JUDICIAL ATTITUDES TO ENFORCEMENT OF TRANSNATIONAL AWARDS UNDER THE NEW YORK CONVENTION: A CRITICAL ASSESSMENT OF THE ENGLISH AND NIGERIAN COURTS

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Declaration

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Dedication

This thesis is dedicated to my late father, H.R.H, Eze, Councillor Nwanadi Olokotor, (JP) who is presently in the morgue.

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You are all diamonds in the midst of stones!

Abstract

Arbitration is considered the preferred mechanism for settling cross-border commercial disputes. A court can be an unusual setting for dispute resolution for a national of another country due to such individual's foreignness with the practices, applicable laws and attitudes of the judges. The charm of arbitration is that it upholds party autonomy and underpins finality and certainty in dispute resolution. Arbitration allows parties to a contract to provide for a procedure which is mutually agreeable. National courts which uphold these rights are considered to be pro-arbitration, whereas courts that limit such rights are either considered as interventionist or hostile to arbitration. Attitudes of courts have implications for parties who select a seat or the laws of a particular country to regulate their arbitration process.

This thesis relates to international commercial arbitration and examines the attitudes of courts towards enforcement of transnational arbitral awards. The significance of enforcement hinges on the fact that arbitration is considered to be inconsequential if its award is not enforceable. The primary focus of this thesis is to evaluate the attitudes of the English and Nigerian courts to enforcement of international commercial arbitral awards: based purely on transnational principles, or annulled at the seat of arbitration. The thesis offers a comparative evaluation and engages the law and policy considerations to enforcement of international commercial arbitral awards in both countries under review. To this end, an examination of the English and Nigerian legislation, case law and practice are undertaken.

This thesis argues that international commercial arbitration and its awards transcends national frontiers as such, transnational in character. It concludes that the English and Nigerian courts in an appropriate case are ready to enforce arbitral awards based purely on transnational principles or annulled at the seat of arbitration.

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Chapter one

General Introduction

1. Background

Arbitration as a private system of adjudication is premised on the consent of the parties to submit or refer their dispute to a neutral party, the arbitrator. By choosing arbitration, parties effectively waive their right to litigation.[1] The often quoted benefits of international arbitration include, but are not limited to, efficiency, neutrality of the forum for dispute settlement, finality of arbitral decisions, and enforceability of arbitral awards.[2] Arbitration also permits procedural flexibility by allowing parties the freedom to tailor the dispute resolution process to their needs and appoint arbitrator of their own choice.[3]

Generally, the arbitrator's duty is to oversee the reference from commencement to resolution. Once an award is properly rendered by the arbitrator, such award becomes final and binding on the parties to the arbitration. Although, a party to the arbitration can challenge the award, or the unsuccessful party resist enforcement, there are limited grounds of such challenge or resistance against an award on the merits before national courts. Thus, according to Born, enforceability of arbitral awards globally, and the final and binding nature of arbitration contributes to its attractiveness to commercial parties, who usually expect swift conclusion of disputes.[4] In contrast, though in litigation [appellate] courts' judgments are final and binding, parties are not permitted to tailor rules of court to their own dispute resolution needs. Courts use established procedures and do not have discretion to modify the rules subject to the circumstances of individual parties.

1. Rowley, J. W. and Swaroop, S. (2009) "The Role of Judiciary in International Arbitration- The Benefits of Support: Recent English Experience" *Business Law International* Vol. 10, No. 3, pp. 272 – 279.
2. Born, G. B. (2015) International Arbitration: Law and Practice, 2nd edn., Kluwer Law International, The Netherlands, pp. 8 – 17; Moses, M. L. (2012) The Principles and Practice of International Commercial Arbitration, 2nd edn., Cambridge University Press, Cambridge, pp. 2 – 4.
3. Blackaby, N., *et al*, (2015) Redfern and Hunter on International Arbitration, 6th edn., Oxford University Press, Oxford, pp. 187 – 190.
4. Born, G. B. (2015) at pp. 8 – 17.

Sometimes, disputes in court last for decades and parties pay the cost financially plus time wastage. To this end, arbitration carries real economic benefits.[5] Like national arbitration laws and policies, attitudes of courts concerning enforcement of international commercial arbitration awards have implications for each nation's economy.[6] Nevertheless, the interplay between national legal systems and arbitration, both domestic and international, differs. Some relate to arbitration in an interventionist manner, while others are supportive and are regarded as 'arbitration friendly' jurisdictions.[7] This raises questions as to the policy consideration national arbitration laws reflect and the attitudes of the national courts towards the enforcement of arbitral awards.

The need to enforce arbitral awards becomes necessary if a party to arbitration fails, or neglects, or refuses to honour the arbitral award. The enforcement of foreign arbitral award is guaranteed by international conventions such as the New York Convention of 1958 (NYC).[8] The right to resist enforcement, on limited grounds, are also guaranteed under such conventions. Though, arbitral awards have the same status as a binding and final court's judgment, a party still needs the support of a national court when enforcing against the unsuccessful party that has failed to comply with the terms of the arbitral award. Likewise, a party challenging or resisting the enforcement of the award needs the support of the court either at the seat of arbitration or at the enforcing state, as the case may be.

According to Asouzu, although, cross-border parties depend upon international conventions or treaties and national arbitration laws for enforcement of arbitral awards,

5. Rowley, J. W. and Swaroop, S. (2009) p. 275.
6. Dietz, T. (2014) "Does International Commercial Arbitration Provide Efficient Contract Enforcement Institutions for International Trade?" in Mattli, W. and Dietz, T. (eds.) *International Arbitration and Global Governance: Contending Theories and Evidence*, Oxford University Press, Oxford, pp. 168 – 195; Hale, T. (2014) "What is the Effect of Commercial Arbitration on Trade?" ?" in Mattli, W. and Dietz, T. (eds.) *International Arbitration and Global Governance: Contending Theories and Evidence*, Oxford University Press, Oxford, pp. 196 – 213; McConnaughay, P. J. (2013) "The Role of Arbitration in Economic Development and Creation of Transnational Legal Principles" *Peking University Transnational Law Review*, No. 1, pp. 9 – 31.
7. Lew, J. D. M. (2009) "Does National Court Involvement Undermine the International Arbitration Processes?" *American University International Law Review*, Vol. 24, No. 3, pp. 489 – 537; Ball, M. (2006) "The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration" *Arbitration International*, Vol. 22, No. 1, pp. 73 – 94.
8. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

the efficacy of the arbitration processes is contingent on the pro-arbitration approaches of national courts.[9] In addition, the continued use of arbitration as a mechanism of private adjudication will diminish without the availability of a reliable, fair and effective method of enforcing the arbitral award.[10] Thus, the fashion in which courts set aside or enforce awards affects the popularity of the jurisdiction as a seat for arbitration.

This thesis comparatively examines the attitudes of the courts in England[11] and Nigeria towards the enforcement of transnational commercial arbitral awards under the NYC. An objective of this thesis is to offer a comparative analysis and consider the principles of enforcing, challenging and resisting arbitral awards as applied by the courts under review. The investigation pursued in the following chapters finds that national courts play a key role in assisting parties to arbitration to achieve their legitimate expectations. The national courts of both jurisdictions exercise maximum pro-arbitration discretion towards the enforcement of arbitral awards. These courts only set aside or refuse the enforcement of arbitral awards if there is a serious defect in the process of rendering the award.

2. The significance of the thesis

The crucial test of any arbitration process, whether domestic or international, is its capability to produce an award which, if necessary, will be recognised and enforced in relevant national courts. While on the one hand, the recognition of arbitral awards generally means giving preclusive effect to the award, usually in an effort to foreclose re-litigation or re-arbitration of the claims already arbitrated conversely, enforcement is the invocation of coercive judicial remedies to accomplish the terms of an arbitral award.[12] This thesis concerns enforcement rather than recognition though the requirements for legal proceedings for both are the same.

Generally, the purpose of this thesis is to understand the manner in which national courts respond to the enforcement of transnational commercial arbitral awards. Particularly, it evaluates the efficacy of international commercial arbitration regimes in England and Nigeria, and the validity and enforceability of arbitral awards based purely

9. Asouzu, A. A., (1999), "The Adoption of the UNICITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards", *Journal of Business Law*, 185.
10. Hu, L., (2004), "Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China", *Arbitration International,* Vol., 20, No., 2, p. 167.
11. Reference to England in this thesis means 'England and Wales.'
12. Blackaby, N., *et al*, (2015) pp. 610 – 612.

on transnational principles by both countries' national courts. Hence, the significance of this thesis lies in the conduct of a comparative and contextual examination of judicial approaches to the enforcement of transnational arbitral awards, and the consequential conclusions which have been arrived at independently.

The legislative frameworks in both countries cannot function without the support and cooperation of their national courts. The manner in which these courts interpret and apply the legislations constitutes a major source of authority and impact on the effectiveness of the regimes on the enforcement of transnational arbitral awards. All the more so, a test whether the regimes are fit for purpose or accord with the enforcement bias of the NYC. A detailed examination of the relevant provisions of the laws and the courts' decisions are analysed comparatively. On areas where divergent interpretations exist, attempt is made to offer an amenable approach, not losing sight of the peculiar circumstances of each country under examination.

3. Research questions

The research questions examined in this thesis are:

i) Whether the same standards are applied in determining the validity of the enforcement of transnational commercial arbitral awards by the English and Nigerian courts.

ii) Whether the juridical theory of arbitration the law and attitude of the national courts of England and Nigeria reflect in enforcing transnational commercial arbitral awards are the same.

iii) Whether arbitral awards based purely on transnational rules are enforceable in England and Nigeria; and whether the procedures for the enforcement of such arbitral awards in England and Nigeria are effective.

iv) Whether the English and Nigerian courts apply the same conditions in setting aside transnational commercial arbitral awards.

v) Whether the English and Nigerian courts apply the same conditions in refusing enforcement of transnational commercial arbitral awards; and whether the conditions for the refusal of such awards in England and Nigeria are effective.

4. Research methodology

This research is library-based and draws from a combination of qualitative legal research methodologies in collating and analysing primary and secondary sources of law in both jurisdictions. The key legal research methodology used in this regard is comparative black letter or doctrinal analysis of arbitration legislations and case laws from both countries and other jurisdictions. The choice of this methodology is premised on the fact that earlier scholarships have shown that comparative doctrinal analysis can be used as a research methodology and an effective vehicle of law reform.[13] According to Watson, comparative law is the study of the relationship between legal systems or between rules of more than one legal system in the context of a history.[14] Thus, this thesis utilises some fundamental insights from comparative arbitration legislations and case laws from both jurisdictions. Arbitration legislations and case laws from other jurisdictions assist in exploring best practices and also provide a basis for the evaluation of contemporary legal principles.

Again, the choice of a comparative methodology is influenced by the subject matter, examination of the research questions and the significance of the thesis. This thesis does not test a proposition as may be expected in the examination or deflating of a theory. According to Copi and Cohen, a proposition usually states something that is either true or false, however when a question is asked or a problem is posed, it is neither an assertion nor a denial and hence cannot be judged to be true or false.[15] A comprehensive study of a question or problem [whether legal, social, economic or clinical] in pursuit of an answer is therefore a valid academic exercise and process that is capable to contribute to knowledge, which is a core requirement of a PhD.[16] It is also useful to employ the comparative research method where the approach to a particular issue in two

13. Smiths, J. M. (2007) "Comparative Law and its Influence on National Legal Systems" in Reimann, M. and Zimmermann, R., (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, pp. 513 – 538; Michaels, R. (2007) "The Functional Method of Comparative Law" in Reimann, M. and Zimmermann, R., (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, pp. 339 – 382; Nelken, D. (2007) "Comparative Law and Comparative Legal Studies" in Orucu, E. and Nelken, D. (eds.) *Comparative Law: A Handbook*, Hart Publishing, Portland, pp. 3 – 42; Glenn, H. P. (2007) "Comparative Legal Families and Comparative Legal Traditions" in Reimann, M. and Zimmermann, R., (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, pp. 421 – 440.
14. Watson, A. (1993) *Legal Transplants: An Approach to Comparative Law, 2nd edn*.,The University of Georgia Press, Athens, p. 6.
15. Copi, I. M. and Cohen, C. (1994) *Introduction to Logic, 9th edn*., Macmillan, New York, p. 2.
16. Copi, I. M. and Cohen, C. (1994) at pp. 2 – 6.

or more legal systems is considered. The approaches of national courts, particularly that of England and Nigeria, is contrasted to discover similarities, dissimilarities, strengths and weakness, in order to determine the optimal approach to enforcement of arbitral awards in common law jurisdictions.[17]

Theoretically, this thesis examines various contributions offered by commentators, research reports projects, and soft laws principles advanced by both public and private international organisations. The analysis is selective and only covers issues on the enforcement of transnational arbitral awards. To this end, reference is made to international conventions, including multilateral and bilateral treaties, national laws, arbitration rules, guidelines and notes.

5. Choice of selected jurisdiction: England and Nigeria

The choice of two common law jurisdictions, England and Nigeria, was made for various reasons. Arguably, arbitration law and practice in England has a major impact on the development of arbitration globally.[18] In addition, England provides a model for the common law approach to arbitration law and has influenced African and Asian legislations, particularly those of common law jurisdictions.[19]

Another reason for choosing both countries is similarity of legal tradition.[20] Nigeria was a colony of Great Britain. By statute, Nigeria received her first arbitration legislation, the Arbitration Act 1889, from England in 1914, the Arbitration Ordinance 1914. The Arbitration Ordinance applied to the whole country and was re-acted verbatim as Arbitration Act 1963 when Nigeria became a Federal Republic. From 1889 to 1996,

17. Dannemann, G. (2007) "Comparative Law: Study of Similarities and Differences?" in Reimann, M. and Zimmermann, R., (eds.), The Oxford Handbook of Comparative Law, Oxford University Press, Oxford, pp. 383 – 419.
18. Sayre, P. L. (1928) "Development of Commercial Arbitration Law", *The Yale Law Journal*, Vol. 37, No. 5, pp. 595 – 617; Wolaver, E. S. (1934) "The Historical Background of Commercial Arbitration", *University of Pennsyvania Law Review*, No. 83, pp. 132 – 146; Macassey, L. (1938) "International Commercial Arbitration, - Its Origin, Development and Importance", *American Bar Association Journal*, Vol. 24, No. 7, pp. 518 – 582; Jones, W. C. (1958) "Inquiry into the History of Adjudication of Mercantile Disputes in Great Britain and the United States", *The University of Chicago Law Review*, Vol. 25, No. 3, pp. 445 – 464.
19. Joireman, S. F. (2001) "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy", *The Journal of Modern African Studies*, Vol. 39, No. 4, pp. 571 – 596; Joireman, S. F. (2006) "The Evolution of the Common Law: Legal Development in Kenya and India", *Commonwealth and Comparative Politics*, Vol. 44, No. 2, pp. 190 – 210.
20. Cotterrell, R. (2007) "Is it so Bad to be Different? Comparative Law and the Appreciation of Diversity" in Orucu, E. and Nelken, D. (eds.) Comparative Law: A Handbook, Hart Publishing, Portland, pp. 133 – 154.

both years inclusive, England amended the Arbitration Act 1889 notably five times.[21] However, Nigeria in 1988 completely departed from the provisions of the Arbitration Act 1889.[22] Therefore, notwithstanding their common law origins, England and Nigeria have discernible differences respecting their arbitration legislations. While the Nigerian Arbitration and Conciliation Degree 1988 (ACA) substantially adopts the UNCITRAL Model Law 1985, same cannot be said of the English Arbitration Act 1996 (AA 1996), though also influenced by the Model Law. In addition, both jurisdictions are parties to the NYC.

6. Chapter synopsis

This thesis is divided into seven chapters. This chapter one gives a general introduction to the thesis. Chapter two introduces both jurisdictions through a discussion of the history of commercial arbitration in England and Nigeria. It provides an understanding of the laws governing international commercial arbitration in both countries. Chapter three analyses the juridical theories of arbitration. This chapter gives a theoretical background of the arguments advanced in the thesis and also examines the policy consideration the law and courts England and Nigeria reflect. The juridical theories are applied in the next three chapters to various aspects of enforcement of awards in the two jurisdictions. Chapter four evaluates the approaches of the courts in the two jurisdictions towards the requirements for the enforcement of arbitral awards. It analyses the notion of 'transnational rules' or *lex mercatoria* and examines whether awards based purely on such rules are enforceable in both jurisdictions. Chapter five assesses the attitude of the courts in both jurisdictions towards the challenge of arbitral awards. It also examines how the courts of the two jurisdictions treat the role of the seat of arbitration for purposes of annulling an award. Chapter six analyses the grounds for resisting the enforcement of an award in the two jurisdictions. In chapter seven, a conclusion of the thesis is drawn.

21. The Arbitration Act 1889 Act was amended by the Arbitration Act 1934 and thereafter consolidated by the Arbitration Act 1950. Part 1 of the 1950 Act was later amended by the Arbitration Act 1979 and the Consumer Arbitration Agreements Act 1988. Part II of the 1950 Act which was amended by the Arbitration Act 1975 concerned itself with international arbitration under the Geneva Convention. The Arbitration Act 1996 which was passed on June 17, 1996 came into force January 31, 1997, save sections 85 to 87 which relates to domestic arbitration agreements.
22. The Arbitration and Conciliation Decree 1988, (ACA), copiously mirrors the UNCITRAL Model Law 1985, UNCITRAL Arbitration Rules, and incorporates the NYC which is set out as the Second Schedule to the Act.

Every chapter begins with a brief introduction highlighting the research question examined therein, provides an outline of its various sections and subsections, and concludes with a summary.

Chapter two

Historical overview of arbitration in England and Nigeria

2.0. Introduction

The likelihood of disputes arising in any human interaction is generally high. This has led to the creation of different methods for the resolution of such disputes. Arbitration is one of such methods of dispute resolution and is as old as human communities.[1] According to Bales, arbitration was used as a means of resolving differences before the use of litigation.[2] To support his assertion, Bales points to the records of ancient Egyptians, Greeks and Romans. Arguably, these records show that in early times, the arbitrator was generally a person known and trusted by the disputants and the better known the arbitrator the more confidence the disputants had in the arbitrator's decision. For example, in 337 BC Philip of Macedon, father of Alexander the Great, is documented to have used arbitration to resolve territorial disputes arising from a peace treaty with some of the Greek States.[3]

In its simplest sense, arbitration is a procedure that can be used to resolve disputes between disputants without going through litigation. Within the business community, arbitration as a means of alternative dispute is not novel. It has a long standing record and has developed from its infancy to the present state.[4] According to Lord Mustill:

> Commercial arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force.[5]

This chapter discusses the historical background of arbitration in England and Nigeria. Before that, it examines the concept of transnational law (2.1). In discussing the historical background of arbitration in England, it examines the development of commercial arbitration from the common law period to its present day statutory regime

1. Roebuck, D. (1998) "Sources for the History of Arbitration: A Bibliographical Introduction", *Arbitration International*, Vol. 14, No. 3, pp. 237 – 344.
2. Bales, R. A. (1997) *Compulsory Arbitration: The Grand Experiment in Employment*, Cornell University Press, New York, pp. 1 – 31.
3. Bales, R. A. (1997) at pp. 1 – 3.
4. Rivkin, D. W. (2008) "Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited", *Arbitration International*, Vol. 24, No. 3, pp. 375 – 386.
5. Mustill, M. J. (1989) "Arbitration: History and Background", *Journal of International Arbitration*, Vol. 6, No. 2, pp. 43 – 56.

(2.2). For Nigeria, the chapter discusses the use of arbitration prior to British colonisation, during and after colonisation (2.3). The chapter then discusses the application of the NYC to transnational commercial arbitration in England and Nigeria (2.4).

2.1. The concept of transnational law

The idea of transnational laws, rules or policies have been addressed in a plethora of articles, conference reports and papers, monographs and lectures on international law and arbitration with different measures of analysis and depth. Sometimes, the concept is referred to as *lex mercatoria* or the new *lex mercatoria* – 'the law merchant.' The subject took centre stage following Philip C. Jessup's Seminal Storrs lectures on 'Transnational Law' at Yale Law School in 1956. In his lecture, Jessup postulated that:

> I shall use instead of 'international law', the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and international law are included, as are other rules which do not wholly fit into such standard categories… [6]

From a robust standpoint, Jessup's concept of transnational law can be classified as a practical approach of grouping all laws, rules and policies which control all circumstances and events that exist outside national boundaries, arbitration inclusive.

Lalive in a discourse on transnational public policy stated that transnational laws are a corrective mechanism and an important component of the body of rules beyond a nation state's rules which a tribunal is called upon to apply in a dispute.[7] For Lalive, the function of national and transnational laws does not differ in substance. While national laws safeguard the fundamental concerns of a country, transnational laws protect the fundamental concerns of the international community. Consequently, transnational law operates in the realm of cross-border interactions as a distinct and independent legal phenomenon.

6. Jessup, P. C., (1956). "Transnational Law", Seminal Storrs Lecture, Yale Law School; (1956) New Haven, Yale University Press, p. 1.
7. Lalive, P. (1986), "Transnational (or Truly International) Public Policy and International Arbitration", ICCA Congress Series – No. 3, Kluwer, pp. 258 – 318.

In an inquiry on the procedural category of transnational public policy, Mantilla-Serrano examined the term 'transnational', which implies 'among' or 'between' nations. He further remarked that since there is no universally acceptable definition of 'transnational', the meaning that attaches in a context remains consensual.[8] Thus, for Mantilla-Serrano, 'transnational' denotes circumstances or events among or between nation states, including but not limited to individuals.

Cotterrell in an academic discourse on 'what is transnational law' conceptualised 'transnational law' as law 'spilled out' beyond the borders of nation states.[9] Cotterrell's dissertation on 'transnational law' has three limbs; an extension of jurisdiction across nation states, rules not originated by nation states or international instruments, and proposed rule(s) that addresses across border transaction(s). From the viewpoint of his thesis, transnational law creates a situation where individuals, merchant communities, public and private agencies that operate across national boundaries make rules that bind them as law in their various interactions.

Oduntan in his exposition on the origins of *lex mercatoria*, sees transnational law as part of *lex mercatoria* and thus remarked that:

> *Lex mercatoria* is global and beyond the state. It includes the concept of transnational law… The *lex mercatoria* is a tool of justice… A contract is poorer for not including *lex mercatoria* as an applicable regime and not richer or safer for excluding it.[10]

Menkel-Meadow in analysing why and how to study 'transnational law' defines transnational law as the study of legal phenomena; law making processes, rules and legal institutions inclusive, that impact or have the power to impact behaviours beyond a nation state border.[11] According to Menkel-Meadow, these legal phenomena may not be formally enacted by a nation state yet they regulate interactions, private and public, across borders. Menkel-Meadow's definition contemplates transnational law as a form

8. Mantilla-Serrano, F., (2004) "Towards a Transnational Procedural Public Policy", *Arbitration International*, Vol. 24, No.1, pp. 333 – 353.
9. Cotterrell, R. (2012) "What is Transnational Law", Queen Mary, University of London, School of Law Legal Studies Research Paper No. 103/2012; (2012) Law and Social Inquiry, No. 2, pp. 1 – 23.
10. Oduntan, G. (2016) "The 'Reimaginarium' of Lex Mercatoria: Critique of the Geocentric Theory about the Origins and Episteme of the Lex Mercatoria", *Manchester Journal of International Economic Law,* Vol. 13, No. 1, pp. 63 – 80 at p. 79.
11. Mankel-Meadow, C., (2011), "Why and How to Study Transnational Law", *UC IRVINE Law Review,* Vol. 1, No. 1, pp. 97 – 129.

of informal legal phenomena that transcends national borders and affect or have the power to affect interactions.

In a philosophical examination of transnational law, Mendenhall writes:

> … it is the pluralistic order of various principles and rules from divergent customs, cultures, and communities that draws its lexicon from competing philosophical discourses and not from top-down coercive commands of states or sovereigns … it is an unsettling of borders and boundaries and a turn towards compromise and competition as means by which to settle disputes.[12]

Mendenhall sees transnational law as a body of law emanating from different customs, cultures and communities, and agreed upon by individuals (corporate, private and public institutions inclusive) to regulate their interactions, not necessarily handed down by the state yet transcends state boundaries. He concluded that the beauty of transnational regulation lies in its dual service of supposed 'liberal' interest of pluralism and assumed 'conservative' interest of minimising and circumventing government bureaucracy.[13]

For Calliess,[14] transnational law refers to an institutional framework for cross-border transaction beyond the nation state. In contrast to territorially organised national and international law, it is structured as a variety of practically specialised cross-border frameworks, which in a utilitarian approach synthesise different regulatory instruments of private (norms, alternative dispute resolution, social sanctions) and public (laws, courts, enforcement) origin, where the latter are disintegrated from the national framework.[15]

Similarly, Calliess and Zumbansen see transnational law as a third category of autonomous legal system beyond the traditional dichotomy of municipal law and (public) international law created and developed by the law making apparatus of a global civil society.[16] Reasoned in this context, transnational law is hinged on four

12. Mendanhall, A. P., (2011), "Transnational Law: An Essay in Definition with a Polemic Addendum", *Libertarian Alliance Legal Notes* No. 52 pp. 1 – 15.
13. Mendanhall, A. P., (2011) at pp. 5 – 7.
14. Calliess, G-P., (2010) "Law, Transnational", *CLPE Research Paper Series 35/2010*, Vol. 06, No. 08, pp. 1 – 9.
15. Berman, H. J. and Kaufmann, C. (1978), "The Law of International Commercial Transactions." *Harvard International Law Journal,* 19, pp. 221 – 227.
16. Calliess, G-P. and Zumbansen, P. (2010) *Rough Consensus and Running Code: A Theory of Transnational Private Law,* Hart Publishing, Oxford, pp. 1 – 10**.**

interconnected lines; firstly, it is anchored on general principles of law, (derived from a practical comparative analysis of the "common core" of municipal legal systems) and usages and customs of international business community as evidenced in standard contract forms and general business requirements; secondly, it is administered and developed by private organisations of alternative dispute resolution; thirdly, it is recognised and executed predominantly by reason of social sanctions (such as reputation and exclusion), and fourthly, its rules are systematised.[17]

Gaillard, an advocate of transnational arbitration sees international arbitration as a transnational phenomenon in which specific arbitration principles are synthesised. These synthesised arbitral principles are from the collective approach of a variety of nation states creating a distinct legal regime that surpasses national legal regimes.[18]

de Lima Pinheiro conceives transnational arbitration in a broad sense. According to him, transnational law of arbitration is a set of standards, rules and principles, which are applied by the arbitral tribunal, elected by the parties to the arbitration, and are developed independently from the action of national and supranational institutions of authorities.[19] He explained that supranational authorities are international conventions which perhaps are of universal or regional scope.[20]

Bonell in a learned article on "The UNIDROIT Principles and Transnational Law"[21] sees transnational law as all kinds of principles and rules of non-national or a-national character used in international business practice as an alternative to domestic law. Bonell's definition is broad in contrast to a narrow definition whereby transnational law is limited to generally recognised principles of law and trade usages.[22]

According to Blackaby, *et al*, transnational law is a blend of national and public international laws, or an assemblage of international trade rules or laws elected by

17. Calliess, G-P. and Zumbansen, P. (2010), pp. 1 – 10.
18. Gaillard, E., (2010) *Legal Theory of International Arbitration*, Martinus Nijhoff Publishers, Leiden & Boston, pp. 13 – 60.
19. de Lima Pinheiro, L., "The Confluence of Transnational Rules and National Directives as the Legal Framework of Transnational Arbitration", available at: http://arbitrgem.pt/estudos/legal-framework-of-arbitration.pdf [accessed on 27/09/2016]
20. de Lima Pinheiro, L.,
21. Bonell, M. J., (2000-2), "The UNIDROIT Principles and Transnational Law", *Rev. dr. Unif*, pp. 199 – 218.
22. Goode, R. (1997), "Usage and its Reception in Transnational Commercial Law", *International and Comparative Law Quarterly*, 46, pp. 1 – 36.

parties to a dispute to govern substantive matters in issue between them.[23] However, Redfern, Hunter, Blackaby and Partasides have observed that while the dichotomy between municipal, international and transnational is helpful and well settled, the exact definitions remain to be widely acknowledged.[24]

Regardless of the position one may take on the 'narrow and broad' definition of transnational law, arguably, what really matters is not the theoretical definition. But the extent transnational laws are applied in practice in lieu of or in addition to municipal laws, and the validity and enforceability of awards based on transnational law. However, from the array of literature reviewed above, 'transnational law' is non-state law. It is a law applied in lieu of or in addition to a relevant national law to relationships among or between persons and organisations, public or private, natural or juristic. It is in this context that transnational arbitral award is examined in this section.

