

**ENFORCEMENT OF FOREIGN INVESTMENT ARBITRAL AWARDS
IN NIGERIA: A CASE STUDY OF THE OIL AND GAS SECTOR**

By

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DECLARATION

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Signed

Olatinuolawa Fagboyegun

DEDICATION

This work is dedicated to the only all-powerful, all-knowing and all-seeing God; the indescribable One and the unquestionable God.

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ABSTRACT

The presence of foreign investment in a developing nation brings about economic growth and development. It increases productivity, creates more jobs, promotes the use of local goods, motivates policies and economic reforms, transfers technological know-how and skills, increases revenue for the government, among others. Nigeria has attracted quite a huge stock of foreign direct investment over the years, majorly in the oil and gas sector. Nigeria's economy is greatly dependent on the revenues generated in the oil and gas sector and the economy thrives on this sector. Disputes arise between foreign investors and government entities – the Federal Inland Revenue Services, Nigerian National Petroleum Corporation, and also with other foreign investors in the sector. These disputes are settled mostly out of court because core legislations in this sector provide that arbitration shall be the settlement mechanism. Hence, disputes are expected to be settled in quick successions, free of unnecessary domestic court intervention, and hurdle-free in the enforcement of arbitral awards. However, the reverse is the case in practice.

The core aim of this research is to identify these challenges by reviewing recent arbitration cases in the oil and gas sector and to examine the legislative and procedural loop holes giving rise to such challenges. To arrive at effective recommendations, the arbitration system of Mauritius was analysed and compared to what is obtainable in Nigeria. From the comparison, this study proffers recommendations that would practically enhance the enforcement proceedings of foreign investment arbitral awards in Nigeria's oil and gas sector and subsequently in other sectors.

LIST OF ACRONYMS

ACA	Arbitration and Conciliation Act of Nigeria
ACIL	Associated Commodity International Limited
ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
CA	Court of Appeal
CPR	Civil Procedure Rules
CREFAA	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
CTC	Certified True Copy
DPR	Department of Petroleum Resources
ECOWAS	Economic Community of West African States
FDI	Foreign Direct Investment
FHC	Federal High Court
FIRS	Federal Inland Revenue Services
IAA	International Arbitration Act
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
LNG	Liquefied Natural Gas
MDC	Multi-Door Courthouse
MFN	Most Favoured Nation
MIAC	Mauritian International Arbitration Centre
NAEL	Nigerian Agip Exploration Limited
NDP	National Development Plan
NGC	Nigerian Gas Company
NGL	Natural Gas Limited
NIPC	Nigerian Investment Promotion Commission
NLNG	Nigerian Liquefied Natural Gas
NNPC	Nigerian National Petroleum Corporation
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of Petroleum Exporting Countries
PCA	Permanent Court of Arbitration

RCICA	Regional Centre for International Commercial Arbitration
SC	Supreme Court of Nigeria
SPDC	Shell Petroleum Development Company of Nigeria
SSA	Sub-Saharan Africa
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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Arbitration Claims and Appeal (Procedure) Rules, 2006

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 2001

Foreign Judgment (Reciprocal Enforcement) Act, Cap F35 Laws of the Federation of Nigeria, 2004

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International centre for Settlement of Investment Dispute (Enforcement of Awards) Act, Cap I20, Laws of the Federation of Nigeria, 2004

Investment Disputes Enforcement of Awards Act, 1969

Nigeria Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurance) (NLNG) Act Decree No.39, 1990

Oil Pipeline Act Chapter N87, 1990 No. 39

Petroleum Act 1969 Chapter P10 Chapter 350 LFN, 1990

Public Enterprises (Privatisation and Commercialisation) Act 1999 No. 28 Cap P. 38 LFN 2014

Supreme Court (International Arbitration Claims) Rules, 2013

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

The Nigerian Investment Promotion Commission (NIPC) Act Cap N117, Laws of the Federation of Nigeria, 2004

The United Nations Commission on International Trade Law (UNCITRAL) Model Law, 1985

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

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CHAPTER ONE

INTRODUCTION

1.1 Background of the study

Foreign investment remains a growing global need for development and economic growth. Developed economies export capital, technologies, and resources into developing countries for the purpose of investing and getting returns on investments. Developing countries which are capital importing countries expect economic growth, increased job creations for citizens and transfer of technological know-how. Nigeria with an estimated human population of 178.5 million,¹ and abundant natural resources, continues to experience inundation of foreign investment. The oil and gas sector has over the years been the largest beneficiary of foreign investment in the country.²

Generally, with foreign investments come a number of issues and hurdles that if left unresolved, will prevent or reduce the full actualization of the investment for both foreign investors and the Host State. In order to guarantee foreign investors protection and to ensure that both contracting parties fulfil their obligations, ‘umbrella clauses’³ are inserted in international investment agreements. Umbrella clauses cover several subjects, such as, the rights and obligations of the Host state to assure investors of a fair and equitable treatment and national treatment equal to that accorded citizens, and the vital issue of settlement of disputes arising from an investment agreement between the Host State and the foreign investor, or between the foreign investor and the citizens of the State.

For a range of reasons, submitting disputes involving foreign investors and the Host State to the local courts is not usually an acceptable option to the foreign investors. A few of these reasons are: cultural differences, conflict of laws, different legal systems, lack of trust in the judicial system, delay in administration of justice, fears of unfairness in a corrupt society, excessive long trials in some jurisdictions, and capacity of judges. This has led foreign investors to find safe havens in foreign investment arbitration mechanisms for resolving

¹ Nigeria population 2016 <http://worldpopulationreview.com/countries/nigeria-population/> (accessed 13 May 2016)

² D Kukoyi ‘DETAIL: Nigeria’s oil and gas sector attracts FDI’ 11 February 2015 <http://www.worldfinance.com/strategy/detail-nigerias-oil-and-gas-sector-attracts-fdi> (accessed 13 May 2016)

³ ‘Umbrella clauses have become a regular feature of international investment agreements and have been included to provide additional protection to investors by covering the contractual obligations in investment agreements between host countries and foreign investors.’ – OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* 2008 <https://www.oecd.org/investment/internationalinvestmentagreements/40471535.pdf> (accessed 04 June 2016)

disputes. Arbitration in foreign investment has grown to be important to foreign investors because it is flexible, confidential, effective, final, has a neutral stance of forum, and most significantly, the award is enforceable all through most of the world.⁴

In reference to Nigeria, the perception and experience of foreign investors of the judiciary has been that of partiality, inconsistent judgments, corruption, slowness and unfairness.⁵ The 2009 Investment Policy Review of Nigeria by the United Nations Conference on Trade and Development (UNCTAD) reports this aspect as one of the fundamental issues for domestic and foreign investors in Nigeria.⁶ This emphasizes a dire need for foreign investors in Nigeria to resort to arbitration as a mechanism for settling investment disputes.

1.2 Research problem

An arbitration process in Nigeria becomes encumbered at the stage of enforcing the arbitral award, which is the most important aspect of arbitration. Foreign investors are faced with challenges that frustrate the enforcement of the awards obtained, which in the long run compromise and jeopardise their right to fair and equitable justice.

Due to the increased foreign investments in the oil and gas industry, disputes have been inevitable and parties resort often times to arbitration. Enforcing these awards in Nigeria take a long period of time before a final decision is given by the court. Former Supreme Court Judge, Justice Eso, as an expert witness in *IPCO v. NNPC* stated that:⁷

The mill of justice can grind very slowly in Nigeria. In particular, Nigeria is not yet geared towards arbitration in a manner which meets with the international standards it agreed to when adopting the New York Convention.

The above statement by a former Justice of the Supreme Court of Nigeria is evident in the enforcement proceedings of foreign investment arbitral awards. For instance, in *Mutual Life & General Insurance Ltd v Kogi Iheme*⁸ where the aggrieved party appealed on “grounds of

⁴ Clayton Utz ‘Guide to protecting foreign investments’ (2014) 29

⁵ *Investment Policy Review: Nigeria*, United Nations Conference on Trade and Development, (2009) 50, http://unctad.org/en/docs/diaepcb20081_en.pdf (accessed 03 February 2016)

⁶ (n 5 above) 50-51

⁷ *IPCO (Nigeria) Ltd. v Nigerian National Petroleum Corporation* [2008] APP.L.R. 04/17

⁸ (2013) 2 CLRN 68

misconduct and an allegation of error on the face of the award”,⁹ enforcement of the arbitral award in this case took 13 years to get to the Court of Appeal from the High Court.¹⁰

Moreover, a large number of the foreign investment arbitral awards challenged in the courts are from the oil and gas sector. Parties are faced with several challenges that prolong enforcement and compliance with an arbitral award. For example, the recently decided case of *Statoil (Nigeria) Limited & Anor v. Federal Inland Revenue Service & Anor*,¹¹ a court ruled that ‘a third party had locus standi to challenge an arbitration agreement to which it was not a party’¹². This only frustrates an ongoing arbitration proceeding and an award gotten from it may also be subjected to delays in enforcement.

Unnecessary objections made by a party not favoured by the result of the award and the granting of anti-arbitration injunctions to non-parties to an arbitration agreement, portray the legal system of Nigeria as unpredictable, and this has become the perception of potential foreign investors. Consequently, foreign investors become entwined in the domestic court system they intended to avoid when resorting to an independent dispute resolution mechanism of arbitration.

The challenges in enforcing foreign investment arbitral awards in Nigeria are the focal point of this study. Thus, this study will analyze the arbitration of foreign investment disputes in Nigeria with focus on the challenges faced by foreign investors in the country and with particular reference to the energy industry. In addition, it seeks to proffer solutions that would help mitigate the risks and also improve the arbitration system in the country.

1.3 Research questions

The broad question this research aims to answer is: how can the challenges encountered by foreign investors in enforcing foreign investment arbitral awards in Nigeria’s oil and gas sector be solved?

⁹ Olasupo Shasore (Ajumogobia & Okeke) ‘Nigeria: injunctions and protective orders’ 21 May 2013, <http://www.africanlawbusiness.com/news/nigeria:-injunctions-and-protective-orders> (accessed on 07 November 2015)

¹⁰ Dorothy Udeme Ufot SAN ‘Arbitration Practice Area Review’, August 2015, <http://whoswholegal.com/news/analysis/article/32446/arbitration-practice-area-review> (accessed on 10 October 2015)

¹¹ *Statoil (Nigeria) Limited & Anor v. Federal Inland Revenue Service & Anor* (2014) LPELR-23144 (CA) decided by the Court of Appeal on 13 June, 2014

¹² Jeremy Wilson and Oliver Grazebrook, ‘Nigerian Court of Appeal Allows Third Party to Challenge Arbitration Award’ 12 February 2015 <http://www.covafrika.com/2015/02/nigerian-court-of-appeal-allows-third-party-to-challenge-arbitration-award/> (accessed on 06 November 2015)

However, subordinate questions to be answered in the course of this research are:

- i. What is the nature of foreign investment?
- ii. What are the available mechanisms for settlement of investment disputes?
- iii. What are the challenges faced by investors in the enforcement of foreign investment arbitral awards in Nigeria's oil and gas sector?
- iv. What lessons can be drawn from the system of enforcing arbitral awards in Mauritius?

1.4 Thesis statement

This study investigates the challenges faced by foreign investors in enforcing foreign investment-related arbitral awards in Nigeria's oil and gas industry and then argues that the foreign investment arbitration system in the country is plagued with various challenges which emphasize that the system is uncertain, unpredictable, exceptionally and unbearably slow, and partial when it involves a state entity. Thus, there is an urgent need to review all extant legislations and practices related to foreign investment arbitration in Nigeria and bring them to a level in tandem with global best practices so as to make the investment climate more conducive.

1.5 Justification

There are a number of issues that arise while considering investing in Nigeria or that face existing investors in the country. These concerns include but are not limited to: corruption, insecurity, inconsistent economic policies, inadequate infrastructures, ineffective judiciary and alternative dispute resolution (ADR) mechanisms, and administrative blockages.

Nigeria has over the decades attracted foreign investors from all walks of life and this has helped grow the country economically, financially, and in other ways. To continue to attract more investors and to keep the existing investors in the country, the concerns and challenges of the investors cannot be ignored. The oil and gas sector is the life of the economy and this sector has attracted several investors for many decades. And for this reason, with each change of government comes a propaganda to address problems hinging on attracting more investments into the oil and gas sector.

This research is timely and essential at a time like this in Nigeria – giving the recent fall of petroleum oil price on which the country derives its largest revenue for sustenance and growth, the present administration is striving towards introducing more policies in relevant

agencies and sectors that if well implemented will make the country more investment and investor-friendly.¹³ Despite the need to diversify, the country still relies heavily on the oil and gas sector and needs the revenue generated in the sector to develop other sectors.

This research seeks to provide and recommend strategies that will promulgate a proficient, predictable, expedient and reliable framework for actualizing a hurdle-free arbitration system that will address the concerns of investors that are in existence, most especially in the oil and gas sector.

1.6 Literature review

This study borders on widely prominent subjects which are foreign direct investment (FDI) and arbitration as a mechanism of settling disputes emanating from investment.

There are two slightly dissimilar concepts of arbitration; the Common law concept and the Civil law concept of arbitration. Pieter Sanders¹⁴ expounds the Common law concept which developed from the English Arbitration Acts of 1950 (a consolidation of the Arbitration Acts between 1889 and 1934) to 1979 which is now the English Arbitration Act of 1996. The Civil law concept on the other hand, is influenced by the French arbitration legislation. He further explicates that the major disparity between both concepts is the extent of control the court can exercise over arbitration matters. Under the Common law, the court may decide to refuse the enforcement of an award on the ground of ‘serious irregularity’ and may grant leave of court to appeal on a ‘point of English Law’ if there are findings of fact that the award is ‘obviously wrong’. The Civil law on the other hand, exclusively restricts the court’s control to setting aside an award on the ground that the award is ‘contrary to public policy’.

It is worthy to note that the Nigerian Arbitration law stems from the Common law concept. Nigeria adapted the English Arbitration Act 1889 which brought about the enactment of the Arbitration Ordinance 1914.¹⁵ Although the Arbitration law of Nigeria has been modified over the years, the grounds on which an award may be set aside are not only limited to violation of public policy. This has opened ports to persons who may decide to take

¹³ ‘Buhari to introduce fresh policies to enhance business’ <https://nationaldailyng.com/2015/buhari-pledges-to-ease-business-processes/> (accessed 06 February 2016)

¹⁴ P Sanders *Quo vadis arbitration – Sixty years of arbitration practice* (1999) 27-38

¹⁵ Chief Mrs Tinuade Oyekunle ‘Nigeria must endeavour to rely more on its own arbitrators’ October 06 2015 <http://www.thisdaylive.com/articles/nigeria-must-endeavour-to-rely-more-on-its-own-arbitrators/221979/> (accessed 08 February 2016)

advantage of the other grounds, and by so doing, abuse the court. This is a major issue which shall be addressed during the course of this study.

M Sornarajah¹⁶ takes a historic approach and unravelled the development of investment treaties and investment arbitration. He recounts that before the advent of investment treaties in 1959, investment terms were negotiated in contracts, which also served as the instrument ensuring protection of foreign investments and investors in the Host State. This is the contract-based investment which introduced the arbitration system as a dispute settlement mechanism. From this emanated foreign investment arbitration law which is inculcated in the investment treaties today. He points out that although investment treaties have over time overtaken the use of contracts in a great deal, contracts are, nevertheless, as important as they were before investment treaties and the importance may advance in the future. Basically, from the foregoing, there are treaty-based arbitration and contract-based arbitration. This study in the facet of arbitration is premised largely on ad hoc arbitration which originated from investment contracts.

Olufemi Soyaju¹⁷ analyses the legal framework governing arbitration in Nigeria; its preference over domestic courts, the concept of international and domestic commercial arbitration in Nigeria, enforcement and setting aside proceedings of foreign and domestic awards in Nigeria, and also addresses the advantages and disadvantages of arbitration in the legal system. One of the several disadvantages that are crucial to this study is the refusal of a losing party to comply with an arbitral award and thereby making an application to the court for the nullification of the award.

In light of this, various authors have written on the problems and challenges in the arbitration system in Nigeria. Tolulope Aderemi¹⁸ points out diverse challenges besetting the efficacy of arbitration in Nigeria. He states that the pivotal objective of arbitration is speed and efficiency and this has been continuously abused in courts as parties delay enforcement of awards by making frivolous applications to the court to discredit an arbitration agreement, procedure and or award. In the same vein, Adedoyin Rhodes-Vivour¹⁹ emphasizes that lawyers file all sorts of applications in court to avoid complying with an award, and parties to

¹⁶ M Sornarajah *The international law on foreign investment* (2010) 276-278

¹⁷ O Soyaju *The rudiments of the Nigerian Law* (2005) 540-579

¹⁸ T Aderemi 'Nigeria: Arbitration In Emerging Markets: Current Challenges' 13 April 2013 <http://www.mondaq.com/Nigeria/x/233848/Arbitration+Dispute+Resolution/Arbitration+In+Emerging+Markets+Current+Challenges> (accessed on 24 November 2015)

¹⁹ A Rhodes-Vivour 'Arbitration and alternative dispute resolution as instruments for economic reform' March 2006, <http://www.drjlawplace.com/media/ADR-DRV-UPDATED-2006.pdf> (accessed on 24 November 2015)

an arbitration agreement end up entwined in the very court system they intended to circumvent.

Jeremy Wilson and Oliver Grazebrook²⁰ examine notable cases in the oil and gas sector and criticise the Nigerian courts for granting an injunction against an arbitration proceeding brought by a third party to an arbitration agreement. They also expressly noted that the legal system in Nigeria is unpredictable and inconsistent in their rulings.

Sophie Pouget in a detailed quantitative study analysis²¹ supports the crux of this study by showing that without doubt, efficiency in an arbitration regime is crucial to foreign investors and it assures them of protection and boosts their confidence. Of a fact, investors are first attracted to an economy that has the best business opportunities but they are also concerned about the legal environment of the economy and how reliable the court system is in enforcing arbitral awards speedily. Sophie's study also emphasizes on stability, predictability and speed in any legal system of any economy aiming at attracting FDI.

Dorothy Udemé Ufot, a Senior Advocate of Nigeria,²² categorically spells it out that there is 'a close relationship between arbitration and investment, whether foreign or domestic'. She cites court cases to buttress that foreign investments in Nigeria have been victims of the slowness and ineffectiveness of the Nigerian courts in enforcing arbitral awards and in other arbitration related matters. She therefore stresses that the rate at which the country attracts FDI will unquestionably bring about increased disputes and the need to use arbitration as a means of settling such disputes. She further states that considering the envisaged influx of FDI in comparison with the practice of arbitration in the country, there are many hurdles to scale.

The United State Department of State recently published the '2015 investment climate statement on Nigeria'²³ and gives an overall assessment of the reality of issues that bother investors in Nigeria. With the diminishing naira, foreign exchange and monetary challenges,

²⁰ J Wilson & O Grazebrook 'Nigerian court of appeal allows third party to challenge arbitration award' 17 February 2015 <http://www.covafrika.com/2015/02/nigerian-court-of-appeal-allows-third-party-to-challenge-arbitration-award/> (accessed on 06 November 2015)

²¹ S Pouget *Arbitrating and mediating disputes: Benchmarking arbitration and mediation regimes for commercial disputes related to foreign direct investment* (2013) <http://iab.worldbank.org/~media/FPDKM/IAB/Documents/FDI-Arbitrating-and-Mediating-Disputes.pdf> (accessed on 24 November 2015)

²² Dorothy Udemé Ufot SAN 'Arbitration Practice Area Review', August 2015, <http://whoswholegal.com/news/analysis/article/32446/arbitration-practice-area-review> (accessed on 10 October 2015)

²³ US Department of State, '2015 investment climate statement on Nigeria' May 2015 <http://www.state.gov/documents/organization/241898.pdf> (accessed on 19 February 2016)

insecurity and unstable power sector at the top of the list; the lengthy timeframe of enforcing arbitral awards is not farfetched. This establishes that even though there are several enormous barriers to promoting FDI in Nigeria, the issues that pertain to the judiciary are pixels in the big picture. Therefore, it is imperative that this study addresses the fragment that qualms foreign investors and FDI in the area of the justice system; most especially in the oil and gas sector.

