s) issues the award (which is a separate action from the initial cause of action), rather than when the original cause of action that prompted the arbitration concludes with the award as is the case at the moment.

5.4.6. Limited Judicial interference and Intervention

A limited judicial review of arbitration decisions is required. Where party autonomy and arbitral independence are guaranteed, the arbitration framework is better preserved. The enforcement of arbitral awards still heavily relies on judicial intervention and review, but the ACA must expressly state when and how much interference is appropriate.

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[16] The Limitation Act, Cap 522, Laws of the Federation of Nigeria, 2004, The Limitation Law, Cap L84 of Lagos State.
[17] City Engineering Nigeria Limited V Federal Housing Authority (1997) 9 NWLR (Part 520) 224
[18] The Arbitration Laws of Lagos State 2009 provides that for the purpose of computing the time within which an enforcement application must be brought begins to run from the date of the award and not before.

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5.4.7. Specialized Courts and Tribunals.

The arbitration process in general, as well as the enforcement of arbitration awards, will be made simpler and faster by the presence of specialized courts and tribunals with arbitration experts.

5.4.8. Sanctions Against Frivolous Challenges and Non-compliance of Arbitral award

More awareness and focus should be given to the requirement for enforceable sanctions against wilful violations of arbitral awards. However, the arbitral process has a known limitation due to the inadequate or absence of coercive sanctions. It is argued that more can be done by the courts, arbitral tribunals, arbitral practitioners, and those who write arbitration statutes to specify and ensure the application of effective arbitral sanctions.

Parties may reconsider or completely cease making unjustified challenges after an award has been made once they become aware of the existence, reality, and severity of arbitral sanctions and punitive costs. With the painful process and delay an otherwise successful party is subjected to at the stage of enforcement and execution of the award, this may very well reduce unjustified challenges to the award and the need to resort to the court for enforcement. Public and general understanding of how arbitration functions can encourage its use.

5.5. South Africa

5.5.1. Amendment of the Arbitration Act

To replace the Colonial Arbitration laws,[19] the current Arbitration Act[20] was passed more than 50 years ago. The arbitration act was created exclusively with domestic arbitration in mind, as was previously mentioned. The current arbitration Act was regarded as sufficiently sophisticated at the time of its enactment, but it is now outdated.[21] The domestic arbitration act needs to be updated to take the place of the current arbitration act.

The grounds cited for the setting aside of a domestic arbitral award are not made explicit in Section 33 of the Arbitration Act. Although there aren't many grounds, they can be interpreted in a variety of ways and cover a wide range of topics. Acts that could be interpreted as misconduct, gross irregularity, and obtaining something improperly should be explicitly stated in the section.

[19] The Arbitrations Act 29 of 1898 (Cape); the Arbitration Act 24 of 1898 (Natal) and the Arbitration Ordinance 24 of 1904 (Transvaal).
[20] The Arbitration Act 42 of 1965
[21] DW Butler & E Finsen 'Arbitration in South Africa: Law and Practice (1993) Juta 6

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5.5.2. The International Arbitration Act

It is also necessary to take into account amending the International Arbitration Act,[22] which governs the enforcement of foreign arbitral awards and applies to all international commercial arbitrations. The reasons for refusing to recognize and enforce foreign arbitral awards, particularly the IAA's provisions regarding arbitrability[23] and public policy[24] should be specifically provided for in the Act.

5.5.3. Limited Court Interference

The Act currently is characterised by giving parties an excessive number of opportunities to involve the court in the arbitration process. However, it can be challenging to determine when judicial intervention begins to resemble interference. Although it has been demonstrated that the judiciary respects arbitration awards without interfering in many instances, the legal framework further conditions the discretion of the judiciary and protects the right of access to the court at the enforcement of award stages.

As important as it is for judges to get involved in arbitration cases, a line needs to be drawn to protect and maintain the fairness of the arbitration process and the ability to enforce arbitration awards. Limiting the court's interference is necessary when it comes to the enforcement of arbitral awards.

[22] The International Arbitration Act 15 of 2017
[23] Section 18(1)(a)(i) of the IAA
[24] Section 18(1)(a)(ii) of the IAA

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