2.1.1. The concept of transnational arbitral award

Different commentators have given transnational arbitral award different names. It has been called a-national award, de-localised award, de-nationalised award, expatriate award, floating award, *lex mercatoria* award and stateless award.[25] In this thesis, it is referred to as 'transnational award.' Regardless of the name called and for the purposes of this study, a transnational arbitral award is defined as an award which results from arbitration that is disconnected, by virtue of parties' arbitration agreement, from the sphere of any national law.[26] Arguably, the concept of transnational arbitration is anchored on two core pillars, the detachment of the arbitration (and its resultant award) from the ambit of any legal system and the agreement by the parties to do so.

23. Blackaby, N., and Partasides, C., Redfern, A., and Hunter, M. (2009), *Redfern and Hunter on International Arbitration*, 5th edn. Student Version, Oxford University Press, Oxford, paras. 1.04 - 1.07.
24. Redferm, A., Hunter, M., Blackaby, N., and Partasides, C., (2004) Law and Practice of International Commercial Arbitration, Sweet and Maxwell, paras. 9 – 33.
25. Paulsson, J. (1981) "Arbitration Unbound: Award Detached from the Law of its Country of Origin", *International and Comparative Law Quarterly*, Vol. 30, No. 2, pp. 358 – 387; Gharavi, H. G. (2002) *The International Effectiveness of the Annulment of an Arbitral Award*, Kluwer Law International, The Hague, pp. 108 – 112; Blackaby, N., and Partasides, C., Redfern, A., and Hunter, M. (2009), paras. 3.74 – 3.75.
26. Lew, J. D. M., (2006) "Achieving the Dream: Autonomous Arbitration", *Arbitration International*, Vol. 22, No. 2, pp. 179 – 204; Mantilla-Serrano, F. (2004) "Towards a Transnational Procedural Public Policy", *Arbitration International*, Vol. 22, No. 2, pp. 333 – 354.

Flowing from the examination of transnational law under 2.1 above, transnational arbitration (which results in transnational award) serves the interests of the parties' autonomy in international contracts. Party autonomy enables the parties to willingly stipulate in their arbitration agreement not to subject the arbitration to any procedural, substantive or conflict of law rules of any particular country or legal system.[27] In the absence of any express agreement by the parties to the contrary, the arbitral tribunal may decide issues in dispute and or conduct the arbitration according to transnational rules. Under the AA 1996, the ACA and the NYC there is no mention or definition of the concept of transnational arbitral award. However, these laws allow parties to agree or their arbitrators in the absence of express agreement to the contrary, to decide issues in dispute between the parties and or conduct arbitration according to transnational rules.[28]

2.2. Historical overview of arbitration in England

In England, dispute resolution via arbitration has been in existence for centuries. The existence and practice of arbitration in England can be divided into two regimes: the common law (2.2.1) and statutes (2.2.2).

2.2.1. Common law arbitration

Opinion is divided as to the exact period in time when the common law developed. Holdsworth documented that the common law emerged in the 12th century from the fast expansion of institutions which existed in an undeveloped form before 1066.[29] Baker writing in support stated that, "the foundation of common law has commonly been traced to the reign of Henry II (1154 to 1189), who succeeded in restoring the firm government of Henry I's days".[30] However, Kiralfy differed when he wrote that the development of the common law in England is traceable to the reign of Edward I in 1485.[31] Nonetheless, the common ground in the different accounts is that, judicial

27. Paulsson, J. (1983) "Delocalisation of International Commercial Arbitration: When and Why it Matters", *International and Comparative Law Quarterly*, Vol. 32, No. 1, pp. 53 – 61.
28. Sections 1, 4, 46, and 66 of the AA 1996 and sections 1, 31, 47 and 51 of the ACA.
29. Holdsworth, W. (1956) A History of English Law, 7th edn., Methuen & co. Ltd and Sweet and Maxwell Ltd. pp. 3 – 64.
30. Baker, J. H. (2002) An Introduction to English Legal History, 4th edn., Butterworths Lexis Nexis, pp. 12 – 14.
31. Kiralfy, A. AK. R. (1962) Potter's Historical Introduction to English Law and its Institutions, 4th edn., Sweet and Maxwell Ltd., London, p. 30.

powers were vested in the Royal courts with jurisdiction only on land matters and behaviours detrimental to the King's peace.[32]

Issues of cross-border disputes such as, contracts, commercial credits and debts incurred in another country owed by and to foreigners, were outside the jurisdictions of the Royal courts.[33] Traders who came to England to do business were not protected by these courts. The traders were seen as men who engaged in transnational business, travelling from fair to fair all over continental Europe without a permanent residence in England.[34] Consequently, these merchants resorted to resolving their disputes by agreement to submit or refer their disputes to special institutions such as, the courts of the fair and markets and, the maritime courts of seaport towns, 'sitting on the seashore from tide to tide.'[35]

These institutions lacked powers to enforce their decisions when compared with the formal legal systems in force at the time. Compliance with their decisions was achieved by isolating individuals, who refused or failed to honour an award, from their trade. Accordingly, Lord Mustill remarked that "a merchant who fell out with his guild was finished. In other contexts, failure to honour a decision could have grave social or business consequences."[36] According to Noussia, the courts of the fair and markets "were the predecessors of today's modern arbitration tribunals in that a predominant feature of their character was that law should be speedily administered in commercial causes".[37]

By the 15th century onward, arbitration had become a reliable method of resolving commercial disputes[38]. As proof of this development, an arbitral award was found in the

32. Kiralfy, A. AK. R. (1962), p. 30 ; Holdsworth, W. (1956), 36; Baker, J. H. (2002), pp. 12 – 14.
33. Parker, H. L. (1959) The History and Development of Commercial Arbitration and Recent Development in the Supervisory Powers of the Courts Over Inferior Tribunals, 5th Series, Magness Press, Jerusalem, pp. 5 – 59.
34. Roebuck, D. (1998), pp. 280 – 294.
35. Ellenbogen, G. (1952) "English Arbitration Practice", *Law and Contemporary Problems*, Vol. 17, No. 4, pp. 656 – 678.
36. Mustill, M. J. (1989) at p. 45.
37. Noussia, K. (2010) Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German, and French Laws, Springer, Heidelberg Dordrecht, London, New York, pp. 11 – 13.
38. Collins, L. *et al*, (2000) Dicey and Morris on Conflict of Laws, Vol. 1, 13th ed., Sweet and Maxwell, London, p. 619; Morris, J. H. C. (2000) The Conflict of Laws, 5th ed., Sweet and Maxwell, London, p. 170.

library of the Mayor's court of the City of London in 1424.[39] At that time, enforcing cross-border arbitral awards in England was outside the jurisdiction of the English courts. It was only from 1927, as evidenced from reported cases, that English courts started enforcing cross-border arbitral awards under the common law.[40] The enforcement of arbitral awards was only possible by an action for the breach of the arbitration agreement.[41] The right of parties to directly seek enforcement of transnational commercial arbitral awards before the courts are granted under the AA 1996.

2.2.2. Statutes of arbitration

The first English arbitration legislation is the Arbitration Act 1697-8. The Act made written arbitration agreement enforceable against a party that holds such arbitration agreement in contempt. Hence, the Act declared *inter alia* in its recital that it:

> …shall and may be lawful for all Merchants and Traders, and others desiring to end any controversy… (for which there is no other Remedy but by Personal Action or Suit in Equity), by Arbitration to agree that their Submission of their Suit to the Award or Umpirage of any person or persons should be made a Rule of any of His Majesty's Courts of Record, which the Parties shall choose, and to insert such Agreement in their Submissions…

Before 1697-8, English courts lacked jurisdiction to review the merits of arbitral awards. Not even on issues of law and facts or where the fundamental questions of natural justice were raised.[42] Thus, the need to have the English judiciary exercise some degree of control over the arbitration process became the crux of the first Arbitration Act in 1697-8.[43] The Act empowered the courts of record to set aside arbitral awards if an error of law and or fact appeared on the face of the award or the award was procured

39. Parker, H. L. (1959) at p. 8
40. *Norske Atlas Insurance Co. Ltd. V London General Insurance Co. Ltd* (1927) 28 Li.LR 104.
41. Roebuck, D. (1998), pp 287 – 309.
42. In *Matthew v Ollerton* (1693) 4 Mod 226, the court refused to overturn an award made by the arbitrator who was one of the disputing parties in the arbitration. This decision was before the Arbitration Act 1697 – 8.
43. 'William III, 1697 – 8: An Act for Determining Differences by Arbitration. [Chapter XV. Rot.Parl.9 Gul. III p.3. n.5]' in Statutes of the Realm: Volume 7, 1695 – 1701, Raithby, J. (ed.) (s.l, 1820), pp. 369 – 370 http://www.british-history.ac.uk/statutes-realm/vol7/pp369-370 [accessed 20/09/2016].

by fraud or undue means. In *Corneforth v Geer*,[44] the issue before the court was whether the court had jurisdiction under the Arbitration Act 1697-8 to annul the arbitral award on the grounds of error of law and or of fact on the face of the award. The court stated that:

> if it appears that the arbitrators went upon a plain mistake, either as to the law, or in a matter of fact; the same is an error appearing in the body of the award, and sufficient to set it aside.[45]

Similarly, in *Anderson v Coxeter*,[46] the issue was whether the court can set aside an award procured by fraud or undue means. The court of the King's Bench held *inter alia* that manifest corruption in the arbitrators is sufficient within the provisions of the Arbitration Act 1697-8 to set aside an award.

Nonetheless, the Arbitration Act 1697-8 was not flawless. It did not permit the courts to look beyond the arbitral award in setting aside an award on grounds of error which did not appear on the face of the award. Put differently, the court might or might not enforce the arbitral award on the ground that corruption or an error had or had not appeared on the face of the award. In *Auriol v Smith*,[47] though a case on the setting aside of a trust arbitral award, yet relevant on point, the main issue before the court was whether the arbitral award which had been made the decision of the court by consent of the parties could be set aside after the statute of limitation had lapsed. In issue also, was the effect on the arbitral award of the trustee's fraudulent concealment of some facts from the arbitrator. The court declared *inter alia* that:

> …had they *(the plaintiffs)* in proper time applied to the Court, they might on the ground of fraud have impeached part of it *(the award)*, and that would have had the effect of impeaching it *(the award)* in toto: but it is impossible to separate such an award, to make it good in part, and bad in part, when it is entire upon the face of it.[48] *[Emphases added]*

44. (1715) 2 Vern 705.
45. *Corneforth v Geer* (1715).
46. (1720) 1 Str 301.
47. March 4, 1823, reported in The English Reports, Vol. 37 Chancery 17, pp. 1041 – 1046.
48. *Auriol v Smith*, add date at pp. 1044 – 1045.

By the 18th and 19th centuries, arbitration had been firmly entrenched as a vehicle for the resolution of private commercial disputes. This resulted in increased judicial intervention in the arbitration process. Primarily, according to Lord Mustill, such interventions were deliberate submission of parties seeking interim orders or seeking the assistance of the court to enforce arbitral awards against unsuccessful parties; while on the other hand, it was propelled by the courts to keep all adjudications within its jurisdiction, or for the fear of the growth of a new legal order.[49] Thus, the need to have the English judiciary exercise more control over arbitration processes necessitated the adoption of the Common Law Procedure Act of 1854.[50]

The Common Law Procedure Act, 1854 was enacted to deal with the rising prospects and challenges of the commercial industry at that time.[51] It was the first English arbitration law to statutorily regulate the arbitral processes. The Act created new powers for the courts, arbitrators and parties. Under section 8 of the Act, courts were empowered to remit arbitral awards back to the arbitrators or parties, to state a question of law or fact for the court to determine.[52] The Act also gave parties the power to apply for a stay of proceedings where an action is brought in court in breach of a prior arbitration agreement or clause. This power to apply for a stay has been contended as one of the cardinal principles of contemporary arbitration.[53] Though, Mustill and Boyd are of the view that the Act was chiefly concerned with reforms in the administration of justice rather than arbitration in particular.[54] The Act can be argued to be the foundation of modern law of arbitration in England.

Towards the end of the 19th century, the English Parliament enacted the Arbitration Act of 1889[55] which, unlike the Common Law Procedure Act, focused on the conduct and judicial control of the arbitral process. The 1889 Act consolidated previous principles and practices of arbitration into a systematic code and increased the regulatory powers

49. Mustill, M. J. (1989), pp. 43 – 51.
50. Roebuck, D. (1998), pp. 270 – 275.
51. Tweeddale, A. and Tweeddale, K. (1999) A Practical Approach to Arbitration Law, 1st ed., Blackstone Press Ltd; p. 484; Marshall, E. A. (2001) Gill: The Law of Arbitration, 4th ed., Sweet and Maxwell Ltd., London, pp. 2 – 3.
52. A question of law stated or the case stated procedure is where a court is free to review an award if an error of law or fact appeared on the face of the award.
53. Tweeddale, A. and Tweeddale, K. (1999) p. 485.
54. Mustill, M. J. and Boyd, S. C. (1989) The Law and Practice of Commercial Arbitration in England, 2nd ed., Butterworths, United Kingdom, p. 440.
55. 52 & 53 Vict, Ch. 53.

of the court over arbitration process.[56] Under the Act, arbitration agreements were irrevocable, save otherwise provided in the arbitration agreement, and courts were vested with powers to either stay actions brought in breach of an agreement to arbitrate or to proceed with the hearing (depending on the merit of each case).[57] In effect, the Act permitted courts to order specific performance of the agreement to arbitrate disputes validly concluded by the parties. The Act was in force in England until 1934 and, according to Samuel, was widely adopted by commonwealth countries as their arbitration laws.[58]

The Arbitration Act 1889 was amended by the Arbitration Act 1934.[59] Between 1889 and 1934, two arbitration Acts were enacted[60] in response to the English courts' failings to effectively deal with cross- border commercial disputes.[61] In *Butcher, Wetherly and Co. Ltd v Norman,*[62] Lord Justice Scrutton of the Court of Appeal stated these failings thus:

> One of the objects of justice is to satisfy litigants that their cases are properly and adequately heard, but certain commercial cases are so complex that judges unfamiliar with that class of business require many explanations in the course of the hearing… Owing to the fact that a number of cases had come before judges not conversant with commercial matters a good deal of dissatisfaction was felt in commercial circles… [63]

Determined to reform and consolidate commercial arbitration regimes, Parliament in 1950 repealed the 1889, 1924, 1930 and 1934 Arbitration Acts and enacted the

56. Noussia, K. (2010) pp.11 – 13.
57. Section 4 Arbitration Act 1889, 52 and 53, Vict., Ch. 49.
58. Samuel, A., (1999) "Arbitration Statutes in England and the USA" *Arbitration and Dispute Resolution Law Journal*, Vol. 2, pp. 6 – 21.
59. The Arbitration Act 1934 (24 and 25 Geo. 5, Ch. 14).
60. The Arbitration Clauses (Protocol) Act 1924 (14 and 15 Geo. 5, Ch. 39) and the Arbitration (Foreign Award) Act 1930 (20 and 21 Geo. 5, Ch. 15). The former was the first arbitration legislation that dealt with recognition and enforcement of foreign arbitral awards by incorporating the Geneva Protocol 1923 into the body of laws of England. The latter implemented the Geneva Convention of the Execution of Foreign Arbitral Awards 1927. The 1924 and 1930 Acts were the first statutory frameworks in England to provide recognition and enforcement of transnational commercial arbitral awards.
61. Hill, J. (1996) The Law Relating to International Commercial Dispute, 2nd edn., LLP London, p. 69 ; Lord Justice MacKinnon, (1944) "The Origin of the Commercial Court", *Law Quarterly Review*, Vol. 60, pp. 324 – 332.
62. (1934) 1 K.B. 475.
63. *Butcher, Wetherly and Co. Ltd v Norman,* (1934) pp. 477 to 478

Arbitration Act 1950.[64] One of the major criticisms of the 1950 Act was its incoherent arrangement.[65] For example, section 1 of the Act dealt with the issue of irrevocability of the arbitrator's authority, while section 32 dealt with the meaning of an agreement to arbitrate.

In 1966, the Arbitration (International Investment Disputes) Act was enacted to give legal effect to the ICSID Convention 1965. Nine years thereafter, the Arbitration Act 1975 was enacted to implement the New York Convention, and amend Part II of the Arbitration Act 1950. Part I of the Arbitration Act 1950 was later amended by section 7 of the Arbitration Act 1979 and the Consumer Arbitration Agreement Act 1988.[66] The 1979 Act abolished the 'question of law stated' or 'case stated' procedure and in its stead provided a structure under which errors of fact could not be the basis of an appeal but only errors of law with stringent conditions.[67]

The English arbitration regime has a long standing record of piecemeal development with a huge body of case law which broaden the meaning and scope of most of the sections. Prior to 1996, the result was a confused and uncertain arbitration regime hence, the Departmental Advisory Committee on Arbitration Law conceded that there were many uncertainties and confusion in English arbitration law.[68] Saville LJ also expressed the same view when he stated that:

> Our law has built up over a very long time indeed. In the main, the developments have come from cases, but in addition, from as early as 1698, Parliament has passed legislation dealing with the law of arbitration. To a large degree this legislation has been reactive in nature, putting right perceived defects and deficiencies in the case law. Thus it is not easy for someone new to English arbitration to discover the law, which is spread around a hotchpotch of statutes and countless cases.[69]

64. The provisions of Part III (3) of the Arbitration Act 1950 provided *inter alia* "The Arbitration Act 1889, the Arbitration Clauses (Protocol) Act 1924 and the Arbitration Act 1934 are hereby repealed ... the Arbitration (Foreign Award) Act 1930 is hereby repealed …"
65. Tweeddale, A. and Tweeddale, K. (1999) p. 487
66. Consumer agreement is outside the scope of this research.
67. Sections 1, 2 and 8 (3) (b) of the Arbitration Act 1979.
68. Para. 108 of the Departmental Advisory Committee on Arbitration Law Report, June 1989.
69. Saville LJ, the Arbitration Act 1996. Keynote Address, IBC Conference, July 4th, 1996.

2.2.2.1. The Arbitration Act 1996 (AA 1996)

Tweeddale and Tweeddale are of the view that prior to the AA 1996, England as a seat for arbitration was not the first choice for many parties who elected to resolve transnational commercial dispute by arbitration.[70] Writing in support, Russell, *et al* stated succinctly that:

> There is no single source of English arbitration law. Prior to Arbitration Act 1996, there was not even a partial statutory code for the conduct of arbitrations. The Arbitration Acts 1950 – 1979 were more concerned with filing the gaps in an incomplete arbitration agreement and specifying the powers of the High Court.[71]

The law that currently governs arbitration in England is the AA 1996. The English Parliament in 1996 repealed the 1979 and 1975 Acts and enacted the Arbitration Act 1996.[72] The Act is an amalgamation of legal principles contained in the previous arbitration Acts, the consumer Arbitration Agreement Act 1988 and the common law doctrines.[73] According to some commentators, the AA 1996 is completely novel and

70. Tweeddale, A. and Tweeddale, K. (1999) p. 486.
71. Sutton, D. St. J., Gill, J. (1997) Russell on Arbitration, 21st ed., Sweet and Maxwell, London, p. 17.
72. Schedule 4 of the Arbitration Act 1996.
73. Merkin, R. and Flannery, L. (2008) Arbitration Act 1996, 4th ed., Informa Law, London p. 1; The Arbitration Act 1996 has 110 sections divided into four parts. Part I (sections 1 to 84) stipulates the general provisions concerning arbitration. Part II (sections 85 to 98) provides for domestic arbitration agreements, consumer arbitration agreement, small claim arbitration in the County Courts, etc. Part III (sections 99 to 104) makes provisions for the recognition and enforcement of certain foreign arbitral awards. Under section 99 of the Act, Part II of the Arbitration Act 1950 remains in force. It relates to the recognition and enforcement of certain arbitral awards that are not NYC award. The Act also has four schedules. Schedule 1 sets out the mandatory provisions of Part I by virtue of section 4 (1) of the Act. The provisions of Schedule I have effect notwithstanding any agreement by the parties to the contrary. Schedule 2 makes provisions that modify Part I in relation to judge-arbitrators. In effect, section 93 of the Act provides for appointment of judges as arbitrators, while section 93(6) provides that the provisions of Part I apply to arbitration before a person appointed under the section with modifications specified in Schedule 2. Schedule 3 enumerates the respective amendments made to other Acts consequent upon the Arbitration Act 1996 being in force. Hence, the consequential amendment affected 62 Acts ranging from the Merchant Shipping Act 1894 to the Industrial Tribunal Act 1996. Some of the amendments are extensive; e.g. The Insolvency Act 1986, where an amendment is made regarding arbitration agreements to which a bankrupt is a party. Others are minor; e.g. Part I of the Arbitration Act 1996 substitutes the Arbitration Act (Northern Ireland) 1937. Schedule 4 itemises different Acts, Parts of Acts and orders which are repealed by the Arbitration Act 1996. A total of 47 Acts and Orders are repealed in whole or in part by the Arbitration Act 1996. They range from the Military Lands Act 1892 to the Private International Law (Miscellaneous Provisions) Act 1995.

probably the most radical piece of arbitration legislation in the history of English statutory arbitration regime.[74]

2.2.2.2. The scope of application of the Act

Section 2(1) states that the provisions of Part I apply where the seat of arbitration is in England and Wales or Northern Ireland. Thus, the scope of Part I of the Act is hinged on the concept of the 'seat' of arbitration.[75]

As a general rule, English courts will decline jurisdiction to exercise their supervisory power if the juridical seat of the arbitration is not in England, or Wales or Northern Ireland, or the arbitration is not subject to English law.[76] The seat concept takes into consideration that arbitration, especially transnational arbitration, occurs in a number of different countries. This is usually for the convenience of the arbitrators or the witnesses or to facilitate the inspection of any relevant property.[77] Thus, as exception to the general rule, an award from an arbitration seated in England would be recognised and enforced as being within the jurisdiction of the English court, even though some parts of the arbitration were conducted outside England or Wales or Northern Ireland.[78]

Other exceptions are created by virtue of section 2(2), (3), (4) and (5). Under section 2(2) those sections in Part I which will apply even though the juridical seat of the arbitration is not in England or Wales or Northern Ireland, or where a seat has not been designated or determined are clearly defined.[79] The provisions of these four sections will apply in any arbitration regulated by English law no matter the seat of arbitration. The effect of section 2(2) is to ensure that the UK's obligations under the NYC are

74. Merkin, R. (2000) Arbitration Act 1996, 2nd ed., LLP, London, pp. 1 – 10; Tweeddale, A. and Tweeddale, K. (1999), p. 492; Mustill, M. J. and Boyd, S. C. (1989), p. 3
75. Part I apply to arbitration where the seat of the arbitration is in England, Wales or Northern Ireland. Section 3 of the Arbitration Act 1996 defines the seat as "the juridical seat of the arbitration". The seat is designated either by the parties to the arbitration agreement, or by an institution or third party with such authority to do so, or by the arbitral tribunal if given the power to do so by the parties, or in the absence of a designation by the court. The seat theory is examined in detail in chapter five.
76. In *Channel Tunnel Group Ltd. V Balfour Beatty Construction Ltd*. [1992] A C 334, the House of Lords ruled that the High Court had no jurisdiction to interfere with arbitration held outside England or Wales or Northern Ireland and not regulated by English law. This, the law Lords reasoned, would be to confer extra-territorial effect on English arbitration statutory law.
77. Merkin, R. and Flannery, L. (2008) pp. 21 – 22.
78. *Bay Hotel and Resort Ltd. v Cavalier Construction Company Ltd*. [2001] UKPC 34
79. These sections are sections 9 to 11 and section 66 (relating to stay of legal proceedings and enforcement of arbitral awards respectively brought in England or Wales or Northern Ireland) of the Act.

fulfilled.[80] English courts under section 2(3) of the AA 1996 have the discretion to secure the attendance of witnesses[81] and support arbitral proceedings[82] notwithstanding that the seat of the arbitration is not within its jurisdiction or a seat has not been designated or determined. However, the exercise of these powers is subject to a proviso that the court may:

> refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.[83]

Section 2(4) empowers the court to apply the provisions of Part I of the Act to arbitral proceedings other than those particularly mentioned in sections 2(2) or 2(3). Such power can only be exercised before the seat of the arbitration is designated or determined, and where the court deems it fit to do so, by virtue of a connection with its jurisdiction.[84] Under section 2(5) English courts may apply sections 7 and 8[85] where the law applicable to the arbitration agreement is English law, even if the seat of arbitration is outside England and regardless of whether or not a seat has been designated or determined. In effect, it is noteworthy to highlight that what is relevant by virtue of section 2(5) is the applicable law to the arbitration agreement. This may be different from the applicable law to the main contract.

The effect of this section is that the provisions of Part I apply in its entirety in any arbitration seated in England. The court will enforce an arbitration agreement and its eventual award, subject to the relevant provisions of the 1996 Act, wherever the seat of the arbitration may be. It may refuse to exercise its power in support of arbitral proceedings if the fact that the seat is or likely to be outside its jurisdiction, makes it inappropriate for it to do so. It may exercise any other discretion vested on it by virtue of Part I where the seat has not been identified and where it is satisfied that any nexus of

80. Harris, B., *et al* (2007) The Arbitration Act 1996: A commentary, 4th ed., Blackwell Publishing, pp. 34 – 35.
81. Section 43 of the AA 1996.
82. Section 44 of the AA 1996.
83. Section 2 (3) of the AA 1996.
84. Merkin, R. and Flannery, L. (2008) supra at p. 24; Harris, B., *et al* (2007) supra at pp. 36 – 37.
85. Separability of an arbitration agreement from the contract containing it and the effect of the death of a party to an arbitration agreement, respectively.

the proceedings within its jurisdiction makes it appropriate for it to do so. The provisions of Part I regarding the separability of the arbitration agreement from the main contract and the consequence of the death of a party will apply provided that English law regulates the arbitration agreement. In such case, a party may be required to satisfy the arbitrator or the court that the arbitration agreement is regulated by English law in order to show that the provisions in question apply.[86]

2.3. Historical overview of arbitration in Nigeria

Arbitration as a means of resolving disputes pre-dates the colonial era and is rooted in the justice system of traditional societies of Nigeria.[87] Before the enactment of the first indigenous arbitration law, the ACA (2.3.3), arbitration in Nigeria had two sources: under customary law (2.3.1) and the common law (2.3.2).