In view of the above and regardless of the common stance this study has with the literatures reviewed, there exists a number of divergences. The focal point of this study which is the enforcement of arbitral awards in the oil and gas sector has been addressed by various scholars and the challenges in the Nigerian legal system as regards this have been highlighted over time; however, the challenges persist and there is a dearth of literature focused on expounding on these challenges. Although some literatures proffer recommendations of judicial reform in the system, in the course of research no detailed reformation process or framework as to how the reforms can be achieved has been proposed. This study, therefore brings to limelight major challenges and shall take into consideration the previous writing of scholars including other factors such as comparative analysis in arriving at a unique, and if well implemented, possible solution to the challenges.

1.7 Research methodology

The research is desktop and library based. It will rely on books and largely on articles and papers written by authors in the legal field. The approach will be analytical, descriptive, comparative and prescriptive.

The descriptive approach will be used in giving an overview of the arbitration system in Nigeria. The analytical approach is adopted in examining the legal challenges and the effects of such problems. A comparative analysis shall be made between the arbitration procedural system in Nigeria and Mauritius.

Mauritius, a member of the commonwealth, practices a hybrid legal system, that is, civil and common law. Nigeria is a member of the commonwealth as well and practices a common law system. Also, Mauritius has adopted the United Nations Commission on International Trade Law Model law 1985 and the New York Convention on the Enforcement of Foreign Arbitral Awards 1958 as Nigeria. The country is also known for its swiftness in concluding arbitration

matters and in enforcing arbitral awards. These make Mauritius ideal for the comparative analysis in this research.

A prescriptive analysis shall therefore be approached by juxtaposing Nigeria's enforcement of arbitral awards procedures with that of Mauritius and thereby arriving at realistic and effective recommendations for Nigeria.

1.8 Limitations to the study

Based on the principle of confidentiality in arbitration, proceedings of arbitrated cases are not readily made public even after applications are made to the court for the setting aside or enforcement of arbitral awards. The only information available to the public is the enforcement proceedings in the domestic court. This has limited this study enormously because it makes it very difficult to have basic knowledge of the disputes and other related information which could have improved the quality of findings made in this study.

Although there are several books on the subject of arbitration in Nigeria, there is a dearth of relevant books on the challenges and problems of the judiciary in arbitration procedures which this study aims to address.

1.9 Outline of chapters

Chapter One

This chapter introduces the research study and outlines the research problem, research questions to be answered, the research methodology and the significance of the study.

Chapter Two

This chapter introduces the history, meaning, theories and importance of foreign investment in the developing countries. It also examines the development of foreign investment in Nigeria and focuses primarily on the oil and gas sector.

Chapter Three

This chapter explores the avenues for settling foreign investment disputes and the concept of foreign investment arbitration.

Chapter Four

This chapter analyses the legal framework governing arbitration in Nigeria's oil and gas sector. This chapter also extensively discusses the challenges and shortcomings in the enforcement of foreign investment arbitral awards in Nigeria's oil and gas sector.

Chapter Five

This chapter comparatively examines the arbitration system of Mauritius and dwells on areas from which Nigeria can learn from to address the shortcomings in the current system.

Chapter Six

This chapter concludes the research work and proffers recommendations that will bring about improvement in the arbitration system of Nigeria.

CHAPTER TWO

THE NATURE OF FOREIGN INVESTMENT

2.1 Introduction

This chapter sets the foundation for this study by exploring the nature of foreign investment and how it has evolved over time. Foreign investment is an important factor in economic growth and for this reason, this chapter will discuss the importance of foreign investment in developing countries and why it is a growing concern for developing nations to attract foreign investment. Subsequently in this chapter, foreign investment into Nigeria will be discussed with the primary focus on the oil and gas sector.

2.2 History and early development of foreign investment

2.2.1 A global perspective to FDI

Cross-border investment can be traced to the Victorian Era (1837-1901) when the United Kingdom ‘was the premier global investor *par excellence* and by far the largest shareholder in the global stock of foreign investments’.¹ This was because Great Britain started to develop earlier than any other country in industrialisation, investment, and capital accrual and savings.² Thus, developed countries of today like the United States of America, benefited from the excess reserves of Europe and it was used to finance their industries, railroads, and canals.³ Capital export from the Great Britain into other countries in the 19th century gave opportunities to those countries to develop. Foreign investment bridged the huge gap in development that was between Great Britain and other countries in Europe and beyond. With the aid of capital investment and the export of several kinds of equipment into the United States, Britain owned shares of American companies in return, and also had ownership of many gas industries in other parts of Europe as well.⁴ Subsequently, the United States and

¹ ‘A very brief history of foreign investment’ 09 July 2014 <https://pseudoerasmus.com/2014/07/09/very-brief-history-of-foreign-investment/> (accessed 18 May 2016)

² L Mises ‘Foreign investment: A great historical event of the 19th Century’ 21 May 2003 <http://capitalismmagazine.com/2003/05/foreign-investment-a-great-historical-event-of-the-19th-century-2-of-5/> (accessed 18 May 2016)

³ (n 1 above)

⁴ (n 2 above)

other countries in Europe were able to develop their economies because of the influx of foreign investments from Britain.⁵

The tide of foreign investment changed after World War I. European countries at war could not continue to invest in other countries and the existing foreign investments in the United States were commandeered to fund the war.⁶ At the end of World War II in 1945, foreign investments took a different turn from what was obtained in the Victorian era.⁷ The trend of investment remained between and within the developed (rich) countries as they acquired more industrial and manufacturing investments in each other.⁸

Developing countries began to experience the flow of foreign investments within their borders in the late 1980s after a debt crisis broke out in the 1970s till the early 1980s.⁹ This relieved the countries in debt and in return, they restructured their markets to become more accessible and accommodating to foreign investments.¹⁰

Statistics show that developing countries attained FDI as high as 741 billion US dollars in 2015, while the developing nations of Asia received a third of global FDI inflows.¹¹ Regionally, developing nations of Asia remain ‘the largest host region for FDI inflows, surpassing EU and North America’.¹² UNCTAD reports that in 2015 the top 10 recipients of FDI are: United States, Hong Kong, China, Netherlands, United Kingdom, Singapore, India, Brazil, Canada, and France.¹³

2.2.2 Foreign investment in Sub-Saharan Africa

Sub-Saharan Africa (SSA) countries were sceptical to open their markets to foreign investments because of deeply-rooted fears of the past experience of colonization, politics, protection of resources, and ideologies contrary to foreign investment and development.¹⁴

⁵ (n 2 above)

⁶ Edelstein Michael reviewing Mira Wilkins, *The History of Foreign Investment in the United States, 1914-1945*. Cambridge MA: Harvard University Press, 2004, ISBN: 0-674-01308-5 http://eh.net/book_reviews/the-history-of-foreign-investment-in-the-united-states-1914-1945/ (accessed 18 May 2016)

⁷ (n 1 and 6 above)

⁸ (n 1 above)

⁹ (n 1 above)

¹⁰ (n 1 above)

¹¹ UNCTAD ‘Global Investment Trends Monitor’ No. 22, 20 January 2016 http://unctad.org/en/PublicationsLibrary/webdiaeia2016d1_en.pdf (accessed 19 May 2016)

¹² UNCTAD (n 11 above)

¹³ UNCTAD (n 11 above)

¹⁴ TJ Moss, V Ramachandran & MK Shah ‘Is Africa’s scepticism of foreign capital justified? Evidence from East African firm survey data’ Center for Global Development (CGD) June 2004, Working paper No. 41 http://www.cgdev.org/files/2748_file_cgd_wp041rev.pdf (accessed 18 May 2016)

These sentimental positions created a harsh investment climate for foreign investments in SSA.

Prior to the late 1980s, foreign funds inflows into Africa were from the purchase of commodities and exports into Europe and other developed countries, and also from aids.¹⁵ Africa began to experience foreign investments between the late 1980s and 1990s, during which a net investment of 8 billion dollars was received from the Organization for Economic Cooperation and Development (OECD) countries.¹⁶ Over this period, SSA countries have improved domestic foreign investment-related legal instruments to improve their investment climates.¹⁷ Statistics show that there was a significant increase in the inflow of FDI to 13.8 billion dollars during 2000 and 2003,¹⁸ and further increased in fivefold to 60 billion dollars in 2015.¹⁹

The increase in foreign investment is attributed to the region's growing population of a billion people, the abundance of natural resources in coal, oil, gas, diamonds, gold, platinum, etc.,²⁰ and also the vast opportunities available in infrastructure and construction sector.²¹ Generally, only a few countries are recipients of huge foreign investment in the region, leaving others at a slight disadvantage. The greater chunk of FDI is targeted primarily at extractive productions with particular reference to the petroleum sector.²²

Although Africa has risen from being the 2nd worst continent to invest in,²³ to the 'the second most attractive investment destination in the world – ranking just behind North

¹⁵ (n 1 above)

¹⁶ P Collier 'Policy commitment arrangements for Africa: Implications for aid, trade and investment flows' in A Oyejide & W Lyakurwa (eds) *Africa and the World trading system* Vol. 1, African Economic Research Consortium (2005) 327, Africa World Press, Inc, Eritrea.

¹⁷ Moss et al (n 14 above)

¹⁸ UNCTAD *Economic development in Africa: Rethinking the role of foreign direct investment* (2005)

UNCTAD/CDS/AFRICA/2005/1 http://unctad.org/en/Docs/gdsafrica20051_en.pdf (accessed 18 May 2016)

¹⁹ M Diop, Y Li, L Yong, HE. Shide 'Africa Still Poised to Become the Next Great Investment Destination' June 30, 2015 <http://www.worldbank.org/en/news/opinion/2015/06/30/africa-still-poised-to-become-the-next-great-investment-destination> (accessed 18 May 2016)

²⁰ UNCTAD (n 18 above)

²¹ Diop et al (n 19 above)

²² K HarunaDanja 'Foreign investment in the Nigerian economy' *American Journal of Economics* (2012) 2(3): 33-40 <http://article.sapub.org/10.5923.j.economics.20120203.02.html> (accessed 19 May 2016)

²³ D Chikanga 'The Scramble for FDI: African Governments Prioritising Foreign Investments' 10 September, 2015

America’,²⁴ there is still need for more foreign investment in the manufacturing and industrial sectors.²⁵

2.3 Foreign investment inflow into Nigeria: A retrospection

Nigeria is the largest country in Africa and is endowed with several natural resources. These resources have been a blessing to the economy and citizens. Also, with the rising population of the country, the demands for goods rise as well.²⁶

2.3.1 The past and the present

Prior to and at independence from the British in 1960, Nigeria was a major exporter of groundnuts, cocoa and palm oil produce in the world.²⁷ At the time, the percentage of foreign investments in the country was over 25 percent.²⁸ Before independence, there was already a significant existence of foreign establishments in the country and it continued to grow at post-independence to over 75 percent.²⁹

In a bid to increase economic development, the government introduced National Development Plans (NDP).³⁰ The first NDP was in 1962 and lasted till 1968, while the second NDP was from 1970 to 1974 and tilted towards indigenization of investments.³¹ This was the beginning of an end to the inflow of foreign investments into Nigeria. The indigenization policies placed restrictions on FDI, earmarked certain industries exclusively for indigenes, and reduced significantly the percentage of foreign ownership in the manufacturing industry.³² While this was going on, Nigeria shifted focus to the oil sector which boomed till the price fell in the early 1980s;³³ and at this point, the agricultural sector

²⁴ Diop et al (n 19 above)

²⁵ UNCTAD ‘Global Investment Trends Monitor’ No. 22, 20 January 2016
http://unctad.org/en/PublicationsLibrary/webdiaeia2016d1_en.pdf (accessed 19 May 2016)

²⁶ HarunaDanja (n 22 above)

²⁷ ‘Nigeria accounted for 16 and 43 percent of world cocoa and oil palm production respectively’ – UNCTAD *Investment Policy Review: Nigeria 2009* UNCTAD/DIAE/PCB/2008/1
http://unctad.org/en/Docs/diaepcb20081_en.pdf (accessed 19 May 2016)

²⁸ UNCTAD *Investment Policy Review: Nigeria 2009* UNCTAD/DIAE/PCB/2008/1
http://unctad.org/en/Docs/diaepcb20081_en.pdf (accessed 19 May 2016)

²⁹ UNCTAD 2009 (n 28 above)

³⁰ As above

³¹ As above

³² As above

³³ As above

was neglected till it could only account for less than 10 percent of exports and food imports increased hugely.³⁴

In 1999, the military regime was over and Nigeria became a democratic nation. The new regime introduced public policies for reform and elimination of FDI restrictions in the non-oil sectors.³⁵ With the strategic policies and programmes put in place, Nigeria was able to attract FDI to the volume of 2.23 billion dollars in 2003 and it increased continuously over the years.³⁶ Recent reports indicate that ‘Nigeria has the third largest FDI stock in Africa – USD 86.6 billion – after South Africa (USD 145 billion) and Egypt (USD 87.8 billion)’.³⁷

For numerous reasons, Nigeria continues to attract FDI in her economy. Some of which include increased privatization, competitively low taxes, investment incentives, abundant natural resources available for exploitation, largest market in Africa, avenue for intra-regional trade within the Economic Community of West African States (ECOWAS), stable political regimes, liberalization of fiscal movement, growing financial sector, free market access, and huge labour force.³⁸

However, the collective impact of the anti-foreign investment policies and decrees from 1972 to the late 1980s is still manifest today in the underdevelopment of the manufacturing, industrial and infrastructural sectors.³⁹ Corruption, poor and substandard infrastructures, electricity challenges, insecurity and insurgencies (Boko Haram), lack of continuity, poor implementation of policies, and mismanagement of funds, have all limited Nigeria from actualizing her full FDI potential.⁴⁰

³⁴ UNCTAD 2009 (n 28 above)

³⁵ As above

³⁶ Haruna Danja (n 22 above)

³⁷ ‘Nigeria: Foreign investment’ <https://en.portal.santandertrade.com/establish-overseas/nigeria/investing> citing *UNCTAD World Investment Report 2015: Reforming International Investment Governance* 2015, United Nations, Geneva http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (accessed 19 May 2016)

³⁸ (n 37 above)

Anita Powell ‘Investors: Nigeria’s Benefits May Outweigh Challenges’ 12 March 2015

<http://www.voanews.com/content/investors-nigeria-benefits-may-outweigh-challenges/2677379.html> (accessed 19 May 2016)

C Nwaigene ‘Business opportunities in Nigeria’ 09 April 2015 <http://www.enterpriseboom.com/benefits-of-business-opportunities-in-nigeria/> (accessed 19 May 2016)

Community for Finance Professional in Africa, <http://www.cfoafrica.net/advantages-of-investing-in-nigeria.html> (accessed 19 May 2016)

The Nigerian Investment Promotion Commission website: <http://www.nipc.gov.ng/index.php/invest-in-nigeria/why-nigeria.html> (accessed 19 May 2016)

³⁹ UNCTAD (28 above)

⁴⁰ ‘Nigeria: Foreign investment’ <https://en.portal.santandertrade.com/establish-overseas/nigeria/investing> (accessed 19 May 2016)

Sectors open to FDI in Nigeria include oil and gas, manufacturing, infrastructural, transport, power, telecommunications, agriculture, mining, solid minerals, financial services, textiles and apparel, and tourism.⁴¹ Of all these sectors open to FDI in Nigeria, the oil and gas sector has attracted the most FDI and it has become the life of the economy on which the country derives revenue; hence, the need to study the early and recent development of FDI in the oil and gas sector.

2.3.2 Nigeria's oil and gas sector

History and development

Oil explorations began in Nigeria in 1908.⁴² Nigeria was under the British colony at the time as a protectorate. The colonial government issued a royal charter to the Nigerian Bitumen Corporation (a German company) and British Colonial Petroleum (a colonial chartered entity) to explore oil in Nigeria.⁴³ Oil was then discovered for the first time in Araromi, Ondo State, Western Nigeria.⁴⁴ Soon after the exploration activities started, World War I broke out and halted all exploratory activities in 1914.⁴⁵ Due to the early discovery that Nigeria is an oil State, there was motivation to continue the search for oil in large quantity.⁴⁶ In 1937, the quest resumed and Shell Petroleum Development Company of Nigeria (SPDC) (formerly Shell D'Arcy, a consortium of Shell and Royal Dutch) was made the sole exploratory licensee with the permission to explore.⁴⁷

After five decades of oil exploration, oil was discovered in commercial quantity in Oloibiri, Bayelsa State, Eastern Niger Delta region.⁴⁸ Production was recorded at 5,100 barrels per day. As a result, Nigeria was able to make the first exportation of crude oil in 1958.⁴⁹ After

⁴¹ The NIPC website: <http://www.nipc.gov.ng/index.php/invest-in-nigeria/why-nigeria.html> (accessed 19 May 2016)

⁴² D Otiotio 'An overview of the oil and gas industry in Nigeria' https://www.academia.edu/2654835/AN_OVERVIEW_OF_THE_OIL_AND_GAS_INDUSTRY_IN_NIGERIA_BY_DENNIS_OTIOTIO?auto=download (accessed 20 May 2016)

⁴³ Otiotio (n 42 above)

⁴⁴ O Ojiabo 'Oloibiri versus Araromi? Where was oil first discovered' The nation online news 01 June 2014 <http://thenationonline.net/oloibiri-versus-araromi-where-was-oil-first-discovered/> (accessed 20 May 2016)

⁴⁵ Otiotio (n 42 above)

⁴⁶ Ojiabo (n 44 above)

⁴⁷ AI Chukwuemerie 'Commercial and investment arbitration in Nigeria's oil and gas sector' in *The Journal of World Investment and Trade* Vol 4, Issue 5 (2003) 841-842. Available at: <http://dx.doi.org/10.1163/221190003X00282> (accessed 20 May 2016)

⁴⁸ The NNPC Website <http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasInNigeria/IndustryHistory.aspx> (accessed 20 May 2016)

⁴⁹ Chuwuemerie (n 47 above)

independence in 1960, foreign oil companies trooped into Nigeria to explore the crude oil.⁵⁰ Nigeria gave licenses to Mobil, Agip, Elf (formerly Safrap), Texaco (formerly Tenneco) and Chevron (formerly Amoseas).⁵¹ By 1970, Nigeria was already a major producer of oil and ranked 7th in the world.⁵² The barrels produced daily increased to a high level of 2.4 million.⁵³

Nigeria thereafter joined the Organization of Petroleum Exporting Countries (OPEC) in 1971.⁵⁴ In order to exercise control over the oil industry, the government enacted a decree that created the Nigerian National Oil Corporation in the same year of joining OPEC.⁵⁵ This corporation is now called the Nigeria National Petroleum Corporation (NNPC). It was established in 1977 to carry out exploratory activities, enter into joint venture with foreign and indigenous oil and gas companies, produce and sell oil, own subsidiaries and also carry out other oil production activities.⁵⁶

Much after the oil exploration activities began; Nigeria was yet to tap into the abundant gas reserves available for utilization.⁵⁷ In the mid-1990s, steps were taken to explore and invest in the gas sector in conjunction with the oil industry. Therefore, the Nigerian Gas Company (NGC) was established as a subsidiary of NNPC.⁵⁸ The Nigerian Liquefied Natural Gas (NLNG) Limited was created to produce Liquefied Natural Gas (LNG) and Natural Gas Liquids (NGLs) for exportation and domestic use.⁵⁹ The LNG plant situated at Bonny Island in Port Harcourt started operations in 1999 and shipped LNG for the first time out of Nigeria in the same year.⁶⁰

Is crude oil a blessing or a curse in Nigeria?

As a fact, oil has profited Nigeria since its discovery. However, the question which arises a number of times is: has oil been a blessing in Nigeria or a curse? This study does not intend to delve into economic calculations, theories or hypothesis; rather, only aims to discuss in brief the benefits and detriments of oil discovery in the nation thus far.

⁵⁰ Chuwuemerie (n 47 above)

⁵¹ Otiotio (n 42 above)

⁵² Otiotio (n 42 above)

⁵³ Otiotio (n 42 above)

⁵⁴ Otiotio (n 42 above)

⁵⁵ Otiotio (n 42 above)

⁵⁶ The NIPC website: <http://www.nipc.gov.ng/index.php/invest-in-nigeria/why-nigeria.html> (accessed 19 May 2016)

⁵⁷ Chuwuemerie (n 47 above)

⁵⁸ The NIPC website: <http://www.nipc.gov.ng/index.php/invest-in-nigeria/why-nigeria.html> (accessed 19 May 2016)

⁵⁹ NLNG website: <http://www.nlng.com/Our-Company/Pages/Profile.aspx#sthash.sASzICPc.dpuf> (accessed 19 May 2016)

⁶⁰ (n 58 above)

Oil has been the major sector generating revenue for the country since its discovery. Over 91 percent of total exports from Nigeria into Europe, America, Asia, and other parts of Africa are oil and gas commodities.⁶¹ Exports of crude oil and natural gas contribute enormously to the revenues that accrue annually to the country. It increased foreign exchange accrued from foreign sales of crude oil.⁶² In the internal generation of revenue, the Department of Petroleum Resources (DPR) which is the regulatory agency for petroleum in the country, charges and ensures that royalties, rent, and penalty fee for gas flaring are paid into the government's federation account.⁶³ Also, the Federal Inland Revenue Services (FIRS) receives petroleum profit tax as a government entity authorised to do so.⁶⁴

However, as against the foregoing, the oil and gas industry is not a perfect sector without downsides. A barrel of oil in 2008 was sold at 147.42 dollars which is the highest it has ever been in history.⁶⁵ This did not last for long as the price dropped tremendously. As of date, the price of oil per barrel is at 48.16 dollars.⁶⁶ The practical effect of this is that the fluctuation of oil prices definitely affects the budget and spending of the country and any price lower than what is budgeted will adversely affect the economy.

Also, there has to be a balance between demand and supply of crude oil in the market for there to be prosperity. In 2014, the United States increased production in oil and stopped importing from Nigeria; India also reduced the quantity of demand and so did China.⁶⁷ Demand for crude oil reduces as developed and emerging countries search for substitutes. Thus, the abundance of oil in Nigeria may become redundant as these countries make every effort to find alternatives.

Several environmental problems are associated with oil and gas exploration. In Nigeria, gas flaring⁶⁸ is an issue endangering the economy.⁶⁹ There are two negative impacts of gas flaring

⁶¹ 'Nigeria exports 1981-2016' Trading economics <http://www.tradingeconomics.com/nigeria/exports> (accessed 20 May 2016)

The World Bank data, <http://data.worldbank.org/indicator/TX.VAL.FUEL.ZS.UN> (accessed 20 May 2016)

⁶² 'Nigerian oil a blessing or curse' Investors King, 26 July 2015 <http://investorsking.com/nigerian-oil-a-blessing-or-curse/> (accessed 21 May 2016)

⁶³ DPR website: <https://dpr.gov.ng/index/revenue/> (accessed 20 May 2016)

⁶⁴ (n 63 above)

⁶⁵ (n 62 above)

⁶⁶ Crude oil and commodity products. As at May, Friday 20 2016 - 19:33:55, oil per barrel is 47.75 dollars www.oil-price.net (accessed 21 May 2016)

⁶⁷ (n 62 above)

⁶⁸ 'Gas flaring is the burning of natural gas that is associated with crude oil when it is pumped up from the ground'. - <http://justiceinnigerianow.org/gas-flaring> (accessed 21 May 2016)

⁶⁹ G Odularu 'Crude oil and the Nigerian economic performance' Oil and Gas Business Journal (2008) 14 http://www.ogbus.ru/eng/authors/odularo/odularo_1.pdf (accessed 21 May 2016)

in the Nigerian economy: the loss of revenue amounting to 2.5 billion dollars yearly,⁷⁰ and the economic problems associated with it such as water contamination, aquatic life endangerment, and human health problems.⁷¹

Another environmental concern is the oil spillage in the Niger Delta region where crude oil is extracted. Oil spillage ‘often results from accidental or operational discharges of petroleum hydrocarbon into the environment.’⁷² In the Niger Delta, there have been several experiences of oil spillage and oil blowouts in the area. Ite et al report that the major causes of oil spillage in this region are caused by ‘equipment failure, oil blowouts from the flow stations, leakages from aged and corroded network of the pipelines, operational mishap, sabotage and vandalism of the oil pipelines by the local militant groups’.⁷³ The effect of oil spillage is that the water is contaminated, the rich mangrove forest of the region is degraded, ecosystem destroyed, and the fishery and agricultural cultivations have been affected.⁷⁴

This issue of oil spillage has caused unrest in the Niger Delta communities. For instance in the Ogoniland community, there was an uproar that resulted in the kidnapping of workers in the oil industry, vandalism of equipment, riots and civil unrest because of the deteriorating state of the community which has resulted in the loss of farming and fishery activities of residents in the community.⁷⁵

In summary, this section gives a peripheral overview of the oil and gas sector in the country, the challenges and the benefits of the sector. The purpose of this is to get the reader acquainted with the history and development of the sector and to understand why the sector is important to the economy despite the glaring challenges in the production of oil and gas.

2.4 Defining foreign investment

It is important to first understand the meaning of an investment. Investment could be defined in a contract or in a Bilateral Investment Treaty (BIT) to suit the desire of the contracting

⁷⁰ E Enejeta ‘Nigeria loses N2trn to gas flaring in seven years’ Financial Watch, 18 March, 2016 <http://www.financialwatchngr.com/2016/03/18/nigeria-loses-n2trn-gas-flaring-seven-years/> (accessed 21 May 2016)

⁷¹ AE Ite, U Ibok, M Ite, & SW. Petters. ‘Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria’s Niger Delta’ *American Journal of Environmental Protection* 1, no. 4 (2013): 78-90.

⁷² Ite et al (n 71 above)

⁷³ Ite et al (n 71 above)

⁷⁴ Ite et al (n 71 above)

⁷⁵ Otiotio (n 42 above)

parties involved. Investment includes equities, stocks, debts, properties, intellectual property rights, mortgage rights, licenses, concessions, liens, and so on.⁷⁶

Giving that there is no *stricto sensu* definition of foreign investment, authors, scholars, courts, and tribunals have defined the term. Sornorajah defines foreign investment as ‘the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets’.⁷⁷

There are however two types of foreign investment: foreign portfolio investment and foreign direct investment. Foreign portfolio investment is typically characterised by the movement of funds for the purpose of purchasing shares in an enterprise established or operational in a different State.⁷⁸ FDI, on the other hand, is broader than just purchasing shares or stock in a company by a foreign investor. It is defined as a ‘cross-border investment by a resident entity in one economy with the objective of obtaining a lasting interest in an enterprise resident in another economy’.⁷⁹

2.5 The necessity for FDI in less-developed economies and the reciprocal benefits

Economists such as Caves and Borensztein support the notion that FDI is important in an economy, and more importantly, in less developed countries.⁸⁰ Classical theorists hold the view that FDI plays an important role in the development of an economy and it is beneficial to the Host State. Contrary to this view, dependency theorists believe that FDI does not develop an economy but exploits a country.⁸¹

A foreign investor looks to invest in a country with abundant resources which can be exploited. Gold, iron, coal, tin, gas, oil, diamonds, bitumen, agricultural produce, and several other natural resources have attracted foreign investors into Africa. These investors have the financial capacity, technologies, equipment and the expertise needed for the sectors. In this way, the Host State and foreign investors collectively contribute to the establishment of FDI.

⁷⁶ K Schefer *International investment law: Text, cases and materials* (2013) 60, Edward Elgar Publishing Limited: UK

⁷⁷ M Sornarajah *The international law on foreign investment* (2010) 8

⁷⁸ Sornarajah (n 77 above)

⁷⁹ OECD Library, ‘definition of FDI’ <http://www.oecd-ilibrary.org/sites/factbook-2013-en/04/02/01/index.html?itemId=/content/chapter/factbook-2013-34-en> (accessed 02 March 2016)

⁸⁰ V Denisia ‘Foreign direct investment theories: An overview of the main FDI theories’ *European Journal of Interdisciplinary Studies* Vol. 2 issue 2 (2010) 106

⁸¹ Sornarajah (n 77 above) 54

For developing and least developed countries, FDI is an essential catalyst for development. Some of the positive impacts of FDI include:

- increase in productivity;⁸²
- transfer of technology know-how which cannot be accomplished by capital investment (portfolio investment);⁸³
- spill over of technology;
- skills empowerment;
- creation of more jobs which reduces the unemployment rate;
- motivates the country to reform policies related to FDI;
- promotes use of locally sourced resources for manufacturing;
- infrastructural development;
- generates fiscal revenues especially in the taxation and exports;⁸⁴
- increases competition and eliminates monopoly;⁸⁵ and
- enterprises development.

For the investors, their benefits are profit oriented as against economic development orientation of the Host State. These benefits include but are not limited to the following:

- FDI creates opportunities for exploring larger markets;
- It enables foreign investors to make increased profit from the exploitation of location advantages in the country;
- It promotes peaceful relationship between the Host State and the Home State of the investors; and
- It creates an avenue for internalization and therefore minimizes operation risks.⁸⁶

Despite the promising reciprocal benefits of FDI, a number of risks are involved. For the Host State, there are environmental degradation risks, health risks especially in extractive

⁸² Denisia (n 80 above)

⁸³ P Loungani & A Razin 'How beneficial is foreign direct investment for developing countries?' Finance and development, A quarterly magazine of the IMF, June 2001, Volume 38, No 2
<http://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm> (accessed 23 May 2016)

⁸⁴ Loungani & Razin (n 83 above)

⁸⁵ OECD (2002) 'Foreign direct investment for development: Maximising benefits, minimising costs' OECD Publications: France <https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf> (accessed 23 May 2016)

⁸⁶ PA Bukari 'Foreign direct investment: How beneficial is it?'
http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car17_36_983684938.pdf (accessed 23 May 2016)

industry, no economic development in areas such as job creation, crowding out local companies, and risks of undue exploitation without any economic benefit. The foreign investors also bear some risks in transnational investment which may be protected adequately in BITs or other International Investment Agreements (IIA). These risks include expropriation of investments, inadequate compensation in cases of expropriation, security risks such as, communal clashes, riots and civil unrest, inability to transfer funds and profits freely, denial of access to justice, unfair and inequitable treatment, and discrimination among others. Although majority of these are contained in BITs and IIAs to assure foreign investors of protection, foreign investments are still faced with these challenges.

2.6 Conclusion

This chapter presented an overview of foreign investment and found that foreign investment has been in existence for centuries. It predates World War I and continues to gain prominence till date.

As observed above, Nigeria's economy used to thrive mainly on the agricultural sector before the discovery of oil. Ever since the oil gold has been discovered, other sectors have suffered neglect. With the oil price fluctuating and reducing drastically, Nigeria's economy is dependent on an unstable source of income. However, one point firmly established in this chapter is the fact that the oil and gas sector generates over 91 percent of the Nigeria's revenue and the annual budget for expenditure and development is highly reliant on this sector.

This chapter concludes by stating that FDI occurs in economies with resources that are made available to foreign investors with the necessary technologies and finances needed to exploit these resources. Therefore, FDI is a combination of resources from both parties – the Host State and the foreign investors. In Nigeria, the primary sector with the most attractive resources is the oil and gas sector. This sector has attracted numerous FDI with the technologies and skills needed to explore crude oil.

Giving the above discussion on the nature of foreign investment, the next chapter shall study the various avenues of settling foreign investment disputes.

CHAPTER THREE

SETTLEMENT OF FOREIGN INVESTMENT DISPUTES

3.1 Introduction

In chapter two, the stage was set by examining the nature and importance of foreign investment. It was concluded that FDI provides reciprocal benefits to foreign investors and the Host State. Therefore, this chapter shall interrogate the mechanisms for settling disputes arising from FDI. A foreign investment dispute is any dispute arising from an investment contract or treaty between two contracting parties, or a contracting party and an investor who is a citizen of the other contracting party. This chapter will therefore, examine how these disputes can be settled and the different mechanisms available to the parties.

Arbitration is a widely practiced dispute settlement mechanism in foreign investment. This chapter shall therefore narrate the history of arbitration and its evolution as a prominent means of dispute settlement. Also, this chapter will discuss the concept, history and meaning of foreign investment arbitration and why it is so important to foreign investors.

3.2 Avenues of settling investment disputes

Usually, dispute settlement mechanisms are stated in BITs and other IIAs according to the mutual agreement of the parties. Foreign investment disputes may arise between the Host State and an investor, and between a Host State and Home State of an investor. The mechanisms available to parties shall be discussed subsequently.

3.2.1 State to state disputes

State to State disputes often arise from issues pertaining to the IIA. The dispute may arise from the interpretation and application of the IIA or a certain provision in it. It could also arise where a party is exercising protection over a citizen who is a foreign investor in the other State. The following are avenues for settling such disputes:

a) Negotiations and consultations

Negotiations or consultations through diplomatic channels are usually the first option available to States in dispute. In most BITs, the dispute settlement clause commonly states

that parties must endeavour as much as possible to settle their disputes amicably during a fixed period of time referred to as the ‘cooling-off period’.¹

b) Ad hoc inter - state arbitration

When negotiations and consultations fail, parties may then refer their dispute to a neutral arbitral tribunal. This mechanism is not institutional and parties mutually agree on the procedure of the arbitration.

c) Permanent arbitral or judicial institutions²

Contrary to ad hoc arbitration, parties may decide to make use of an institution as a forum for settling their investment disputes. The only primary institution that has the jurisdiction to settle State to State dispute is the Permanent Court of Arbitration (PCA).³ The PCA is not a traditional court but a permanent establishment established in 1899 to provide arbitration services to parties and to assist in resolving disputes.⁴ Another institution that can be used by parties based on their mutual agreement is the International Court of Justice.⁵ Also, parties may opt for regional courts created by virtue of a Regional Trade Agreement.⁶ This is a judicial arrangement that allows Members to submit their disputes to the institutions for settlement. For example, the ECOWAS Court of Justice and the Common Market for Eastern States Agreement Court of Justice.⁷

d) Political or administrative institutions⁸

A political institution could be a political body or an organ of an international organization agreed on by parties in an IIA, such as the Dispute Settlement Body of the World Trade Organization.⁹ This is usually the last resort for State parties when deciding on a forum for the settlement of their investment disputes. This is not frequently used because decisions

¹ Article 8 Sweden – Zimbabwe BIT; Article 8 Romania – Senegal BIT; Article 10 US – Mozambique BIT.

² UNCTAD *Dispute Settlement: State-State* UNCTAD series on issues in international investment agreements UNCTAD/ITE/IIT/2003/1 (2003) 18 Switzerland http://unctad.org/en/Docs/iteit20031_en.pdf (accessed 27 May 2016) 18

³ UNCTAD (n 2 above) 18

⁴ The PCA website. <https://pca-cpa.org/en/home/> (accessed 27 May 2016)

⁵ N Bernasconi-Osterwalder ‘State-State dispute settlement in investment treaties’ Best Practices Series, October 2014. <https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf> (accessed 27 May 2016)

⁶ Bernasconi-Osterwalder (n 5 above)

⁷ Bernasconi-Osterwalder (n 5 above)

⁸ UNCTAD (n 2 above) 18

⁹ Bolaji Owasanoye ‘Settlement of investment disputes’ presentation at University of Pretoria, Faculty of Law, LLM International Trade & Investment Law class, 19th – 21st October, 2015

given by such bodies are perceived to be more political than legal and parties may not feel compelled to comply with an award from the institution.¹⁰

3.2.2 Investor - State disputes

Dispute settlement clauses in BITs and IIAs, give foreign investors the right to institute an action against the Host State and therefore exempts the rule of state sovereignty. Dispute between a foreign investor and a Host State usually arises from a violation of any clause in the BIT protecting the investor. For instance, an act of expropriation or breach of any of the substantive clauses in the investment agreement between both parties constitutes a cause of action. Dispute settlement clauses in Investor - State agreement typically provide one or more of the following options:

a) Diplomatic protection

Diplomatic protection occurs when a foreign investor approaches the Home State to act on his or her behalf when there is an injury or a cause of action has arisen.¹¹ Diplomatic protection can only be exercised on the volition of the Home State. Often times, Home States refuse to intervene on behalf of foreign investors for a number of reasons: it is an expensive and time-consuming process, it could ruin a peaceful relationship between both States, and the worth of the claim may not be proportionate to the risks the Home State will be taking.¹²

b) Diplomacy through negotiation and mediation

This is usually the first option available to parties in resolving disputes. They could explore negotiation, mediation, conciliation, and the use of good office.¹³ Just as it is provided in State to State dispute settlement clauses in IIAs, so it is for Investor - State dispute settlement clauses. Parties are often times required to settle amicably before proceeding to other formal options.

c) National courts or domestic tribunals

This is another option that could be explored by parties when a dispute occurs. However, since the development of arbitration, foreign investors have preferred arbitration over domestic litigation. This option may be included in the dispute settlement clause as a prerequisite before any other option, or it may be an alternative option for the foreign investor. However, where the IIA is silent on the choice of local courts or international

¹⁰ UNCTAD (n 2 above) 18

¹¹ Owasanoye (n 9 above)

¹² Owasanoye (n 9 above)

¹³ Owasanoye (n 9 above)

arbitration, it most likely implies that the parties may have to exhaust local remedies before proceeding to an international dispute settlement mechanism.¹⁴

d) International tribunal or institutions

This is a popular mechanism for Investor - State dispute settlement. International centre for the Settlement of Investment Disputes (ICSID) is an institution established for the sole purpose of providing arbitration services to aid settlement of investment disputes between a contracting party and a foreign investor.¹⁵ Other institutions that are available include International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Regional Centre for International Commercial Arbitration, (RCICA) Lagos, Nigeria, Ghana Arbitration Centre, Accra, Ghana, and many more.¹⁶

e) Ad hoc arbitration

Ad hoc arbitration is available to parties that prefer to set the structure of their arbitration to fit their common intents. They decide who the arbitrators would be, the rules to be used, the administrative procedures and all that concerns the arbitration process. It is not uncommon for the dispute settlement clause to include the use of an institution's procedure rules even though they will not be submitting their disputes to the institution.