2.3.1. Customary law arbitration

Before Nigeria became a colony of Great Britain, her traditional societies had recourse to customary arbitration for settlement of all manner of disputes.[88] For example, most disputes relating to land, divorce, and chieftaincy were resolved through customary arbitration. Arbitration and other forms of private dispute resolution are still relied on in various communities in Nigeria.[89]

Referral of a dispute to customary arbitration by members of the community or of a trade was and still remains popular and valid among rural dwellers.[90] Such referrals are usually to a trusted third party, the elders, chiefs, family head, village or clan head or

86. Rutherford, M., and Sims, J. H. M. (1996) Arbitration Act 1996: A Practical Guide, F T Law and Tax, London, pp. 45 – 46.
87. Ezejiofor, G. (1992 - 1993) "The Pre-requisites of Customary Arbitration", *Journal of Private and Property Law*, Vol. 16, pp. 32 – 47; Oluduro, O. (2011) "Customary Arbitration in Nigeria: Development and Prospects" *African Journal of International Comparative Law*, Vol. 19, No. 2. pp. 307 – 330; Ajogwu, F. (2009) Commercial Arbitration in Nigeria: Law and Practice, Mbeyi & Associates, Lagos, pp. 9 – 15.
88. Chukwuemerie, A. I. (2006) "Salient Issues in the Law and Practice of Arbitration in Nigeria", *African Journal of International and Comparative Law*, Vol. 14, No. 1, 1; Chukwuemerie, A. I. (2006) "The Internationalisation of African Customary Law Arbitration" *RADIC*, Vol. 14, No. 2, 143; Chukwuemerie, A. I. (2002) Studies and Materials in International Commercial Arbitration, Lawhouse Books, Port Harcourt, pp. 210 – 227.
89. Mmuozoba, C. U. (2002) "The Law Courts and Arbitral Tribunals under the Arbitration and Conciliation Act, 1990: Some Neglected Questions and Suggested Answers" *Nigeria Law and Practice Journal*, Vol. 6, No. 1, 96. Other forms of customary private dispute resolution are: mediation, conciliation and negotiation.
90. Ajogwu, F. (2009); Ehiribe, I. (1996) "The Validity of Customary Law Arbitration in Nigeria", in Campbell, D. and Cotter, (eds.) Comparative Law Yearbook of International Business Law, Vol. 18, Kluwer Law International, The Netherlands, pp. 131 – 154.

friends, with the objective that the outcome (the award) will be final and binding.[91] In *Agu v Ikewibe*,[92] one of the issues was the existence of customary arbitration as an "existing law" under the Constitution. The Supreme Court affirming the existence of customary arbitration law stated through Karibi-Whyte JSC, thus:

> I venture to regard customary law arbitration as an arbitration in dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their community, and agreement to be bound by such decision…[93]

However, in *Okpuruwu v Okpokam*, Uwaifo JCA, stated that:

> No community in Nigeria regard the settlement by arbitration between disputing parties as part of native law and custom … there is no concept known as customary or native arbitration in our jurisprudence.[94]

Uwaifo JCA missed the point regarding the existence and validity of the law concerning customary arbitration in Nigeria. It is beyond doubt from the Supreme Court case of *Agu v Ikewibe* and practice that customary arbitration was and is still part of Nigerian native law and custom.[95] Accordingly, Ezediaro is of the view and, this thesis share the same view, that:

> Arbitration as a method of settling disputes is a tradition of long standing in Nigeria. Referral of a dispute to one or more layman for decision has deep roots in the customary law of many Nigerian communities.[96]

Also, Oguntade JCA, who dissented from the lead judgement in *Okpuruwu v Okpokam*, respecting customary arbitration, came to the correct position of the law when he stated:

> I find myself unable to accept the proposition that there is no concept known as customary or native arbitration in our jurisprudence. The regular courts in the early stages

91. Amucheazi, O. D. (2003) "Validity of Customary Arbitration in Nigeria: A Review of *Egesimba v. Onuzuruike," Nigerian Bar Journal,* Vol. 1, No. 4, pp. 515 – 225.
92. [1991] 3NWLR (Pt. 180) 385.
93. *Agu v Ikewibe* (1991) p. 407.
94. *Okpuruwu v Okpokam* (1988) 4 NWLR (Pt. 90) 554 at 572.
95. Asouzu, A. A. (1994) "The Legal Framework for Commercial Arbitration and Conciliation in Nigeria", *ICSID Rev-FILJ,* Vol. 9, p. 214.
96. Ezediaro, S. O. (1971) "Guarantee and Incentive for Foreign Investment in Nigeria" *International Law,* Vol. 5, No. 4, 770 at p. 775.

> were reluctant to accord recognition to the decisions or awards of arbitration … if parties to a dispute voluntarily submit their dispute to a third party as arbitrator, and agreed to be bound by the decision of such arbitration then the court must cloth such decision with the garb of *estoppel per rem judicatam*. I do not share the view that natives in their own communities cannot have customs which operate on the same basis of voluntary submission. The right to freely choose an arbitrator to adjudicate with binding effect is not one beyond our native communities…[97]

As with consensual arbitration, the legal validity of customary arbitration flows from the parties' agreement to submit an existing dispute to a trusted third party, the arbitrator, and to be bound by the final decision of the arbitrator, the award.[98] Where issues in dispute between the parties are voluntarily submitted or referred to customary arbitration and such issues are determined by arbitrators at a meeting held pursuant to native law, the award will be binding on the parties.[99] The unsuccessful party in the arbitration cannot resile from the proceedings midway or reject the award. This is because a party who led another to take steps in arbitral proceedings will not be allowed to withdraw at the expense of the other party who had acted in good faith and with the honest belief that their dispute would be resolved by the arbitration. This is evident in the case of in *Onyenge & 2 ors. v Ebere & 2 ors*.,[100] where the Supreme Court of Nigeria stated *inter alia* that:

> where two parties to a dispute voluntarily submit the issue in controversy between them to an arbitration according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, *then once the arbitrators reach a decision, it would no longer be open to either party to*

97. *Okpuruwu v Okpokam* (1988) at p. 585.
98. Ikeyi, N. and Maduka, T. (2014) "The Binding Effect of Customary Arbitration Award: Exorcizing the Ghost of Agu v Ikewibe", *Journal of African Law*, Vol. 58, No. 2, pp. 328 – 349; Akanbi, M. M., Abdulrauf, L. A. and Daibu, A. A. (2016) ""Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters and the Need for Paradigm Shift", *Journal of Sustainable Development Law and Policy (The)*, Vol. 6, No. 1, pp. 199 – 201.
99. Agu v Ikewibe (1991); Nwakoby, G. C. (2004) The Law and Practice of Commercial Arbitration in Nigeria, Iyke Ventures Production, Enugu, pp. 8 – 17.
100. [2004] 11 MJSC 184.

> *subsequently back out or resile from the decision so pronounced.*[101] [Emphases added]

Similarly, in the Ghanaian case of *Larbi v Kwasi*,[102] one of the issues was whether parties are bound by the award of the customary arbitrators. The Privy Council in holding that parties are bound by their voluntary agreement to submit to customary arbitration, stated the law thus:

> Since it is established that the parties gave their consent to the submission of the dispute to the elders without any express reservation of a right to resile and since there is certainly no right to resile after the award is made, it is for the appellants to satisfy the board that a right so contrary to the basic conception of arbitration is recognised by native customary law.[103]

The effect of the foregoing is that where parties voluntarily elect to settle their dispute by customary arbitration, the award thereof is binding on them if the condition precedent, which is the consent to arbitrate the dispute, is established. To establish consent, parties must directly or indirectly submit to the jurisdiction of the arbitrators. The agreement to arbitrate under customary arbitration law is usually oral, making it difficult, if not impossible, to come within the purview of the ACA.[104] This is because section 1 of the ACA requires the arbitration agreement to be in writing.

2.3.2. Common law arbitration

According to Orojo and Ajomo, the 'common law' refers to Nigerian case law and principles of English common law together with doctrines of equity as are still enforceable in Nigeria.[105] In effect as a general rule, the common law of England and its doctrines of equity apply in Nigeria save where they have been rejected or modified either by a court of competent authority in Nigeria or by legislation.

101. *Onyenge & 2 ors. v Ebere & 2 ors*. [2004] 188.
102. [1952] 13 WACA 76.
103. *Larbi v Kwasi* [1952] at p.80.
104. Ezejiofor, G. (1993) "The Nigerian Arbitration and Conciliation Act: A Challenge to the Courts", *Journal of Business Law*, pp. 82 – 98.
105. Orojo, J. O. and Ajomo, M. A. (1999) Law and Practice of Arbitration and Conciliation in Nigeria, Mbeyi & Associates (Nigeria) Ltd., Lagos, p. 12.

Lagos was the first colonial entity in Nigeria that came under British rule by virtue of the Treaty of Cession of 6th of August, 1861.[106] On becoming a British colony, a court was established and English laws were introduced in the Colony from 1862.[107] In 1863, Ordinance No.3 was enacted enabling the English common law, doctrines of equity and statutes of general application to directly apply in the Colony of Lagos and all English settlements. [108]

In 1874, the Colony of Lagos was amalgamated with the settlements in the Gold Coast, and the two were called the Gold Coast Colony. A Supreme Court was established for the Gold Coast Colony by virtue of Ordinance No. 4.[109] By Section 14 of Ordinance No. 4, the common law, the doctrines of equity and the Statutes of general application which were in force in England on the 24th of July, 1874, when the Colony obtained local legislative powers, were also declared to be in force within the jurisdiction of the Gold Coast Colony.[110] One of the effects of both Ordinances on arbitration was that English arbitration laws became applicable within the colony. However, the Ordinances were only to be applicable where local jurisdiction and circumstances permitted.[111] In effect, two sets of arbitration regimes became applicable within the Colony: customary and English common law.

Like customary arbitration, an agreement to arbitrate under the common law is usually oral. Consequently, the question that arises is: which of the two regimes, customary law or common law, will apply to a given situation? The general rule is as held in *Labinjoh v Abake*.[112] In *Labinjoh*, both parties were natives and the defendant, a young girl under 21 years living with her parents, was sued for the goods sold and delivered to her for trading purposes. The issue before the court was the capacity of the defendant to enter into a contract and whether it was English or customary law that should be applied to

106. Smith, R. S. (1979) The Lagos Consulate: 1851-1861, University of California Press, California, p. 140.
107. The first English Laws that were introduced in the Colony of Lagos were: Customs Duties Ordinance No. 1 of 1862; Harbour Regulations Ordinance No. 2 of 1862; Harbour Sanitary Regulations Ordinance No. 3 of 1862; Currency Ordinance No. 4 of 1862; and Use of Official Seal Ordinance No. 5 of 1862.
108. The Settlement Ordinance No. 3 of 1863.
109. The Supreme Court Ordinance (No. 4) of 1876.
110. Section 4 Supreme Court Ordinance (No. 4) of 1876.
111. Section 17 of the Supreme Court Ordinance (No. 4) 1876.
112. [1924] 5 NLR 3.

determine her capacity. The court held, relying on an earlier decision in *Cole v Cole,*[113] that where both parties are natives customary law will apply to their transaction.

However, one of the exceptions to this rule is that if the transaction is of a nature alien to customary law, English common law will apply.[114] Furthermore, if the parties have expressly or by necessary implication agreed that English law should regulate their relationship, then English law will apply.[115] Another exception is where parties are Nigerian and non-Nigerian then, English Law will apply.[116] However, if the court is satisfied that the application of English law will occasion injustice to either of the parties, customary law will apply.[117] Therefore where all the parties are non-Nigerians, English law will govern their relationship.[118] Still, for customary law to be enforced under the colonial regime, the court must be satisfied that such customary law was not repugnant to natural justice, equity and good conscience or incompatible directly or indirectly with any existing law.[119]

Some commentators have posited that it seems that the Arbitration Act 1889 is not a statute of general application.[120] Their suggestion is hinged on the premise that there is no Nigerian decided case based on the Act. Admittedly, as far as records can show, there is no Nigerian decided case based on the Arbitration Act 1889, nonetheless, the Arbitration Act 1889, applied in Nigeria as a Statute of general application by virtue of Ordinance No. 3 of 1863 and Ordinance No. 4 of 1876. Even so, it is difficult to determine which English statutes are those of general application because of the speculative nature of what qualify as 'Statute of general application.' In *Attorney General v John Holt & Co.*[121] the court as per Osborne, CJ ventured to state factors that may determine which English statutes are those of general application, thus:

> No definition has been attempted of what is a statute of general application … each case has to be decided on the merits of the particular statute sought to be enforced. Two

113. [1915] 1 NRL 15.
114. Labinjoh v Abake, [1924].
115. *Griffins v Talabi* (1948) 12 WACA 371.
116. *Koney v UTC* [1934] 2 WACA 188.
117. *Nelson v Nelson* [1951] 13 WACA 248.
118. Obilade, A. O. (1979) The Nigerian Legal System, Sweet & Maxwell, London, p. 154; Ezejiofor, G. (1993) at pp. 89 – 90.
119. Section 19 of the Supreme Court Ordinance (No. 4) of 1876.
120. Ezejiofor, G. (1980) "Sources of Nigerian Law" in C. O. Okonkwo (ed.), Introduction to Nigerian Law, Sweet and Maxwell, London, at pp. 5 – 6.
121. [1910] 2 NLR 1.

> preliminary questions can, however, be put by way of a rough, but not infallible test, viz: (i) by what courts is the statute applied in England and (ii) to what classes of community in England does it apply? If, on January 1, 1900, an Act of Parliament were applied by all civil or criminal courts, as the case may be, to all classes of the community, there is a strong likelihood that it is in force within the jurisdiction. If, on the other hand, it were applied only by certain courts, (e.g. a **s**tatute regulating procedure), only to certain classes of the community (e.g. an Act regulating a particular trade), the probability is that it would not be held to be locally applicable.[122]

This thesis argue that since the Arbitration Act 1889 was applied at that material time by all civil courts in England to all classes of the community and was also a pre January 1, 1900 statute, it constitutes a statute of general application.

Upon the amalgamation of the Northern and Southern Protectorates, now Nigeria, the Arbitration Act 1889 was re-enacted verbatim as Arbitration Ordinance 1914. The Ordinance came into effect on 31st December 1914 and applied to the whole country which was then governed as a single unit. In 1954 when Nigeria was regionalised (and later became a federal state in 1963) the Ordinance continued to apply in the various regions and federating states.[123]

2.3.3. The ACA

As at the time Nigeria became politically independent in 1960, the Arbitration Ordinance 1914 was the only legislation on arbitration in Nigeria.[124] In 1963 when Nigeria became a Republic, the 1914 Ordinance was re-enacted verbatim as the Arbitration Act 1958 and was in force until 1988.[125] This Act applied to Lagos as the then Federal Capital Territory and each region had its own statutory arbitration law.[126] The Arbitration Act 1958 had 19 sections which only regulated domestic arbitration. Recognition and enforcement of non-domestic arbitral awards in Nigeria before 1988

122. *Attorney General v John Holt & Co*. [1910].
123. Abdul, O. Y. (2002) "Arbitration in Nigeria: Problems, Challenges and Prospects*", Nigeria Bar Association, Ilorin Branch Journal*, p. 1.
124. Idornigie, P. O. (2015) Commercial Arbitration Law and Practice in Nigeria, LawLords Publications, Abuja, pp. 20 – 22.
125. Arbitration Act, Cap. 13, LFN and Lagos 1958.
126. The regional arbitration statutes which were also a re-enactment of the Arbitration Ordinance 1914 were: Arbitration Law of Eastern Nigeria 1963; Arbitration Law of Northern Nigeria 1963, and Arbitration Law of Western Nigeria 1958.

was by virtue of sections 2 and 4 of the Foreign Judgment (Reciprocal Enforcement) Act.[127]

Nigeria acceded to the NYC on 17th March 1970 and made the reciprocal and commercial reservations. In effect, only awards from Contracting States with reciprocal legislation that implements Nigerian awards will be recognised in Nigeria. Secondly, only disputes that fall within the statutory definition of "commercial" are enforceable under the NYC in Nigeria. In 1988, the NYC was expressly made applicable in Nigeria by virtue of the ACA.[128]

The ACA regulates domestic and international commercial arbitration throughout the country.[129] Though, the ACA did not expressly repeal or save the previous arbitration statutes, the effect of its section 58 which stipulates that, "This Act … shall apply throughout the Federation," amounts to an implied repeal of any arbitration legislation before it.[130]

2.3.3.1. The scope of application of the Act

It seems the ACA does not delimit disputes which are incapable of reference to arbitration. However, a community reading of the long title and section 57 (1) definition of arbitration reference suggests that the ACA applies only to commercial disputes which arise from contractual relationships. The long title states:

127. Foreign Judgement (Reciprocal Enforcement) Act, LFN, No 31 of 1960. For a non-domestic arbitral award to be enforced in Nigeria under this Act, such award must be registered in the High Court within the relevant region.
128. The Preamble and section 54 of the ACA.
129. The combined effect of the Preamble and section 54 of the ACA is that the Act will apply to matters relating to domestic and international commercial arbitration throughout the country. The Act has four Parts and three Schedules. Part I (sections 1 to 36) deals with arbitration generally. Part II concerns conciliation. Part III relates to additional provisions relating to international commercial arbitration and conciliation. Part IV is the miscellaneous provisions of the Act. There are three Schedules in the Act. The First Schedule makes provisions for the applicable arbitration rules under the Act. The Second Schedule reproduces the text of the NYC. The Third Schedule relates to conciliation rules.
130. In *Leadway Assurance v Jombo United Co. Ltd*. [2005] 5 NWLR (Pt. 919) 539 at pp. 556 – 557, the Court of Appeal relying on *Uwaifo v Attorney-General of Bendel State* [1983] 4 NCLR, 1 (SC) stated that, "where the provisions of two statutes are plainly inconsistent that effect cannot be given to both at the same time, a repeal of the provisions of the earlier statute by implication is inevitable. In other words, the latter statute will be read as having impliedly repealed the former". On the effect of a repealed statute, the Court of Appeal at page 559 further stated, "when a statute is repealed, it is considered, except as to transactions past and closed, as if it had never existed. In other words, the effect of the repealed statute is to obliterate it completely from the records as if it never existed for the purpose of those actions which were commenced, prosecuted and concluded whilst it was in existence."; Asouzu, A. A. (1994) "Developing and Using Commercial Arbitration and Conciliation in Nigeria", *Lawyer Bi-Annual*, Vol. 1, No. 1.

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

The term "commercial" as contained in the long title is defined under section 57(1) of the Act as:

> … all relationships of commercial nature including any trade transaction for the supply or exchange of goods and services, distribution agreement, commercial representation or agency, factoring, leasing, construction works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road;

Though, the ACA implements the NYC in Nigeria, by virtue of its section 54 (1) (b), it does not apply to NYC awards which arose out of non-contractual relationships.[131] The provisions section 54 (1) (b) of the ACA contradict the declaration made by the Federal Government of Nigeria when it acceded to the Convention. The declaration states that:

> In accordance with paragraph 3 of article I of the Convention, the Federal Military Government of the Federal Republic of Nigeria declares that it will apply the Convention on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of a State party to this Convention and to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of the Federal Republic of Nigeria.[132]

Accordingly, Idornigie argued that the non-application of the ACA to non-contractual disputes is a breach of Nigerian treaty obligation under article I (3) of the NYC.[133] This is so because the Federal Government of Nigeria's declaration referred to differences

131. By virtue of Article II (1) of the NYC, the Convention applies to legal relationships, whether contractual or not.
132. http://www.newyorkconvention.org/countries [accessed 20/09/2016].
133. Idornigie, P. O. (2004) "The Principle of Arbitrability in Nigeria Re-visited", *Journal of International Arbitration*, Vol. 21, No. 3, pp. 279 – 288.

arising out of legal relationships whether contractual or not, which are considered as commercial under the laws of the Federal Republic of Nigeria whereas, section 54 (1) (b) of the ACA stipulates otherwise. Idornigie notes that:

> …in international law, a state cannot plead that its domestic law exonerated it from performing obligations imposed by an international treaty, unless in giving its consent to the treaty, a fundamental rule of domestic law concerning constitutional competence to conclude the treaty concerned was broken, and this breach of domestic constitutional law was manifest. There is no such breach of any fundamental rule of domestic law in this case. Even before an international tribunal, a respondent state cannot plead that its domestic law (not even its Constitution) contains rules which conflict with international law, nor can it plead the absence of any legislative provision or of a rule of internal law as a defence to a charge that it has broken international law.[134]

Consequently, commercial transactions under the ACA refer to those arising from contractual relationships only. However, despite the general application of the ACA to the resolution of commercial disputes, some disputes are precluded from arbitration under the Act.[135] Nonetheless, the provision of section 35 that the ACA will not affect any law by which specific disputes may not be subject to arbitration opens the gate for the application of customary arbitration or common law to such disputes.

The ACA does not mention any particular subject matter that cannot be referred to arbitration. However, the effect of section 35 of the ACA is that certain disputes will not be referred or submitted to arbitration if any law so provides.[136]

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134. Idornigie, P. O. (2004) at p. 280; Idornigie, P. O. (2003) "*The 1988 Nigerian Arbitration and Conciliation Act: Need for Review?", International Arbitration Law Review*, Vol. 6, No. 2, pp. 49 – 61; Idornigie, P. O. (2002) "The Relationship Between Arbitral and Court Proceedings in Nigeria", *Journal of International Arbitration*, Vol. 19, No. 5, pp. 443 – 457.
135. By implication, tortious relationships, criminal and matrimonial disputes (especially dissolution of marriage) are deemed non-arbitrable under the ACA.
136. In *Arab Republic v Ogunwale* [2002] 9 NWLR (Pt. 771) 127, the court of Appeal stated that the test for the determination of whether a dispute is arbitrable or not is that the dispute or difference must necessarily arise from the clause contained in the agreement. Hence, the question of whether or not a dispute is resolvable by arbitration under the Act is at the discretion of the court.

2.3.3.2. Applicability of the ACA in Nigeria

Prior to May 29, 1999, the constitutionality or otherwise of the ACA was not an issue because the Act was a product of a military regime.[137] With the return to democratic government on May 29, 1999, the Constitution changed the legal status of the decrees and became the grundnorm in Nigeria.[138] As the highest law underlying and establishing the basis of the entire system of governance in Nigeria, the Constitution prevails over any law that is in conflict with it.[139]

This sub-section examines whether the ACA is applicable in all the states of the Federation and the constitutionality or otherwise of its application as a federal legislation in all the states of the Federation. It analyses the distribution of legislative jurisdictions under the Constitution (i), the preservation of laws that were in force prior to May 29, 1999 by the Constitution (ii) and, the doctrine of 'covering the field' (iii).

(i) Distribution of legislative authorities under the 1999 Constitution

Under the Constitution, legislative powers are shared between the Federal and State legislatures. The Federal Government through the National Assembly has exclusive legislative powers on any matter contained in the exclusive legislative list or as may be specifically allowed by the Constitution.[140] The Federal and State Governments[141] have concurrent legislative authorities on matters contained in the Concurrent Legislative List.[142] Nevertheless, the legislative competence of a House of Assembly to legislate on

137. During the then military administration, Nigeria had a government akin to a unitary system of government. Federal decrees (laws) were held supreme over and above the constitution and state edicts. Any law (including the Constitution) that was in conflict with a federal decree was declared null and void to the extent of its inconsistency with such decree. The Federal Military Government promulgated the Constitution (Suspension and Modification) Decree (No. 1 of 1984), the Federal Military Government (Supremacy and Enforcement of Powers) Decree (No. 13 of 1984) and the Constitution (Suspension and Modification) Decree (No. 107 of 1993) to allow itself to modify and suspend any provision of the 1979 Constitution that challenged its operations. The decrees also gave the Federal Military Government power to make laws (by way of decrees) territorially and procedurally for the federating states of Nigeria.
138. The Constitution of the Federal Republic of Nigeria 1999 (as amended).
139. Sections 1(1) and 1(3) of the 1999 Constitution (as amended) provides that: (1) "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. (2) … (3) 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."
140. Section 4(3) and the Second Schedule, Part I of the 1999 Constitution.
141. The State Government exercises its legislative functions through the House of Assembly of the State.
142. Section 4(4) (a), (7) (a) and the Second Schedule, Part II of the 1999 Constitution; *Attorney General of Ogun State v Aberuagba* [1985] 1 NWLR (Pt. 3) 395.

a matter listed in the concurrent legislative list is restricted by the condition that such law shall only operate subject to its conformity with existing federal law on that matter.[143]

Matters not specifically listed either in the exclusive or concurrent legislative lists are generally regarded as residual matters.[144] Such residual matters are within the exclusive domain of the House of Assembly of each Federating state to legislate on, and of all the items listed in the exclusive and concurrent legislative lists, arbitration is not mentioned. Thus, it is arguable that arbitration falls into the residual legislative list, which is within the exclusive legislative competence of states.[145] Arbitration generally not been listed as an item within the legislative competence of the National Assembly raises the question of the constitutionality of the ACA. It is even more complicated considering the provisions of section 58 of the ACA.[146]

However, it can be argued that the combined stipulations of items 62(a), 31 and 68 of the exclusive legislative list imply that the National Assembly is constitutionally competent to legislate on commercial arbitration matters.[147] Under item 62(a) the National Assembly is empowered to legislate on trade and commerce between Nigeria and other countries, and between Federating states. Item 31 deals with the implementation of international treaties on matters contained in the exclusive legislative list. Item 68 empower the National Assembly to legislate on any matter incidental or supplementary to the matters listed in the exclusive legislative list.

Therefore, it is contended that since the ACA: (i) only applies to commercial arbitration,[148] (ii) implements the NYC in Nigeria[149] and, (iii) is incidental to trade and

143. Ikeyi, N. and Amucheazi, O. (2013) "Applicability of Nigeria's Arbitration and Conciliation Act: Which Field Does the Act Cover?" *Journal of African Law*, Vol. 57, No. 1, p. 126.
144. Niki Tobi, JSC expounding on the existence of the residual list in Attorney General of *Abia State v Attorney General of the Federation* [2006] 16 NWLR (Pt. 1005) 265 at 380 stated *inter alia*: "The Constitution of the Federal Republic of Nigeria 1999, like most constitutions, does not provide for residual list. And that is what makes the list residual. The expression emanates largely from the judiciary, that is, it is largely a coinage of the judiciary to enable it exercise its interpretative jurisdiction as it relates to the constitution. Etymologically, 'residual; merely meaning that which remains. In legislative or parliamentary language, residual matters are those that are neither in the exclusive or concurrent legislative list."
145. Rhodes-Vivour, A. (2010) "Recent Arbitration Related Development in Nigeria" *Arbitration*, Vol. 76, No. 1, pp. 130 – 135.
146. Section 58 of the ACA provides: "This Act may be cited as Arbitration and Conciliation Act … and shall apply throughout the Federation."
147. Asouzu, A. A. (2001) "Arbitration and Judicial Powers in Nigeria" *Journal of International Arbitration*, Vol. 18, No. 6, 617 – 640.
148. Which is under item 62(a) of the exclusive legislative list "trade and commerce."

commerce,[150] it is by necessary inference within the legislative competence of the National Assembly. Adaralegbe argued in support, though differently, that the ACA falls within the legislative jurisdiction of the National Assembly of Nigeria.[151] He further argued that, the community effect of sections 12(2)[152] and 4(4)[153] of the 1999 Constitution on the one hand, and section 10(2) of the Interpretation Act[154] on the other hand, gives the National Assembly the constitutional competence to legislate on the ACA.[155] Also, Ikeyi and Amucheazi argued that item 62 of the exclusive legislative list gives the National Assembly power to legislate only on matters relating to international and intra-state trade and commerce, and not on settlement of disputes arising out of intra-state trade and commerce.[156]

The above views pose the question whether federating states can validly legislate on matters relating to arbitration. Giving regard to the fact that the ACA did not either repeal or save the existing state laws on arbitration, apart from stating that the Act will apply to commercial arbitration throughout the federation,[157] are state laws on arbitration still applicable or have they been impliedly repealed.[158] A discussion on the doctrine of covering the field may provide answers to this question.

(ii) The doctrine of 'covering the field'

Another way of testing the constitutionality of the ACA is by applying the doctrine of 'covering the field.' The doctrine is to the effect that, where the National Assembly has

149. Item 31, implementation of a treaty (New York Convention) on a matter (trade and commerce) contained in the exclusive legislative list.
150. Item 68 of the exclusive legislative list.
151. Adaralegbe, A. G. (2006) "Challenges in Enforcement of Arbitral Awards in Capital Importing States: The Nigerian Experience", *Journal of International Arbitration*, Vol. 23, No. 5, 401 – 426.
152. Section 12 (2) of the 1999 Constitution (As Amended) provides: "The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purposes of implementing a treaty."
153. Section 4 (4) of the 1999 Constitution (As Amended) provides: "In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say; (a) any matter in the Concurrent Legislative List … (b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of the Constitution."
154. Section 10 (2) of the Interpretation Act, Cap. 123, LFN, 2004 provides that: "An enactment which offers powers to do any act shall be construed as also conferring all such other powers as are reasonably necessary to enable that act to be done or are incidental to the doing of it"
155. Adaralegbe, A. G. (2006), p. 401.
156. Ikeyi, N. and Amucheazi, O. (2013) pp. 132 – 133.
157. Section 57 and 58 of the ACA.
158. For example, Arbitration Law of Northern Nigeria, 1963, applicable to Kano State; the Arbitration Law, Cap 12, Laws of Cross River State, 1981, the Lagos State Arbitration Law (No. 10) 2009.

validly legislated on a matter, the House of Assembly of the federating states will be incompetent to legislate on the same matter.[159] Applying this doctrine to the applicability of the ACA throughout the Federation, section 57 provides that the Act applies only to commercial arbitration, whilst section 58 provides that the Act shall apply throughout the country. These sections therefore suggest that, with regard to commercial arbitration, the ACA precludes any federating state law on commercial arbitration and conciliation.[160]

In *Comagnie Generale De Geophysique v Etuk*,[161] one of the issues for determination before the Court of Appeal, as framed by Ekpe JCA, was the applicable law to the dispute between the parties. The respondent contended that the applicable law was the Arbitration Law of Cross River State, while the appellant argued that the applicable law was the ACA. The court held that by the operation of the doctrine of covering the field, the ACA was the applicable law to the dispute to the preclusion of the Arbitration Law of Cross River State. The Court further stated that since the aim of the ACA is to apply throughout the country by virtue of section 58, the Act will apply even though it did not expressly repeal the Arbitration Laws of the federating states. Thus, Ekpe JCA stated:

> Where under a federal set up both the federal and the state legislatures, each being empowered by the constitution to do so, legislate on the same subject, then if it appears from the provisions of the federal law on the subject that the federal legislature intends to cover the entire field of the subject matter and thus provide what the law on the subject matter should be for the entire federation, then the state law on the subject is invalid…[162]

However, opinion is divided on the real effect of the doctrine on state commercial arbitration laws. Orojo and Ajomo argue that the effect is that the ACA is deemed to have impliedly repealed or kept in abeyance the states' laws on arbitration, except in the areas not expressly, exclusively and comprehensively covered by the Act.[163] Idornigie

159. *Lakanmi v Attorney General Western Nigeria* [1971] 1 UILR 201; *Attorney General Ogun State & ors v Attorney General Federation* [1982] 13 NSCC 1; Okocha, O. C. J. (2003) "The Doctrine of Covering the Field and the Limits of Legislative Powers of the National Assembly *vis-à-vis* the State and Local Governments Legislatures in Nigeria" *Nigerian Bar Journal*, Vol. 2, No. 1, 117.
160. Orojo, J. O. and Ajomo, M. A. (1999) supra pp. 25 – 27.
161. [2004] FWLR (Pt. 235) p. 86.
162. *Comagnie Generale De Geophysique v Etuk* [2004] pp. 88 – 89.
163. Orojo, J. O. and Ajomo, M. A. (1999) p. 25.

on the other hand contended that the ACA by the effect of the doctrine did not repeal but kept the states' arbitration laws in abeyance.[164] Nevertheless, a better view is that the doctrine renders state laws on commercial arbitration inoperative to the extent of any inconsistency.[165]

(iii) The position prior to the 1999 Constitution

In order to preserve the existence of the decrees and edicts promulgated under the military regime, section 315 of the 1999 Constitution provides that, laws that existed prior to the Constitution will continue to be in force as 'existing law'. An existing law would remain in force either as an Act of the National Assembly or as a law of the House of Assembly of the federating states, subject to the legislative competence of the legislature under the 1999 Constitution to legislate on the subject of such existing law.[166] If an existing law is not in conformity with the provisions of the Constitution, then an 'appropriate authority' can 'modify' it to bring it into conformity with the Constitution.[167] The ACA being a law that was in force prior to May 29, 1999 qualifies as an existing law under the Constitution.

The question whether the ACA should continue to be in force as an Act of the National Assembly or a law of a House of Assembly depends on the legislature with the competence to legislate on commercial arbitration. By an earlier review of the exclusive and concurrent legislative lists, neither the National Assembly nor a House of Assembly has the express legislative power to legislate on commercial arbitration. However, since the National Assembly has already covered the field, state laws on commercial arbitration that conflicts with the ACA will be declared invalid.

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164. Idornigie, P. O. (2000) "The doctrine of 'covering the field' and Arbitration Laws in Nigeria" *Arbitration*, Vol. 66, No. 3, p. 193
165. Ikeyi, N. and Amucheazi, O. (2013), p. 126; Idornigie, P. O. (2000), p. 193; Akintoye, A. (2002) "The Doctrine of Covering the Field and the Blue Pencil Rule in Legislative Enactments: A Judicial Revisitation", a publication of the Nigerian Bar Association, Ilorin Branch, p. 189.
166. Section 315(4) of the 1999 Constitution provides: "an existing law means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date."
167. Section 315(1) of the 1999 Constitution provides: "subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be: (a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and (b) a Law made by the House of Assembly to the extent that it is a law with respect to which a House of Assembly is empowered by this Constitution to make laws."

2.4. The NYC

The NYC is one of the efforts of the international business community to establish the transnationality of international commercial arbitral awards.[168] Starting with the Geneva Protocol of 1923 on Arbitration Clauses and the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards, these efforts target the promotion of international trade and non-litigation approach of resolving disputes arising out of such international commercial transactions. Arguably, these efforts culminate in promoting the merits of international commercial arbitration over litigation as a method of resolving transnational commercial disputes with a certainty that an award will be recognised and enforced almost anywhere in the world.[169] Accordingly, Briner asserts that, "International commercial arbitration is the servant of international business and trade."[170]

Several international instruments on arbitration, such as the 1923 Geneva Protocol and the 1927 Geneva Convention, contain provisions for the enforcement of arbitral awards.[171] Arguably, these two instruments, established (or at the least attempted to establish) a legal framework for the recognition of transnational commercial arbitration. One of the apparent deficiencies of the 1923 Geneva Protocol was its circumscription of the enforcement of cross-border arbitral awards to the seat of the arbitration only.[172]

With respect to the 1927 Geneva Convention, its foremost deficiencies were the *double exequatur* requirement and the onus of proof on the party seeking recognition and enforcement of the award to show that the award had become final.[173] In effect, the Convention required confirmation of finality of the arbitral award in the country of origin before the enforcing court could perhaps recognise and enforce it. In essence, the

168. Mistelis, L. A. and Di Pietro, D. (2010) "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958", in Mistelis, L. A., (ed.), Concise International Arbitration, Kluwer Law International, The Netherlands, pp. 1 – 32.
169. Kronke, H. (2010) "The New York Convention Fifty Years On: Overview and Assessment", in Kronke, H., *el at*, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Kluwer Law International, The Netherlands, pp. 1 – 18.
170. Briner, R. (1998) "Philosophy and Objectives of the Convention" a paper presented at 'New York Convention Day' held in the Trusteeship Council Chamber of the United Nations Headquarters, New York on the 10 June 1998 to celebrate the 40th anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
171. Article 3 of the Geneva Protocol; article 1 of the Geneva Convention.
172. Redfred, A. *et al*, (2004) Law and Practice of international Commercial Arbitration, 4th edn., Sweet & Maxwell, London, pp. 67 – 68.
173. Redfern, A., *et al*, (2004) at p. 68.

party seeking enforcement was required to obtain leave for enforcement from a competent authority at the seat of arbitration. In addition to the leave from the seat, the enforcing party was also required to obtain leave in the country where enforcement was sought.

The idea to replace the 1923 Geneva Protocol and the 1927 Geneva Convention was first conceived by the ICC which issued a preliminary draft Convention in 1953.[174] In 1955, the UN Economic and Social Council took over the ICC initiative and produced an amended draft Convention.[175] Between May and June 1958, the said draft was subject to discussions and on June 10, 1958 at a Conference of the UN in New York, the NYC was adopted.[176] Since its adoption by the UN, the NYC has remained the principal convention and legal cornerstone for enforcing international arbitral awards in 157 countries.[177] The NYC obliges a Contracting State's court, to refer parties to arbitration where there is a valid arbitration agreement between parties in an international dispute and, to enforce the award therefrom.[178] England and Nigeria are Contracting States to the NYC.

2.4.1. The scope of application of the NYC

The title of the NYC suggests that it regulates the recognition and enforcement of foreign arbitral awards. The two terms, recognition and enforcement, are distinct, though, it is possible to seek for both remedies in court jointly and severally.[179] According to Born, the NYC is more generally applicable to a vast spectrum of arbitration agreements and is not circumscribed by the Convention's application to an itemised group of foreign or non-domestic arbitral awards.[180] To this end, the NYC would apply either to all agreements to arbitrate dispute, or more specifically, all

174. ECOSOC Official Records, Committee on the Enforcement of International Arbitral Awards, Summary Record of the first meeting held March 1955, document F/AC.42/SR.1, p 3. The first meeting was held at the UN Headquarters, New York; .Lynch, K. (2003) The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration, Kluwer Law International, The Hague, pp. 128 – 140.
175. Mistelis, L. A. and Di Pietro, D. (2010), pp. 1 – 32.
176. http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958 [accessed on 20/09/2016].
177. http://www.newyorkconvention.org/countries [accessed on 20/09/2016].
178. Article II and III of the NYC.
179. Rubino-Sammartano, M. (2001) International Arbitration Law and Practice, 2nd edn., Kluwer Law International, The Hague, p. 936.
180. Born, G. B. (2009) International Commercial Arbitration, Vol. 1, Kluwer Law International, p. 277.

international agreements to arbitrate dispute.[181] With regard to what may amount to non-domestic award, article I (1) of the NYC provides:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of difference between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

The effect of the text of article I (1) of the NYC is that, the Convention will apply where the arbitral award is made in the jurisdiction of another country other than the country where the arbitral award is sought to be enforced. Also it will apply where the enforcing court considers the arbitral award non-domestic.

However, it has been noted by van den Berg that a "non-domestic" arbitral award may result in three types of awards.[182] The first is an award rendered in the enforcing country under the arbitration law of another country. The second is an arbitral award rendered in the enforcing country involving a foreign element under the arbitration law of that country. The third is an award that is termed "a-national" because it is not regulated by any national arbitration law. Instances under the first would be where parties elect to arbitrate in one country under the arbitration law of another country. The second is where an arbitral award was rendered under foreign law or involved parties that are domiciled or have their principal place of business outside the enforcing country.[183] As regard the last, van den Berg argued that in case of enforcement of an 'a-national' award under the NYC, the place where the award is rendered is immaterial.[184] However, he queried whether 'de-nationalised' arbitration and the attendant 'a-national' award are

181. Born, G. B. (2009), p. 277.
182. van den Berg, A. J. (2008) "The New York Convention of 1958: An Overview", in Gaillard, E. and Di Pietro, D., (eds.), Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice, Cameron May, London, pp. 39 – 68.
183. *Bergesen v Muller* (1983) (US No. 54, reported in Yearbook Vol. IX p. 487) where the US Court of Appeal for the Second Circuit in 1983 stated inter alia that: "awards 'not considered as domestic' means awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g. pronounced in accordance with a foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction."
184. van den Berg, A. J. (2008), pp. 39 – 68.

legal reality and if so, whether the NYC can be applied to them.[185] The issues raised by van den Berg are examined under the concept of the seat in chapter four of the thesis.

2.5. Summary

This chapter sets out the legal framework that governs the enforcement of arbitral awards in England and Nigeria. The historical development of arbitration in both countries demonstrates that arbitration emerged as a result of party autonomy. The next chapter will analyse the juridical theory adopted in both jurisdictions.

185.van den Berg, A. J. (2008), p. 65.

Chapter three

The nature and theories of arbitration

3.0 Introduction

There is no universally acceptable legal definition of transnational commercial arbitration. Indeed, the definition of arbitration as a private dispute resolution mechanism differs according to international conventions and treaties, international and national practice and national laws[1]. Generally, laws on arbitration do not define arbitration but define the agreement to arbitrate. However, descriptions of arbitration have been offered by national courts, arbitrators and commentators. Born describes transnational arbitration as a process by which disputes arising out of cross-border transactions are settled pursuant to parties voluntary agreement by a method other than litigation.[2] The process is based on the consent of parties to resolve their disputes by non-governmental decision maker selected by or for the parties. The consent to arbitrate disputes arising out of their legal relationship is either expressed in a submission agreement or arbitration clause.[3]

This chapter examines the nature of arbitration generally (3.1) and specifically under the NYC, English AA, and the Nigerian ACA (3.2). It then discusses the juridical theories and applies these to test the regimes in England and Nigeria (3.3) following which the policy considerations adopted in both jurisdictions in enforcing arbitral awards is examined (3.4).

3.1 The nature of arbitration

Dispute resolution is an essential feature of any legal system and one of the primary conditions of a peaceful community or society is the resolution of disputes by processes which are non-violent in nature.[4] Although the judiciary is the official

1. Steingruber, A. M. (2012) "The Mutable and Evolving Concept of 'Consent' in International Arbitration - Comparing rules, laws, treaties and types of arbitration for a better understanding of the concept of 'Consent'" *Oxford U Comparative L Forum 2 at ouclf.iuscomp.org* [accessed on 20/09/2016]
2. Born, G. B. (2012) International Arbitration: Law and Practice, Kluwer Law International BV, The Netherlands, pp. 4 – 5.
3. Lyons, J. (1985) Arbitration: "The slower, More Expensive Alternative?" *The American Lawyer,* Jan.-Feb, 107.
4. Genn, H. (2012) "What Is Civil Justice For? Reform, ADR, and Access to Justice," *Yale Journal of Law & the Humanities*, Vol. 24, No. 1, Art. 18, pp. 397 – 417.

organ known for that purpose, many disputes are resolved by methods other than court action. Methods of dispute resolution can be either of compromise or of decision.[5] Under compromise, disputes are resolved either directly between the disputants through the aid and intervention of an agreed or volunteer third party (mediation or conciliation). Mediation and conciliation are most informal and their essence lies in the fact that the settlement achieved may be acceptable to the parties to the dispute.[6] This is because in mediation or conciliation, disputants may be offered less than what they originally desired or felt was their due respectively. Thus, mediation, conciliation and negotiation are means of compromising disputes on a give-and-take basis. Though as informal processes, they are distinct and well recognised methods of dispute resolution. Nonetheless, when the method of resolving disputes shifts from compromise to decision-making, litigation is generally thought of disregarding the prominence of arbitration. Hence, arbitration most times is dismissed as another type of compromise mechanism. This section argues that in so doing the significance and generative power of the arbitration process is not identified. This section highlights three distinctive elements of commercial arbitration, namely, its private (3.1.1), consensual (3.1.2) and final and binding (3.1.3) nature.

3.1.1 Private and confidential

Generally, arbitration is considered to be inherently a private and confidential dispute resolution mechanism for settling disputes arising out of a legal relationship.[7] It is private because unlike litigation, only the parties to the arbitration agreement, their legal representatives (lawyers) and their witnesses, if any, can attend hearings and take part in the arbitral proceedings. Thus, proceedings are conducted in private

5. According to Mentschikoff, "The importance of determining whether a particular method is essentially one of compromise or of decision lies in the psychological attitude which accompanies resort to it. In the one context, 'bargain' and the emotive connotations of that word are evoked; in the other, 'judgment' and the emotive connotations of that come into play. This distinction is of peculiar significance in evaluating the arbitration process and in attempting to place it in the general machinery of … legal institutions." Mentschikoff, S. (1952) "The Significance of Arbitration--A Preliminary Inquiry" *Law and Contemporary Problems*, Vol. 17, pp. 698 – 710, at p. 698.
6. Okekeifere, A. I. (1998) "Commercial Arbitration as the Most Effectively Dispute Resolution Method: Still a Fact or Now a Myth", *Journal of International Arbitration*, Vol. 15, No. 4, pp.81 – 105.
7. Tashiro, K. (1992) "Quest for a Rational and Proper Method for the Publication of Arbitral Awards", *Journal of International Arbitration*, Vol. 9, No. 2, pp. 97 – 104; Trakman, L. E. (2014) "Confidentiality in International Commercial Arbitration", *Arbitration International*, Vol. 18, No. 1, pp. 1 – 18.

not in public. It is confidential because, except the parties agree otherwise, the parties themselves, their witnesses, if any, and arbitrators cannot disclose to third parties information concerning the arbitration, such as pleadings, evidence and decisions of the arbitrators.[8]

One of the elements that differentiate litigation from arbitration is the rigidity of the court procedure. As a private dispute resolution mechanism, arbitration can be much more flexible both in time and procedure. Unlike litigation, parties to the arbitration agreement freely determine the most suitable procedure, structure and other details of the arbitration.[9] In effect, neither the parties nor the arbitrators are tied to strict rules of court. Parties also by their agreement expressly or impliedly confer authority on the arbitrator within the limit of a relevant law or rules.[10] In litigation, cases are randomly allocated to judges, and litigants have no say in the selection process, much less the freedom to elect a judge with a specialised skill or expert knowledge concerning their dispute.

In Nigeria, pursuant to the Arbitration Rules, arbitral proceedings are held 'in camera', save parties agree otherwise.[11] Arguably, this means that arbitral proceedings and evidence generated are to be treated as private and confidential. Thus, it follows that awards and evidence related to the arbitration proceeding cannot be made public, except both parties give their permission.[12] In England, there are no statutory stipulations in the AA 1996 which deal with confidentiality of evidence related to arbitration and the award. However, under the common law, evidence generated from arbitral proceedings including the award are considered confidential though, this presumption is rebuttable. This is evident in the English Court of Appeal case of *Emmott v. Michael Wilson & Partner*.[13] In that case, Lord Collins noted:

> … an implied obligation (arising out of the nature of arbitration itself) on both parties not to disclose or use

8. Hwang, M. S. C. and Chung, K. (2009) "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" *Journal of International Arbitration*, Vol. 26, No. 5, pp. 609 – 645.
9. Yu, H-L, (2012) "Duty of Confidentiality: Myth and Reality", *Civil Justice Quarterly*, Vol. 31, No. 1, pp. 68 – 88.
10. Blackaby, N., Partasides, C., Redfern, A. and Hunter, M. (2009) Redfern and Hunter on International Arbitration, 5th ed., Oxford University Press, New York, p. 86.
11. Article 25 (4) of the Arbitration Rules, First Schedule to the ACA.
12. Chukwuemerie, A. I. (2007) "Arbitration and Human Rights in Africa", *African Human Rights Law Journal*, Vol. 7, No. 1, pp. 103 – 141.
13. [2008] EWCA (Civ) 184 (CA).

> for any other purpose any document prepared for and used in the arbitration, or disclose or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by the witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court.[14]

Conversely, the fact that a party is involved in court proceedings is a matter of public record, save such court proceedings cannot be made public by reason of statutory restriction or a court order. Thus, unlike litigation, in arbitration there is no public hearing and no public record. Nonetheless, the common law implied rule that the arbitration, evidence adduced in the arbitral proceedings and the award is confidential, is subject to exceptions.

For example, in *Ali Shipping Corp v Shipyard Trogir*,[15] The English Court of Appeal considered the general rule of confidentiality of documents (and awards) and laid the following rules: disclosure made with the express or implied permission of the party who originally produced the document; where there is an order of the Court, for instance where an order is made for disclosure of materials generated by an arbitration for the purposes of a later Court proceedings; disclosure when and to the degree judiciously necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party; where leave of the Court has been given. Potter LJ recognised that difficulties would arise with the question of what grounds would give rise to such leave being given; and disclosure required in the public interest.[16]

14. *Emmott v Michael Wilson & Partner* [2008] at para. 81. Similarly, Thomas, LJ at para. 129 stated that:
    > … a specific obligation of confidentiality in relation to documents produced by each party to the arbitration under the process of disclosure applicable by the procedural law of arbitrations conducted in England and Wales. This is analogous to that imposed by the courts of England and Wales in proceedings before them. As between the parties, all such documents are covered by the obligation of confidentiality.
15. [1999] 1 WLR 314.
16. In *Glidepath BV and Others v John Thompson and Others* [2005] EWHC 818 (Comm), the court applied the principle in *Ali Shipping Corp*. and held that arbitration proceedings and evidence generated were treated as confidential to the parties and the arbitrator, subject to certain exceptions.

Again in *Associated Electric and Gas Insurance Services Ltd ("Aegis") v European Reinsurance Co. of Zurich,*[17] the Privy Council further considered the extent of confidentiality attaching to an arbitral award. The question that arose for determination was whether an express confidentiality agreement relating to an earlier arbitration between the same parties precluded one of them from referring to the earlier award in a later arbitration between them. The Privy Council considered that the justification for the duty of confidentiality was to determine the disputes between the parties to the arbitration in a way that did not involve the disclosure of information to parties with interests adverse to those involved in the arbitration. Thus, it was held that the use of the earlier award in a later arbitration between the same parties would not give rise to such danger. Their Lordships went on to hold that to forbid any disclosure of the award would truncate an essential purpose of the arbitration by thwarting enforcement of the award.

3.1.2 The consensual nature of arbitration

Arbitration is either mandatory or voluntary. It is compulsory where parties are required by legislation or a court order to submit their dispute to arbitration without their willingness to do so. Under this type of arbitration, parties are compelled to arbitrate their dispute. Conversely, it is voluntary where parties willingly agree to refer or submit their dispute to a neutral third party (arbitrator or arbitrators) with a legal intention that the valid decision (award) of the arbitrator or arbitrator will be binding on them.[18] Unlike mandatory arbitration, an agreement to arbitrate cross-border commercial disputes is voluntary.[19] Such election requires both parties' assent, the *consensus ad idem*. This meeting of the minds is considered the foundation on which the arbitral process is built.[20]

In an international commercial arbitration, proceedings are seen as an expression of the parties' intention to refer or submit their dispute to the arbitrators on the basis of

17. [2003] 1 WLR 1041.
18. Katz, L. V. (1993) "Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin", *Journal of Dispute Resolution*, Vol. 1993, No. 1, pp. 1 – 55; LeRoy, M. H. (2009) "Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review", *Journal of Dispute Resolution*, Vol. 2009, No. 1, pp. 2 – 48.
19. Khan, L. A. (2013) "Arbitral Autonomy", *Louisiana Law Review*, Vol. 74, No. 1, pp. 1 – 58.
20. Steingruber, A. M. (2012) Consent in International Arbitration, Oxford University Press, Oxford, paras. 6.33 – 6.40.

party autonomy.[21] This consensus of the parties to have their dispute resolved by arbitration is fundamental for the validity of the arbitration agreement and by extension, the arbitral proceedings and its resultant award. A binding contract, international commercial arbitration agreement inclusive, requires *consensus ad idem*, agreeing to the same thing in the same sense by the parties. Thus, the element of consent in an international commercial arbitration is indispensable, without it there can be no valid arbitration reference and arbitral award.[22] This is because one of the significant values upon which arbitration rests is that the arbitrator's authority flows from the consent and voluntary agreement of the parties.

The English and Nigerian courts would normally not invoke their jurisdiction and would generally stay proceedings before them in favour of arbitration. This is because the NYC, AA 1996 and the ACA, by virtue of which the English and Nigerian courts honour commercial arbitration agreements in the first place, are expressly concerned with arbitration processes premised on consensual agreements.[23]

3.1.3 Final and binding

International commercial arbitration policies are founded upon two cardinal interests, namely: preserving the finality of arbitral awards and maintaining a just private dispute resolution system.[24] To this end, a final arbitral award is a concluding and binding determination of parties' rights and obligations. The final and binding element of arbitration awards resonates with the parties' initial consent to arbitrate their dispute.[25] In effect, once an award is rendered, all issues and claims of the parties to the arbitration cannot be re-arbitrated or even litigated. Such issues and claims become *res judicata* in the same way as a court judgement.[26]

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21. Hanotiau, B. (2011) "Consent to Arbitration: Do we Share a Common Vision?" *Arbitration International*, Vol. 27, No. 4, pp. 539 – 555.
22. Brekoulakis, S. (2015) "Parties in International Arbitration: Consent v Commercial Reality" *been a paper presented at the School of International Arbitration 30th Anniversary Conference, Queen Mary University of London, on Monday, 20 April 2015.*
23. Article II of the NYC; Section 9 of the AA 1996, and Section 5 of the ACA
24. Lalive, P. (2010) "On the Reasoning of International Arbitral Awards", *Journal of International Dispute Settlement*, Vol. 1, No. 1, pp. 55 – 65.
25. Steingruber, A. M. (2012), para. 6.33 – 6.40.
26. Walters, G. L. (2012) "Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?" *Journal of International Arbitration*, Vol. 29, No. 6, pp. 651 – 680.

Though arbitral proceedings are not court proceedings, the procedures that are followed in reaching a final and binding award may be described as judicial. The arbitrator is bound to act judicially and judiciously. This implies that the arbitrator, like a judge, must "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent".[27] Although the above quotation is from the English AA 1996, the obligation is arguably one of general application. This is because similar provision is contained in basically all laws on arbitration and is a basic requirement of natural justice, due process. This leads to the observation that the crux of the nature of arbitration can be summed up as party autonomy.[28] Therefore, given the importance of party autonomy in the arbitral process, the sections that follow will often revert to that freedom.

3.2 Arbitration under the NYC, AA 1996 and ACA

The contractual nature of transnational arbitration permits parties to pre-arrange a predictable system of dispute resolution which preserves the privacy of their commercial relationship. This section discusses the nature of cross-border commercial arbitration under the NYC, the AA 1996 and ACA respectively. To this end, it examines party autonomy (3.2.1), arbitration agreement (3.2.2), arbitrability of the subject matter (3.2.3), the writing requirement (3.2.4), judicial interpretations of the writing requirement (3.2.5) and separability of the arbitration agreement (3.2.6).

3.2.1 Party autonomy

Whereas litigation proceeds under state law and court assigned judge, arbitration proceeds on the agreement of the parties.[29] The primary idea of arbitration is rooted in party autonomy, which is often referred to as the cornerstone of cross-border commercial arbitration.[30] The essence of party autonomy is to hold parties to their

27. Section 33 (1) (a) of the Arbitration Act 1996.
28. Holtzmann, H. M. (1993) "Some Reflection on the Nature of Arbitration", *Leiden Journal of International Law*, Vol. 6, No. 2, pp. 265 – 277.
29. Lew, J. D. M. (2006) "Achieving the Dream: Autonomous Arbitration", *Arbitration International*, Vol. 22, No. 2, pp. 179 – 204; Khan, L. A. (2013) "Arbitral Autonomy", *Louisiana Law Review*, Vol. 74, No. 1, pp. 1 – 58.
30. Teitz, L. E. (2005) "The Hague Choice of Court Convention: Validating Party Autonomy and providing an alternative to Arbitration", *American Journal of Comparative Law*, Vol. 53, No. 3, pp. 543 – 558; Kazutake, O. (2005) "Arbitration and Party Autonomy", *The Seinan*

agreement by allowing them to freely mould the conduct of their arbitration and be bound by the outcome of the arbitration they submitted to.[31] Thus, parties in exercising their freedom to contract may agree on the choice of arbitrator (or arbitrators and of the chairman), the strategy for the conduct of the arbitration, the seat of the arbitration, the choice of law applicable to the main contract and the arbitration agreement, the choice of documentary evidence and the examination of witness(es).[32] In this regard, party autonomy ensures that arbitration will proceed and the award honoured in accordance with the parties' agreement.

Under Article II of the NYC, though not expressly stipulated, an agreement in writing implies that parties are free to tailor their arbitration agreement to their dispute resolution needs.[33] In effect, if the arbitration is conducted without the parties' consent, the resultant award would be refused enforcement. For example, article V (1) (d) of the NYC provides that recognition and enforcement of the arbitral award may be refused if "the composition of the arbitral authority or the procedure was not in accordance with the agreement of the parties …"

In *Polimaster Ltd. (Belarus) and Na & Se Trading Co. Ltd. (Cyprus) v RAE Systems Inc. (US)*[34], the 1st and 2nd plaintiffs contracted with the defendant for the manufacturing and distribution of the 1st plaintiff's radiation detection instruments. The contracts contained clauses to the effect that disputes between the parties will be settled by reference to arbitration "at the defendant's site", which is the geographical location of the defendant's principal place of business. When disputes arose, the

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Law Review, Vol. 38, No. 1, pp. 1 – 29; Boralessa, A. (2004) "The Limitations of Party Autonomy in ICSID Arbitration" *American Review of International. Arbitration,* Vol. 15, pp. 253 – 266; Chatterjee, C. (2003) "The Reality of Party Autonomy in International Arbitration*" Journal of International Ar*bitration, Vol. 20, No. 6, pp. 539 – 560; Carbonneau, T. E. (2003) "The Exercise of Contract Freedom in Making Arbitration Agreements", *Vanderbilt Journal of Transnational Law,* Vol. 36, pp. 1189 – 1196.

31. Scherer, M. and Silberman, L. (2016) "Limits to Party Autonomy at the Post-Award Stage", in Ferrari, F. (ed.), Limits to Party Autonomy in International Commercial Arbitration, New York University School of Law, Public Law Research Paper No. 16 – 28, pp. 441 – 492; Tweeddale, A. and Tweeddale, K. (2007) Arbitration of Commercial Disputes: International and English Law and Practice, Oxford University Press, Oxford, pp. 496 – 497.
32. Webster, T. H. (2003) "Party Control in International Arbitration*", Arb. Int'l.*, Vol. 19, No. 2, pp. 119 – 142.
33. Cordero-Moss, G. (2014) "Limits to Party Autonomy in International Commercial Arbitration" *Oslo Law Review,* Issue 1, pp. 47 – 66.
34. (2011) ICCA, Yearbook Commercial Arbitration, Vol. XXXVI, pp. 381 – 383.

plaintiffs filed a joint request for arbitration at the defendant's principal place of business in California, USA. An arbitrator was appointed. The defendant filed an answer which also contained counterclaims. The 1st plaintiff argued that the arbitrator lacked jurisdiction over the counter claims filed by the defendant. Contending that under the parties' arbitration agreement, claims must be brought at the location of the party against whom such claims are brought. Thus, the defendant counterclaims are to be brought at Belarus, the 1st plaintiff's principal place of business. The arbitrator after considering issues before it rendered an award in favour of the defendant. The defendant sought to enforce the award at the US District Court for the Northern District of California, San Jose Division. The court granted the application for enforcement.