3.3 History of arbitration

The origin of arbitration is lost in oblivion and it is impossible to trace it back to the first time people decided to submit their disputes to an individual other than the conventional legal process.¹⁷ The arbitration timeline may not be precisely accurate in recording all of the instances in which it was used but it does establish that it predates westernization and the civilised era.¹⁸

Historically, ADR has been used by Kings and an example is recorded in the Holy Bible. The King of Israel, King Solomon, settled the dispute between two women individually claiming

¹⁴ Owasanoye (n 9 above)

¹⁵ UNCTAD (n 2 above) 17 - 18

¹⁶ Owasanoye (n 9 above)

¹⁷ ES Wolaver 'The historical background of commercial arbitration' December, 1934 University of Pennsylvania Law Review

http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8693&context=penn_law_review (accessed 24 May 2016)

¹⁸ 'Alternative dispute resolution guidelines' Investment Climate Advisory Services of the World Bank Group June 2011 http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf (accessed 22 February 2016)

to be the mother of a baby. This judgment was recorded to have taken place in 960 B.C. Historians usually refer to King Solomon as the first arbitrator.¹⁹

In India, parties submitted their disputes to a group of sages in the community who would resolve the disputes by giving a binding decision to the parties.²⁰ This system was called the *Panchayat* system and it dates centuries back to 500 B.C.²¹ Also at this time, there was a system which permitted entrepreneurs to resolve their disputes by submitting to a group of respected, neutral and knowledgeable businessmen referred to as the *Mahajans*.²²

In 400 B.C., Athens put in place the system of a public arbitrator in order to help lessen the overload of the Athenian courts.²³ This system was instituted to assist in decongesting the courts and for quick disposition of matters that could be resolved through other means other than the formal court process.²⁴ The disputants submit voluntarily without force to the public arbitrator, but the arbitrator is obligated as a matter of civic responsibility and duty to perform such functions.²⁵ The role of the arbitrator is to first attempt to amicably resolve the disputes between the parties before imposing a decision after going through the process of calling witnesses and examining written evidence.²⁶ A petition could be made to challenge the arbitrator to a 'college of arbitrators' who would then refer the dispute to the court for settlement.²⁷

In the middle Ages, merchants voluntarily submitted their commercial disputes to the 'merchant courts' for settlement of disputes that arose from their participation in trade fairs that took place in different States within Europe.²⁸ Parties got to select who would preside

¹⁹ JT. Barrett & J Barrett, 'A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement' <http://www.adr.gov/events/2009/may7-2009-materials-history.pdf> May 2009 (accessed 22 February 2016)

²⁰ K Sarma et al 'Development and practice of arbitration in India – Has it evolved as an effective legal institution?' Center on Democracy, Development, and The Rule of Law Freeman Spogli Institute for International Studies No. 103 2009 http://iis-db.stanford.edu/pubs/22693/No_103_Sarma_India_Arbitration_India_509.pdf (accessed 22 February 2016)

²¹ JT Barrett & J Barrett (n 19 above)

²² Anil Xavie 'Mediation: Its origin & growth in India' (2006) 27 Hamline Journal of Public Law & Policy 275 http://www.arbitrationindia.org/pdf/mediation_india.pdf (accessed 22 February 2016)

²³ JT Barrett & J Barrett (n 19 above)

²⁴ (n 18 above)

²⁵ JT. Barrett & J Barrett, 'A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement' <http://www.worldcat.org/wcpa/servlet/DCARead?standardNo=0787967963&standardNoType=1&excerpt=true> (accessed 23 February 2016)

²⁶ JT Barrett & J Barrett (n 25 above)

²⁷ JT Barrett & J Barrett (n 25 above)

²⁸ PL Bruner, 'Rapid Resolution ADR', The Construction Lawyer, Volume 2 (2011) <http://www.jamsadr.com/files/Uploads/Documents/Articles/Bruner-Rapid-Resolution-Spring-2011.pdf> (accessed 23 February 2016)

and those selected carried out their duties expeditiously and without formalities by applying the rules of equity as against the stringent laws of commerce.²⁹

During the Dutch and British colonial eras, 1624-1664 and 1664-1776 respectively, commercial arbitration became a continuous practical use in New York City and in other States.³⁰ Arbitration continued to be the desired avenue for settling merchant disputes in England and it became the *Lex mercatoria* as stipulated in the exposition on commercial law written in 1622.³¹

The practice of arbitration continued to spread across the globe and arbitration laws were enacted, and arbitration institutions, bodies, forums, and professional courses were instituted.³²

3.4 Genesis of foreign investment arbitration

The origin of foreign investment arbitration is found in the long history of foreign investment law. In the early years of foreign investment, foreign investors were protected based on the provisions of the domestic laws of a country.³³ The treatment of foreign investors and their investments depended solely on the local laws. Roman law and the laws of some States in Ancient Greek guaranteed foreigners that they would be treated the same way their citizens were treated (national treatment principle).³⁴ This was assured by virtue of bilateral treaties that promoted commercial dealings and welcomed entrepreneurs into the economy.³⁵

During the medieval period, thoughts on international law steered towards the development of general principles to govern the treatment of foreign persons as individuals.³⁶ The principles of national treatment, most favoured nation (MFN) principle and foreigner's right to properties were proposed by Vitoria, Grotius, and Emer de Vattel respectively.³⁷ However, at this period, there were no general legal principles on the subjects until the mid-19th century when FDI became prominent for constructions, project financing, industrial

²⁹ Bruner (n 28 above)

³⁰ JT Barrett & J Barrett (n 19 above)

³¹ Bruner (n 28 above)

³² JT Barrett & J Barrett (n 19 above)

³³ K Schefer *International investment law: Text, cases and materials* (2013) 3

³⁴ Schefer (n 33 above) 4

³⁵ As above

³⁶ As above

³⁷ As above

technologies, and manufacturing, sourced from private entities.³⁸ Even though the principle of national treatment was gaining acceptance through Europe, some States in the United States refused this principle and desired to exercise state control over foreign investments (expropriation).³⁹ States that accepted the notion of protecting foreigners and treating them as they treated their citizens did so as their responsibilities to the foreign investors and as a courtesy to their home countries.⁴⁰ During this era, settlement of dispute was through diplomatic channels or by use of force when issues have escalated beyond peaceful resolution.

For assurance of protection, foreigners negotiated the terms of their protection and that of their investments with the Host State in contracts before their entry.⁴¹ Foreign investors did this before investing because they had more control at this stage. In the 19th and 20th century when the popularity of arbitration grew in most Europe and America, parties began to include arbitration clauses in their investment contracts, together with stabilisation and choice-of-law clauses.⁴² After World War II, disputes over investment property rights and nationalisation surged and so did arbitration.⁴³ It was possible for foreigners to seek recourse through other neutral forum other than the local courts because the Host State explicitly agrees to submit to arbitration in the investment contracts.

By the mid-20th century, investors sought a better access to dispute settlements with the Host States and this prompted the inclusion of arbitration clauses in BITs.⁴⁴ In 1965, Pakistan and the Republic of Germany set out a novel model for settling disputes by including an arbitration clause in the BIT between them.⁴⁵ The result of this is that the Host State is responsible to the Home State and any investor from the State. This is different from what was obtainable in the contract between the Host State and an investor.

As development increased in the 1960s, so did foreign investment as a necessary tool for economic development in the developing countries. Therefore, there arose a necessity for a multilateral agreement on protection of foreign investment to encourage the continuity and

³⁸ Schefer (n 33 above) 5

³⁹ Schefer (n 33 above) 5

⁴⁰ As above

⁴¹ Sornarajah *The law on foreign investment* (2010) 276

⁴² Sornarajah (n 41 above) 276

⁴³ Schefer (n 33 above) 370

⁴⁴ As above

⁴⁵ As above

increase of cross-border investments.⁴⁶ To make that possible, competent international organisations deliberated some strategies aimed at removing any form of uncertainty and hindrances that challenged investors in any alien country.⁴⁷ One of the schemes concluded the Draft Convention on the Protection of Foreign Property.⁴⁸ In this draft were most of the clauses present in IIAs of today, such as just compensation, national treatment, fair and equitable treatment, to mention a few.⁴⁹ This draft could not be passed as countries could not agree to sign the draft because of their differentiating views on the clauses. Since this failed, World Bank's legal counsel, Aron Broches, had an idea to 'focus on the procedural norms for investment protection rather than substantive norms', that is, 'to establish a politically neutral multilateral forum where investment disputes could be resolved between investor and host state'.⁵⁰ This idea was accepted swiftly and in 1966, ICSID came to be.⁵¹

3.5 The concept of foreign investment arbitration

3.5.1 Definition of arbitration

Arbitration is 'more like a trial that omits the discovery stage, simplifies evidentiary rules, and provides parties to a dispute some choices in selecting the individual hearing the case'.⁵² Basically, Arbitration is an ADR mechanism that allows the parties to set the structure of their trial to suit their interests and the nature of dispute to be resolved. Parties can determine who the arbitrators would be, the procedural rules to be followed, the time frame of the arbitration, the seat of arbitration and also the official language to be adopted.⁵³ There are two types of arbitration: ad hoc and institutional arbitrations.

Ad hoc arbitration

Ad hoc arbitration is where the parties agree to self-administered arbitration.⁵⁴ Parties select their arbitrators and the procedural rules to be used during the course of the arbitration.

⁴⁶ The World Bank *History of the ICSID Convention* Vol. 1, (1970) Washington DC
<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/History%20of%20ICSID%20Convention%20-%20VOLUME%20I.pdf>

⁴⁷ The World Bank (n 46 above)

⁴⁸ As above

⁴⁹ As above

⁵⁰ Schefer (n 33 above) 372

⁵¹ The World Bank (n 46 above)

⁵² K Aina *Dispute resolution* (2012) 60

⁵³ ML Moses *The principles and practices of International Commercial Arbitration* (2008) 1

⁵⁴ S Blake et al *A practical approach to alternative dispute resolution* (2011) 388 para 23.68

However, this does not preclude the parties from making an institution the appointing authority where they cannot mutually agree to select their own arbitrators.⁵⁵ Also, the parties may decide to adopt the procedural rules of any institution or reserve the decision of the rules to be used to the panel of arbitrators.⁵⁶

Institutional arbitration

Institutional arbitration is an ‘arbitration conducted according to the rules of a specified institution which may, to a greater or lesser extent, exercise a supervisory and supportive role over an arbitration conducted pursuant to its rules.’⁵⁷ The institution provides all that will be needed to conduct the arbitration proceedings - the rooms, the appointment of arbitrators, setting of procedural rules.⁵⁸ However, it is not unusual for an institution to make use of procedural rules of other institutions other than its own.⁵⁹

Examples of arbitration institutions are ICC, the American Arbitration Association, LCIA, and ICSID.⁶⁰

3.5.2 Meaning of foreign investment arbitration

Although the term foreign investment arbitration does not have a specific definition, an attempt shall be made to define it.

According to Sornarajah’s definition of foreign investment earlier discussed, foreign investment is ‘the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets’.⁶¹ Placing this definition of foreign investment in light of arbitration as discussed above, foreign investment arbitration can be defined as the mechanism for settling disputes arising from, relating to, or concerning any foreign investment or its foreign investors in an approach independent of local courts, and before a forum selected by the parties.

⁵⁵ Blake et al (n 54 above) 388 para 23.68

⁵⁶ Blake et al (n 54 above) 388 para 23.68

⁵⁷ HJ Brown & AL Marriott *ADR principles and practices* (1999) 74 para 4-111

⁵⁸ Blake et al (n 54 above) 388 para 23.66

⁵⁹ Blake et al (n 54 above) 388 para 23.66

⁶⁰ HJ Brown & AL Marriott (n 57 above)

⁶¹ Sornarajah (n 41 above) 8

3.6 Importance of foreign investment arbitration

One of the major concerns of foreign investors is the protection of their investments. Assurance of protection helps to mitigate risks associated with investing in a foreign country. This is usually covered in IIAs, which may be contract or treaty based. A BIT is treaty-based. It is a legal instrument between two States for the advancement and security of investments of nationals of both parties investing in their territories.⁶² Protection offered in BITs essentially are fair and equitable treatment, national treatment, MFN treatment, compensation in circumstances of expropriation, full and adequate protection and security, repatriation of funds among others.⁶³

From the views of investors, an essential facet of international protection of investment is the ability to settle disputes arising from foreign investment.⁶⁴ This is because a violation of any of the aforementioned protections will require a dispute settlement method which determines what happens to the investor or investment. An arbitration clause in an IIA is important to foreign investors because:

- a) it evens out the playing field because of the powers of the government;
- b) it allows an investor to bring a suit against the State irrespective of the principle of sovereignty of a State;
- c) there is procedural clarity and no ambiguity in the road map to the settlement of disputes;
- d) it instils confidence in the investor that justice will be duly served; and
- e) it has a deterrent effect on the parties and serves as a precaution to violating the provisions of the contract between the parties.

3.7 International model instruments on arbitration

A State may choose to adopt a model law and incorporate it as the domestic law on arbitration. Parties are at liberty to choose and apply the rules of an institution in their arbitration proceeding. Widely accepted international instruments on arbitration shall be highlighted briefly below:

⁶² 'The ABC of Arbitration' <http://www.derrainsgharavi.com/arbitration/the-abc-of-arbitration/> (accessed 04 March 2016)

⁶³ As above

⁶⁴ Christoph Schreuer 'Investments, International Protection' January 2011, paragraph 109

a) The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985/2006 (the Model Law).

The Model Law applies to all areas of an international commercial arbitration. It covers all segments of an arbitration process: the determination of the authority of the tribunal and its structure, the arbitration agreement, the degree of court control, and also the rules of recognising and enforcing arbitral awards.⁶⁵ The Model law was drafted for the purpose of uniformity and with the vision that countries would adopt it as their national laws in order to achieve the purpose of the Model Law.⁶⁶ Some amendments made to the Model Law of 1985 were adopted in 2006.⁶⁷

b) The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)

ICSID Convention came into force on 14 October 1966, and established ICSID.⁶⁸ ICSID is a renowned Centre for the resolution of international investment disputes existing between State and investor or the State of the investor and the Host State.⁶⁹ The disputes brought to ICSID must be investment-related arising from BITs, Free Trade Agreements or any other IIA.⁷⁰

c) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (the New York Convention)

The New York Convention is one of the conventions under the UNCITRAL. The Convention aims at ensuring that there is no discrimination between foreign and domestic arbitral awards in recognition and enforcement of the awards.⁷¹ Signatories to the New York Convention are to recognise foreign arbitral awards in the courts, regardless of the foreign characteristics of

⁶⁵ The UNCITRAL website

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (accessed 29 February 2016)

⁶⁶ As above

⁶⁷ The amendments made to the Model law are to ‘Articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006’.

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (accessed 29 February 2016)

⁶⁸ ‘ICSID Convention, Regulations and Rules’ ICSID 15/April 2006

https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (accessed 01 March 2016)

⁶⁹ The ICSID Website <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx> (accessed 01 March 2016)

⁷⁰ As above

⁷¹ (n 65 above)

the award.⁷² The Convention also requires that courts of the contracting parties uphold arbitration agreements and refuse to litigate disputes that are to be referred to as arbitration.⁷³ This convention has made arbitration more flexible because parties can have their seats of arbitration in any country other than that in which it will be enforced, and it also allows parties to apply foreign laws in their arbitration proceeding.

3.8 Conclusion

This chapter has examined the concept of foreign investment arbitration. It began with the exploration of the history of arbitration; and it was discovered that arbitration has been functional in resolving political, religious, commercial and social disputes. From the historical account in this chapter, it is understood that the practice of arbitration preceded the advent of the formal court systems. Merchants and international traders have been drawn to arbitration because of the several benefits that outweigh the court system practice.

Foreign investment arbitration practices fully emerged after World War II due to the rising need to protect foreign investors and investments in a foreign territory from expropriation and other disagreeable occurrences in the Host State. Foreign investors needed a forum that was neutral, accessible, flexible, reliable and impartial; thus, the introduction of arbitration clauses in investment contracts. Today, settlement of investment dispute clause and other essential clauses can be found in almost all BITs and IIAs all over the world.

With this general understanding of foreign investment arbitration from a universal perspective and having studied its development and importance to foreign investors, the next chapter will explore the law and practice of settling foreign investment disputes in Nigeria's oil and gas sector.

⁷² (n 65 above)

⁷³ As above

CHAPTER FOUR

FOREIGN INVESTMENT ARBITRATION IN NIGERIA'S OIL AND GAS SECTOR

4.1 Introduction

In the preceding chapter, it was found that there are several mechanisms available to foreign investors for the settlement of investment disputes. It was also established that arbitration is a preferred means of settling foreign investment disputes and the provision of arbitration in an investment contract provides some level of protection for the foreign investors.

As discussed earlier in chapter two, Nigeria's oil and gas sector is a very important sector that has attracted several foreign investors and FDI into the economy. In this sector, disputes are bound to arise between the foreign investors and the Host State or State entities. In this chapter, therefore, various mechanisms available to foreign investors for the settlement of disputes arising from investments in the oil and gas sector will be discussed. Arbitration is a major tool for settling investment disputes related to oil and gas; as a result, the primary focus of this chapter shall be on arbitration, its legal framework in the sector, the enforcement of arbitral awards and also grounds on which enforcement may be refused. The major aspect to be studied in this chapter is the challenges that foreign investors face in the courts during an arbitration and after it is concluded.

4.2 Dispute settlement mechanisms in the oil and gas sector

There are two broad ways of resolving disputes in the oil and gas sector: the adjudicatory and non-adjudicatory process.

4.2.1 Adjudicatory mechanisms

Adjudication as the term implies is the process of instituting a legal action in the courts and seeking redress through litigation. Foreign investors have access to the domestic courts in Nigeria. The court of first instance is the Federal High Court of Nigeria. The Court has the exclusive jurisdiction to hear matters related to 'mines and minerals (including oil fields, oil mining, geological surveys and natural gas)'.¹ Parties also have the right of appeal on

¹ Section 251(1)(n) of the 1999 Constitution of the Federal Republic of Nigeria as amended

questions of law to the Court of Appeal if dissatisfied with the judgment of the Federal High Court.² A further and final appeal can also be made to the Supreme Court of Nigeria on questions of law and not fact.³

4.2.2 Non-adjudicatory mechanisms

ADR is the generic term for non-adjudicatory mechanisms and they refer to mechanisms of resolving conflicts outside of the court. One of the core elements of any ADR mechanism is voluntariness. No individual can be forced to explore any of the various methods of ADR and both parties must agree to submit their dispute to ADR for amicable settlement. ADR is ‘a range of dispute resolution processes or mechanisms designed and available outside of, but supplementary to litigation’.⁴

In Nigeria’s oil and gas sector, parties often times prefer to utilize any of the ADR mechanisms available for reasons of speed, fairness, neutrality, and flexibility. They include:

a) Negotiation

Negotiation has been used formally and informally to bury hatchets and discords over time. It is defined as ‘a process whereby two or more parties discuss issues in dispute with the purpose of reaching an agreement based either on their positions or their interest, depending on the strategy they adopt’.⁵ Parties go back and forth while compromising in order to reach an agreement that satisfies each party’s interests. A failed negotiation process births other forms of ADR and litigation.

The technique of negotiation is often used in the Niger Delta region in disputes relating to compensation.⁶

b) Mediation

In the oil and gas industry, parties have the option of resolving their disputes amicably using mediation. Where the dispute is commercial-related, mediation is a preferred mechanism for parties. This is a commonly used ADR technique. In Mediation, the process is similar to

² Section 241(1) of the Constitution of Nigeria

³ Section 233 of the Constitution of Nigeria

⁴ K Aina *Commercial mediation: Enhancing economic growth and the courts in Africa* (2012) 41

⁵ E Patelia & MA Chicktay *Mediation, negotiation & Arbitration: A practical guide to Dispute Resolution* (2014) 16

⁶ EOC Obidimma, M Anushiem & T Anaje ‘Arbitration in the oil and gas industry in Nigeria: Prospects and challenges’

https://www.academia.edu/8955552/ARBITRATION_IN_THE_OIL_AND_GAS_INDUSTRY_IN_NIGERIA_PROSPECTS_AND_CHALLENGES (accessed 28 May 2016)

negotiating but with the help of a ‘middle-man’ who helps both parties reach an agreement. The ‘middle-man’ is called the mediator – appointed by mutual decision of the parties. He is a third neutral party with no interest or bias whatsoever in the dispute.⁷ The mediator ensures the process goes peacefully and can be likened to a ‘referee in a football match’. The mediator has no power to impose terms of settlement on the parties and parties can walk away from the mediation process at any point. If parties are able to reach an agreement, their terms of settlement are put in writing and become binding on the parties as a contract.⁸

c) Conciliation

Conciliation is very similar to mediation and often times, the terms are used interchangeably to mean the same.⁹ The conciliator performs same functions as a mediator with an additional duty of proposing the terms of settlement to the parties after the process which may or may not be accepted by the parties.¹⁰

d) Arbitration

Arguably, arbitration is sometimes described as adjudicatory and not classified as non-adjudicatory. This is because it is more formal than other ADR techniques and the structure is similar to that of courts. Notwithstanding, arbitration is a form of ADR that has been employed severally by foreign investors in Nigeria’s oil and gas sector. Arbitration may be in any of three forms: voluntary, statutory or by court order. The basic rule is that arbitration is voluntary. However, it could be mandatory if it is stipulated by law in legislation. Also, the court may refer a dispute to be settled out of court in Nigeria. Often times, the courts refer the parties to the Multi-Door Courthouse (MDC) annexed to the court to provide ADR services to parties.¹¹

The use of arbitration in the oil and gas sector shall be discussed further in the course of this study.