On appeal to the US Court of Appeal for the Ninth Circuit, one of the issues the court considered was whether the arbitration had been conducted in accordance with the parties' agreement. The court consequently reversed the district court's decision and refused enforcement. Citing article V (1) (d) of the NYC, the court stated that enforcement of an arbitral award may be declined on the basis that "the arbitral procedure was not in accordance with the agreement of the parties". The court held that the dispute relating to the counterclaim should not have been arbitrated in California, but in Belarus. The court reasoned that the arbitration agreement required disputes to be arbitrated at Polimaster's site. Thus, conducting the arbitration otherwise was a breach of the parties' agreement.

Though, party autonomy is broadly reflected in the arbitral process, the freedom is not absolute.[35] There are a number of restrictions imposed by the NYC in order to ensure that the requirements of due process are met.[36] These restrictions stem from the lack of *bona fide* authenticity, illegality or breach of public policy.[37] The provisions of article V (1) (a) and (2) of the NYC, which are on procedural public policy, are no less mandatory. If not taken into account by parties in their agreement,

35. Scherer, M. and Silberman, L. (2016), p. 441.
36. Cordero-Moss, G. (2014), pp. 47 – 66.
37. Articles II (1) and (3) and V (1) (a) and (2) of the NYC; Leaua, C. (2012) "The Applicability of Party Autonomy in the Appointment of Arbitrators", in Belohlavek, A. J. and Rozehnalova, N. (ed.), Czech and Central European Yearbook of Arbitration 2012: Party Autonomy versus Autonomy of Arbitrators, JurisNet LLC, pp. 133 – 145; Redfern, A. and Hunter, M. (2003) Law and Practice of International Commercial Arbitration, Student Edition, Sweet and Maxwell, London, pp. 97 – 9.8

they may affect the validity of the award or its recognition and enforcement under the NYC.[38] These provisions are examined in detail in chapter 5.

One of the underlying considerations of the AA 1996 is party autonomy.[39] Under the AA 1996, the principle of party autonomy is stated in section 1 (b) thus:[40] "The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest." The section gives parties the freedom to adopt the procedure they wish for the resolution of their dispute. According to the DAC Report, party autonomy encompasses two distinct limbs: (i) parties should be held to their agreement; and (ii) parties should be free to agree how their dispute is to be settled.[41] Undoubtedly, the first limb presupposes that the parties agreed to accept and be bound by the decision of the arbitrator. Such agreement is therefore to be respected and given effect by the courts.[42] The second limb gives parties the discretion to choose their arbitrator(s) and structure the arbitral process freely. In *Hashwani v Jivraj*,[43] the UK Supreme Court reaffirmed its support for the doctrine of party autonomy. Lord Clarke of Stone-cum-Ebony stated:

> One of the distinguishing features of arbitration that sets it apart from proceedings in national courts is the breadth of discretion left to the parties … to structure the process for resolution of the dispute. This is reflected in section 1 of the Arbitration Act 1996…[44]

The case arose from a dispute between parties who were at a time partners. In 1981, the parties entered into a contract which contained an arbitration clause. The clause provided that disputes between the parties would be settled by 'respected members of the Ismaili Community and holders of high office within the Community'. When disputes arose, Mr Hashwani sought to appoint a retired English judge who was not a member of the Ismaili community as one of the arbitrators. Mr Jivraj challenged the appointment in court. Mr Hashwani contended that the clause requiring arbitrators to be members of Ismaili community was invalid as it offended the Employment

38. Tweeddale, A. and Tweeddale, K. (2007), pp. 496 – 497.
39. DAC's Report of February 1996 at para. 69.
40. The following sections directly or indirectly refer to the party autonomy principle: sections 7, 8, 12, 14, 42, 44, 45, and 47 – 58.
41. DAC's Report of February 1996 at para. 19.
42. Section 1 (c) of the AA 1996.
43. [2011] UKSC 40; [2011] ICR 1004.
44. [2011] ICR 1004 at 1026, para. 61.

Equality (Religion or Belief) Regulation 2003, the Human Rights Act 1998, or public policy at common law. Mr Hashwani's argument was rejected by the trial court. The court held *inter alia* that Mr Hashwani was not at liberty to appoint an arbitrator who was not a member of the Ismaili community. Dissatisfied, Mr Hashwani appealed to the Court of Appeal and the appeal was allowed with conditions. Dissatisfied with the Court of Appeal's judgment, both parties cross appealed to the Supreme Court. The Supreme Court dismissed Mr Hashwani's appeal and allowed Mr Jivraj's appeal.

The Supreme Court's decision demonstrated the court's pragmatic and supportive approach to arbitration as an independent dispute resolution mechanism. It also recognises that party autonomy as stipulated under section 1 of the AA is the guiding principle in determining the procedure to be followed in the arbitral process.[45] However, under the AA 1996, party autonomy is not absolute. It is subject to such safeguards as are necessary in the public interest.[46] These safeguards are provided by the mandatory provisions of Part I of the AA. The safeguards apply regardless of any agreement between the parties to the contrary.[47] Another exception to party autonomy is where parties' choice is contrary to public policy.[48] In such cases, the parties' choice will not be followed and the arbitral awards resulting from such choices may not be recognised or enforced by the English courts.[49]

In Nigeria, party autonomy underpins the ACA.[50] Unlike the English AA 1996 which expressly embeds the principle of party autonomy, the principle is implied into certain provisions of the ACA. The combined effect of sections 6 and 7 of the ACA is the guarantee of the parties' freedom to appoint their arbitrator(s) or prescribe the procedure for the appointment of the arbitrator(s). Under section 6, parties are free to determine the number of arbitrators who shall arbitrate their

45. Samuel, A. (2011) "Should the Debate end despite the decision on Jivraj v Hashwani?", *The Resolver*, 8.
46. Section 1 (b) of the AA 1996.
47. Section 4 (1) of the AA 1996; Engle, R. (2002) "Party Autonomy in International Arbitration: Where Uniformity gives way to Predictability" Transnational Law, vol. 15, pp. 323 – 356.
48. Section 103 (3) of the AA 1996.
49. *Soleimany v Soleimany* [1998] EWCA Civ 285; [1999] 3 All ER 847.
50. Ibe, C. E. (2011) "Party Autonomy and the Constitutionality of Nigerian Arbitration and Conciliation Act 1988, section 7 (4) and 34: Commentary on Agip Oil Co. Ltd v Kremmer and others, Chief Felix Ogunwale v Syrian Arab Republic and Bendex Engineering Ltd v Efficient Petroleum (Nigeria) Ltd." *Journal of International Arbitration* , Vol. 28, No. 5, pp. 493 – 499.

dispute. However, where the parties fail to agree the number of arbitrators, it shall be deemed that they intended to appoint three arbitrators. Also, it is the right of the parties under section 7 (1) to decide the procedure for appointing their arbitrators. In the event that they fail to appoint their arbitrator(s) or specify the procedure for such appointment, section 7 (2) will apply if it is a domestic arbitration, and if it is an international commercial arbitration, section 44 in addition to section 7 (2) will apply.

Parties also have the autonomy to waive the arbitrator challenge procedure. Under the ACA, a potential arbitrator shall, when offered an appointment, disclose all circumstances likely to lead to any justifiable doubts as to his impartiality or independence.[51] The duty of disclosure imposed on the arbitrator continues even after the arbitrator has been appointed and subsists throughout the arbitral proceedings.[52] Nonetheless, parties in their agreement to arbitrate are free to waive such disqualifying circumstances when disclosed by the potential arbitrator.[53] The parties in their arbitration agreement are also free to decide the procedure to be followed in challenging the arbitrator.[54] However, where no procedure is determined by the parties in their arbitration agreement, the provisions of articles 9 to 12 of the first Schedule to the ACA will then apply.[55] Section 9 of the ACA guarantees the freedom of the parties to determine the procedure to be adopted in challenging their arbitrator in the appropriate circumstances.

Nigerian courts have given weight to the principle of party autonomy.[56] This is borne out of the fact that disputing parties are free to resort to private dispute settlement without unjustified intervention by the court.[57] One example is the case of *M. V. Lupex v Nigerian Overseas Chartering Shipping Ltd*.[58] In *M. V. Lupex*, parties under clause 7 of their charter-party agreement contracted to submit to arbitration in London under English law. When dispute arose, the respondent sued the appellants

51. Section 8 (1) of the ACA.
52. Section 8 (2) of the ACA.
53. Section 8 (1) of the ACA.
54. Section 9 (1) of the ACA.
55. Section 9 (2) of the ACA.
56. *Niger Progress Ltd. V North East Line Corp*. [1989] 3 NWLR (Pt. 107) 68; *M. V. Lupex v Nigerian Overseas Chartering and Shipping Ltd.* [2003] 15 NWLR (Pt. 844) 469.
57. Nwakoby, G. C. (2004) The Law and Practice of Commercial Arbitration in Nigeria, IYKE Ventures Production, Enugu, Nigeria, pp. 328 – 338.
58. [2003] 15 NWLR (Pt. 844) 469.

at the Federal High Court Lagos, claiming damages for breach of contract. They also sought an interim order for the arrest of M. V. Lupex. The interim application was granted. The appellants applied to the court to set aside the ex parte order and stay proceedings *sine die*. The appellants informed the court that at the time of the court's interim order to arrest M. V. Lupex, the respondents had made a counterclaim against the appellants in arbitration proceedings in London. The court declined to stay proceedings and further held that the appellant should supply a bank guarantee in the sum of USD735,000.00 or its equivalent in Naira before M V Lupex could be released. Dissatisfied with the trial court's ruling, the appellant appealed to the Court of Appeal. The Court of Appeal dismissed the appeal. The appellant further appealed to the Supreme Court. The Supreme Court in affirming the principle of party autonomy and the court's duty not to encourage the breach of a valid arbitration agreement stated:

> The mere fact that a dispute is of a nature eminently suitable for trial in a court is not sufficient ground for refusing to give effect to what the parties have by contract, expressly agreed to. So long as an arbitration clause is retained in a contract that is valid and the dispute is within the contemplation of the clause, the court ought to give due regard to the voluntary contract of the parties by enforcing the arbitral clause as agreed to by them.[59]

In arriving at this conclusion, the Supreme Court considered the provisions of sections 4 (2) and 5 of the ACA and came to two conclusions that where parties have agreed to arbitrate their dispute:

> (1) the provision of section 4(2) of the ACA may make the court's refusal to order a stay ineffective as the arbitral proceedings may nevertheless be commenced or continued and an award made by the arbitral tribunal may be binding on the party that has commenced an action in court, and

59. *M. V. Lupex v Nigerian Overseas Chartering Shipping Ltd*., [2003] at 491, paras. G-H

(2) the court should not be seen to encourage the breach of a valid arbitration agreement particularly if it has international flavour.[60]

However, like under the NYC and the AA 1996, party autonomy under the ACA is not absolute, it is exercisable according to the provisions of the ACA.[61] For example, under section 52 (2) (b) (i) and article V (2) (a) of the Second Schedule to the ACA, an enforcing court in Nigeria is obliged to consider the arbitrability of a dispute in accordance with the laws of Nigeria. The implication of the above provisions of the ACA is that parties cannot by their arbitration agreement agree to arbitrate a dispute that is non-arbitrable under the laws of Nigeria.[62]

3.2.2 Arbitration agreement

Article II (1) of the NYC defines the arbitration agreement as:

> … an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Article II (1) also obliges its Contracting States to recognise such arbitration agreement.[63] The onus of recognition falls precisely on national courts of the Contracting States when considering the validity of an arbitration agreement.[64] The courts' duty to recognise an agreement to arbitrate can become important in different

60. *M. V. Lupex v Nigerian Overseas Chartering Shipping Ltd* ., [2003] at pp. 490-491, per Iguh, JSC
61. Fagbemi, S. A. (2015) "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality", *Journal of Sustainable Development Law and Policy (The)*, Vol. 6, No. 1, pp. 202 – 246.
62. For example, in *SNEP & 3 ors. v FIRS & anor*. (2016), Appeal No. CA/A/208/2012, delivered on 31/08/2016 and *EEPN & anor. v NNPC* (2016) Appeal No. CA/A/507/2012, delivered on 22/07/2016, respectively, the Court of Appeal held that disputes arising under the Petroleum Tax Act are not arbitrable. The court reasoned that disputes relating to the revenue of the Government of Nigeria or its organ and matters pertaining to taxation of companies and other bodies carrying on business in Nigeria are not arbitrable.
63. Article II (1) of the NYC states that:
    "Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."
64. Poudret, J. F. and Besson, S. (2007) Comparative Law of International Arbitration, Sweet and Maxwell, London, para. 72; Berger, K. P. (2003) International Economic Arbitration , Wolters Kluwer Law and Business, The Netherlands, p. 133.

situations. One of which is where a party to the arbitration seeks enforcement of the arbitral award.[65] From the provisions of article II (1), an arbitration agreement must satisfy three important conditions in order to be valid, namely: it must relate to existing or future differences arising out of a defined contractual or non-contractual legal relationship; the subject matter of the dispute between the parties must be arbitrable, and; the arbitration agreement between the parties must be in writing.[66]

However, even if the three requirements are satisfied and the arbitration agreement held valid, the court is still obliged to determine whether the parties are bound by the arbitration agreement. This is because the court has to be satisfied that parties were *ad idem* when they contracted to arbitrate their dispute. The determination of the question is also important if one of the parties in the proceeding did not sign the arbitration agreement. It is noted that the NYC does not fully regulate all the requirements because it does not stipulate uniform provisions that overrides national laws.[67] Accordingly, it leaves other requirements to national laws to regulate with that more favourable national law can apply.[68]

With regards to the writing requirement, cross-border and most national arbitration agreements are required to be in writing.[69] This requirement is drawn from the provisions of article II (1) of the NYC and several national arbitration legislations.[70]

65. Others may include: where a party to the arbitration challenges the arbitral awards; where a national court seized of an action in a matter covered by an arbitration agreement – application of Article II (3) of the NYC; where a party in an arbitral proceedings requires the court's assistance in respect of interim measures, appointment or removal of arbitrator(s).
66. Kroll, S. (2011) The Arbitration Agreement in Enforcement Proceedings of Foreign Awards: Burden of Proof and the Legal Relevance of the Tribunal's Decision , in Kroll, S. *et al*, (ed.), International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, Wolters Kluwer Law and Business, The Netherlands, pp. 317 – 335.
67. Though, it can be argued that article II (2) of the NYC is an overriding provision that is to be interpreted uniformly across Contracting States.
68. Article VII (1) of the NYC.
69. Yu, H-L. (2012) "Written Arbitration Agreements: What Written Arbitration Agreements?" Civil Justice Quarterly, Vol. 32, No. 1, pp.68 – 93.
70. For example, article 178 of the Swiss Private International Law provides, "As to form, the arbitration agreement shall be valid if it is made in writing, by telegram, telex, telecopier, or any other means of communication that establishes the terms of the agreement by a text", Article 1507 of the French Code of Civil Procedure 2011, requires domestic arbitration agreements to be in writing and precludes any such condition in cross border arbitration agreement; article 1677 of the Belgian Judicial Code provides, "An arbitration agreement shall be constituted by an instrument in writing signed by the parties or by other documents binding on the parties and showing their intention to have recourse to arbitration"; section 2 of the U.S. Federal Arbitration Act; article 16 of the Arbitration Law of the People's Republic of China; also make the same provisions.

The reasons for this requirement are sufficiently canvassed by commentators.[71] According to Hu and Nasir, requirements such as writing and signature are based on the need for some evidence or authentication from the parties who have given up their right of access to national courts.[72] In effect, the significance of an arbitration agreement resides in the fact that by undertaking to refer or submit disputes to arbitration, parties denounce their right to litigate in a national court.[73] Such waiver is not to be taken lightly, or be foisted on the parties.[74] A written arbitration agreement therefore, draws the attention of the parties that they are entering into a solemn contract. Thereby, requiring parties to discuss and determine arbitral issues with thoughtfulness and seriousness.[75] It also reduces disputes as to whether or not an arbitration agreement was reached, its terms and conditions and other issues covered by the written arbitration agreement.[76]

The text "agreement in writing" under article II of the NYC is also contained in article 7 (2) of the UNCITRAL Model Law, but construed differently. Under article II (2) of the NYC, 'agreement in writing' includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. While under article 7 (2) of the UNCITRAL Model Law, 'agreement in writing' will be established if it is contained in a document signed by the parties or

71. Born, G. A. (2014) International Commercial Arbitration, 2nd ed., Vol. 1, Kluwer Law International BV, The Netherlands, pp. 660 – 663; Strong, S. I. (2012) "What Constitutes an 'Arbitration in Writing' in International Commercial Arbitration?: Conflicts Between the NYC and the Federal Arbitration Act" *Stanford Journal of International Law*, vol. 48, pp. 47 – 91; Wolff, R. (2012) "Article II: Recognition of Arbitration Agreement, Agreement in Writing" in Wolff, R. (ed.), NYC: Commentary, Beck/Hart Publishing, Munich, 114; Park, W. W (2008) "Non-Signatories and International Contracts: An Arbitrator's Dilemma" *Dispute Resolution International*, vol. 2, pp. 84 – 116; Di Pietro, D. (2004) "Incorporation of Arbitration Clauses by Reference", *Journal of International Arbitration*, Vol. 21, No. 5, pp. 439 – 452; Herrmann, G. (1999) "Does the World Need Additional Uniform Legislation on Arbitration?", *Arbitration International*, Vol. 15, No. 3, pp. 211 – 226; van den Berg, A. J. (1981) The New York Arbitration Convention of 1958: Towards a Uniform Judicial interpretation, Kluwer Law and Taxation Publishers, Deventer, The Netherlands, pp. 171 – 173; Yu, H. (2012) "Written Arbitration Agreements – What Written Arbitration Agreements?", *Civil Justice Quarterly*, Vol. 32, Issue 1, pp. 68 – 93.
72. Yu, H. and Nasir, M. (2003) "Can Online Arbitration Exist Within the Traditional Arbitration Framework?" *Journal of International Arbitration*, Vol. 20, 455 at p. 458.
73. Born, G. A. (2014) at pp. 660 – 663.
74. Carducci, G. (2013) "Validity of Arbitration Agreements, Court Referral to Arbitration and FAAS. 206, Comity, Anti-suit injunctions worldwide and their effects in E. U. Before and After the New E. U. Regulation 1215/2012" *American Review of International Arbitration* Vol. 24, No. 3, 515; Carducci, G. (2012) "The Arbitration Reform in France: Domestic and International Arbitration Law", *Arbitration International*, Vol. 28, No. 1, pp. 125 – 157.
75. Hill, R. (1999) "Online Arbitration: Issues and Solutions", *Arbitration International*, Vol. 15, 199.
76. DAC's Report of February 1996 para. 33.

in an exchange of letters, telex, telegrams or other means of telecommunication which provides a record of the agreement. The UNCITRAL Model Law provides a broad spectrum of 'in writing' than the NYC. The difference in the provisions of article II of the NYC and article 7 of the UNCITRAL Model Law are reflected in national arbitration laws.[77] This leaves open the question of what constitutes valid written arbitration agreement; or when the 'in writing' requirement of article II (2) of the NYC is met.

A cardinal prerequisite for a valid arbitration agreement, aside from the form requirement, is parties' consent to arbitrate their dispute.[78] While this statement appears rather straightforward, deciding the issue of whether the parties gave their consent to arbitrate a dispute between them generally proves difficult. Sometimes parties may have their arbitration agreement in writing, yet deny consenting to such agreement. For example, where both parties did not sign the arbitration agreement or where the principal contract containing the arbitration clause was signed by both parties but the arbitration clause in another document was not signed. To establish consent, article II of the NYC requires the arbitration agreement to be evidenced in writing. To satisfy the 'in writing' requirement of article II (2), and by extension establish parties' consent to arbitrate, it is sufficient if the principal contract containing the arbitration clause is signed by both parties.[79] However, parties need not sign the arbitration clause as a separate agreement because what is relevant is the parties' intention, and not the form of the document establishing the intention.

77. For example, article- section? 6 (a) of the U.S. Uniform Arbitration Act refers to "an arbitration agreement contained in a record", whereas the record means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form while article 1031 (5) of the German Code of Civil Procedure provides that the written form may be substituted by the electronic form by virtue of section 126 of the German Civil Code. Section 5 (1) of the English AA 1996 stipulates "writing" and defines "writing" in subsection 6 to "include it being recorded by electronic means". Under section 1 (1) (a) of the Nigerian ACA, "… other means of communication which provide a record of the arbitration agreement" satisfies the writing requirement.
78. Torgbor, E. (2009) "Tracking Down Consent and Dissent in Arbitration Law and Practice", *Stellenbosch Law Review*, Vol. 20, No. 3, pp. 551 – 561; Rau, A. S. (2008) "Arbitral Jurisdiction and the Dimensions of Consent", *Arbitration International*, Vol. 24, No. 2 , pp. 199 – 264.
79. Lew, J. D. M. (1989) "Arbitration Agreements: Form and Character", in Sarcevic, P. (ed.), Essays on International Commercial Arbitration, Graham & Trotman/Martinus Nijhoff, London, pp. 51 – 63.

According to Wilner, "it is the spirit of the agreement, rather than the mere wording, which will govern the construction of the arbitration clause."[80]

This point is illustrated in the old case of *Societe Italo-Belge pour le Commerce et I'Industrie (Belgium) v S.p.a. I. G. O. R. (Italy)*.[81] The principal contract which was signed by both parties contained an arbitration clause to refer any dispute arising out of the contract to arbitration in London under the Federation of Oils, Seeds and Fats Association (FOSFA). When disputes arose, the claimant initiated arbitration in London against the respondent. The arbitrator rendered its award in favour of the claimant. Upon the respondent's refusal to honour the award, the claimant requested enforcement of the award before the Court of Appeal of Brescia. The respondent objected to the enforcement of the award on the grounds that the arbitration agreement was null and void because it was not written as required by article 2 of the Italian Code of Civil Procedure and article II (1) and (2) of the NYC; and the arbitration clause was inoperative as it had not been specifically approved in writing as required by the Italian Civil Code. The court granted the claimant's application and held *inter alia* that the arbitration clause was valid and as required by Italian law and the NYC.

The court reasoned that the arbitration clause did not leave any doubt that disputes which may arise out of the contract shall be arbitrated by FOSFA. The court then held that the respondent cannot deny knowledge of FOSFA having exchanged correspondence with the body.[82] Therefore, in the context of the case, article II (1) and (2) of the NYC, being special law, prevail over the general provisions of article 2 of the Italian Code of Civil Procedure and articles 1341 and 1342 of the Italian Civil Code. This case, although decided over three decades ago, illustrates application of the spirit of the law.

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80. Wilner, G. M. (ed.) (1984) Domke on commercial Arbitration: Law and Practice of Commercial Arbitration, rev. ed., Wilmett, III., Callaghan, p. 47.
81. (1981) 17 Rivista di diritto internazionle private e processuale, pp. 781 – 786, reported in (1983) International Council for Commercial Arbitration, Yearbook Commercial Arbitration, Vol. VIII, pp. 383 – 385.
82. *Societe Italo-Belge pour le Commerce et I'Industrie (Belgium) v S.p.a. I. G. O. R. (Italy)* (1981) On the respondent's argument that the arbitration clause was inoperative because it was not in writing as required under Italian law. [The court also held that, once international conventions have been implemented in Italy, they become new legal rules. Such rules derogate from the general legal rules and acquire the capacity of *lex specialis*.

The text "contained in an exchange of letter or telegrams" in article II of the NYC has been suggested to mean a written offer and a written acceptance of the offer.[83] The written acceptance binds parties and establishes their mutual intention to arbitrate disputes arising out of their legal relationship. In *Kukje Sangsa Co. Ltd (Korea) v GKN International Trading (London) Ltd (UK)*[84] the defendant argued that the arbitration agreement was invalid because it was not discussed by the parties. It further argued that the exchanged document which contained the arbitration agreement was printed in smaller letters than the other terms and conditions of the contract. The Supreme Court of Korea rejected the argument and held that the writing requirement of article II of the NYC was sufficiently satisfied. The court reasoned that the parties concluded a valid arbitration agreement when the purchase orders containing the arbitration clause was accepted. It was immaterial that the clause was not discussed or was written in smaller letters than the other terms and condition. The acceptance of the purchase orders containing the arbitration clause therefore, must be read as establishing parties' intentions to arbitrate their dispute.

The decision of the Supreme Court of Korea arguably makes good commercial sense. This is because an inadvertent or deliberate omission by one or both parties to sign a document establishing their intention should not diminish the validity of the arbitration agreement contained in the document. However, the source of such document would need to be established if fraud is alleged.[85]

In *XYZ v ABC & JKL*,[86] one of the issues before the arbitrator was whether the parties' arbitration agreement was formally and substantively valid. In that case, the legal predecessor of XYZ (an Italian seller) entered into sale and purchase contract with the legal predecessor of ABC (a US buyer). JKL (a Ukrainian) was the

83. di Pietro, D. and Platte, M. (2001) Enforcement of International Arbitration Awards: The NYC of 1958, Cameron May, London, p. 81.
84. (1992) ICCA Yearbook Commercial Arbitration, Vol. XVII, p. 568.
85. In *Israel Chem. & Phosphates Ltd v NV Algemene Oliehandel* (1976) ICCA, Yearbook Commercial Arbitration, Vol. 1, p. 195, an arbitration agreement was deemed to be concluded 'in writing' as stipulated by Article II (2) of the NYC under the following circumstances. The claimant sent the respondent a purchase order in writing. As a reply, the claimant received a sales contract, the copy of which the claimant did not return to the respondent. The sales contract contained an arbitration clause. The claimant protested against the arbitration clause two months after it took delivery of the goods. The court held that from the exchange of the written documents, it was proper to imply that the parties intended to refer their dispute to arbitration and that the sales contract though not signed by the claimant, constituted a valid arbitration agreement under article II (2) of the NYC.
86. Final award in International Chamber of Commerce (ICC) Case No. 14792, reported in International Council for Commercial Arbitration, Vol. XXXVII (2012), pp. 110 – 125.

consignee/guarantor of the sale and purchase contract. The contract that was signed by the parties contained an arbitration clause. When disputes arose, the Italian seller initiated ICC arbitration against the US buyer and the Ukrainian consignee/guarantor for breach of contract. The US buyer and the Ukrainian consignee/guarantor did not respond. Following the appointment of a sole arbitrator by the ICC, the Ukrainian consignee/guarantor filed an objection to the jurisdiction of the arbitrator. The Ukrainian consignee/guarantor argued that the arbitration agreement between the parties was invalid as it did not meet the writing requirement stipulated under international law and Swiss law. Also, that the ambiguous reference to the 'International Commercial Arbitration Court of Geneva' rendered the arbitration agreement unenforceable.

The arbitrator considered the provision of article 178 (1) of the Swiss Private International Law which is on all fours with article II (2) of the NYC. The arbitrator held that, the arbitration agreement between the parties was formally valid under Swiss law, and that the ambiguous reference to 'International Commercial Arbitration Court of Geneva' was a reference to ICC arbitration in Geneva. The arbitrator reasoned that the formal validity stipulated in article 178 (1) of the Swiss law is designated to serve as a 'form of conclusion' and not as a mere 'form of evidence'. Therefore, even if one is to reach a conclusion that the contract between the parties (including the arbitration agreement) has not been duly signed, the arbitration agreement in the principal contract would still be valid in terms of form. This is because, what is required is not a signed arbitration agreement rather an arbitration agreement 'evidenced by a text'.

This thesis argues (supported by the Italian Court of Appeal's decision in *Societe Italo-Belge pour le Commerce et I'Industrie supra*) that matters concerning article II (1) and (2) of the NYC constitutes *lex specialis*, and should therefore prevail over general provisions of national laws. The NYC does not require specific approval, in form of signature, of an arbitral clause in contracts. It is unnecessary. What is required is evidence of the parties' intention to arbitrate their dispute. If a contract contains an arbitral clause, the clause forms part of the document. The signature of the parties in the contract must be deemed to apply to the arbitral clause as an

unequivocal manifestation of the parties' common intention to refer their dispute to arbitration.[87]

In England**,** section 5 of the AA 1996 requires that the arbitration agreement must be in writing. However, such arbitration agreement need not be signed by the parties to satisfy the writing requirement.[88] This condition is interpreted broadly to satisfy not only clearly written arbitration clauses, but also recorded agreements in exchange of communications.[89] It is sufficient if the agreement is simply evidenced in writing or made otherwise than in writing, incorporating general terms and conditions which are written.[90] The requirement is also met if there is an exchange of submissions in legal or arbitral proceedings in which an arbitration agreement is alleged to exist by one party and not denied by the other.[91] Such exchange of written submissions between the parties will amount to an arbitration agreement in writing. Finally, an arbitration agreement under the AA 1996 is assumed to be in writing if it is recorded by any means.[92]

Unlike article II of the NYC, the provisions of section 5 of the AA 1996 arguably are drawn widely. It even includes circumstances where a party through its agent's ostensible or actual conduct, accepts the terms of a contract incorporating an arbitration clause. This is illustrated in the case of *Toyota Tsusho Sugar Trading Ltd v Prolat SRL*.[93] The applicant agreed to sell sugar to the defendant under a contract which contained an arbitration clause with its seat in London. The defendant commenced judicial proceedings in Naples alleging various breaches of contract and also tortious infringements. The applicant objected to the jurisdiction of the Italian court in reliance on the arbitration clause. Pending a determination by the Italian

87. *Getreide Import Gesellschaft MbH (F.R. Germ) v Fratelli Casillo (Italy)* reported in (1982) International Council for Commercial Arbitration, Yearbook Commercial Arbitration, Vol. VII, pp. 342 – 344.
88. Though, under article 7 (2) of the UNCITRAL Model Law, parties need to sign the arbitration agreement.
89. Section 5 (2) of the AA 1996.
90. Section 5 (3) of the AA 1996. It is also noted that the DAC in its February 1996 Report, paragraph 36 expressed the view that such agreements are concluded, and gave example of what might be caught by this provision to include but not limited to: a contract for the sale of goods which is oral (though parties have not formally agreed on terms) but may be assumed to have entered into the standard terms of the buyer by reference to the fact that the seller has performed the contract.
91. Section 5 (5) of the AA 1996.
92. Section 5 (6) of the AA 1996. The recording can be made by one of the parties or by a third party with the authority of the parties under section 5 (4).
93. [2014] EWHC 3649 (Comm).

court, the applicant commenced arbitration in London seeking payment of the purchase price for the sugar. The defendant objected to the jurisdiction of the arbitral tribunal, asserting that it had never signed any arbitration clause. On the evidence, the court found the existence of an arbitration agreement between the parties, and held that the requirements of section 5 of the AA 1996 had been satisfied. The court reasoned that the defendant was bound by the arbitration agreement because it carried out the terms of the principal contract despite not signing the contract. In effect, what is material is the parties' legal intention to be bound by the written document and not the signature. This is because signatures are not a necessary evidence of the content of the document but authentication of the document. Thus, they are not themselves a necessary condition of a valid arbitration agreement.[94]

Furthermore, an oral agreement that incorporates the terms of a written agreement containing an arbitration clause will constitute an agreement in writing. This is so because section 5 (3) of the AA 1996 permits oral agreements insofar as such oral agreement incorporates written arbitration terms. It also covers an agreement by conduct, where one of the parties offers to contract on written terms containing an arbitration clause, and the other party, without expressly accepting the offer in writing, performs the contract in accordance with the written terms.[95]

However, to incorporate a written term orally, such incorporation must be sufficient and unequivocal. In *Sun Life Assurance Company of Canada v C X Re insurance Company Ltd*.[96], the parties agreed on a reinsurance contract that was partly oral and partly written. They negotiated and contracted the wording of a draft treaty, which contained an arbitration clause, but did not execute it. One of the issues before the Court of Appeal was whether the incorporation of the arbitral clause was sufficient and unequivocal. The Court of Appeal found that the parties' incorporation of the written arbitration clause was not sufficient and unequivocal. The court also found from the facts of the case that the parties were yet to conclude on the arbitral clause. They were negotiating on the ground that execution of a formal contract was a pre-

94. *Maple Leaf Macro Volatility Master Fund and another v Rouvory and another* [2009] EWCA Civ. 1334.
95. *Toyota Tsusho Sugar Trading Ltd v Prolat SRL*, [2014]; Harris, B., Planterose, R. and Tecks, J. (2007) The Arbitration Act 1996: A Commentary, 4th ed., Blackwell Publishing, p. 47.
96. [2003] EWCA Civ. 238.

condition for contracting to arbitral disputes between them. Thus, the arbitration clause was held to be 'null and void'.

Under section 6 (2) of the AA 1996, a reference in a principal agreement to a separate written arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement. However, such reference must make the arbitration clause part of the agreement. One of the legal effects of section 6 (2) is that an oral agreement which incorporates written terms that provides for arbitration, constitutes an arbitration agreement between the parties.[97] The incorporation of the agreement to arbitrate by reference must be nonetheless clear and unequivocal.[98]

In *Christian Kruppa v Alessandro Benedetti and other,*[99] a contract between the parties provided that, in the event of a dispute, the parties should "endeavour" to resolve the matter through Swiss arbitration first. Pursuant to section 9 of the AA 1996, the defendants applied to stay court proceedings, on the grounds that the parties were bound to arbitrate. Mr Justice Cooke dismissed the application and held that the parties did not contract to refer their disputes to arbitration. The court reasoned that by virtue of the parties' agreement, they were merely obliged to "endeavour" to resolve their dispute through Swiss arbitration. Given the wording of the clause, it is logically impossible to have a two-tiered dispute resolution clause possessing two binding elements. Accordingly, the requirement to submit to a binding arbitration was lacking from the agreement. Therefore, there was no valid arbitration agreement for the purposes of section 6 (1) of the AA 1996.

Related to this is the issue of whether an arbitration clause can be incorporated into a contract by general words and the validity of such incorporation. According to van der Berg, a contract may reference a written arbitral clause from anywhere provided, the arbitration clause is effectively incorporated into the contract.[100] Though, the question whether there is an effective incorporation by reference will depend upon the facts and interpretation of the agreement on a case by case basis. Nonetheless, where parties seek to incorporate terms in their earlier contracts, general words of incorporation will suffice in an arbitration clause from the previous contract without

97. Tweeddale, A. and Tweeddale, (2007), pp. 508 – 509.
98. *Aughton Ltd. v MF Kent Services Ltd*. [1991] 57 B.L.R. 1.
99. [2014] EWHC 1887 (Comm).
100. van den Berg, A. J. (1981) The New York Arbitration Convention of 1958, Kluwer Law and Taxation Publishers, The Netherlands, pp. 228 – 236.

specifically referring to it. This is evidenced in the case of *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL*.[101]

In *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS,* the respondent through its agent, entered into a sale contract with the applicant. The contract contained an arbitration clause with London as seat and stipulated *inter alia* that "the rest will be as per previous contracts." Between the parties, there had been 14 previous contracts. The applicant drafted the first 3 contracts, the 1st and the 2nd contracts contained arbitration clauses without any seat. The other 11 contracts were drafted by the respondent and its agent. When disputes arose, the respondent commenced arbitral proceedings in London and the applicant objected to the jurisdiction of the arbitrators. The applicant argued that the sale contract did not incorporate London arbitration clause in the earlier contracts drafted by the respondent. The arbitrators rejected the applicant's submission and rendered an award in favour of the respondent. Dissatisfied, the applicant challenged the arbitral award. One of the issues before the court was, whether the general words of incorporation were effective to incorporate the arbitration clause into the sale contract. The court held that general words of incorporation are capable of incorporating terms which includes an arbitral clause without expressly referring to it, provided the parties seek to incorporate terms in earlier contracts between them. The court reasoned that an arbitration clause is not usually some kind of oppressive term to which special attention has to be drawn. Thus, the court dismissed the application and stated that:

> …a distinction should be drawn between incorporation of the terms of the earlier contracts made between the same parties, and incorporation of the terms of a contract made between different parties. In relation to the latter, a more restrictive approach was required. In such a case, it might not be evident that the parties intended not only to incorporate the substantive provisions of the other contracts, but also provisions as to the resolution of disputes between different parties, particularly if a degree of verbal manipulation was needed for the incorporated arbitration clause to work.

101.[2010] 1 All ER (Comm) 1143; [2010] EWHC 29 (Comm).

> Those considerations did not apply to contracts between the same parties.[102]

However, in contrast to excess insurance cases, a strict test of application is required. An arbitration clause contained in one contract will not be regarded as been incorporated into another contract between the same parties simply by the latter contract stating that it is made on the same conditions as the former. Arguably, this is because of the special nature of insurance contracts. The proposition is that insurance contracts are drawn up by insurance companies staffed with expert legal counsel to draft policies to serve the companies' best interests and the insured, who usually without the benefit of counsel, merely adheres to it, with little or no choice as to its terms. Consequently, insurance companies must pay the penalty for any ambiguity it creates in the process.[103]

In *Trygg Hamsa Insurance Co. Ltd. V Equitas Ltd*[104] the applicant reinsured the respondent Lloyd's syndicates. The primary policy contained an arbitration clause with London as seat. The reinsurance contract incorporated the arbitration clause in the primary policy. When disputes arose, the applicant reinsurer sought a stay of action by its excess of loss reinsured. It contended that the excess of loss insurance contract had incorporated the arbitration clause in the principal policy so that, the reinsurance dispute is subject to arbitration. The issue was whether the general words of incorporation in the excess of loss and reinsurance contracts were sufficient to incorporate the arbitration clause into the insurance contract between the parties. The court rejected the argument that general words of incorporation indicated an intention by the parties to incorporate the arbitration clause from the primary insurance contract. It further held that in the absence of special circumstances, general words of incorporation are not to be treated as sufficient for the purposes of section 6 (2) of the AA 1996. To incorporate arbitration clause from one contract to another, express reference is required.

102. *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] at p. 1144
103. Lowry, J. (2009) "Whither the Duty of Good Faith in UK Insurance Contracts", *Connecticut Insurance Law Journal*, Vol. 16, No. 1, pp. 97 – 156.
104. [1998] 2 Lloyd's Rep. 439.

According to Tweeddale and Tweeddale, case law on incorporation of arbitration clause is largely inconsistent in England.[105] In some cases, it has been held that clear words of incorporation are needed for a valid arbitration to be upheld.[106] Yet in other cases, it has been stated that express incorporation is needed because of the supplementary character of arbitration clauses to the principal contract.[107] Therefore under English law, where parties have notice of the terms of the substantive contract containing the arbitration clause, general words of incorporation will suffice.[108] Express wording is only required when parties do not have such notice.[109]

In Nigeria, for an arbitration agreement to come within the ambit of the ACA, the agreement must be in writing and relate to resolving present or future disputes by arbitration.[110] Section 1 of the ACA provides:

> (1) Every arbitration agreement shall be in writing contained;
>
> (a) in a document signed by the parties; or
>
> (b) in an exchange of letters, telex, telegrams or other means of communication which provide a record for the arbitration agreements; or
>
> (c) in an exchange of points of claims and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another.[111]

In *C. N. Onuselogu Enterprises Ltd v AfriBank (Nig.) Plc*.,[112] the appellant had a fixed deposit account with the respondent bank, which the appellant used as collateral to secure an overdraft which was later increased. When dispute arose over

105. Tweeddale, A. and Tweeddale, K. (2010) "Incorporation of Arbitration Clauses Revisited", *Arbitration*, Vol. 76, No. 4, p. 656.
106. *Thomas v Portsea* [1912] AC 1.
107. *Seabridge Shipping A. B. v A. C. Orssleff's Eftf's? A/S* [1999] 2 Lloyd's Report 685.
108. *Sea Trade Martime Corp. v Hellenic Mutual War Risk Association (Bermuda) Ltd* (No. 2) [2007] 1 All ER (Comm) 183; *Secretary of State for Foreign and Commonwealth Affairs v Percy International and Kier International* [1998] 65 Con. L. R. 11.
109. *Trygg Hamsa Insurance Co. Ltd. V Equitas Ltd*, supra note 106; Todd, P. (2014) "Incorporation of Charterparty terms by general words", *Journal of Business Law*, No. 5, pp. 407 – 424.
110. Nwakoby, G. C. (2001) "Arbitration Agreement under the Act: A Critique of Stay of Proceedings", *UNIZIK Law Journal*, Vol. 1, No. 3, pp. 220 – 236.
111. The provision of this section is on all fours with article 7 of the UNCITRAL Model Law, which itself is premised on article II (2) of the NYC.
112. [2005] 1 NWLR (Pt. 940) 577.

the state of the appellant's account, both parties orally agreed to submit the dispute to a sole arbitrator. The arbitrator rendered an award in favour of the respondent. The appellant refused to honour the award and the respondent went to court to recover its debt against the appellant. The trial court gave judgement in favour of the respondent. Dissatisfied, the appellant appealed to the Court of Appeal. One of the issues before the Court of Appeal was whether, from the documents submitted by the parties, there was a valid arbitration agreement under the ACA. The court in dismissing the appeal held that an arbitration agreement under the ACA must be in writing, precise and unequivocal. The court then stated:

> Although, under the common law, an oral agreement to submit present or future differences to arbitration may be valid and enforceable, but section 1 (1) and (2) of the Act have clearly displace[d] this common law principle.[113]

To satisfy the writing requirement, no particular form is necessary, save that parties must be *ad idem*.[114] Besides the parties signing the arbitration agreement, proof of the existence of the arbitration agreement may be established from other documents related to the agreement. Such documents may be found in correspondences like letters, telex, telegrams, e-mails and other forms of cable or electronic communication between the parties. In *Continental Sales v R. Shipping*, Ogunwumiju, JCA, stated the law regarding e-mail as a form of document in writing thus:

> E-mail is a form of communication that is set down in writing. It is not oral. The fact that it is electronic is immaterial. It can be downloaded and as real as a hard copy of a letter or mail.[115]

Also, in *Fidelity Bank Plc v Jimmy Rose Company Ltd and Mr James Eze*,[116] the respondents obtained a credit facility from the appellant using the 2nd respondent's property as collateral for the facility. When a disagreement ensued, the respondents on April 1, 2003 wrote a petition against the appellant to the Bankers Committee on

113. *C. N. Onuselogu Enterprises Ltd v AfriBank (Nig.) Plc*., [2005] p. 1749.
114. Akpata, E. (1997) The Nigerian Arbitration Law in Focus, West Africa Book Publishers Ltd., p. 19.
115. *Continental Sales v R. Shipping* [2013] 4 NWLR (Pt. 1343) 67 at 85.
116. [2012] 6 CLRN 82.

Ethics and Professionalism of the Chartered Institute of Bankers of Nigeria. On March 3, 2004, the respondents wrote a plea to the same Bankers Committee for the determination of the dispute between them and the appellant. The appellant on April 28, 2004, responded to the petition and the plea. The appellant on May 7, 2004 instituted a suit against the respondent at the High Court to recover its debt. While the suit at the trial court was still pending, the appellant filed a motion asking the court to recognise and enforce the final arbitration award rendered by the Bankers Committee as a judgement of the court. The respondent objected to the application. The application for the recognition and enforcement of the award was dismissed by the trial court on the grounds that there was no valid arbitration agreement between the parties.

On appeal, the Court of Appeal considered the issue whether there was a valid arbitration agreement between the parties as stipulated by the ACA. In their arguments, both parties conceded that there was no formal agreement to arbitrate their dispute. Nevertheless, the appellant contended that the respondent's petition and plea constituted an offer to submit the dispute between them to arbitration. While their response to the petition and the plea was the acceptance of the offer, making a valid arbitration agreement by incorporation. The Court of Appeal rejected the appellant's argument and held that there was nothing on the face of the documents referred to that suggested that the parties intended to submit their dispute to arbitration. Okoro, JCA, noted:

> The position of the law is that whether or not the arbitration agreement is a document signed by the parties as envisaged by section 1 (1) (a) of the Arbitration and Conciliation Act, Cap. A18, 2004 Laws of the Federation of Nigeria, or discoverable from correspondences as per Section 1 (1) (b) thereof, the essential prerequisite is that it must be precise and unequivocal. The court will hold such an agreement to be unequivocal if the word used is neither permissive nor discretionary.[117]

117.*Fidelity Bank Plc v Jimmy Rose Company Ltd and Mr James Eze*, [2012] at p. 92

3.2.3 Arbitrability of the subject matter

For an arbitration agreement to be valid under article II (1) of the NYC, it is required that the subject matter must be "capable of settlement by arbitration". To this end, a subject matter is arbitrable where it is not mandatorily required to be resolved under the exclusive jurisdiction of a national court.[118] Nevertheless, article II do not stipulate the types of disputes that are capable of settlement by arbitration nor the law that governs the determination of the issue.[119] This creates a gap in the NYC. To fill this gap, national courts may distinguish between domestic and international disputes. Thus, the question of whether a dispute is domestic or transnational then becomes significant to the determination of the issue of arbitrability. If the dispute is transnational, issues of arbitrability may be interpreted more liberally than in a domestic context.

In *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc*.,[120] the issue was whether private anti-trust claims were arbitrable under United States law. The US Supreme Court held that private anti-trust claims are arbitrable in international commerce. The court in a five-to-three decision ruled that, the issues of arbitrability should be interpreted more broadly in an international context than in a domestic context. The majority stated that if an international contract contains a broad arbitration clause, the US policy favouring arbitration will override its domestic public policy against arbitration of antitrust claims. Thus, the court stated that:

> … concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[121]

118. Rubino-Sannartano, M. (2014) International Arbitration Law and Practice, 3rd ed., JurisNet, LLC, New York, pp. 867 – 869.
119. van den Berg, A.J.(1981) pp. 152 – 154.
120. 473 US 614 (1985).
121. *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc.*, at p. 629.

Citing the case of *Fritz Scherk v Alberto-Culver Co.*,[122] with approval, the court further stated that:

> it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration.[123]

Arbitrability under the English AA 1996 and Nigerian ACA are examined in more details in chapter 6.

3.2.4 Separability of the arbitration agreement

This section raises the issue of the effect of the arbitration clause where the principal contract has either been terminated by performance or declared null and void. The relevant questions examined are whether the arbitration agreement is separate from the main contract under the jurisdictions examined. If yes, what is the effect of separability of the arbitration agreement on the enforcement of the arbitral award?

The concept of separability posits that an arbitration clause is separate from the principal contract. This ensures that the validity of the arbitration agreement is not subject to that of the principal contract[124]. Separability implies that certain defects in the principal contract will not affect the arbitration agreement within it, save those that explicitly pertain to the arbitration agreement.[125] Thus, the arbitration agreement survives even where the principal contract may have been performed, terminated or vitiated.[126] It also protects the integrity of the arbitration agreement and commands a vital role in ensuring that the parties' intention to arbitrate their dispute is not easily

122. 417 US 506, 515-520 (1974).
123. *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc.*
124. Bermann, G. A. (2012) "The Gateway Problem in International Commercial Arbitration", *The Yale Journal of Int'l Law,* Vol. 37, No. 1, pp. 1 – 50.
125. Graves, J. and Davydan, Y. (2011) "Competence – Competence and Separability: American Style", in Kroll, S. *et al,* (ed.) International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, Wolters Kluwer Law and Business, The Netherlands, pp. 157 – 160. McNeill, M. and Juratowitch, B. (2008) "The Doctrine of Separability and Consent to Arbitrate", *Arbitration International,* Vol. 24, No. 3, pp. 475 – 488.
126. Lew, J. D. M. (1987) "Determination of Arbitrator's Jurisdiction and the Public Policy Limitation on that Jurisdiction", in Lew, J. D. M., (ed.) Contemporary Problems in International Arbitration, Maritinus Nijhoff Publishers, The Netherlands, p. 76.

defeated.[127] Thus, Onyema summarised the justification for the independence of the arbitration agreement as:

> Respecting or upholding the autonomy of the parties who, having agreed on arbitration, do not wish to have part of their claim decided by arbitration and part by national courts. Where parties want this they use clear words limiting the scope of the arbitration agreement. This doctrine prevent[s] or checks the excesses of parties wishing to frustrate or delay the arbitral reference by pursuing claims before national courts that the underlying contract was void or vitiated by one factor or the other. This doctrine ensures that the same results are achieved whether the arbitration agreement is pre-dispute or post-dispute. The doctrine ensures that when requested to determine whether an arbitration agreement is valid or not, the danger of the courts going into the merits of the dispute is greatly reduced since this will be contrary to the purpose of arbitration as an alternate forum to determine and decide the issues in dispute between the parties.[128]

This principle that preserves the autonomy of parties who have consented to arbitrate their dispute is not explicitly provided for under the NYC but can be implied.[129] Hence Born commented:

> … the Convention does assume that international arbitration agreement from the parties' underlying contract, impliedly treats them as such, and sets forth substantive rules applicable only to such agreements. In so doing, the Convention reflects the general understanding and expectations of the parties to international arbitration agreements that such agreements are separable, but does not mandate such an understanding.[130]

It appears that the provisions of article V (1) (a) of the NYC imply the independence of the arbitration agreement from the principal contract.[131] Though, the article

127. Lew, J. D. M., Mistelis, L. A. and Kroll, S. M. (2003) Comparative International Commercial Arbitration, Kluwer Law International, The Hague, p. 102
128. Onyema, E. (2009) "The Doctrine of Separability under Nigerian Law" *Apogee Journal of Business, Property and Constitutional Law*, Vol. 1, No. 1, p. 70.
129. van den Berg, A. J. (1981) pp. 145 – 146.
130. Born, G. B. (2014) International Commercial Arbitration, 2nd ed., Vol. 1, Wolters Kluwer Law and Business, The Netherlands, p. 355.
131. Article V (1) (a) of the NYC provides:
    (1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
        (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to

stipulates an exception to the enforcement of awards,[132] nevertheless, it contemplates the application of a definite national law to the arbitration agreement and an investigation into the validity of the agreement, distinct from the principal contract.[133] Also the provisions of article II (2) of the NYC implies the existence of an independent, better still a separable, agreement which is or can be separated from the principal agreement, if need be.[134]

However, it is noted that there are divergent opinions as to whether the NYC recognises the doctrine of separability of the arbitration agreement. Some writers conclude that the NYC is "indifferent" to the doctrine.[135] Others posit that the NYC adopts or at least requires the application of the doctrine by "implication".[136] Born believes that both positions are wrong and argued that by virtue of articles II and V (1) (a) of the NYC:

> …the Convention rest(s) on the premise that arbitration agreements can, and will ordinarily, be separate agreements and that these agreements therefore will often be treated differently from, and subject to different rules of validity and different choice of law rules than, the parties' underlying contracts.[137]

Nonetheless, there is no significant difference between Born and Schwebel's positions. The only difference, if at all, is the choice of words. Therefore, this thesis argues that the combined effect of articles II and V (1) (a) of the NYC permit the separability of the arbitration agreement from the principal contract.

English courts, approach to the rule that an arbitration agreement is distinct, self-contained and collateral to the principal contract has long been established by case law in England.[138] Thus, the agreement survives the invalidity, ineffectiveness or

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which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or …

132. That is, where the arbitration agreement is invalid under the law chosen by the parties or, failing any indication thereon, under the law of the seat of arbitration.
133. Born, G. B. (2014), p. 355.
134. Schwebel, S. M. (1987) International Arbitration: Three Salient Problems (Hersch Lauterpacht Memorial Lectures) Cambridge University Press, pp. 3 – 6.
135. Born, G. B. (2014) at pp. 355 – 357; Lessing, A. (1984) "Sauer-Getriebe KG v White Hydraulics Inc.: Applicability of the Federal Arbitration Act to International Commercial Arbitration" *International Tax and Business Lawyer,* Vol. 2, pp. 331 – 356; Gaillard, E. and Savage, J. (1999) Fouchard Gaillard Goldman on International Commercial Arbitration, (eds.) Kluwer Law International, p. 209.
136. Gaillard, E. and Savage, J. (1999), p. 209.
137. Born, G. B. (2014) p. 357.
138. *Heyman v Darwin* [1942] AC 356.

allegation of illegality against the principal contract.[139] Under the AA 1996, an arbitration agreement will remain valid notwithstanding a decision (by an arbitrator) that the principal contract has been terminated by performance or is null and void.[140]

In *Fiona Trust & Holding Corporation and 20 Ors v Yuri Privalov and 17 Ors*[141] disputes arose out of charter party contracts entered into between a Russian group of ship owners and some charter companies. The ship owner wished to rescind the charter-party contracts alleging that they were secured by bribery. The charter-party contracts contained a 'law and litigation' clause that stipulated for disputes arising 'under' or 'out of' the charter to be settled by the English courts. The contract also gave both parties the right to elect to have their dispute settled by arbitration in London. The parties chose arbitration in London and sought to proceed to arbitration accordingly. The ship owners sought an injunction preventing the arbitral proceedings. They argued that the charter-party agreements and the arbitration agreements had been rescinded on grounds of alleged bribery. The trial court granted the injunction sought by the ship owners. On appeal, the Court of Appeal upheld the appellants' submission and reversed the trial court's decision.

Dissatisfied, the ship owners appealed to the House of Lords. One of the issues before the House of Lords was whether the invalidity or rescission of the principal contract also means invalidity or rescission of the arbitration agreement. The House of Lords upheld the decision of the Court of Appeal and emphasised the doctrine of separability of arbitration agreements as enshrined under section 7 of the AA 1996. The court further stated that an arbitration agreement can only be invalidated on grounds that are directly related to it, and not as a consequence of the invalidity of the principal contract. However, Lord Hoffmann noted that there may be circumstances when an attack on the principal contract means a challenge to the validity of the arbitration agreement. For instance, in situations where the signature

139. *Harbour Assurance Co. Ltd v Kansa General International Insurance Co. Ltd* [1993] 1 Lloyds' Rep. 455.
140. Section 7 of the AA 1996; Sparka, F. (2010) Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis, Springer-Verlag, Berlin Heidelberg, pp. 85 – 86; Landolt, P. (2013) "The Inconvenience of Principles: Separability and Kompetenz-Kompetenz" *Journal of International Arbitration*, vol. 30, No. 5, pp. 511 – 530.
141. [2007] EWCA Civ 20; [2007] 1 All ER (Comm) 891; *El Nasharty v J Sainbury Plc* [2007] EWHC 2618 (Comm); *Premium Nafta Products Ltd v Fili Shipping Co. Ltd* [2007] UKHL 40.

or the document containing the principal contract and the arbitration agreement was forged, or where the agent lacked the authority to contract on the principal's behalf. On the facts of the case, the House of Lords held that the allegation of bribery was insufficient to show that the agent had been bribed into concluding the arbitration agreement.

The House of Lords in *Fiona Trust*[142] considered the real intention of the parties in entering into the arbitration agreement, which is to settle their dispute out of court. The decision confirmed the limited scope for challenging the validity of an arbitration agreement in court. If parties desire to impeach an arbitration agreement, a direct challenge to the arbitration agreement is required.[143] It will be insufficient to attack the principal contract, except the reason for such attack is also a direct challenge against the validity of the arbitration agreement.[144] Similarly, in *Vee Networks Ltd v Econet Wireless Int'l. Ltd.,*[145] one of the issues for determination was whether a partial award was open to challenge on the ground that if the arbitrator had ruled the principal contract to be *ultra vires*, then the arbitration agreement would have fallen with it. The court held, applying section 7 of the AA 1996, that a ruling on an issue affecting the validity of the principal contract will not, by implication, ground a ruling on the validity of the arbitration agreement

In Nigeria, the independence of the arbitration agreement from the principal contract is stipulated under section 12 (2) of the ACA, thus:

> For the purposes of subsection (1) of this section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause.[146]

142. *Fiona Trust & Holding Corporation and 20 Ors v Yuri Privalov and 17 Ors* [2007].
143. *Vee Networks Ltd v Econet Wireless Int'l. Ltd.* [2005] 1 Lloyd's Rep 192.
144. Paulson, J. (2013) The Idea of Arbitration, Oxford University Press, Oxford, pp. 60 – 72; Samuel, A. [2008] "Separability and Construing Arbitration Clauses: The House of Lords Decision in *Premium Nafta* and *Fiona Trust*", *Arbitration International*, Vol. 24, No. 3, pp. 489 – 497.
145. *Vee Network Ltd. v Econet Wireless Int'l. Ltd.* [2005].
146. The provisions of this section has the same effect as the provisions of section 7 of the AA 1996; article 16 (1) of the UNCITRAL Model Law

The effect of this doctrine on arbitration in Nigeria is mandatory. Parties cannot, in their arbitration agreement agree otherwise.[147] Section 12 (2) of the ACA ensures that the arbitration agreement survives even when the principal contract has been performed or repudiated[148]. It also ensures that the arbitration agreement survives when the principal contract comes to an end prematurely as a result of supervening circumstances, such as illegality or force majeure.[149]

However, novation of the principal contract is an exception to separability. An arbitration agreement in an abrogated contract cannot be transferred to a new contract between the parties. Where a contract which contains an arbitration clause is novated, the arbitration clause in the old contract if not contained in the new contract will not bind the parties.[150]

In *M/S Young Achievers v IMS Learning Resources Pvt. Ltd*.,[151] parties by a memorandum of understanding (MoU) titled "Exit Paper" dated 01/02/2011 abrogated their earlier partnership contracts dated 01/04/2007 and 01/04/2010 (the partnership contracts). The partnership contracts contained arbitration clauses, while the MOU did not. When disputes arose, the respondent filed an action at the High Court of Delhi for the determination of the dispute. The appellant moved the court to stay proceedings and refer the dispute to arbitration, contending that the arbitration clauses contained in the partnership contracts are still valid. The High Court dismissed the appellant's application and held that the arbitration clauses cannot survive the partnership contracts because it elapsed by reason of the new contract, the MoU. On appeal, the Division Bench of the Delhi High Court dismissed the appellant's appeal and upheld the trial court's ruling.