⁷ P Pretorius *Dispute resolution* (1993) 4

⁸ P Capper *International arbitration: A handbook* (2004) 51

⁹ Capper (n 8 above)

¹⁰ Pretorius (n 7 above)

¹¹ Dr Emilia Onyema ‘The Multi-door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC’ http://eprints.soas.ac.uk/14521/1/Final_Report_on_LMDC_2012.pdf (accessed 10 March 2016)

4.3 Legislative framework for arbitration in Nigeria's oil and gas sector

4.3.1 The New York Convention 1958

The New York Convention on recognition and enforcement of arbitral awards was ratified by Nigeria on 17 March 1970, came into force 15 June 1970¹² and was adopted as the national law governing foreign arbitral awards in Nigeria.¹³ It is incorporated as the Second Schedule to the Arbitration Act of Nigeria.

4.3.2 Arbitration and Conciliation Act 2004

The Arbitration and Conciliation Act (ACA) governs both domestic and international arbitration. It is divided into four parts: Part I provides for arbitration, Part II provides for conciliation, Part III contains additional provisions relating to international commercial arbitration and conciliation, and Part IV contains the miscellaneous provisions. Also included in the Act are three Schedules:¹⁴ The first is the Arbitration Rules, the second Schedule is the Convention on Recognition and Enforcement of Foreign Arbitral Award, 1958 and the third Schedule, the Conciliation Rules.¹⁵

4.3.3 UNCITRAL Model Law

The Model Law was adopted by Nigeria in 1990 and it is on this that the Arbitration Act of Nigeria is premised.

4.3.4 ICSID (Enforcement of Awards) Act, 2004

The ICSID Convention was ratified 23 August 1965 and it came into force 14 October 1966 when it was domesticated as a national law binding in Nigeria on ICSID arbitral awards.¹⁶ An ICSID award is enforced in the Supreme Court of Nigeria. This places it at par with a judgment by the Supreme Court once registered.

¹² 'Arbitration in Africa: Nigeria' June 2007 <http://www.nortonrosefulbright.com/files/nigeria-25760.pdf> (accessed 22 April 2016)

The New York Arbitration Convention website: <http://www.newyorkconvention.org/countries> (accessed 22 April 2016)

¹³ OO. Abe 'Enforcement of foreign arbitral award in Nigeria' Unpublished LL.M short thesis, Central European University, 28 March 2009

¹⁴ Arbitration and Conciliation Act of Nigeria Cap A19 Laws of the Federation 2004

¹⁵ Same as above

¹⁶ International centre for Settlement of Investment Dispute (Enforcement of Awards) Act, Cap I20, Laws of the Federation of Nigeria, 2004

4.3.5 The Nigerian Investment Promotion Commission (NIPC) Act

This is an Act that establishes the NIPC for the encouragement and promotion of investment and related matters in Nigeria.¹⁷ Section 26 of the NIPC Act provides that disputes between the State and an investor which could not be settled peacefully and mutually may be submitted to arbitration based on the decision of the aggrieved party.¹⁸

4.3.6 Foreign Judgment (Reciprocal Enforcement) Act, 2004

This is an Act that provides for the enforcement of awards and judgments obtained outside of Nigeria in a country that also recognises and enforces awards/judgments given in Nigeria.

4.3.7 Petroleum Act 1969¹⁹

The Petroleum Act is the primary legislation in the petroleum sector that governs exploration of petroleum within the territory of Nigeria and it also vests the ownership of all the resources, revenues derived from it and all related matters in the federal government of Nigeria.²⁰ The Act provides that in the event of a dispute arising from any of the matters governed by the Act, the dispute ‘shall be settled in accordance with the law relating to arbitration in the appropriate State and the provision shall be treated as a submission to arbitration for the purpose of that law’.²¹ Also, the Act provides that in any matter relating to licensing, payment of royalties, rent, or any fee, arbitration shall be the dispute settlement mechanism, except where it is ‘excluded from arbitration expressly or expressed to be at the Minister’s discretion’.²²

This Act provides for statutory arbitration and the use of the word ‘shall’ emphasizes that parties may only settle disputes arising from this Act by arbitration.

4.3.8 Public Enterprises (Privatisation and Commercialisation) Act²³

This Act is the governing law on all matters relating to privatisation and commercialisation of some public enterprises in Nigeria.²⁴ Section 27 of this Act established an arbitration panel called the Public Enterprises Arbitration Panel. It is saddled with the responsibility of settling

¹⁷ The NIPC website: <http://www.nigeria-law.org/Nigerian%20Investment%20Promotion%20Commission%20Act.htm> (accessed 08 March 2016)

¹⁸ Section 26 NIPC Act, 2004

¹⁹ Chapter P10 (Chapter 350 LFN 1990)

²⁰ (n 19 above)

²¹ Section 11 Petroleum Act

²² Section 42 Petroleum Act

²³ 1999 No. 28 cap P. 38 LFN 2014

²⁴ As above

disputes arising between an enterprise and the Bureau or Council also established by this Act.²⁵

4.3.9 Oil Pipeline Act²⁶

The oil pipeline Act makes ‘provision for licenses to be granted for the establishment and maintenance of pipelines incidental and supplementary to oilfields and oil mining and for purposes ancillary to such pipelines’.²⁷ The Act provides that any dispute between a licensee and the Minister or President shall be settled by arbitration if both parties are unable to agree.²⁸

4.3.10 Nigeria Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurance) (NLNG) Act²⁹

An Act that confers pioneer status on the NLNG Limited and gives certain tax and custom duties incentives and also makes provision for guarantees and assurances by the Federal Government to the company and its shareholders which include foreign investors.³⁰ The NLNG Act provides that where parties cannot amicably resolve disputes within 90 days, the dispute may be submitted to ICSID.

4.4 Enforcement of foreign investment arbitral awards in Nigeria

4.4.1 Importance of enforcement of foreign arbitral awards in the oil and gas sector in Nigeria

No matter how swift and fair an arbitration proceeding may be, the most important stage is the recognition and enforcement of the awards.

For the reason that arbitration is voluntary, arbitral awards are to be complied with by parties ordinarily. However, where there is no amenability, a party will have to request an external authority to enforce the award.³¹ This can only be done in a domestic court of law in the

²⁵ Section 27 Public Enterprises Act

²⁶ Chapter N87, 1990 No. 39

²⁷ As above

²⁸ Section 17(5) Oil Pipeline Act

²⁹ Decree No.39 1990

³⁰ As above

³¹ JT McLaughlin & L Genevro ‘Enforcement of arbitral awards under the New York Convention- Practice in U.S. Courts’ (1986) 3 Berkeley Journal of International Law 250
<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1034&context=bjil> (accessed 04 March 2016)

jurisdiction in which the award is to be enforced. The award must be adapted as a judgment of the court for it to have the legal effects of a judicial judgment.³² For an award to be enforced, recognition is a prerequisite because the court will have to accept that the award is valid and can therefore be binding on the parties.³³

Foreign arbitral awards must be recognised before they can be enforced. A party may apply for an order of recognition alone without a further order for enforcement of the award.³⁴ An order of court recognising the award will prevent the institution of another action by the losing party based on the same facts, before the court.³⁵ A foreign arbitral award that cannot be recognised and enforced in the jurisdiction where the parties have assets is a waste of time and resources spent on the arbitration.³⁶ This is the reason why parties must ensure that the arbitral award will be recognised and enforceable in Nigeria before proceeding.

4.4.2 Avenues of enforcing foreign arbitral awards

There are five avenues through which foreign awards may be enforced in Nigeria. They are:

Section 51 of the ACA

Section 51(1) of the ACA provides that all arbitral awards are enforceable in Nigeria, regardless of what country it is made. However, in Section 54 of the ACA, reciprocity is a necessary requirement, that is, the award must have been made in a country that recognises a Nigerian award. This is contradictory to Section 51 of the ACA which specifically states that the country in which the award is made is not relevant in recognition and enforcement. However, the position of the courts in the interpretation of this section is that the principle of reciprocity 'is material in the enforcement of foreign arbitral awards in Nigeria'.³⁷

The New York Convention 1958

Article I (1) of the Second Schedule enumerates the two instances in which the New York Convention shall apply.

³² McLaughlin & Genevro (n 31 above)

³³ Capper (n 8 above) 122

³⁴ LM Mousa Daradkeh 'Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law)' PhD thesis, University of Leeds, 2005 18 <http://etheses.whiterose.ac.uk/494/2/DX231171.pdf> (accessed 04 March 2016)

³⁵ As above

³⁶ As above

³⁷ Prof. GC Nwakoby & Dr 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* 118 <http://www.iiste.org/Journals/index.php/JLPG/article/viewFile/22555/22930> (accessed 22 April 2016)

- i) It shall apply to arbitral awards not gotten in the jurisdiction where it is sought to be recognised and enforced;
- ii) It is also applicable to an arbitral award not considered to be a domestic arbitral award according to the arbitration law of the State in which it is to be recognised and enforced.³⁸

The ICSID (Enforcement of Awards) Act

All ICSID awards are easily enforceable in Nigeria by application to the Supreme Court of Nigeria (SC).³⁹ This prevents an unwilling party from objecting to the awards. An award duly certified by the Secretary General of the ICSID shall be filed by the party seeking its enforcement.⁴⁰

Registration under the Foreign Judgment (Reciprocal Enforcement) Act

Judgments and arbitral awards are enforced in Nigeria under this Act based on reciprocity. An award originating from a country that recognises and enforces judgments from Nigeria can be registered as a judgment of the court, provided that such registration is made within six years of obtaining the award.

Suing upon an award

A person can institute an action in court by suing upon the arbitral award for its enforcement, notwithstanding the reciprocity or otherwise of the country from which the award originates from.⁴¹ The applicant needs to show proof that an arbitration agreement exists, that the arbitration was conducted in line with the agreement, and that the award is valid.⁴²

4.4.3 Grounds for refusing recognition and enforcement

Section 52 of the ACA and Article V of the New York Convention embedded in the Second Schedule of the ACA provide that a request can be made to the court by any party to an arbitration proceeding, seeking that the court should refuse to recognise or enforce the award. The request may be granted where the party sufficiently proves any of the following grounds:

³⁸ Article I (1) Second Schedule, ACA

³⁹ Okoronkwo 'Enforcement of foreign arbitral awards' <https://www.hg.org/article.asp?id=6031> (accessed 11 March 2016)

⁴⁰ As above

⁴¹ *Toepfer Inc. of New York v. Edokpolor* (trading as John Edokpolor & Sons) [1965] All N.L.R. 307

⁴² Oluyele Delano (SAN) 'Enforcement of awards and foreign judgments in Nigeria' www.akindelano.com (accessed 12 March 2016)

Incapacity of any of the parties⁴³

An arbitration agreement is a contract between the parties to submit their dispute to arbitration. Therefore, the rules of a contract shall apply to the agreement. A party is incapable where he is of an unsound mind, or a minor, or disqualified from entering into contractual agreements, or under some influence.⁴⁴

Invalidity of the arbitration agreement under the applicable law⁴⁵

In considering the validity/invalidity of the arbitration agreement, the applicable law provided in the agreement shall be the determining law. Where parties did not indicate the applicable law in the agreement, the court shall review the arbitration agreement in accordance with the law of the place where the arbitral award was issued.

Improper appointment of arbitrator(s) and inability to make presentation⁴⁶

For a fair trial, parties must participate in the selection and appointment of arbitrator(s) and it must be mutually done. Each party must also be given the chance to present his or her case at all times. Where there is no notification of appointment and where a party is not able to make his case, the *audi alterem partem*⁴⁷ principle of equity has been breached.⁴⁸ Importantly, a party cannot challenge an award on this ground, if notification was given and the party ignored it.⁴⁹

Award is beyond the scope of submission to arbitration⁵⁰

Where an arbitral award exceeds the coverage of the subject of the agreement between the parties, the arbitral award can be challenged by one of the parties. Where only a part of the award is *ultra vires*, only that part will not be recognised or enforced by the court. The court shall apply the principle of ‘separability’ and separate the part of the award that is within the scope of arbitration from the rest of the award for recognition and enforcement.

⁴³ Section 52 (2)(a)(i) ACA

⁴⁴ S Kumar ‘Capacity of parties’ 11 March 2012 <http://shivamlawworld.blogspot.co.za/2012/03/capacity-of-parties.html> (accessed 12 March 2016)

⁴⁵ Section 52 (2)(a)(ii) ACA

⁴⁶ Section 52 (2)(a)(iii) ACA

⁴⁷ ‘Means that no person shall be condemned, punished or have any property or legal right compromised by a court of law without having heard that person’ -

<http://www.duhaime.org/LegalDictionary/A/AudiAlteramPartem.aspx> (accessed 15 March 2016)

⁴⁸ Abe (n 13 above) 35

⁴⁹ *Lagos State Development and Property Corporation V. Adold Stamm International (Nigeria) Limited* (1994) LPELR-1745(SC)

⁵⁰ Section 52 (2)(a) (iv) & (v) ACA

Arbitral procedures not in accordance with the agreement⁵¹

This includes the composition of the arbitral tribunal, the conducts of the arbitrators, and the procedural aspect of the arbitration. The court is to determine this based on the applicable law in the agreement or *lex loci arbitri*⁵² where parties did not preselect an applicable law. Where the conduct of the arbitrator is *ultra vires* or constitutes misconduct, an arbitral award can be challenged.⁵³

Award not binding⁵⁴

The general principle is that an arbitral award is binding on the parties once they agree to submit their dispute to arbitration. However, the ACA provides that an award may not be recognised or enforced where the award is non-binding on the parties by virtue of the applicable law, or has been suspended or set aside by the court.

The subject-matter of the dispute is not arbitrable in Nigeria⁵⁵

If the findings of the court reveal that the award covers a subject that cannot be submitted to arbitration by virtue of the Nigerian law, the award can neither be recognised nor enforced.

Award contravenes public policy⁵⁶

An award that contradicts Nigeria's public policy cannot be recognised or enforced. Although public policy is not defined in an instrument, it is left to the court to determine what constitutes a violation of public policy based on the matter before the court.⁵⁷

4.5 Challenges in the enforcement of foreign investment arbitral awards in Nigeria's oil and gas sector

There are several stumbling blocks on the path to enforcing foreign investment arbitral award in Nigeria. A significant number of the disputes arbitrated in Nigeria are related to the oil and

⁵¹ Section 52 (2)(a)(vi) & (vii) ACA

⁵² Law of the place where arbitration took place. <http://encyclopedia.thefreedictionary.com/Lex+loci+arbitri> (accessed 16 March 2016)

⁵³ *Adwork Limited V. Nigeria Airways Limited* (1999) LPELR-6494(CA); *A. Savoia Limited v. A. O. Sonubi* (2000) LPELR-7(SC); *Stabilini Visinoni Limited v. Mallinson & Partners Limited* (2014) LPELR-23090(CA); *Taylor Woodrow (Nig.) Ltd. v. Suddentsche Etna-Werk GMBH* (1993) 4 NWLR 127

⁵⁴ Section 52 (2)(a)(viii) ACA

⁵⁵ Section 52 (2)(b)(i) ACA

⁵⁶ Section 52 (2)(b)(ii) ACA

⁵⁷ *Taylor Woodrow (Nig.) Ltd. v. Suddentsche Etna-Werk GMBH* (1993) 4 NWLR 127

gas sector mainly because of the mandatory arbitration clauses in the sector's laws. The challenges to be discussed are those that are court related and not all challenges that parties encounter in arbitration. Some of the actions and practices of the courts, lawyers, and parties which negatively affect the enforcement of arbitral awards in Nigeria shall also be discussed.

4.5.1 Court intervention

The Constitution of Nigeria is supreme and 'if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall, to the extent of the inconsistency, be void' (emphasis added).⁵⁸ Section 6⁵⁹ gives judicial powers to the courts over 'all matters between persons, or between government or authority and any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person'.⁶⁰ This section of the constitution empowers the courts to hear disputes of any nature which also includes arbitration-related matters.

However, section 34 of the ACA provides that 'a court shall not intervene in any matter governed by this Act except where so provided in this Act'. The ACA does preclude the courts from intervening in arbitration matters but also made exceptions for certain circumstances. The question therefore is: To what extent can the court intervene in arbitration and at what stage?

Ensuing from a scrutinized examination of the ACA, the instances in which the court may intervene as stipulated in the Act are identified as follows:

- a) The court may grant leave of court for the revocation of an arbitration agreement.⁶¹
- b) The court may give orders to stay proceedings of court actions on the request of a party to arbitration before further steps are taken in the proceeding.⁶²
- c) The court may order writs of *subpoena ad testificandum* and *subpoena duces tecum* to compel witnesses to testify or produce documents.⁶³ The court may also order a writ of *habeas corpus ad testificandum* to allow a prisoner to be examined before any tribunal.⁶⁴

⁵⁸ Section 1(3) of the constitution of Nigeria, 1999 (as amended)

⁵⁹ The constitution of Nigeria

⁶⁰ Section 6 (6)(b) of the constitution of Nigeria

⁶¹ Section 2 ACA

⁶² Section 4 & 5 ACA

⁶³ Section 23(1) ACA

⁶⁴ Section 23 (2) ACA

- d) The court may set aside arbitral awards if a party not pleased with the arbitral award makes an application to the court for the setting aside of the award within three months, and can prove that any of the conditions by which a court may set aside an award can be found.⁶⁵
- e) The removal of an arbitrator for misconduct.⁶⁶
- f) Recognition and enforcement of foreign arbitral awards by way of a written application accompanied by a certified true copy (CTC) or a duly authenticated original award, the original or CTC of the arbitration agreement, and a duly certified translation of a foreign award to English language.⁶⁷
- g) Refusal to recognise and enforce arbitral awards by application of one of the parties if any of the grounds can be proved.⁶⁸

However, the courts have in decided cases, intervened in arbitrations that were yet to be concluded and obstructed their continuity and completion. Some of the instances where the court granted anti-arbitration injunctions and third parties the right to intervene shall be addressed subsequently.

Anti-arbitration injunctions

An anti-arbitration injunction is a court order pre-empting arbitration from being initiated or concluded in a matter.

In *NNPC v. Statoil (Nig.) Ltd & Ors*,⁶⁹ (the *Statoil case*) the Federal High Court (FHC) granted an order restraining the arbitration from continuing. In this case, the Production Sharing Agreement between the parties stated that any dispute arising from the contract will be submitted to arbitration for resolution. NNPC made an objection to the jurisdiction of the arbitral tribunal on the ground that the subject matter is related to taxation and cannot be arbitrated for this reason. The arbitral tribunal refused to grant the stay of proceedings and this led the applicant to make an ex parte application to the court for an interim injunction which was granted.

⁶⁵ Section 29 ACA

⁶⁶ Section 30 ACA

⁶⁷ Section 31 & 51 ACA

⁶⁸ Section 32, 48 & 52 ACA

⁶⁹ (unreported) Suit no. CA/L/758/2012

Subsequently, the order was challenged on appeal to the Court of Appeal (CA), and the court discharged the order by stating that Section 34 of the ACA is mandatory and the ex parte order contradicts the provisions of the section because it is not listed as an exception.⁷⁰

Sequel to the judgment of the court in the *Statoil case*, the CA in *Nigerian Agip Exploration Ltd (NAEL) v. NNPC*⁷¹ (*the NAEL case*) delivered a judgment in the same vein on 25 February 2014. The originating motion of the applicant sought the court to grant ‘an order staying further proceedings in respect of the arbitration proceeding, including but not limited to...doing anything whatsoever towards reconvening...and or concluding the Partial Award towards delivering the Final Award’.⁷²

The court in refusing to grant such order stated that ‘I am of the fervent view that the proceedings of an arbitral panel should not be unduly clogged by the grant of an injunction’.⁷³

Giving the above judgments in 2013 and 2014, one may come to a conclusion that anti-arbitration injunctions should be considered as of the past and not to reoccur again in the courts. However, it is bewildering to find out that this trend is still being practised in the courts till date.

In the very recent case of *The SPDC & Ors v. Crestar Integrated Natural Resources Limited*⁷⁴ (*the Crestar case*), the applicant made an application to the Court seeking that the court grants an ‘order of injunction restraining the appellants/respondents from proceeding with an arbitration that had begun. The respondent argued that the courts do not have jurisdiction to grant anti-arbitration injunctions and cited section 34 of the ACA, *the Statoil case* and *the NAEL case* above.

In pronouncing judgment, the Court stated that Section 34 cannot apply in the instant case because it is an international arbitration.⁷⁵ The court further established that although the UNCITRAL Model Law applies to international arbitration, it can only govern arbitrations

⁷⁰ *Statoil Nigeria Limited v Nigerian National Petroleum Corporation* (2013) 14 NWLR (Pt 1373) 1 Page 28, paras D-F

⁷¹ (unreported) Suit no. CA/A/628/2011

⁷² ‘Can A Court Restrain the Continuation and Finalization of Arbitral Proceedings?’ Hybrid quarterly, June 2014, Vol. 1 No.2

[www.hybridsolicitors.com/solicitor/newsletters/Can a court restrain the continuation and finalization of arbitral proceedings.pdf](http://www.hybridsolicitors.com/solicitor/newsletters/Can_a_court_restrain_the_continuation_and_finalization_of_arbitral_proceedings.pdf) (accessed 25 March 2016)

⁷³ As above

⁷⁴ (2015) LPELR-40034(CA)

⁷⁵ Per OBASEKI-ADEJUMO, J.C.A. (Pp. 9-12, Paras. F-E)

that chose the Model Law as the applicable law and since parties chose English law as their applicable law, the Model Law will not apply to the parties.⁷⁶

The court, therefore, examined the approach of the English courts and concluded that the CA and the lower court have the power to grant such injunctions. The court replicated a decision of the English court in *Excalibur Ventures Llc v. Texas Keystone Inc*⁷⁷ where it was held that:

...the English Courts have Jurisdiction ...to grant injunctions restraining arbitrations where the seat of the arbitration is a foreign jurisdiction, although it is a power that is only exercised in **exceptional circumstances and with caution**... (Emphasis added)

However, the phrase ‘exceptional circumstances and with caution’ above, requires a narrow explanation as to what circumstances are exceptional, and how often a court can exercise the power to intervene in international arbitration ‘with caution’. The court therefore restated the decision of the court in *Claxton Engineering Services Ltd v. TXM Olaj-ES Gazkutato KFT*⁷⁸ and held that:

In order to establish exceptional circumstances, it will usually be necessary, as a minimum; to establish that the applicant's legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable, these being the principles which govern the grant of injunctions to restrain proceedings in a foreign Court...

In the *Crestar case*, the circumstances under which the court granted the injunction revolved around the ‘balance of convenience’. The respondent made a plea that the prohibitive cost of the London arbitration cannot be afforded and that the continuation of the process will result to ‘a waste of its resources and judicial time in comparison to an instant appeal’.⁷⁹ It is paramount to point out that the parties agreed to arbitration in London and should have – at the time of making the decision – envisaged the cost.

This judgment of the court in the *Crestar case* will only give lawyers the free will to make application for an anti-arbitration injunction in instances not favourable to their client. If the position of the Nigerian courts is that an anti-arbitration injunction can be granted to stop an arbitration conducted outside the shores and jurisdiction of Nigeria and the ACA, it is an enormous impediment in the way of a smooth and swift international arbitration proceeding.

⁷⁶ Per OBASEKI-ADEJUMO, J.C.A.

⁷⁷ [2012] 1 ALL ER (Comm.) 933 at 947, the Queen’s Bench Division of the English Commercial Court

⁷⁸ (No 2) (2011) ALL ER (Comm.) 128

⁷⁹ ‘Power of courts to order anti-arbitration injunctions in foreign arbitration proceedings’ 16 February 2016 <http://www.lexology.com/library/detail.aspx?g=78f4ccc7-efeb-4f67-be8b-46ca14687b82> (accessed 25 March 2016)

Third party intervention

Ordinarily, only parties to an arbitration proceeding can be allowed to challenge or object to the proceeding. A third party not signatory to an arbitration agreement is barred from interfering in arbitration or halting an arbitration process. This has been established in the case of *Folarin Rotimi Abiola Williams V. Chief Oladipupo Akanni Olumuyiwa Williams & Ors*⁸⁰ (the *Williams case*) where the court held that ‘an applicant for the stay of proceedings must be a party of the arbitration agreement’.⁸¹

Conversely, the FHC and the CA have decided in *Statoil (Nigeria) Limited & Texaco Nigeria Outer Shelf Limited v. FIRS & NNPC*⁸² (the *Statoil & Anor v. NNPC & FIRS case*) that a third party is allowed to challenge the jurisdiction of an arbitral tribunal.

Based on the Production Sharing Contract between the appellants/defendants (Statoil & Texaco) and the 2nd respondent (NNPC), any dispute arising from the contract is to be settled by arbitration. The appellants instituted an arbitration proceeding after the occurrence of a dispute. The 1st respondent/plaintiff (FIRS) is the institution authorised by law to manage, control and collect revenue and taxes accruable to the government. At the FHC, the FIRS by way of originating summons, sought an order declaring that the claims relate to taxes that the arbitration is against public policy, and therefore, an order of injunction restraining the defendants from complying with the arbitral awards should be granted. The appellants/defendants, therefore, claimed that the NNPC colluded with the FIRS to institute the action against them in order to hinder the arbitration from proceeding. The appellants filed particulars of the claim which stated that the communications between the parties were confidential and FIRS could have only known about the arbitration through the NNPC.

The objections of the appellants/defendants were dismissed and the court ruled that any dispute that involves tax matters cannot be submitted to arbitration under the Nigerian laws. On appeal to the CA, the ruling of the lower court was upheld and the court held that FIRS had *locus standi* to challenge the arbitration agreement and jurisdiction of the arbitral tribunal.⁸³

⁸⁰ (2014) LPELR-22642(CA)

⁸¹ *A.I.D.C. v. NIGERIA L.N.G. LTD* (2000) 2 SC 57 or (2000) 4 NWLR (PT 653) 494

⁸² (2014) LPELR-23144 (CA)

⁸³ Per JOSEPH TINE TUR, J.C.A. (Pp. 43-45, paras. F-C)

The decisions of the courts in the above case have been criticised by various writers, arbitrators, pro-arbitration stakeholders, and the Nigerian arbitration society at large.⁸⁴ A prolific writer on arbitration practice in Nigeria, Dorothy Ufot, comments on the *Statoil & Anor v. NNPC & FIRS case* in an article and states that⁸⁵:

A decision of an appellate court which permits a non-signatory third party to the arbitration agreement to intervene in an ongoing arbitration proceeding, with a view to stopping the process, on the grounds that the impending award will impinge on its ability to perform its statutory or constitutional functions, or on the ground of arbitrability of the subject matter of arbitration, can at best be described as unfortunate.

Correspondingly, Wilson and Grazebrook describe the decision of the court in the instant case as being ‘based on the whims of the judge in question rather than the applicable arbitration law’.⁸⁶

The above authors have said it all and thus require no further elaboration. The decisions of the FHC and the CA go against the essence of arbitration by allowing a third party to disrupt an arbitration proceeding and obstruct it from concluding.

4.5.2 Arbitrability and public policy

Pursuant to section 48(b) (i) - (ii) of the ACA, the court may set aside an arbitral award if the court finds that the subject matter of the dispute is that which cannot be submitted to arbitration based on the laws of the Federation. An award may also be set aside under this subsection if it is against the public policy of Nigeria.

According to the provisions of ACA and the New York Convention, arbitrability and public policy are grounds on which an arbitral award – domestic or foreign – may be challenged and enforcement refused.⁸⁷ The sections of the ACA and the New York Convention providing for recognition and enforcement of arbitral awards do not stipulate in any part, expressly or impliedly, that an ongoing arbitration can be stopped abruptly on any of the grounds stated therein. An arbitration proceeding should survive the process and the award can only then be challenged.

⁸⁴ J Wilson & O Grazebrook, ‘Nigerian Court of Appeal Allows Third Party to Challenge Arbitration Award’ 12 February 2015 <http://www.covafrika.com/2015/02/nigerian-court-of-appeal-allows-third-party-to-challenge-arbitration-award/> (accessed on 06 November 2015)

⁸⁵ D Ufot ‘Arbitration Practice Area Review’, August 2015, <http://whoswholegal.com/news/analysis/article/32446/arbitration-practice-area-review> (accessed on 10 October 2015)

⁸⁶ J Wilson & O Grazebrook (n 84 above)

⁸⁷ Section 52 (2)(b)(i) & (ii) ACA; Article V(2)(a) & (b) of the New York Convention.

One common feature in the several cases illustrated above, is the basis on which anti-arbitration injunctions and orders were sought – the arbitrable nature of the dispute and the issue of public policy. In the *Statoil & Anor v. NNPC & FIRS case*, the court granted the declarations and orders of FIRS that halted an arbitration proceeding based on public policy and the arbitrable nature of the dispute. Evidently shown is that the decisions of the court are not in tandem with the provisions of the ACA and the New York Convention which provide that under no circumstance should an ongoing arbitration be interrupted.

In several decided cases where the court has set aside an arbitral award or thwarted an arbitration proceeding, the decisions have been in favour of State entities or agents. The FIRS and NNPC are major applicants and beneficiaries of anti-arbitration injunctions and orders. These agencies have overly raised defences of public policy and arbitrability in order to challenge the enforcement of awards not favourable to them.⁸⁸ In the case of *FIRS v. NNPC & Ors*,⁸⁹ the FHC gave orders that restrained arbitration based on the argument of FIRS that the subject matter is not arbitrable by law. Also, in *NNPC v Statoil Ltd & 2 Ors*⁹⁰, the same decision was made and an ex parte order was granted.

Giving the trends of courts on issues of public policy, it is paramount to note that the SC in the case of *Sonnar (Nigeria) Ltd & Anor. V. Partenreedri M. S. Nordwind Owners Of The Ship M. V. Nordwind & Anor* (the *Nordwind case*), stressed the peril of making decisions based on public policy.⁹¹ The Apex Court stated that⁹²:

...it is dangerous for a court to base its decision mainly on public policy, which indeed would be another means of avoiding the rules, law and procedure which govern a matter. Public policy is usually equated with public good. To ask a Court to decide only as a result of public policy or public good, goes beyond the measure of liberalism in the application of the law or even viewing a matter from the socio-economic context of law. Who is to determine what constitutes public policy? To rely on public policy or public good simpliciter, is to give room to uncertainty in the law. It is a way "to beg the question"...

⁸⁸ A. Atake, O. Whyte & V. Akpara 'Nigeria: Beating the system' 01 June 2012 <http://www.iflr.com/IssueArticle/3083700/Supplements/Nigeria-Beating-the-system.html?supplementListId=86540> (accessed 27 March 2016)

⁸⁹ FHC/ABJ/CS/774/2011 judgment delivered on 29 February 2012

⁹⁰ FHC/L/CS/1043/2012

⁹¹ (1987) LPELR-3494(SC)

⁹² Per ESO, JSC (Pp. 27-28, paras. E-G)

Following suit, the CA in *Edet v. Chagoon*⁹³ laid down a principle on this issue of public policy⁹⁴:

Public policy is traditionally described as an unruly horse, and a Judge has neither qualification nor experience in such equestrian matters. Thus, to render a decision solely on public policy or public good is to plague the law with uncertainty, and it is against public policy to produce uncertainty in the law...

The decisions of the SC and the CA in the cases above appear not to have been considered by the courts when rendering decisions to set aside arbitral awards on the grounds of public policy and arbitrability. In reality, what is regarded as an issue of public policy may be a camouflage of the real motives behind making an anti-arbitration application. Taking into consideration that the applicants are most times government entities, it may be construed that the State is tactically preventing the conclusion of arbitration for reasons that are political.⁹⁵ An application may be made on the ground of public policy, but in fact, be a ploy to prevent the State from having to pay exorbitant sums that may, or have been, awarded against it. The foregoing is not a baseless assumption because the quantum of the awards rendered void and invalid by the FHC on grounds of non-arbitrability of the subject-matter in two cases is about 10.8 billion dollars.⁹⁶

Will it therefore be outrageous for one to assume that the government is preventing the enforcement of awards by urging the courts to set aside awards made against it or by requesting that the arbitration proceeding be halted?

4.5.3 Delays

Justice Eso, a retired Supreme Court judge, was factual when he stated that ‘the mill of justice grinds slowly in Nigeria’.⁹⁷ Nigerian judicial system has been recognised internationally, as a very slow justice attainment system – the arbitration system is not exempted from this. Enforcement of an arbitral award takes a long duration of time to be concluded. Since arbitral awards can be challenged at the High Court or FHC and further challenged to the CA and afterwards to the SC hierarchically, parties hardly throw in the towel when an arbitral award is not in their favour.

⁹³ (2008) 2 NWLR (Pt. 1070) 85

⁹⁴ Per Ngwuta, JCA P. 105, paras. B-D

⁹⁵ A. Atake et al (n 88 above)

⁹⁶ I. Anaba & I. Nnochiri ‘Court voids two arbitration awards worth N480bn against NNPC’

www.vanguardngr.com (accessed 27 March 2016)

JC Azu ‘Justice Adamu Bello: Judge who saved Nigeria \$10.8bn bows out’ 14 Jan. 2014,

<http://www.dailytrust.com.ng/daily/index.php/law/14344-justice-adamu-bello-judge-who-saved-nigeria-10-8bn-bows-out> (accessed 29 March 2016). See also: the *NAEL case*; the *FIRS v NNPC case*

⁹⁷ *IPCO (Nigeria) Ltd. v Nigerian National Petroleum Corporation* [2008] APP.L.R. 04/17

In *NNPC v. Clifco Nigeria Limited*,⁹⁸ (the *Clifco case*) the parties submitted a dispute arising from a contract between them to arbitration. The arbitral tribunal gave an award in favour of Clifco and awarded cost and an alternative award for performance against NNPC. NNPC being dissatisfied with the award applied to the FHC by filing an originating summons praying the court for two reliefs.⁹⁹ The first was to set aside the arbitral award made 12 December 2000, and the other was to refuse the recognition and enforcement of the award. The FHC delivered a judgment on 31 October 2001 which set aside the award and refused its recognition and enforcement. Clifco therefore filed an appeal at the CA and the court partially set aside the arbitral award and affirmed a part of it. The respondent displeased by this judgment of the court, filed an appeal at the SC on 30 June 2003 and Clifco filed a cross-appeal. The SC in delivering judgment on 15 April 2011 dismissed the appeal and cross-appeal for lack of merit and upheld the partial award as ordered by the CA.

In the instant case, the arbitral award was given in 2000 and was challenged up to the SC where final judgment was given in 2011. It took 11 years for the case to be decided and at the end of the litigation, the arbitral award was still enforced by the court – although not in whole but in part. The arbitral award provided that the respondent paid a sum to the claimant or in the alternative, to perform contractual obligations. The court enforced the alternative award.

Both parties could have avoided further expenses in litigation and enforced the arbitral award of the tribunal. 11 years of litigation only to be ordered to do as the arbitral tribunal ordered, is a waste of time and resources. There are two ways to look at this:

- a) NNPC was only delaying the performance of their duties by applying to the court to refuse the enforcement of the award. The alternative award which was for a period of 18 months was due to be completed in June 2002. Adhering to the award would have prevented a prolonged litigation which ended in 2011.
- b) The courts could have ensured that the matter be concluded sooner than it did. Although the trial court set aside the award, judgment was delivered within a year. While it took the CA two years to give a decision and the SC, eight years.

The delay in enforcement is not limited to the initial proceedings of recognition and enforcement but also extends to after the award may have been enforced by the court. The losing party usually would not relent until the judgment of the court is further appealed.

⁹⁸ (2011) LPELR-2022(SC)

⁹⁹ *NNPC v Clifco* suit no: FHC/ABJ/CS/433/2000 (unreported)

In *The Vessel MV Naval Gent & Ors (Naval Gent & Ors) v. Associated Commodity International Limited (ACIL)*,¹⁰⁰ the parties referred their dispute to arbitration in London pursuant to the dispute settlement clause in their agreement. Based on this, the FHC stayed proceeding in the action instituted by ACIL against Naval Gent & Ors¹⁰¹ pending the result of the arbitration. The arbitral award dated 04 February 2004 was registered as the judgment of the FHC. Subsequent to this, ACIL filed an application in the very court to continue the initial suit that was stayed pending the conclusion of the arbitration. The court accepted the application and the suit was set down for trial. So, Naval Gent & Ors appealed against the ruling of the FHC at the CA. The sole issue for determination was: ‘Whether the FHC retains any jurisdiction to entertain the Respondent's claims in Suit No. FHC/L/CS/731/2000 in view of the unchallenged London final arbitration award on the same claims?’

While the court was ready to determine the issue before it, the respondent raised a preliminary objection that lingered for a long time which had to be resolved before the issue before the court could be determined. After going back and forth on the preliminary objection on the subject of signature on the Notice of Appeal, the court dismissed the objection as being baseless and without merit.

The CA pleasingly resolved the issue in favour of the appellant. The court held, among others, that the FHC lacked jurisdiction to set the suit down for hearing after the international award has been registered and thereby enforced by the court. The CA further held that the respondent cannot make an application to set aside an award by making an application to set the initial suit down for hearing. The CA finally ruled that the lower court ‘lacked jurisdiction to make the order setting down the suit for hearing’. The Court overruled the judgment of the FHC and struck out the respondent’s application for want of jurisdiction.

Despite the applauding decision of the CA in the instant case, the fact that the matter dragged on for a long period of time cannot be overlooked. The arbitral award was given on the 04 February 2004 and was only concluded at the CA on 27 November 2015. Prior to the completion of the arbitration, an action was already instituted in the FHC in 2000 which had to be stayed pending the conclusion of the arbitration. When calculated, it shows that the dispute lasted from 2000 till 2015. Fifteen years is a lengthy time for a business dispute to linger.

¹⁰⁰ (2015) LPELR-25973(CA)

¹⁰¹ Suit no: FHC/L/CS/731/2000

Although the instant case discussed above is not related to the oil and gas sector, it shows that delays in the system also affect foreign investments in other sectors in Nigeria.

The cases discussed above are only a few of the cases which have been prolonged by actions of a recalcitrant party, procedural challenges, the slow pace of resolving disputes by the court and the defiance to not comply with the award of a competent tribunal.

4.6 The implications for FDI in the oil and gas sector and other sectors in Nigeria

Dr Onyema gave her candid and direct opinion on the judicial system and security of investments in Nigeria¹⁰² as she reviewed the *NNPC v IPCO* case¹⁰³. She emphasized that efficiency is part of security as it means ‘access to and speed of obtaining justice in addition to substantive justice’.¹⁰⁴ In *NNPC v. IPCO* case, an arbitral award was issued against NNPC and in favour of IPCO on 28 October 2004 at the end of an arbitration that took less than a year. The sum of 152 million US dollars was awarded with an interest of 14 percent accruable from the day the award was made. IPCO applied to the English courts for enforcement and NNPC (as usual) challenged the award in the Nigerian courts.¹⁰⁵ Several applications were made in Nigerian and English courts simultaneously, and in 2015, the latter had delivered five judgments, while the former was yet to deliver a single judgment.¹⁰⁶ The only ruling made so far was to grant an order to transfer the matter to another judge.¹⁰⁷ Giving all of these, one of the English judges characterised the Nigerian judiciary as ‘catastrophic’.¹⁰⁸

In further discussing the judicial concerns of foreign investors in the Nigerian experience, it is important to discuss the impact of the challenges faced by foreign investors in the oil and gas sector above. Each of them shall be discussed in *pari passu* with the repercussions they have on foreign investments and investors in Nigeria.