Dissatisfied, the appellant appealed to the Supreme Court of India. One of the issues the Supreme Court considered was whether an arbitration clause in an abrogated contract can be invoked in a new contract between the parties. The Supreme Court answered the question in the negative and, stated thus:

147. Onyema, E. (2009) p. 69.
148. *NNPC V CLIFCO Nig. Ltd*. [2011] 10 NWLR (Pt. 1255) 209.
149. Ezejifor, G. (1997) The Law of Arbitration in Nigeria, Longman Nigeria Plc, Lagos, pp. 67 – 68.
150. *Heyman v Darwins Ltd.* [1942] AC 356; *M/S Young Achievers v IMS Learning Resources Pvt. Ltd.* Civil Appeal No. 6997 of 2013 (Arising out of SLP (c) No. 33459 of 2012)
151. Civil Appeal No. 6997 of 2013 (Arising out of SLP (c) No. 33459 of 2012)

> Survival of the arbitration clause…in the agreement dated 01/04/2007 and 01/04/2010 has to be seen in the light of the terms and conditions of the new agreement dated 01/02/2011. An arbitration clause in an agreement cannot survive if the agreement containing the arbitration clause has been superseded/novated by a later agreement…The principle laid down is that if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it… [the] principle laid down by the House of Lords in *Heyman v Darwins* Ltd 1942 (1) All E.R. – 337 was also relied on by this court for its conclusion … so far as the present case is concerned, parties have entered into a fresh contract … it is nothing but a pure and simple novation of the original contract by mutual consent. Above being the factual and legal position, we find no error in the view taken by the High Court.[152]

On the contrary, in *NNPC v CLIFCO Nig. Ltd,*[153] the Supreme Court of Nigeria held that an arbitration agreement in an abrogated contract can be invoked in a new contract between the same parties. The facts of the case are that the appellant challenged the jurisdiction of the arbitrators to render an award in an arbitration in which it fully participated. The appellant in a contract dated 07/10/1994 agreed to sell to the respondent 24 cargos of Vacuum Gas Oil (VGO contract) at the rate of 1 cargo per month. When the appellant defaulted, the parties on 27/11/1999 novated the VGO contract for 19 cargos of Low Pour Fuel Oil (LPFO contract). The VGO contract contained an arbitration clause while the LPFO contract did not.

When disputes arose, the parties arbitrated the dispute and the arbitrators rendered an award in favour of the respondent. The appellant sought to set aside the award. The trial court held in favour of the appellant and the award was set aside. Aggrieved, the respondent appealed to the Court of Appeal. The Court of Appeal, Lagos Division set aside the part of the award which ordered the appellant to pay damages to the respondent, and affirmed the part which ordered specific performance of the LPFO contract. Dissatisfied, the appellant appealed to the Supreme Court. One of the issues the court considered was whether the arbitrators had jurisdiction to render the award given the fact that the VGO contract was novated by the LPFO contract. The Supreme Court dismissed the appeal and held that the appellant's failure to timeously raise the issue of jurisdiction before the arbitrators in accordance with

152. *M/S Young Achievers v IMS Learning Resources Pvt. Ltd.*, pp. 5 – 9 , paras 6 – 9, per Radhakrishnan J
153. [2011] 10 NWLR (Pt. 1255) 209.

section 12 (3) (a) and (b) of the ACA was fatal to the appeal. On the effect of novation on arbitration clauses contained in abrogated contracts, the court stated:

> Novation is the substitution of a new contract for an existing one between the same or different parties. It is done by mutual agreement. It is never presumed. The requisites for novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation and the validity of the new one … Generally, in … agreements, where the arbitration clause is a part, the arbitration clause is regarded as separate. So where there is novation, purpose of the contract may fail but the arbitration clause survives. See *Heyman v Darwins Ltd* [1942] AC 356 … The purpose of the contract might have failed, but the arbitration clause which is not one of the purposes of the contract survives.[154]

The court's conclusion that where a contract is novated the purpose of the contract may fail but the arbitral clause survives, is not the correct position of the law in common law jurisdictions. All the more so, the court cited the case of *Heyman v Darwins Ltd.*[155] It is argued (fortified by *M/S Young Achievers'* case) that an arbitration clause cannot survive if the contract containing the clause has been novated by another contract without a similar clause. The justification for the non-survival of the arbitration clause in a novated contract is the lack of arbitral consent between parties in the new contract. Apparently, without an agreement to arbitrate disputes, arbitration will not occur, even if it occurs the award will be invalid.[156] This is so because as the jurisdiction of the arbitrator is material to the validity of the award, so is mutual consent of parties to the jurisdiction of the arbitrator.[157]

It appears the Supreme Court of Nigeria did not consider Lord Macmillan's *dictum* in *Heyman v Darwins Ltd,* which is very instructive. Lord Macmillan in that case confirmed that an arbitration clause in an abrogated contract cannot be invoked for determination of rights and obligations under the new contract and stated that:

> Parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract for the

154.*NNPC v CLIFCO* [2011] at p. 242, per Fabiyi, JSC.
155.[1942] AC 356.
156.With exception to statutory and court ordered arbitrations.
157. *Statoil (Nig.) Ltd v NNPC* [2013] 14 NWLR (pt. 1373) 1; Onyema, E. (2009), p. 70.

> contract which has abrogated the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement. All this is more or less elementary[158]

Thus, had the Supreme Court addressed Lord Macmillan's observation (which was also cited in the Indian case of *M/S Young Achiever v I M Learning Resources Pvt. Ltd*) the court would have reached a contrary conclusion. However, for now, the law in Nigeria remains that the arbitration agreement survives novation of the principal contract.

3.3 The theories of arbitration

The juridical nature of arbitration depends on the policy considerations of a national legal system. Five theories have been suggested with regard to the juridical nature of arbitration, namely: the jurisdictional (3.3.1), the contractual (3.3.2) the mixed or hybrid (3.3.3), the autonomous (3.3.4) and the concessional (3.3.5). Though, none of these theories has received universal acceptance, they explain the interaction between arbitration as a private process and the sovereignty and control of a State, and how the legal system of the State relates to the arbitration mechanism.

3.3.1 The jurisdictional theory

The thesis of the jurisdictional theory is based on the notion of the state as a sovereign entity. Therefore, the arbitrator derives its authority from the state, not from the parties' agreement, and the *lex loci arbitri* regulates the arbitral process, procedure and award.[159] It then follows that the exercise of judicial powers are the exclusive prerogative of the state.[160] Klein argued that:

> …the state alone has the right to administer justice, so that if the law allows the parties to submit to arbitration, this institution could be exercising a public function …[161]

158. *Heyman v Darwins Ltd*., [1942] pp. 370 – 371.
159. Park, W. W. (2012) Arbitration in International Business Disputes 2nd ed., Oxford University Press, Oxford, p. 50.
160. Asouzu, A. A. (2001) "Arbitration and Judicial Powers in Nigeria", *Journal of International Arbitration*, Vol. 18, No. 6 pp. 617 – 640.
161. Klein, F. E. (1955) Considerations sur l'arbitrage en droit international prive, Heilbing and Lichtenhahn, Bale; quoted in Lew, J. D. M. (1978) Applicable Law in International

The theory emphasises the importance of the state's regulatory and supervisory power over the arbitral process.[162] In effect, the parties' freedom to conclude a valid arbitration agreement, appoint arbitrator, the arbitrator's powers and the arbitral proceedings need to be regulated by the municipal laws of the seat of arbitration.[163] According to Onyema, disputing parties can submit their dispute to arbitration only to the extent allowed by the law of the seat of arbitration.[164] Thus, Mann stated:

> Whatever the intentions of the parties may be, the legislative and judicial authorities of the seat control the tribunal's existence, composition and activities … The local sovereign does not yield to them except as a result of freedoms granted by himself.[165]

The jurisdictional theory also contemplates arbitration as part of a single national legal order, especially that of the seat of arbitration.[166] The proponents of the theory argue that arbitrators are a component of the state's judiciary. Arbitrators as alternative arbiters to the municipal judges perform quasi-judicial functions and derive their authority from the state[167]. Accordingly, Lew noted:

> It follows that the arbitrator, like the judge, draws his power and authority from the local law; hence the arbitrator is considered to closely resemble a judge. […] The only difference between judges and arbitrators is that the former derives his nomination and authority directly from the sovereign whilst the latter derives his authority from the sovereign but his nomination is a matter for the parties.[168]

The effect of the jurisdictional theory on the arbitral award is that, arbitral awards are accorded the same status as a judgement of a municipal court judge. Recognition and

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Commercial Arbitration: A study in Commercial Arbitration Awards, Oceana Publications Inc., pp. 52 – 53.

162. Mann, F. A. (1967) "Lex Facit Arbitrum", in Sander, P. (ed.) International Arbitration: Liber Amicorum for Martin Domke, Martinus Nijhoff, TheHague, pp. 157 – 159.
163. Mustill, M. (1984) "Transnational Arbitration in English Law", *Current Law Problems*, Vol. 37, pp. 133 – 142.
164. Onyema, E. (2009) pp. 74 – 77.
165. Mann, A. (1986) "Lex Facit Arbitrium" *Arbitration International*, Vol. 2, No. 3, p. 246.
166. Mann, F. A. (1983) "England rejects 'Delocalised' contracts and Arbitration", *International and Comparative Law Quarterly*, Vol. 33, pp. 193 – 198.
167. Goode, R. (2001) "The Role of Lex Loci Arbitri in International Commercial Arbitration" *Arbitration International*, Vol. 17, No. 1, pp. 19 – 29.
168. Lew, J. D. M. (1978) Applicable Law in International Commercial Arbitration, Oceana Publications Inc., p. 53.

enforcement of the award, in the absence of voluntary performance, is executed in the same way as the court's judgment in the enforcing state. In this sense, the arbitral award derives its legal validity exclusively from the sovereign law of the seat of arbitration through the court.[169] Hence, Niboyet contended that in practice, an award:

> … is still only a draft judgement, and it only becomes a final judgement when the judicial authorities of the country in which it was rendered have adopted it by means of national exequatur. This exequatur gives the award of the arbitrator the seal of a judicial decision which the law accepts as final.[170]

Though the jurisdictional theorists are not in conflict with the idea that arbitration has its root in the parties' agreement, they firmly posit that arbitration occurs at all because the state permits it.[171] Thus, the validity of the arbitrator's power, arbitration process, procedures and award are determined by municipal law, especially of the seat of arbitration.[172] Acting on the power conferred on them, either by the parties or by a third party empowered by the parties or by law, arbitrators do not occupy public office by such appointment. Therefore, arbitrators are not conferred with pre-existing state judicial powers, which they obtain only at the instance of the parties' consent. While the jurisdictional functions and powers of the arbitrator are essentially in parallel to that of a judge, an arbitrator lacks the capacity to utilise the coercive authority of a judge. This is because the source of the arbitrator's power is limited to the private agreement between the parties.

Nevertheless, much as the jurisdictional theorists support the state's monopoly over the administration of justice within its jurisdiction, their argument diminishes the practical effect of article V (1) (d) of the NYC.[173] The jurisdictional theory stands in the way of party autonomy and over stresses the power of the state in controlling the arbitral process.

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169. Mann, F. A. (1967) "State Contracts and International Arbitration" *British Year Book International Law*, Vol. 42, pp. 1 – 16.
170. Niboyet, J. P. (1948-1950) Traite de droit international prive francais, tomes v, VI, 2, Sirey, Paris; quoted in Lew, J. D. M. (1978) p. 53.
171. Yu, H-L. (2008) "A Theoretical Overview of the Foundations of International Commercial Arbitration", *Contemporary Asia Arbitration Journal*, Vol. 1, No. 2, pp. 255 – 286.
172. Yu, H-L. (2004) "Explore the void – An Evaluation of Arbitration Theories – Part 1", International *Arbitration Law Review*, Vol. 7, No. 6, pp. 180 – 190.
173. Under article V (1) (d) of the NYC, recognition and enforcement may be refused if the constitution of the arbitral panel or the arbitral procedure is not in accordance with the parties' agreement.

3.3.2 The contractual theory

The contractual theory rejects the arguments of the jurisdictional theorists and suggests that the validity of the arbitral process, procedure and the award are wholly premised on the parties' mutual agreement.[174] It is the parties themselves that decide the system of arbitration (institutional or ad hoc) expressly or impliedly, appoint the arbitrator, decide the venue and time of the arbitral proceedings, regulate the procedure to be followed and voluntarily agree in advance to accept and carry out the award of the arbitrator.[175]

The contractual theorists traverse the supremacy of the state on arbitration. They posit that the most central and material part of arbitration is the parties' voluntary agreement to arbitrate disputes arising out of their legal relationship. According to Kitagawi, the State has no authority on arbitration because the whole arrangement is premised on the parties' agreement.[176] The resolution of private disputes by arbitration should not be influenced by the state. The parties' agreement should be observed as final and binding on them. A similar view is expressed by Kellor thus:

> … arbitration is wholly voluntary in character. The contract of which the arbitration clause is part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an arbitration agreement is made part of the principal contract, the parties voluntarily forgo established rights in favour of what they deem to be the greater advantages of arbitration.[177]

The contractualists argue that because parties voluntarily agree to arbitrate their disputes, it follows that they also agree in advance to accept the award as having binding contractual force on them.[178] The effect of this is that, the arbitral award is a

174. Carlston, K. S. (1952) "Theory of the Arbitration Process", *Law and Contemporary Problems*, Vol. 17, No. 4, pp. 631 – 651.
175. Isaacs, N. (1927) "Two Views of Commercial Arbitration", *Harvard Law Review*, Vol. 40, No. 7, pp. 929 – 942.
176. Kitagawa, T. (1967) "Contractual Autonomy in International Commercial Arbitration including a Japanese Perspective" in Sander, P. (ed.) International Arbitration: Liber Amicorum for Martin Domke, Matinus Nijhoff, The Hague, pp. 132 – 142.
177. Kellor, F. (1941) Arbitration in Action, quoted in Stone, M. (1966) "A Paradox in the Theory of Commercial Arbitration", *Arbitration Journal*, Vol. 21, No. 3, pp. 156 – 163.
178. Kellor, F. (1941), p. 158.

contract between the parties' and not a judgement of the court. The point is emphasised by Niboyet in the following words:

> Arbitration awards have a contractual nature, as the arbitrators do not hold their power from the law or the judicial authorities, but from the parties' agreement (arbitration agreement, submission to arbitration). The arbitrator decides just as the parties could have done by agreement; [the parties] give the arbitrators a real mandate to decide in their place. The award is thus impregnated with a contractual character, and [according] to the law, it appears to be the work of the parties, it must have, as with all agreements, lawful effect, and [it must] possess the authority of a final judgement.[179]

Although the contractualists de-emphasise the concept of arbitration as a part of a single national legal order of the seat, they concede that arbitration can be influenced by the laws of the enforcing state.[180] Therefore, the award having "lawful effect" and possessing "authority of a final judgement" implies that parties are obliged to voluntarily perform their obligations under the award. Failing which, the award can be enforced by the courts, not as a judgement of another court, but as an executed contract against the defaulting party.[181]

On the status of the arbitrator as an agent of the parties, the contractualists hold different views. Merlin believes that arbitrators are agents of the parties' to the arbitration agreement.[182] This view is anchored on the premise that arbitrators' authority is drawn from the parties' agreement, and so they represent the parties who appoint them to act on their behalf. Foelix and Demangeat in support of Merlin's opinion argued that the relationship between the parties and the arbitrators is private and not public, thus a principal and agent relationship.[183] The parties as the principal while, the arbitrators are the agents.

179. Niboyet, J. P. (1948 - 1950), para. 1284.
180. Yu, H-L. (2008), p. 260.
181. Niboyet, J. P. (1948 - 1950) para. 1985.
182. Merlin, P. A. (1829) 9 Recueil Alphabetique de Question de droit 144, 4th ed., quoted in Park, W. W. (2012), p. 268.
183. Foelix, J. J. G. and Demangeat, C. (1847) quoted in Yu, H-L and Sauzier, E. (2000) "From Arbitrator's Immunity to the Fifth Theory of International Commercial Arbitration", *International Arbitration Law Review*, Vol. 3, No. 4, pp. 114 – 121, at 115

However, Bernard disagreed with Merlin, Foelix and Demangeat's positions but upheld the contractual nature of arbitration.[184] He argued that though, the authority of an arbitrator is drawn from the parties' agreement, the relationship between the parties and the arbitrator is not a principal and agent relationship. It is a relationship of a contract of its own kind and unique in its characteristics.[185] Samuel described the relationship in the following terms:

> It is a contract *sui generis*, governed by rules appropriate to it and which must be dealt with by taking into account both the principles governing contracts in general and the particular nature of the function exercised by the arbitrator.[186]

Also rejecting Merlin's agent theory, Laine argued that the functions of arbitrators are contrary to that of an agent.[187] The agent works on the principal's behalf and in their best interest. The arbitrators are appointed by the parties to settle the dispute between them independently, rather than work for the best interest of the party who appointed them.[188]

It is doubtful whether the contractual theory can be relied upon as providing any answer to the juridical nature of commercial arbitration. Firstly, it distorts the real nature of commercial arbitration by assuming that the relationship of the parties and the arbitrator is one of principal and agent. The crucial duty of the arbitrator to evaluate the claims put forward by the parties, and render a final and binding award on the merit is cardinal to the nature of commercial arbitration. This duty cannot be treated merely as a contract between the parties and the arbitrator. Thus, the contract theory fails to offer sufficient explanation of the responsibility of the arbitrator as an impartial umpire.[189]

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184. Bernard, A. (1937) quoted in Yu, H-L and Sauzier, E. (2000) "From Arbitrator's Immunity to the Fifth Theory of International Commercial Arbitration", *International Arbitration Law Review*, Vol. 3, No. 4, pp. 114 – 121.
185. Bernard, A. (1937) quoted in Yu, H-L and Sauzier, E. (2000), p. 117.
186. Samuel, A. (1989) Jurisdictional Problems in International Commercial Arbitration – A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law Schulthess, Polygraphischer Verlag, Zurich, p. 41.
187. Laine, A. (1899) quoted in Yu, H-L and Sauzier, E. (2000) "From Arbitrator's Immunity to the Fifth Theory of International Commercial Arbitration", *International Arbitration Law Review*, Vol. 3, No. 4, pp. 114 – 121.
188. Yu, H-L. (2004), p. 186.
189. Samuel, A. (1989), p. 41.

Again, the contractual theory is faulted on the ground that it down plays the role of the state. This is because the contractual theory has no regard for the laws of the seat of arbitration as its central theme is on parties' contract and no more. These laws may be mandatory procedural rules and public policy principles to which parties must adhere and cannot contract outside of.[190] It is questionable whether the fundamental idea of the theory is plausible and adequately represents the position of arbitration as a viable mechanism for the resolution of commercial dispute.[191] To this end, this thesis supports the view that the contractual theory is an outdated theory for explaining the juridical nature of arbitration because of current international trends.[192] Apparently, one of such current trends is the provisions of article V (1) (e) of the NYC which the central thesis of the contractual theory undermines.[193]

3.3.3 The mixed or hybrid theory

The crux of the hybrid theory is that arbitration contains both jurisdictional and contractual elements. The mixed theorists contend that arbitration though contractual cannot be wholly separated from the state as advocated by the classical contractual theorists.[194] Therefore, arbitration derives from both contractual elements, which makes it a private contract between the parties, and procedural elements which gives it a public interest requiring some supervision from the state. According to Sauser-Hall, the two elements are 'indissolubly intertwined'.[195]

The mixed theory was propounded by Professor Surville, and brought to limelight by Professor Sauser-Hall in his report to the Institute de Droit International in 1952.[196] Professor Sauser-Hall argued that international commercial arbitration as a 'mixed judicial institution, *sui generis*, has dual character. It is rooted in the parties'

190. Onyema, E. (2010) International Commercial Arbitration and the Arbitrator's Contract, Routledge, London, pp. 36 – 38.
191. Onyema, E. (2010), pp. 36 – 38.
192. Michaels, R. (2014) "Roles and Role Perceptions of International Arbitrator" in Mattli, W. and Dietz, T. (ed.) International Arbitration and Global Governance: Contending Theories and Evidence, Oxford University Press, Oxford, pp. 47 – 73
193. Article V (1) (e) of the NYC provides *inter alia*: Recognition and enforcement of the award may be refused if; "The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."
194. Schmitthoff, C. M. (1967) "The Supervisory Jurisdiction of the English Courts" in Sander, P. (ed.) International Arbitration: Liber Amicorum for Martin Domke, Matinus Nijhoff, The Hague, pp. 289 – 300.
195. Sauser-Hall, G. (1952) quoted in Yu, H-L. (2008), p. 270.
196. Yu, H-L. (2008), pp. 274 – 276.

agreement and draws its jurisdictional effects from civil law'.[197] Supporting the dual nature of arbitration, Professor Sanders argued that it would be inadequate if the emphasis was only based on one character of arbitration because:

> On the one hand arbitration must be based on an agreement of parties to arbitrate; no arbitration can take place when there is no valid agreement of the parties to submit their differences to arbitration. If emphasis is laid upon this starting point and the line is drawn further, covering as well arbitral procedure and the award, it leads to the contractual theory on the nature of arbitration. On the other hand, emphasis may be put upon the quasi-judicial character of arbitration. Arbitration is a judicial process. The arbitrators, once appointed, act as a judge. Their function is to give a final decision on the differences submitted to them. Their decision has, in principle, the same effects as a judgement of a court. The dualistic character of arbitration has led to the intermediary view taken by those who adhere to what may be called the mixed arbitration theory. The character of arbitration is influenced both by its contractual origin and by the judicial process it involves.[198]

The notion that international commercial arbitration draws from both contractual and jurisdictional elements is well canvassed.[199] The parties' autonomy to contract an arbitration agreement, choose arbitrators, venues, time and the governing laws is based on the contractual elements of arbitration. Undeniably also, issues relating to arbitral proceedings, validity of the arbitration agreement, validity of the award and recognition and enforcement of the award are scrutinised according to the mandatory rules and public policy of the seat of arbitration and the enforcing state.[200] This view is also supported by Redfern and Hunter, who wrote that:

> International commercial arbitration is hybrid. It begins as a private agreement between the parties. It continues by way of private

197. Yu, H-L., (2004), p. 185.
198. Sanders, P. (1975) Trends in the field of International Commercial Arbitration, Recueil des Cours, vol. 145, No. 2, at pp. 233 – 234.
199. "… there is thus a jurisdictional as well as a contractual element in arbitration…" Hunter, R. L. C. (2002) The Law of Arbitration in Scotland, 2nd ed., Tottel Publishing, p. 3; "…The liberal attitude adopted by most states towards international arbitration generally supports the mixed or hybrid theory as the most effective of the juridical nature of international commercial arbitration", Onyema, E. (2010) p. 58; "The hybrid or mixed theory became the most recognised worldwide theory…" Ismail, M. A. M (2011) Globalisation and New International Public Agreements in developing Countries: An Analytical Perspective, Ashgate Publishing Limited, p. 170; Belohlavek, A. (2011) "The Legal Nature of International Commercial Arbitration and the Effects of Conflicts between Legal Cultures", *Law of Ukraine Journal*, No. 2, pp. 18 – 32.
200. Ancel, J. P. (1993) "French Judicial Attitudes Towards International Arbitration", *Arbitration International*, Vol. 9, No. 2, pp. 121 – 129.

> proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award which has binding legal force and effect and which, on appropriate conditions being met, the courts of most countries of the world will be prepared to recognise and enforce. The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national law.[201]

This dual character creates a nexus between the private and public aspects of cross-border arbitration.[202] Accordingly, the nature of the award is viewed by the mixed theorists as both the result of a contract and as a judgement.[203] Nevertheless, the dual nature will mean dual review of the award, one by the seat and another by the enforcing state. This position has been criticised by Professor Gaillard in the following terms:

> Even though, technically speaking, such dual review does not amount to the double exequatur that the drafters of the NYC intended to abolish, it certainly borders on it. No matter how it is labelled, this dual control is undoubtedly a step backwards as compared to the model in which each national legal order makes its own determination of the conditions under which it will recognise international awards, subject to the application of the principles agreed upon in international conventions. In a world in which arbitration is increasingly recognised as the normal means of settling international disputes, the least one could say is that such an accumulation of obstacles to the juridicity of arbitration is archaic and inopportune.[204]

Nevertheless, the mixed theory is regarded as the closest to the juridical nature of arbitration. However, it is problematic to rely on the theory as providing the basis for the juridical nature of arbitration and its resultant award. This is so because the mixed theory creates a gap regarding who regulates the arbitral process. From the thesis of the mixed theory, it is not clear whether it is the State or the parties' arbitration agreement that regulates arbitral process. Furthermore, this gap or complication in the regulation of arbitration is expressed by Michaels thus:

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201. Redfern, A. and Hunter, M. (1991) Law and Practice of International Commercial Arbitration, Sweet and Maxwell, London, p. 8.
202. Onyema, E. (2010), p. 58.
203. Savadkouhi, S. H. *et al*. (2014) "The Four Legal Theories of International Commercial Arbitration", *Asian Journal of Research in Social Sciences and Humanities*, Vol. 4, No. 6, pp. 292 – 302.
204. Gaillard, E. (2010) Legal Theory of International Arbitration, Martinus Nijhoff Publishers, Leiden Boston, p. 33.

> The problem, in a nutshell, is this: on the one hand, the arbitrator now fulfils the role of judge, including a function of global governance. On the other hand, his legitimacy and his mandate are limited to those of a service provider, which especially limits his ability for governance. The state, on the other hand, which would be competent to regulate, is deprived of this competency by the private arbitration agreement. So long as state courts cannot reach the transnational sphere and arbitrators do not have the legitimacy to regulate, we face a potential regulation deficit.[205]

3.3.4 The autonomous theory

The autonomous theory was advanced by Professor Rubellin-Devichi.[206] The theory views international arbitration from a different perspective from the jurisdictional, contractual and mixed or hybrid theories. Autonomous theorists reject the jurisdictional and contractual theories because both theories fail to comport with reality and controverted each other. The autonomous theorists also reject the mixed or hybrid theory because of its ambiguous scope of application.[207] The jurisdictional, contractual and hybrid theorists focused on the aspects of arbitration which correspond with municipal and international law, how the right of the parties to arbitrate their dispute and determine the arbitral process is restricted by the law. In contrast, the autonomous theorists focus on the issues of arbitration itself, such as the objective of arbitration, the arbitral proceedings, the function of arbitration and the rationale behind the functions.[208]

The theme of autonomous theory is that the real nature of arbitration should be determined on the premise of its use and purpose. This is done by placing arbitration on a supra-national level which recognises its autonomous character.[209] The theory contemplates international arbitration as an autonomous legal order – the arbitral

205. Michaels, R. (2014) "Roles and Role Perceptions of International Arbitrators", in Matti, W. and Dietz, T., International Arbitration and global Governance: Contending Theories and Evidence, Oxford University Press, Oxford, p.71.
206. Rubellin-Devichi, J. (1965) L'arbitag: Nature Juridique: Droit Interne et Droit International Prive, in Librairie Generale de Droit et de Jurisprudence p. 365.
207. Yu, H-L. (2008), p. 280.
208. Gaillard, E. (2010) "Three Philosophies of International Arbitration" in Rovine, A. W., Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009, Martinus Nijhoff Publishers, Leiden. Boston, pp. 305 – 310.
209. Rubellin-Devichi, J. (1965), p. 365; Samuel, A. (1989) pp. 67 – 73.

legal order. Thus, cross-border commercial arbitration should remain free from the restraints of municipal laws, especially that of the seat of arbitration.[210] Considering the practical aspects, the existence and continuous development of arbitration which accord with the demands of the international commercial community, Rubellin-Devichi argued that:

> … in order to allow arbitration enjoy the expansion it deserves, while all along keeping it within its appropriate limits, one must accept, I believe, that its nature is neither contractual, nor jurisdictional, nor hybrid, but autonomous.[211]

The proponents of the autonomous theory maintain that arbitration was first created and developed by businessmen. With globalisation, the law simply sustains and amplifies the effects of arbitration.[212] Therefore, the parties' freedom to decide both substantive and procedural law is not premised on the jurisdictional or contractual or even a combination of both elements, but on the exigencies of commercial custom and practice.[213] Yet, the reason why arbitration agreements and its awards are enforceable is not because they are just contract, or the enforcing state gives concession, but because businesses across the globe will not be able to engage in cross-border commercial transactions successfully if arbitration agreements and its awards are unenforceable.[214] In effect, the theorists contend that the supremacy of party autonomy should be the controlling factor in international commercial arbitration.