¹⁰² E Onyema ‘Nigeria: IPCO v NNPC saga and liability of Nigerian legal system’ 22 December 2015 <http://allafrica.com/stories/201512220439.html> (accessed 27 April 2016)

¹⁰³ [2015] EWCA Civ 1144 & [2015] EWCA Civ 1145

¹⁰⁴ Onyema (102 above)

¹⁰⁵ Onyema (n 102 above)

¹⁰⁶ I Uwaleke ‘Nigeria: Judiciary and govt’s investment drive’ 12 January 2016 <http://allafrica.com/stories/201601120621.html> (accessed 27 April 2016)

¹⁰⁷ Onyema (n 102 above)

¹⁰⁸ Uwaleke (n 106 above)

a) Anti-arbitration injunctions and third party intervention

The recent stance of the Nigerian courts on granting anti-arbitration injunctions in international arbitration is that the courts have jurisdiction to grant orders that may obstruct the successful conclusion of arbitration. The *Crestar case* sets precedence for others to follow. One of the reasons why parties agree to have their disputes resolved by arbitration conducted outside of Nigeria is to enjoy freedom from intrusion by the local courts. Giving the judgment of the court in the *Crestar case*, parties may take advantage of this recent development to achieve their concealed intents.

Foreign investors and their investments will be threatened because they will have to submit to the domestic courts and all the challenges that come with it. The future of foreign arbitration being smoothly conducted without interruption where a Nigerian party is concerned is almost unforeseeable. The practicality of the decision in the *Crestar case* is that anti-arbitration injunctions obtained in Nigeria may be ignored and parties may also encounter problems in enforcing them in other jurisdictions.¹⁰⁹

Dorothy Ufot, gives her in-depth comment on the subject of anti-arbitration injunctions being granted in Nigeria. Her perspective is that:¹¹⁰

One of the challenges of arbitrating in Nigeria...is the perennial problem of anti-arbitration injunctions habitually issued by some Nigerian courts... There is no doubt that any country whose courts habitually interfere with ongoing arbitration proceedings by issuing injunctions which prematurely determine the proceedings cannot attract the desired foreign investment inflow.

One core advantage attributed to arbitration is that a third party not signatory cannot interfere in an ongoing arbitration proceeding without the prior consent of the parties. Based on the decision of the court in *Statoil & Anor v. NNPC & FIRS*, third parties are now allowed to make applications to the court to interrupt arbitration. Co - authors commenting on the *Statoil case* state that the court's decision 'shows that arbitration in Nigeria remains unpredictable and therefore, parties looking to invest in Nigeria should be aware of these risks when negotiating the dispute resolution clauses of their agreements'.¹¹¹

¹⁰⁹ 'Power of courts to order anti-arbitration injunctions in foreign arbitration proceedings' 16 February 2016 <http://www.lexology.com/library/detail.aspx?g=78f4ccc7-efeb-4f67-be8b-46ca14687b82> (accessed 25 March 2016)

¹¹⁰ D Ufot 'Lagos Court of Appeal lifts anti-arbitration injunction in groundbreaking decision' 13 December 2013, <http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Nigeria/Dorothy-Ufot-Co/Lagos-Court-of-Appeal-lifts-anti-arbitration-injunction-in-groundbreaking-decision> (accessed 30 March 2016)

¹¹¹ J Wilson & O Grazebrook (n 84 above)

Foreign investors desire the assurance of a predictable legal system where the judgments of the courts will not be impulsive. As of date, the justice system has exceedingly proven to be unpredictable and erratic in giving decisions.

b) Arbitrability and public policy

Taking into consideration that what constitutes public policy is not contained in a single instrument, this creates uncertainty in the approach of the court in state-related matters.¹¹² Drawing from the analysis in 4.5.2 above, it is unavoidable that foreign investors will be sceptical to institute an arbitration proceeding against a government entity. There are uncertainty and lack of trust in the legal system as a result of the trends in the arbitrations involving a state entity; especially, in instances where huge sums of money are awarded against the entity.

c) Delay in enforcement proceedings

In the *Clifco case* and *The Vessel MV Naval Gent & Ors v. ACIL*, enforcement of arbitral awards in these cases took 11 and 15 years respectively before a final and binding judgment was given by the court. The obvious implication of this is that investments, trade, and all other commercial transactions relating to the subject of the dispute will be put on hold pending the outcome of the matter. The financial and economic impact of this cannot be minimal. One of the reasons why investors and businessmen choose arbitration is because of the speed associated with its practice.

In *MV Lupex v. Nigerian Overseas Chartering and Shipping Limited*,¹¹³ an application for ‘stay of proceedings pending reference of the dispute to arbitration’ was made to the court.¹¹⁴ The SC finally granted the application and allowed the parties to proceed with the arbitration instituted in London as stipulated in their contract. After 10 years of pursuing the application, the goods detained in the vessel had already decayed and was of no value anymore.

The importance of speed to investors cannot be overemphasized nor overstressed. The slow pace at which arbitration matters are concluded in Nigeria may cause investments to suffer a significant loss of revenue and could shake such investments to their roots.

¹¹² A. Atake et al (n 88 above)

¹¹³ (2003) 15 NWLR (part 844) 468 SC

¹¹⁴ Dorothy Ufot ‘The challenges arbitrating in Africa: the Nigerian experience’ 06 December 2012, www.internationallawoffice.com (accessed 19 March, 2016)

4.7 Conclusion

In this chapter, it was found that there are various methods of resolving foreign investment disputes in the oil and gas sector. Parties may choose any of the non-adjudicatory methods or resort to the domestic court. Although majority of the laws in the oil and gas sector provide that arbitration 'shall' be the means of settling disputes, parties cannot be denied of their rights to access the domestic courts. Also found was that the major parties in disputes arising from the sector are: the foreign investors, local investors, the NNPC, FIRS and oil corporations. Arbitration in the oil and gas sector increases as the disputes increase. This is not unusual as disputes are bound to occur in any investment or business transaction. The major challenge is enforcing foreign investment arbitral awards.

From the foregoing, the courts have persistently, and in several instances, gone against the ACA and intervened in instances where they are not permitted to. As discussed above, these have influenced the negative perception of investors and tainted the image of the judiciary in Nigeria.

The consequences of the challenges discussed in 4.5 above create complications for existing and prospective foreign investors and investments in Nigeria. These challenges affect both foreign and domestic arbitration and arbitral awards. More increasingly, the upsurge of issues in enforcing international arbitral awards in Nigeria is dreadful.

The next chapter will consider how enforcement in a selected country excels, and what can be done to improve the enforcement of foreign investment arbitral awards in Nigeria by learning from an African experience.

CHAPTER FIVE

IMPERATIVE FOR AN EFFICIENT SYSTEM FOR THE ENFORCEMENT OF FOREIGN INVESTMENT ARBITRAL AWARDS IN NIGERIA: LESSONS FROM MAURITIUS

5.1 Introduction

In chapter four, it was concluded that the process of enforcing foreign investment arbitral awards in Nigeria is clogged with several challenges. This makes the arbitration system inefficient and incompetent in enforcing arbitral awards. This chapter will examine the laws and more particularly the practices of arbitration in Mauritius. In this analysis, attempts will be made to draw some lessons from the practices of arbitration in Mauritius that could be useful to Nigeria. The aim of this is to discover what could be done differently in Nigeria for the improvement of the existing arbitration laws and procedures in the enforcement of foreign investment arbitral awards. Hence, this chapter seeks to identify areas in which Nigeria can draw lessons from an African experience.

5.2 Why Mauritius?

The rationale behind the choice of Mauritius is not only limited to the common colonial origins and English legal system but also extends to the adoption of the UNCITRAL Model Law as the basis for the legal framework on arbitration. Both countries strive towards being the best in their respective regions and have also established international arbitration institutions for the main purpose of attracting foreign arbitrations and enhancing the investment climate.

Prior to the selection of Mauritius, the researcher examined the laws and practice of arbitration in a few more countries closely related to Nigeria and also within the ECOWAS region but found that most of them experience similar issues addressed in this work. Further research showed that Mauritius is an ideal choice for Nigeria and the most suitable choice in SSA.

Although the main sectors attracting foreign investment into Mauritius and Nigeria are different - financial services sector and oil and gas respectively - enforcement of foreign investment arbitral awards in both jurisdictions are very vital regardless of the sector.

5.3 Legal framework for arbitration in Mauritius

The legal system in Mauritius is a hybrid of French and English law and therefore based on both civil and common law.¹ Domestic arbitration in Mauritius is governed by the Code de Procédure Civile which is based on the French model of 1981.² It is contained in a different instrument and is wholly separated from the international arbitration law. The law governing international arbitration in Mauritius is the International Arbitration Act (IAA) 2008.³ The IAA is grounded on the UNCITRAL Model Law as amended in 2006.⁴ The IAA governs any international arbitration that commenced after 01 January 2009, irrespective of the execution date of the arbitration agreement.⁵ It is however not retroactive and cannot be applied to any arbitration that began before the commencement date of the IAA.⁶

Mauritius became a signatory to the New York Convention of 1958 in 1996 and passed the Act as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA), 2001.⁷ This Act provides for the recognition and enforcement of foreign arbitral awards as provided in the Convention. Also, Mauritius acceded to the ICSID Convention of 1965 and enacted the Investment Disputes Enforcement of Awards Act 1969 to implement the provisions of the Convention.⁸

Similarly, Nigeria also acceded to all of the International Conventions highlighted above. These have formed the basis for the international arbitration laws in both countries.

¹ 'ADR and Trusts: Mauritius', <http://www.axis.mu/uploads/ADR%20and%20Trusts%20-%20Mauritius.pdf> (accessed 14 April 2016)

² Organisation for Economic Cooperation and Development (OECD), *OECD Investment Policy Reviews: Mauritius* (2014) 95 <http://dx.doi.org/10.1787/9789264212619-en> (accessed 14 April 2016)

³ International Arbitration Act No 37 of 2008. It came into force on 1 January 2009.

⁴ W Jahnle *Assessment report of arbitration centres in Cote d'Ivoire, Egypt and Mauritius*, a report prepared for the African Development Bank, 10 April 2014 http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment_Report_of_arbitration_centres_in_C%3CB4te d%E2%80%99Ivoire_Egypt_and_Mauritius.pdf (accessed 14 April 2016)

⁵ Erriah Chambers 'International arbitration in Mauritius' 29 August 2014 <http://www.erriahchambers.com/blog/?p=64> (accessed 14 April 2016)

⁶ As above

⁷ Jahnle (n 4 above)

⁸ Jahnle (n 4 above) 64

5.4 Initiatives adopted for the enhancement of foreign investment arbitration in Mauritius

Prior to the adoption of initiatives for the enhancement of foreign investment arbitration in Mauritius, Mauritian judicial system experienced, excessive long delays in concluding matters brought before the court.⁹ The log jam of cases led the government to initiate judicial reforms to correct the irregularities and challenges.¹⁰ Several judicial-led reforms were introduced to improve and remodel the judiciary to enable expedite settlement of disputes.¹¹ The initiatives revolving around the arbitration arm of the judiciary are highlighted below.

5.4.1 State-of-the-art legislation

The IAA 2008 is regarded as the ‘state-of-the-art legislation’ because:

(a) It adopted the UNCITRAL Model Law 2006 which is an improvement of the UNCITRAL Model Law 1985;

(b) It includes certain features which places it in frontier with other standard international arbitration laws:

- The Act stipulates that all arbitration applications shall be brought before a panel comprising of three Supreme Court judges and ‘with a direct and automatic right of appeal to the Privy Council’.¹²
- The PCA at The Hague is made the appointing authority where parties cannot agree on an arbitrator.¹³ To enable the success of this, a Host Country Agreement was created to ensure unwavering co-operation between the PCA and the government of Mauritius.¹⁴
- In order to establish a relationship between the booming offshore sector in Mauritius and its international arbitration sector, certain provisions have been included.
- The Act clearly permits foreign representation of parties in international commercial arbitration within the country.¹⁵

⁹ OECD (n 2 above) 93

¹⁰ As above

¹¹ OECD (n 2 above) 93

¹² ‘Mauritius international arbitration’ <http://amarbheenick.blogspot.co.za/2010/12/mauritius-international-arbitration.html> (accessed 15 April 2016)

¹³ OECD (n 2 above) 96

¹⁴ As above

¹⁵ ‘Mauritius international arbitration’ <http://amarbheenick.blogspot.co.za/2010/12/mauritius-international-arbitration.html> (accessed 15 April 2016)

(c) The IAA 2008 was amended in 2013 to introduce some provisions in support of the existing IAA 2008. It was enacted as the International Arbitration (Miscellaneous Provisions) Act 2013 (the IAA Amending Act).¹⁶ Some major inclusions are:

- The Supreme Court has the jurisdiction to grant interim reliefs in support of arbitration and not to halt or disrupt an initiated proceeding.¹⁷
- The IAA amending Act makes clear the laws governing recognition and enforcement of foreign arbitral awards. It limits the applicable laws and provisions to the IAA 2008 and the CREFAA 2001 and repealed it in the Code of Civil Procedure.¹⁸
- It provides that only six designated judges appointed for a five year period are authorized to preside over any matter brought pursuant to the IAA 2008 and the CREFAA 2001.¹⁹ The intended purpose of this is to create opportunity for the judges to get more familiar with the evolving practice of arbitration.²⁰
- It also introduces witness statement as admissible evidence before the Supreme Court. A statement verified by a statement of truth is admissible even if it was made outside of Mauritius.²¹ This provision removes the strict compliance provisions that a witness statement would ordinarily have to fulfil before it can be admitted.²²

5.4.2 Case management

Criteria have been set in order to ensure efficient arbitration proceedings at the Supreme Court and to prevent delay when a party makes a claim arising from the IAA or the CREFAA. The Supreme Court (International Arbitration Claims) Rules 2013 (Supreme Court Arbitration Rules) was enacted to support the IAA and the CREFAA in matters arising from them.²³ It entails the procedures for instituting an arbitration claim in the Supreme Court.²⁴ The Rules strictly state the different time frames at every stage of the proceeding and vividly spell out the importance of promptness in determining the matter before the Supreme Court.²⁵

¹⁶ M Namdarkhan 'International arbitration in Mauritius: New developments in 2013' https://international-arbitration-attorney.com/wp-content/uploads/International_Arbitration_in_Mauritius.pdf (accessed 16 April 2016)

¹⁷ Jahnelt (n 4 above) 63

¹⁸ Namdarkhan (n 16 above)

¹⁹ As above

²⁰ As above

²¹ As above

²² As above

²³ Jahnelt (n 4 above) 64

²⁴ Section 5 & 6 Supreme Court Arbitration Rules

²⁵ Section 10 of the Rules

5.4.3 Training of judges

Based on the provisions of the Supreme Court Arbitration Rules, all matters shall be heard before a panel of three judges from the six designated judges.²⁶ These judges have gone through a specialised training and they are occasionally encouraged to participate in highly professional programmes organised by international institutions like the ICC.²⁷ The logic behind this initiative is to widen the horizon of the judges in the arbitration field and to get them acquainted with the *modus operandi* of arbitration. The expertise and experience of the judges can only increase practically when more cases are brought before the judges.

5.4.4 Appointing arbitrators

Appointing a mutual arbitrator or third arbitrator may sometimes be herculean for the parties especially when they are in dispute. For the avoidance of delay ploys by any of the parties to arbitration when it comes to the selection of an arbitrator, Mauritius signed an agreement with the PCA and appointed a permanent representative of the institution in 2009.²⁸ The PCA is charged with the responsibilities of appointing arbitrators on behalf of the parties.²⁹ Also, where an arbitrator is challenged by any of the parties, the PCA is the appropriate authority to hear the matter, so long as the arbitration is governed by the IAA. An appeal against it can only be made against the award when it is being challenged on any of the grounds stipulated in the IAA because a decision by the PCA is ordinarily not revocable.³⁰

5.4.5 Immunity of arbitrators

Section 19 of the IAA in addition to the provisions of the UNCITRAL Model Law, as amended, provides that arbitrators are protected from any liability ensuing from the arbitration and the final decisions given.³¹ The only exception to this compulsory provision is where the acts or omissions of the arbitrator can be proved to have been in bad faith.³² Also, the PCA or any other institution shall not be liable for acts or omissions that occur while discharging their duties and functions.³³ This is put in place to prevent a party from making frivolous applications against an arbitrator in order to frustrate the enforcement of the

²⁶ Section 11 of the Rules, Section 42(1) IAA

²⁷ Jahnel (n 4 above) 65

²⁸ OECD (n 2 above) 96

²⁹ OECD (n 2 above) 96

³⁰ Jahnel (n 4 above) 66

³¹ Section 19(1) IAA

³² As above

³³ Section 19(3) IAA

arbitral award. It is also for the protection of the arbitrator and arbitration institution to give them immunity from all acts done in good faith during the course of carrying out their functions.

5.5 Comparing arbitration practices in Mauritius and Nigeria

Having discussed arbitration from the Mauritian perspective above and the practice of arbitration in Nigeria in the previous chapter, the following questions are imperative: What are the differentiating factors in the arbitration practices of both countries in enforcing foreign investment arbitral awards? What lessons can be drawn from the initiatives and strategies put in practice in Mauritius? What standard does the arbitration system in Mauritius have to meet for it to be eligible for emulation? These questions will be answered collectively in this section.

To be able to effectively determine the efficiency of an arbitration system, a structure for this analysis is required. In carrying out this analysis, three sets of indicators employed by the World Bank in carrying out a research in 2013 on ‘arbitrating and mediating commercial disputes as they relate to FDI’ shall be applied.³⁴ They are: (i) strength of arbitration laws; (ii) ease of process; and (iii) judicial support in recognition and enforcement.³⁵ The purpose of the World Bank research is to provide foreign investors with a foreknowledge of the legislative framework in the country they are considering to invest in.³⁶

In essence, to give an overall assessment of the arbitration system in a country, the three indicators mentioned above are sufficient to determine the strengths and weaknesses of an arbitration system. In this context, they shall be examined in Mauritius and Nigeria simultaneously as they affect recognition and enforcement of foreign investment arbitral awards.

³⁴ S Pouget *Arbitrating and mediating disputes: Benchmarking arbitration and mediation regimes for commercial disputes related to foreign direct investment* (2013)
<http://iab.worldbank.org/~media/FPDKM/IAB/Documents/FDI-Arbitrating-and-Mediating-Disputes.pdf>
(accessed on 24 November 2015)

³⁵ Pouget (n 34 above)

³⁶ Pouget (n 34 above)

5.5.1 Strength of arbitration laws

A feature of a robust arbitration framework is the ratification of internationally and widely accepted international instruments on international arbitration – the UNCITRAL Model Law, ICSID Convention and the New York Convention – which both countries are signatories to.

Nigeria adopted the UNCITRAL Model Law 1985 in 1990³⁷ and has not updated, repealed nor added any provision to improve the obsolete law. There is a pending amendment Bill before the National Assembly since 2006 which is still yet to be passed.³⁸ There is also a proposed Arbitration Claims and Appeal (Procedure) Rules 2006 which is a part of the Federal Arbitration and Conciliation Act Amendment Bill.³⁹ For 10 years, this Bill is yet to be enacted and even if it is passed now, it will still require to be updated because of the evolving nature of arbitration.

Mauritius on the other hand, adopted the Model Law as amended in 2006 and in 2013 amended the IAA to include more provisions to make it more suitable for international arbitration. It has been tagged as a state-of-the-art legislation⁴⁰ and also as a modern arbitration law because the IAA has included provisions that are in other notable arbitration Acts in the world. Therefore, a combination of the provisions of the UNCITRAL Model Law, as amended, other provisions adopted from the Dubai International Financial Centre Arbitration Law, the Indian Arbitration and Conciliation Act, 1996, and the English Arbitration Act, qualify the IAA as being nothing else but robust and modern.⁴¹ This peculiar feature makes the IAA more attractive to companies and foreign investments interested in international arbitration.⁴²

Another feature of a robust legislative framework is having all the arbitration laws of the country in a single instrument and not scattered in different laws.⁴³ Nigeria and Mauritius both have consolidated laws on arbitration – the ACA and IAA respectively. The Mauritian

³⁷ The UNCITRAL website:

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (accessed 19 April 2016)

³⁸ 'Reform and harmonization of arbitration and ADR laws in Nigeria' <http://www.aluko-oyebode.com/files/amended%20report.pdf> (accessed 24 April 2016)

³⁹ B Ojo 'Arbitration Bills (pending in the National Assembly) and foreign investments' 22 February 2011 <http://businessenvironmentnetwork.blogspot.co.za/2011/02/arbitration-bills-pending-in-national.html> (accessed 24 April 2016)

⁴⁰ 'Mauritius international arbitration' <http://amarbheenick.blogspot.co.za/2010/12/mauritius-international-arbitration.html> (accessed 15 April 2016)

⁴¹ (n 5 above)

⁴² (n 5 above)

⁴³ Pouget (n 34 above)

IAA Amending Act repealed the Civil Procedure Code so that the only governing law on arbitration shall be the IAA and the CREFAA for the recognition and enforcement of foreign arbitral awards.⁴⁴ In the case of Nigeria, the governing law on arbitration is the ACA but there are several avenues by which a party may enforce a foreign arbitral award. The New York Convention in the Second Schedule is the major governing law on enforcement of foreign arbitral awards, but a foreign award may also be enforced by registration⁴⁵ or by suing upon the award. In addition to this, Section 51 of the ACA provides that a foreign arbitral award is enforceable in Nigeria, regardless of the country in which it is made. Contradictorily, Section 54(1) states that an arbitral award is enforceable based on reciprocity. The challenge with this is that there are two positions under the same law and this only creates confusion and debate. On the provision of reciprocity, the Mauritius IAA 2008 also provides that a foreign arbitral award may only be considered for enforcement based on reciprocity. However, in improving the IAA, the Amending Act removed the reciprocity reservation in the CREFAA.⁴⁶ It is thus clear that the legislative framework on arbitration in Mauritius is more comprehensive and modern than that of Nigeria.

5.5.2 Ease of process

Ease of process for the purpose of this study refers to the arbitration process from the selection of arbitrators, the procedural rules and the enforcement of the arbitral award in the courts.

In both countries, parties are at liberty to freely constitute their panel of arbitrators, choose the language of their choice, and make use of any procedural rules as they may deem fit in international arbitration.⁴⁷ Parties may decide to have their arbitration administered by an institution or have the proceedings self-administered.

In addition to having facilities readily available to assist parties in making informed choices on what type of arbitration to opt for in both countries, the appointment of arbitrators and the choice of procedural rules and time frame of concluding arbitrations play a major role in

⁴⁴ Namdarkhan (n 16 above)

⁴⁵ Registration under the Foreign Judgment (Reciprocal Enforcement) Act Cap F35 LFN 2004

⁴⁶ Madun Gujadhur Chambers 'The recognition and enforcement of foreign arbitral awards – A bird's eye view from Mauritius

http://www.madungujadhurchambers.com/images/pdf/introduction_the_mauritius_legislative_framework.pdf (accessed 20 April 2016)

⁴⁷ The World Bank Group, online data 'Investing across borders: Indicators of foreign direct investment regulation' <http://iab.worldbank.org/Data/ExploreEconomies/nigeria/arbitrating-commercial-disputes#arbprocess> (for Nigeria) <http://iab.worldbank.org/Data/ExploreEconomies/mauritius/arbitrating-commercial-disputes> (for Mauritius) (accessed 19 April 2016)

easing the process. Usually, the length of the arbitration proceeding is largely dependent on the parties and the arbitrators, depending on if it is an institutional or ad-hoc arbitration.

5.5.3 Judicial support

The judiciary renders assistance in three phases in arbitration: (i) referring matters that can be settled out of court to arbitration; (ii) granting interim orders in support of arbitration and; (iii) enforcing arbitral awards.

In Nigeria, the court may advise the parties to settle the dispute out of court where the judge finds that the dispute may be amicably resolved by the parties and refer the parties to a MDC. The court could also refer a matter already pending before the court to arbitration if both parties mutually agree to resort to arbitration or mediation. Another instance in which the court could refer a dispute to litigation is where a party brings to the notice of the court that there is an existing arbitration agreement between the parties which should be honoured.⁴⁸ In Mauritius as well, the court established in *Mall of Mont Choisy Limited v Pick N' Pay Retailers (Proprietary) Limited & Ors*⁴⁹ that the court shall refer a matter already initiated in the court to arbitration, where it is proven that an arbitration agreement exists.⁵⁰ The only exception to this rule is where 'the party denying the arbitration agreement can show before the Supreme Court, on a prima facie basis, a very strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed'.⁵¹ The court, in the instant case, referred the matter to arbitration.

In litigation, an interim order may be granted in favour or against the application. However, in arbitration, it is expected that an interim order should only be granted when it is in favour of arbitration and not against it. In Nigeria, no section of the ACA stipulates that the court can grant interim injunctions to parties in arbitration. Section 13 of the ACA only provides that the arbitral tribunal has the power to grant reliefs. However, the court may decide to grant an interim injunction in support of arbitration if it fulfils the requirements of urgency

⁴⁸ As decided in *Williams v. Williams* (2014) LPELR- 22642 (CA)

⁴⁹ 2015 SCJ 10

⁵⁰ 'Mauritius Supreme Court hands down two judgments on international arbitration' <http://www.lcia-miac.org/news/mauritius-supreme-court-hands-down-two-judgments.aspx> (accessed 19 April 2016)

⁵¹ As above

and threat to property or person and if it cannot be obtained from the arbitral tribunal because it is yet to be constituted.⁵²

Mauritius, on the other hand, permits the court to grant interim measures during or before the arbitral proceedings; and this is compatible with the IAA.⁵³ However, Section 23(2A) of the IAA further provides that: ‘the Court shall exercise the power...in such a manner as to support, and not to disrupt, the existing or contemplated arbitration proceedings’. This limits the power of the court and the court may only grant it in support of arbitration and not in opposition. The IAA restricts the court’s power even more by stating that the court can only grant such an order if the arbitral tribunal or institution lacks authority or cannot act at the moment.⁵⁴

A salient difference between the ACA and the IAA is that the former does not provide that the court can grant interim orders. Therefore, granting such an application is contravening the section of the ACA that prevents court intervention.⁵⁵ Also notable is that if a Nigerian court decides to grant an interim application based on its inherent jurisdiction conferred by the Constitution, the order may not be in support of arbitration and may, in actual fact, disrupt the arbitration. In contrast, Mauritian courts cannot in any circumstance grant an interim order that will ‘disrupt the existing or contemplated arbitration proceedings’.⁵⁶ Any act of the court that contradicts this shall be unlawful. Therefore, on the subject of court intervention, there is no lacuna on the face of the IAA that permits court intervention in the guise of granting an interim order. However, in the ACA, court intervention is bound to occur and anti-arbitration injunctions could be granted.

The third phase of judicial assistance in arbitration – recognising and enforcing arbitral awards – can be regarded as the most vital aspect of an entire arbitration. The role of the court is highly relevant and it determines whether or not the end will justify the means. Time is essential and the time frame for enforcing or challenging an arbitral award in the court depends on the attitude of the lawyers, the court and the parties. The court, being the umpire, holds more control of the pace of the proceedings.

⁵² ‘International Arbitration 2015: Nigeria’ International Comparative Legal Guide, <http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2015/nigeria#chaptercontent7> (accessed 19 April 2016)

⁵³ Section 6(1) IAA

⁵⁴ Section 23(5) IAA

⁵⁵ Section 34 ACA

⁵⁶ Section 23 IAA

In chapter 4.5.3 above, it is pointed out that in several cases that it takes a long period of time for a final judgment to be awarded by the Nigerian courts. Although this may not be the situation for all arbitral awards brought before the court for enforcement, it certainly has been in a number of landmark cases as discussed in the previous chapter. However, to analyse this in a wider scope, the World Bank's statistical analysis shall be consulted. The statistics show that conducting arbitration in Nigeria and Mauritius will take about 18 months to conclude respectively.⁵⁷ This is owed to a number of reasons, some which may be as a result of unnecessary court intervention, but also attributed more to the acts of the parties and the conduct of the arbitral tribunal. Parties have the right to set the course of the proceedings and this is an addition to why parties choose arbitration over litigation. An arbitral tribunal has jurisdiction over courts in its arbitration because of the principle of *kompetenz - kompetenz*⁵⁸ and thus, responsible for all that concerns the proceeding, including speed.

However, how long it takes for an arbitral award to be enforced by the court depends on the parties and the court. The statistics also illustrates that it takes five months to have an arbitral award enforced in Mauritius and approximately 18 months in Nigeria.⁵⁹ In Mauritius, the Supreme Court Arbitration Rules emphasises the paramount importance of speed and provides that the court should be mindful of time in proceedings. Section 10 of the Supreme Court Arbitration Rules on case management has a strict timetable on the number of days for each step of the proceeding. Sub-section 10(b) expressly states that the court shall bear in mind, the 'need for arbitration claims to be determined promptly'.

According to the provisions of the Rules, the filing process of evidence takes 63 days before the hearing date. Depending on the date picked by the Chief Justice, the parties have not less than 23 days to have their written arguments filed, as oral argument is not permitted except where the court demands it. Basically, the process (before the court issues judgment) can be estimated to be three months. Looking at this from a practical point of view and less of theory, this has been implemented in a recent case. In *Cruz City 1 Mauritius Holdings v Unitech and Anor*,⁶⁰ the applicant made an application to the court for the enforcement of

⁵⁷ Pouget (n 34 above)

⁵⁸ 'The doctrine of Kompetenz-Kompetenz is a legal fiction granting arbitration tribunals the power to rule on their own jurisdiction'. – L. Mistelis 'Applicable laws and procedures in international commercial arbitration' 2005 http://www.londoninternational.ac.uk/sites/default/files/applicable_laws_procedures.pdf (accessed 21 April 2016)

⁵⁹ Pouget (n 34 above)

⁶⁰ 2014 SCJ 100

three foreign arbitral awards given in England.⁶¹ The respondents (Unitech & Anor) made objections on three bases: that the arbitral tribunal had no jurisdiction; the awards were against public policy and the awards also breached the constitution of Mauritius.⁶² The Court dismissed all objections on detailed grounds and the awards were enforced.⁶³ In less than a year, the designated panel constituted by the IAA handed down their first judgment.⁶⁴

In contrast with the Supreme Court Arbitration Rules of Mauritius, Nigeria does not have separate court rules specific to arbitration. The ACA states that any application for the recognition, enforcement, and challenge of an arbitral award shall be made to the court.⁶⁵ The court in the ACA refers to the High Court of a State, the High Court of the Federal Capital Territory and the FHC.⁶⁶ Either of these courts shall hear any dispute arising from the ACA, domestic and international arbitration alike. The subject matter of the dispute determines the court with the jurisdiction as empowered by the Constitution of Nigeria. Although no provision of the ACA stipulates that the Civil Procedure Rules (CPR) shall apply, it is apparent that the High Court or FHC CPR shall apply.⁶⁷ Therefore, the implication of this is that the same Rules that apply to litigation also apply to domestic and international arbitration proceedings in Nigeria. There are quite a number of differences between the Mauritian Supreme Court Arbitration Rules and the High Court CPR in Nigeria:

- (i) The first major difference is that Mauritius has enacted a distinct procedure rules for arbitration; Nigeria has not.
- (ii) The Mauritian rules advocate for speed and there are time limits which are to be strictly adhered to, but this is not the situation with the CPR. There are no specific rules stating that arbitral matters should be expedited at trial.

⁶¹ M. Namdarkhan 'Mauritius: International arbitration case notes' 29 May 2014 International financial Law Review <http://www.iflr.com/Article/3345131/Mauritius-International-arbitration-case-notes.html> (accessed 21 April 2016)

⁶² As above

⁶³ *Cruz City I Mauritius Holdings v Unitech and anor*, Judgment delivered by Hon. S. Peeroo 28 March 2014 http://www.globalarbitrationreview.com/cdn/files/gar/articles/Cruz_City_judgment.pdf (accessed 21 April 2016)

⁶⁴ Jahnél (n 4 above)

⁶⁵ Section 29, 30, 48, 51 & 52 of ACA

⁶⁶ Section 57 of ACA

⁶⁷ K Aina 'Procedure for the enforcement of domestic arbitral awards in Nigeria' https://www.academia.edu/8877824/Procedure_for_the_enforcement_of_domestic_arbitral_awards_in_Nigeria (accessed 22 April 2016)

(iii) The CPR makes provision for extension of time to file applications after the due date stipulated in the rules has elapsed. The application is made by motion on notice and supporting affidavit; whereas, the Mauritian rules has no provision for the extension of time.

5.6 Conclusion

This chapter has examined the Mauritian arbitration laws and procedures and compared it to the laws and practices of arbitration in Nigeria. Although both countries have their laws founded on the English laws, the UNCITRAL Model Law, and the New York Convention, there are variances in the laws. Basically, the laws and procedural rules of Mauritius are more inclined towards constant modernisation and development.

Based on the discussions above, it is concluded that enforcement of foreign investment arbitral awards proceedings in Mauritius are faster, more modern, developed and efficient. Several initiatives that were put in place by Mauritius, if considered by Nigeria, may also be helpful in reformative strategies. Also, based on the factors considered by the World Bank's research in the examination of arbitration legal framework for investments, it is hereby concluded that on a large scale, Mauritius passed the litmus test and Nigeria can learn a great deal from their initiatives, strategies, and schemes. The next chapter will consider some recommendations that will help improve the enforcement of foreign investment arbitral awards in the oil and gas sector and in Nigeria as a whole.

CHAPTER SIX

FINAL CONCLUSION

6.1 Summary of findings

Chapter two laid the foundation of this study by recounting the history and early development of foreign investment in developed countries, SSA, and Nigeria. It was discovered that foreign investment was the bedrock on which great nations, such as the United States, developed their economy. Countries realised that they needed foreign investors and investments for their economy to thrive and develop. This study thereby narrowed down the historical pursuit to Nigeria and found that the oil sector attracted foreign investors into Nigeria as early as 1908 when the quest for oil began. Since the first export of crude oil was made in 1958, the oil and gas sector has been the major revenue generator for Nigeria. The economy is heavily dependent on oil – despite the woes that come with it.

Chapter three analysed the settlement of foreign investment disputes and the various methods available to parties. Settlement of foreign investment disputes used to be a hassle for foreign investors prior to the advent of foreign investment arbitration. This study further established the fact that arbitration is an important avenue for the settlement of foreign investment disputes. Foreign investment arbitration has been widely accepted because it is flexible, quick, can be cheaper than litigation in some instances, its awards are more easily enforceable in other jurisdictions than a court judgment, an arbitration claim can be instituted against a State once there is consent in any IIA, and parties decide how the proceedings should be conducted.

Chapter four therefore proceeded with the study of foreign investment dispute settlements in the oil and gas sector and the mechanisms available to foreign investors in Nigeria. The legislative framework was also analysed and it was found that Nigeria has adopted the relevant international Model laws on arbitration, and also the New York Convention on enforcement of foreign arbitral awards. Major oil and gas Acts, such as the NLNG Act and the Oil Pipeline Act, provide that arbitration shall be the dispute settlement method where a dispute arises from any of the matters in the Acts. Although Nigeria stretches out wide arms in acceptance of foreign investment arbitration in the oil and gas sector, several challenges make the judicial and arbitration system appalling and unattractive. The challenges faced by parties in enforcing arbitral awards as discovered in this study are not only of delays, but also

of unnecessary court interventions and the courts' attitude in granting anti-arbitration injunctions based on public policy and arbitrability. These issues have not been identified based on whims and speculations, but on practical arbitration cases in the oil and gas sector that have been brought before the courts for enforcement.

This chapter took a leap forward by analysing the practical effect of the challenges on FDI in the oil and gas sector and how it affects other sectors in the country. Security and protection of foreign investments and investors cannot be adequately actualised in a country where the judicial system is not trusted, reliable, quick and impartial. The challenges in the arbitral system of Nigeria are detrimental to existing and prospective FDI in the country.

Drawing from the practices and experiences of arbitration in Mauritius, chapter five discussed some initiatives and strategies that are worth considering by Nigeria. This was done through a comparative analysis of the arbitration systems in both Mauritius and Nigeria as it concerns enforcement of arbitral awards proceedings and foreign arbitration as a whole. It was found that Mauritius has developed a well-functioning arbitration system based on some adopted initiatives. They include training judges, providing immunity for arbitrators, developing a state-of-the-art legislation, and enacting rules specific to international arbitration proceedings.

In essence, this study shows that foreign investment arbitration is continuously evolving and there is a need to keep up with the pace of development.

6.2 Conclusion

There are several foreign investments in the oil and gas sector in Nigeria and this sector has attracted more investors than any other sector. Investment in this sector is different from other sectors because the government is always involved in all its operations. The oil and gas sector is one that does not permit 100 percent foreign ownership. As a result of this, disputes arising in this sector are most times among foreign investors and state agents. As seen in the cases analysed in chapter four above, many disputes involved the NNPC and the FIRS while other disputes were between foreign investors in the sector. Disputes are inevitable in this sector; however, the major aspect of any dispute settlement process is the ability to have a fair, quick and just trial. Although several Acts in the oil and gas sector provide that

arbitration shall be the mechanism for the settlement of disputes, it does not guarantee that the practice of arbitration is sound and smooth in Nigeria.

The challenges faced by investors in foreign investment arbitration in Nigeria are in two phases: during the course of arbitration, and at the recognition and enforcement of arbitral awards. In both phases, the court is expected to play a minimal supervisory and supportive role. However, Nigerian courts, unlike several other jurisdictions, habitually intervene in arbitration proceedings to disrupt; rather than to support and encourage smooth completion. This only defeats the main purpose of arbitration. Arbitration is intended to protect the autonomy of parties and also to attain justice in a more flexible and expedient way.

An arbitral award that is not easily enforceable is a waste of time and renders the whole arbitration process a futile endeavour of parties. The importance of an efficient system for the enforcement of foreign investment arbitration in the oil and gas sector and other sectors cannot be overemphasized.

As observed in this study, the various challenges uncovered in the enforcement of arbitral awards in the oil and gas sector only establish that the system is uncertain, unpredictable, partial – when it involves a state entity – exceptionally and unbearably slow, not trustworthy, and unreliable. These have been found in recent arbitration cases in the oil and gas sector, international reports and surveys by world leading institutions, scholars and arbitration practitioners – foreign and domestic, and legal firms as discussed in previous chapters.

There may not be any empirical evidence to show that an inefficient arbitration system may decrease the inflow of FDI into a country, but it has been proved that they are concerns that need to be addressed. For this reason, this study only examined the deficiencies of arbitration and judicial system in Nigeria as mind boggling concerns for foreign investors. Securing FDI also includes having access to justice at all times fairly and speedily. Where investors are entangled in the domestic judicial complications and disputes last for over a period of 10 years, investments are affected and huge revenue lost in the process.

Therefore, it is absolutely important for Nigeria to address these issues in the judicial system in relation to arbitration, and to also ensure that the fears of foreign investors are allayed in order to ensure that foreign investments thrive in the country.

6.3 Recommendations

In view of the foregoing, the following recommendations are considered as paramount in enhancing the legislative framework and arbitration system in Nigeria:

- a) The courts need to refrain from granting anti-arbitration orders that prevent, obstruct, deter, and halt arbitration proceedings as this is against the ACA;
- b) High monetary sanctions should be put in place to serve as a deterrence to parties and lawyers who challenge arbitral awards for the sole purpose of delaying enforcement of an arbitral award by instituting frivolous and baseless court actions;
- c) The courts should address awards brought on grounds of public policy with utmost caution to prevent this from being the usual practice devised by private and state agents in refusing to honour arbitral awards;
- d) The ACA needs to be reviewed and brought to the current international standards of Arbitration Acts worldwide;
- e) Distinct court rules on arbitration proceedings should be enacted and specific rules on time frame should be included. Also, the rules must emphasize that arbitration matters must be treated as urgent and disposed fairly and timely as provided in the Supreme Court Arbitration Rules of Mauritius;
- f) The CA should be made the court of first instance for arbitration matters and all divisions of the CA across the 36 States in Nigeria should have a separate courtroom that will hear and determine only arbitration-related cases. Thereby leaving the only recourse for appeal to be made to the SC. This will make the process shorter and faster;
- g) These courts should have designated judges, saddled with the responsibilities of hearing arbitration matters brought before the court, as is the practice in Mauritius. These judges should be encouraged to undergo trainings to enable them to carry out their duties more effectively.

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