Arguing on the status of the arbitral award, the theory contemplates delocalisation or supra-national arbitration for the validity of arbitration and its award.[215] In effect, the autonomous theorists maintain that the validity of arbitration and the arbitral award should be placed in a delocalised or supra-national level which recognises its

210. Gailard, E. (2010) pp. 35 – 39.
211. Rubellin-Devichi, J. (1965), quoted in Yu, H-L. (2008), p. 280.
212. Hanotiau, B. (2011) "International Arbitration in a Global Economy: The Challenges of the Future", *Journal of International Arbitration*, Vol. 28, No. 2, pp.89 – 103.
213. Zumbansen, P. (2002) "Piercing the Legal Veil: Commercial Arbitration and Transnational Law", *European Law Journal*, Vol. 8, No. 3, pp. 400 – 432.
214. Asouzu, A. A. (1999) "The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards", *Journal of Business Law*, pp. 185 – 204.
215. Ahmed, M. (2011) "The Influence of the Delocalisation and Seat Theories upon Judicial Attitudes towards International Commercial Arbitration", *Arbitration*, Vol. 77, No. 4, pp. 406 – 422.

autonomous character.[216] This simply means that parties' autonomy to arbitrate their dispute should be respected, and the arbitration agreement and the award be recognised and enforced in any country without controls imposed by the state. Yu described delocalisation theory as it relates to the validity of the award in the following terms:

> With respect to the issue of validity of arbitration agreement and arbitral awards, in accordance with the delocalisation theory, the proponents of the autonomous theory maintain that arbitration should be free from restraints imposed by the laws of the relevant states. They also argue that the national laws of the place of arbitration or the place where the recognition or enforcement is sought should not have supervisory role to play in an arbitration. Furthermore, because of the parties' wishes to arbitrate and the supra-national nature of arbitration, arbitration agreements and awards should be enforceable in any country.[217]

Paulsson writing in support of delocalisation, explained the concept thus:

> The sometimes – used expression 'floating arbitration' is not entirely satisfactory, because all arbitral awards may, and frequently do, 'float' … the question is not so much whether an award may float … this seems beyond dispute … but whether it may also drift, that is to say enjoy a potential for recognition in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered.[218]

The decisions of the French Supreme Court strongly demonstrate the validity and their acceptance of the autonomous theory. Recently, in *Ryanair v SMAC*,[219] the Cour de Cassation (French Supreme Court) considered an appeal against a Paris Court of Appeal decision. The appeal concerned whether the enforcement of a foreign arbitral award, which involved a public procurement contract, fell within the jurisdiction of the ordinary courts as opposed to administrative courts. The Supreme Court overruled the Court of Appeal and held that the enforcement of a foreign

216. Renner, M. (2009) "Towards a Hierarchy of Norms in Transnational Law", *Journal of International Arbitration*, Vol. 26, No. 4, pp. 533 – 555.
217. Yu, H-L. (2008) p. 280.
218. Paulsson, J. (1981) "Arbitration Unbound: Award Detached from the Law of its Country of Origin" *International and Comparative Law Quarterly*, Vol. 30, No. 2, p. 358; Paulsson, J. (2010) "Arbitration in Three Dimensions", *LSE Law, Society and Economy working Papers*, No. 2, pp. 1 – 34.
219. Cass. Civ. 1re, 8 Juillet 2015, n° 13-25.846.

award, regarding public procurement, fell within the jurisdiction of the ordinary courts.

Chiefly remarkable in *Ryanair* was the French Supreme Court's heavy reliance on the fact that international arbitration is an autonomous "international arbitral order" thus, international arbitral awards are not connected to any national legal system. In effect, the Supreme Court unambiguously acknowledged the scheme that international arbitration is an autonomous legal order. While the famous 2007 decision in *Putrabali v Rena*[220] had recognised that an international award is not attached to any national legal system, this decision goes further and clearly accepts the existence of an independent international arbitral order, at least in France.

One of the criticisms against the theory of delocalisation is that it has the undesired effect of preventing finality in arbitration.[221] Finality in cross-border arbitration is cardinal to parties when electing to have their disputes settled by arbitration.[222] Another contention against the delocalisation theory is that it robs parties of the judicial assistance which guarantees the integrity of the arbitration process.[223] The court is there to provide assistance and support to the arbitral process.[224] For example, this can be done in enforcing the arbitration agreement and providing parties safeguards against arbitrators exceeding their authority.

The view is however taken that the arguments of the autonomous theorists reflect a practical assessment of modern arbitration as a whole. Though, no empirical investigation has been carried out on this line of argument, however, Samuel remarked that the major problem with the functional evaluation of arbitration is that empirical data which would cast some light on the functions of arbitration is limited and often quite unrepresentative of the arbitral community as a whole.[225] Lately,

220. Cass. Civ. 1re, 29 Juin 2007, n° 05-18.05.
221. Lew, J. D. M. (1978), p. 79.
222. Goode, R (2000) "The Role of the Lex Loci Arbitiri in International Commercial Arbitration" in Rose, F. D. (ed.) Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds, LLP, London, p. 262.
223. Lutz, R. E. (1988) "International Arbitration and Judicial Intervention", *Loyola of Los Angeles International and Comparative Law Review*, Vol 10, pp. 621 – 627.
224. Mistelis, L. (2006) "Reality Test: Current State of Affairs in Theory and Practice Relating to 'Lex Arbitiri' *American Review of International Arbitration*, Vol. 17, No. 2, pp. 155 – 183.
225. Samuel, A. (1989), p. 41.

though, efforts have been made to have more representative surveys.[226] Notwithstanding empirical evidence, Lew, Mistelis and Kroll remarked that:

> International arbitration has developed because parties sought a flexible, non-national system for the regulation of their commercial disputes. They wanted their agreement to arbitrate to be respected and enforced; they envisaged fair procedures, fashioned according to the characteristics of the particular case but not copying any national procedural system; they expected the arbitrators would be impartial and fair; they believed the ultimate award would be final and binding, and they presumed that it would be easily enforceable. Arbitration, organised the way they considered it appropriate, is how the parties have decided to determine disputes between them.[227]

3.3.5 The concession theory

The concession theory was used by Stokes to explain the full legal personality of corporations in modern times.[228] The theory as it relates to company law sees the company as an artificial entity created by state law. From this viewpoint, the separate legal status of the company is regarded as a concession granted by the state.[229] The theory claims that the company has no right except the state elects to grant it legal personality.[230] Concession theory in effect emphasises public interest over the private interest of those individuals involved in the company.

From this perspective, Yu and Sauzier adapted and applied the theory to justify the juridical nature of international commercial arbitration. Yu and Sauzier posit that though arbitration is a contract between the parties on the one hand, and the parties

226. 2006 International Arbitration Survey: Corporate Attitudes and Practice, School of International Arbitration, Queen Mary University of London; 2008 International Arbitration Survey: Corporate Attitudes and Practice, School of International Arbitration, Queen Mary University of London; 2010 International Arbitration Survey: Choices in International Arbitration, School of International Arbitration, Queen Mary University of London; 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, School of International Arbitration, Queen Mary University of London; 2013 International Arbitration Survey: Corporate choices in International Arbitration – Industry Perspectives, School of International Arbitration, Queen Mary University of London; and 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, School of International Arbitration, Queen Mary University of London
227. Lew, J. D. M., Mistelis, L. A. and Kroll, S. M. (2003) p. 81.
228. Stokes, M. (1986) "Company Law and Legal Theory", in Twining, W.(ed.), Legal Theory and Common Law, Blackwell, Oxford, pp. 115 – 162.
229. Oman, N. B. (2005) "Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria", *Denver University Law Review*, Vol. 83, No. 1, pp. 101 – 146.
230. Griffiths, A. O. (2005) Contracting with Companies: Contemporary Studies in Corporate Law, Bloomsbury Publishing Plc, London, pp. 164 – 168.

and the arbitrator, on the other hand, the contract is developed, regulated and supervised by municipal laws.[231] The law enacted typify the state's show of concession of some judicial responsibility to the arbitrator to settle private disputes between parties. The concession as it regards to international arbitration exists by the consensual agreement of states acceding to international treaties and conventions, such as the NYC.[232] The arguments of the concessionist extend to compliance with mandatory public policy requirements of either the seat of arbitration or the enforcing state. By this, they contend that even in an institutional arbitration, the law of a particular state is still relevant, whether it is applied or not. The mere fact that parties to the arbitration did not invoke the relevant laws will not diminish the relevance and existence of such laws.[233]

The theory is distinguished from the jurisdictional theory where the state delegates some of its judicial powers to the arbitrator.[234] The concession theorists argue that the state's intervention is purely supportive and not intrusive. Thus, the supportive intervention is available to be invoked by the parties and the arbitrator before, during and after the arbitral proceedings.[235] However, like the jurisdictional theory, the applicability of the concession theory is most apparent on the issue of arbitrability.[236] This is true as it is within the purview of a state to define disputes that can be determined by arbitration. Where parties agree to arbitrate a dispute that is not arbitrable, such agreement, the arbitration itself and its award may be declared invalid and unenforceable.[237]

From the arguments of the concession theorists, it is difficult to clearly define the juridical status of the arbitral award. However, it appears that the theory supports the concept of 'delocalised arbitral award', enforceable in any jurisdiction by invoking the relevant laws of the enforcing states. Thus, Onyema described the theory as a semi-autonomous theory with the capacity of producing a semi-delocalised award, in the following terms:

231. Yu, H-L and Sauzier, E. (2000), pp. 119 – 120.
232. Yu, H-L. and Sauzier, E. (2000), p. 119.
233. Onyema, E. (2010), pp. 41 – 43.
234. Yu, H-L. and Sauzier, E.(2000), p. 120.
235. Yu, H-L. and Sauzier, E. (2000), p. 119 – 120.
236. Onyema, E. (2010) p. 42
237. Article V (2) (a) of the NYC.

> …it is possible to describe the concession theory as a semi-autonomous theory of international arbitration, which [falls] short of removing international arbitration completely from the reach of the states to which it may be connected while at the same time recognising the effect of various limitations on party autonomy as it affects international arbitration.[238]

From this viewpoint, this thesis adopts the autonomous theory because it focuses more on the intention of the users of arbitration (the parties) and the purpose of arbitration rather than whether arbitration is a part of a national legal system, the nature of the arbitrator's function and the nature of the award. Furthermore, it argues that the autonomous theory highlights arbitration more as a flexible transnational procedure for dispute settlement than the other theories. The other theories highlight how parties' right to submit or refer their dispute to arbitration and define the arbitral process is limited by national law. Thus, enforceability of arbitral award is subject to the decision of the national court of the seat of arbitration. This should not be, because as a flexible or user friendly procedure, enforceability of the award should not be limited by the seat's annulment decision. Hence, if an award is annulled at the seat of arbitration, the successful party may still seek to enforce the award elsewhere. The flexibility of the procedure and the delocalisation of the award are contemplated under article V (1) of the NYC and arguably, one reason arbitration remains the preferred transnational dispute settlement mechanism.[239]

3.4 Justification for enforcement of awards

This section examines the policy considerations that support the enforcement of arbitral award in England and Nigeria. The successful party in a cross-border arbitration dispute expects the unsuccessful party to voluntarily comply with the terms of the award without delay.[240] If the unsuccessful party fails to voluntarily

238. Onyema, E. (2010) p. 43.
239. Paulsson, J. (1981) supra note 221; Lew, J. D. M., Mistelis, L. A. and Kroll, S. M. (2003) pp. 81 – 82
240. Born, G. B. (2015) International Arbitration: Cases and Materials, 2nd ed., Kluwer Law International, The Netherlands, pp. 1059 – 1061.

perform the award, the successful party may have recourse to the courts for the enforcement of such award.[241]

It can be argued that the legal justification for the enforcement of arbitral award in England is party autonomy, which in principle reflects the autonomous theory. This position is underscored by the general principles of the AA 1996. Section 1 provides:

> 1. The provisions of this Part are founded on the following principles, and shall be construed accordingly
> (a) The object of arbitration is to obtain the fair resolution of disputes by impartial tribunal without unnecessary delay or expense;
> (b) The parties should be free to agree how their disputes are resolved, subject only to safeguards as are necessary in the public interest;
> (c) In matters governed by this Part, the court should not intervene except as provided by this Part.

Wherefore, when parties agree to refer their dispute to arbitration, the court will in appropriate circumstances respect their election and ensure the finality of the arbitral process.[242] In *Aoot Kalmneft v Glencore International A. G. and others*,[243] Colman, J. gave judicial approval to the policy consideration of the AA 1996 thus:

> … the twin principle of party autonomy and finality of awards which pervade the Act tend to restrict the supervisory role of the court and to maximise the occasion for the courts intervention in the conduct of arbitrations … [The] threshold for intervention by the court has long been recognised in the field of the courts' supervisory jurisdiction as appropriately preserving the finality of the awards and party autonomy.[244]

This statement illustrates two issues, namely: (i) that the agreement to submit to arbitration, the form of arbitration and the regulation of the proceedings are within the exclusive control of the parties; and (ii) that the legal effect of the agreement and enforceability of the award are subject to the Act. It is all the more so when

241. Friedland, P. D. (2007) Arbitration Clauses for International Contracts, 2nd ed., JurisNEt, LLC, pp. 7 – 36.
242. Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, February 1996, paras. 18 – 19.
243. [2002] 1 Lloyd's Rep 128.
244. *Aoot Kalmneft v Glencore International A. G. and others* [2002], pp. 136 – 140.

considered in the light of Lord Clarke of Stone-cum Ebony, JSC statement in *Hashwani v Jivraj*.[245] The law and case law on this point reject absolute party autonomy as the driving force in arbitration and enforceability of the award. Instead, a balance is struck between the State's involvement in arbitration and the parties' autonomy to resolve disputes by arbitration. In effect, where party freedom stops, statutory and judicial supportive supervision starts or *vice versa*.[246]

Like England, the enforcement of arbitral awards in Nigeria is founded on parties' freedom to refer their dispute to arbitration, which also in principle reflects the autonomous theory. To delimit the intrusive involvement of the court where parties have exercised their autonomy, section 34 of the ACA is instructive. It states: "A court shall not intervene in any matter governed by this Act except where so provided in this Act." By this provision, the court is precluded from interfering with arbitral proceeding, save where so provided by the ACA. Indeed by the ACA, the court is expected to support and ensure that parties comply with the arbitral process.[247] This is evident in the case of *Nigerian Agip Exploration Ltd. V Nigerian Petroleum Corporation and Oando Oil 126 and 134 Ltd*.[248]

In *Nigerian Agip Exploration Ltd.*, the appellant and the respondents entered into a production sharing contract (PSC) in respect of Oil Prospecting Licence which was later converted to Oil Mining Licence. The PSC contained an arbitration clause in accordance with the provisions of the ACA. When disputes arose, the appellant and the 2nd respondent issued a notice of arbitration. The appellant and the respondents participated fully in the arbitration proceedings and the arbitral tribunal rendered a partial award in favour of the appellant and 2nd respondent. The tribunal ordered the appellant and 2nd respondent to provide their updated revised damages in accordance with the terms of the partial award to allow the tribunal render a final award. Dissatisfied, the 1st respondent filed an originating and ex-parte applications in the Federal High Court. The ex-parte application was granted. It restrained the appellant, 2nd respondent and the tribunal from taking any further steps in the arbitration pending the final determination of the originating application. The appellant and the

245. [2011] ICR 1004 at p. 1026, para. 61.
246. Fagbemi, S. A. (2015), pp. 229 – 236.
247. Olatawura, O. O. (2014) "Constitutional Foundations of Commercial and Investment Arbitration in Nigeria", *Commonwealth Law Bulletin*, Vol. 40, No. 4, pp. 657 – 689.
248. Suit No. CA/A/628/2011, decided on 25/02/2014.

2nd respondent applied to the court to discharge its interim order. The trial court dismissed the appellant and 2nd respondent's application. Dissatisfied with the trial court's refusal to discharge its interim order, the appellant appealed to the Court of Appeal. The Court of Appeal, Abuja Division, allowed the appeal. The Court of Appeal held *inter alia* that as a general rule, the law does not permit the court to intervene in arbitration proceedings so as not to interfere with the parties' agreement to submit their dispute to arbitration.

Similarly, in *Statoil Nigeria Ltd & anor v NNPC & 2 ors*,[249] parties entered into a PSC which contained an arbitration clause. When disputes arose, the 1st respondent objected to the jurisdiction of the arbitral tribunal to determine the dispute on grounds of arbitrability of the subject matter. Parties to the arbitral proceedings including the 1st respondent agreed that the tribunal should determine the preliminary objection and the substantive dispute in one award, instead of having a partial and final award differently. During the pendency of the arbitral proceedings, the 1st respondent obtained an interim order restraining parties and the tribunal from further conducting the arbitral proceedings. Dissatisfied with the trial court's order, the appellants appealed to the Court of Appeal. In allowing the appeal and setting aside the trial court's order, the Court of Appeal held *inter alia*, that where parties have elected to refer their dispute to arbitration instead of an action in the regular court, a *prima facie* duty is cast upon the court to act upon the parties' arbitration agreement.

It can be argued that party autonomy as a basis for enforcement of arbitral award is highlighted in the ACA.[250] To this end, arbitral awards are recognised and enforced by Nigerian courts as a decision binding the parties and not as a judgement of the court.[251] This was demonstrated in the Nigerian Supreme Court case of *Ral Pal Gazi Construction Company Ltd. V Federal Capital Development Authority*.[252]

In that case, the appellant was awarded a contract by the respondent to construct a cultural centre in Abuja. The contract was later terminated by the respondent. The appellant sued the respondent for damages. During the pendency of the suit, the

249. [2013] 7 CLRN 72.
250. The earlier discussion of party autonomy refers.
251. Oraegbunam, I. (2015) "Enforcement in Nigeria of International Commercial Arbitral Awards based on Lex Mercatoria" *International Journal of Business an Law Research*, Vol. 3, No. 1, pp. 53 – 59; Oppong, R. F. (2013) Private International Law in Commonwealth Africa, Cambridge University Press, pp. 397 – 422.
252. (2001) 5 S. C. (Pt. II) 16.

parties agreed and were allowed by the court to submit their dispute to arbitration. The arbitrator appointed by both parties rendered an award in favour of the appellant. The respondent sought to set aside the award, and the trial court in its ruling held that the award was binding on the parties. The court further declared that "the arbitration award is hereby made the judgement of the court." The respondent was aggrieved and appealed to the court of Appeal. The Court of Appeal allowed the appeal and set aside the decision of the trial court which made the arbitral award a judgement of the court. In its place, a judgement recognising the arbitral award as binding between the parties was substituted. Dissatisfied, the appellant appealed to the Supreme Court. One of the issues considered by the Supreme Court was whether an arbitral award can be made a judgement of court. Put differently, whether the court has jurisdiction to convert an arbitral award into its own judgement instead of recognising the award as binding on the parties for purposes of enforcement. The appeal was unanimously dismissed and Katsina-Alu, JSC who read the lead judgement stated the law *inter alia*:

> A valid award on a voluntary reference no doubt operates between parties as a final and conclusive judgement upon all matters referred … when parties decide to take their matter to arbitration, they are simply opting for an alternative dispute resolution … parties have a choice to either go to court … or refer the matter in dispute to an arbitrator resolution… Arbitration as an alternative mode of dispute resolution has for decades been given legal backing … There is nothing in the … Act which empowers the court to make the arbitral award the judgement of the … court … the court has no power to make the arbitral award its own judgement … nowhere in the Act is the … court given power to convert an arbitration award into its own judgement …[253]

It can be argued that the most important part of the Court of Appeal's strict interpretation of section 34 of the ACA in the cases of *Nigerian Agip Exploration Ltd* and *Statoil Nigerian Ltd.* is the court's readiness to support and respect the parties' choice of private dispute settlement. Thus, in this thesis' view, supported by the Supreme Court case of *Raj Pal Gazi Construction Company Ltd*, the validity of arbitral processes is hinged on the parties' voluntary agreement and is supported by the State as a valid process.

253.*Ral Pal Gazi Construcion Company Ltd. V Federal Capital Development Authority* [2001] pp. 13 – 19.

3.5. Summary

This chapter examined the nature of arbitration and its juridical theories. It argues that in principle, the autonomous theory of arbitration best represents the laws and attitudes of the English and Nigerian courts towards the enforcement of arbitral awards. This allusion is demonstrated in the discussion under 3.4 above. The next chapter examines English and Nigerian courts approaches to the enforcement of arbitral awards rendered purely on the basis of transnational rules.

Chapter four

Attitudes of Courts towards enforcement of awards

4.0. Introduction

Having received an arbitral award, the successful party can anticipate one of three things to happen: (i) the unsuccessful party to the arbitration may voluntarily perform the terms of the arbitral award; or (ii) the unsuccessful party may fail to honour the award and take no active steps to resist the award; or (iii) the unsuccessful party may refuse to honour the award, and take active steps to resist the award. Where either (ii) or (iii) is the case, the successful party may have to take further steps to ensure the arbitral award is recognised and/or enforced, if it is to enjoy the fruits of its efforts in obtaining the award.

To this end, this chapter examines the steps open to a party to enforce an arbitral award rendered in its favour in the two jurisdictions. Firstly, the chapter examines the competent authority to recognise and enforce arbitral awards (4.1). Secondly, it discusses the methods of enforcement of arbitral awards available to the successful party (4.2). Lastly, it engages with the issue of whether an arbitral award based purely on transnational rules is enforceable in England and Nigeria (4.3). The aim of this chapter is to determine two things. First, is to ascertain whether the English and Nigerian courts' policy considerations for the enforcement of arbitral awards are effective; and secondly, to determine both courts' attitude towards the enforcement of transnational arbitral awards.

4.1. The competent authority

Generally, aside from making an order authorising the successful party to enforce the award, the arbitrator lacks power to enforce its award. In simple terms, an arbitrator becomes *functus officio* once it renders a final award. Thus, if the unsuccessful party fails to voluntarily comply with the award, the successful party may seek to enforce the award against the unsuccessful party. To enforce the award against the unsuccessful party, the successful party must bring its application before a competent authority where the unsuccessful party has assets. So the questions that then arise are: what (or who) is the competent authority (4.1.1) and its role towards the

enforcement of awards (4.1.2). This section also examines the powers of the competent authority (4.1.3).

4.1.1. What (or who) is the competent authority?

The NYC is silent on what or who the competent authority is. It only makes reference to the term 'the competent authority' in article V (1) of the Convention:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if the party furnishes to the *competent authority* where the recognition and enforcement is sought, proof that...[1]

Arising from this silence, the competent authority varies from country to country. In some countries, the competent institution is the court (the judiciary) while in others, it is a public office or official.[2] For example, in Saudi Arabia, the competent authority with jurisdiction to enforce foreign awards is the Enforcement Judge.[3] However, in most countries, it is the courts that are empowered to recognise and enforce foreign arbitral awards. In some countries different courts have jurisdiction over foreign and domestic awards. For example, in Belgium and Oman, the same courts have powers to enforce both foreign and domestic awards[4] in Egypt and Qatar, the competence is vested in different courts.[5]

In England, pursuant to section 105 of the AA 1996, the competent authority to hear applications for the enforcement of foreign arbitral awards is either the High Court or the County Court.[6] Civil Justice in England and Wales is primarily dealt with in

1. Article V (1) of the NYC.
2. David, R. (1985) Arbitration in International Trade, Kluwer Law Taxation Publishers, Deventer, pp. 368 – 369.
3. Article 1 of the new Enforcement Law, Royal Decree No. M/53.
4. Article 1719 of the Belgium Judicial Code; and Articles 253, 352, 36 and 41 of the Royal Decree 29/2003 on Civil and Commercial Procedure Law (Oman).
5. In Egypt, under articles 9 and 56 of the Arbitration Act 1994, national arbitral awards are enforced by the court of First Instance, while foreign arbitral awards are enforced by the Court of Appeal. In Qatar, under articles 379 to 380 and 203 to 204 of the Code of Civil and Commercial Procedure, request for the enforcement of foreign arbitral awards are submitted to the Court of First Instance, while the competent court to enforce national arbitral awards is the court which would originally have jurisdiction to hear the dispute.
6. As a general rule, pursuant to article 2 of the High Court and County Court (Allocation of Arbitration Proceedings) Order 1996 and the High Court and County Courts (Allocation of Arbitration Proceedings) (Amendment) Order 1999, actions under the AA must be commenced and heard by the High Court. However, under article 4 of the Order, actions under Ss. 66 and 101(2) of the AA may be commenced in any County Court. Under article 5

the County Courts and, in matters involving substantial or complex issues, the High Court.[7] The civil jurisdiction of the High Court is vested in the Queen's Bench Division (Civil) and the Chancery Division. The Queen's Bench Division (Civil) includes the Commercial Court, the Admiralty Courts; and the Technology and Construction Court. The Chancery Division includes; the Bankruptcy and Companies Court, the Patents Court, Chancery Chambers (Masters), and the Intellectual Property and Enterprise Court.[8] Actions in respect of arbitrations are heard at first instance by the Commercial Court, usually with a right of appeal to Court of Appeal and ultimately the Supreme Court. The commercial court hears complex matters concerning business disputes, both national and international.[9]

In Nigeria, by virtue of section 57 (1) of the ACA, the competent authority is the High court. The section stipulates that:

> unless otherwise stated, court in the context of the Act means the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court, and "Judge" means a judge of the High Court of a State, the High Court of the Federal Capital Territory, Abuja, or the Federal High Court.[10]

However, the question that arises is whether the exclusive jurisdiction of the Federal High Court under section 251 of the 1999 Constitution (as amended) precludes the jurisdiction of the High Court of a State or the High Court of the Federal Capital Territory, Abuja, in matters included in the section which is the subject matter of an arbitration.

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of the Order, actions under the AA may be commenced and heard in the Central London County Court Business List. This jurisdiction is regulated by the provisions of article 5 (2) (3) (4) and (5) of the Order. Article 6 of the Order empowers the judge in charge of the commercial list to transfer proceedings under AA to another list, court or Division of the High Court to which the judge has power to transfer proceedings ad where such transfer is made, the proceedings may be taken in that list, court or Division of the High Court as the case may be.

7. https://www.judiciary.gov.uk/about-thejudiciary/the-justice-system/jurisdictions/civil-jurisdiction [Accessed on 23/09/2016].
8. County Courts deal with contract and tort (civil wrong) cases and recovery of land actions. Some County Courts can also deal with bankruptcy and insolvency matters, as well as matters concerning wills and trust, equity and contested probate cases, where the value of the trust, fund or estate is less than £30,000.01, actions under the Race Relations Act 1976, and matters which parties agree to be heard in a County Court.
9. The Work of the Commercial Court is regulated by Part 58 of the Civil Procedure Rules
10. Section 57 (1) of the ACA.

In *Adeoye Magbagbeola v Temitope Sanni*,[11] the respondent pursuant to an arbitration agreement between him and the appellant brought an application under section 7 (2) (b) of the ACA at the High Court of Lagos State for the appointment of a sole arbitrator. The appellant filed a notice of preliminary objection challenging the jurisdiction of the court to entertain the matter on grounds that the court lacked competence to decide issues concerning the running and sharing of profits of companies incorporated under the Companies and Allied Matters Act, 1990. In his ruling, the trial Judge held that the preliminary objection calls for the examination of the provisions of sections 251 (1) (e) and 272 (1) of the 1999 Constitution (as amended). The court then held that it has jurisdiction to hear and determine the applicant's claim. Accordingly, the preliminary objection was dismissed. The court reasoned that there is nothing in the above sections of the Constitution which says that the Federal High Court has exclusive jurisdiction to appoint an arbitrator. The substantive claim seeks the appointment of an arbitrator and a State High Court or Federal High Court has jurisdiction to appoint an arbitrator. The appellant's appeal to the Court of Appeal was also dismissed and the trial court decision upheld. Dissatisfied, the appellant appealed to the Supreme Court which also dismissed the appeal and stated that by virtue of section 57 of the ACA, both the State High Court and the Federal High Court have jurisdictions to hear and determine applications in any matter governed by the ACA.

Thus, the competent authority with jurisdiction to hear arbitration applications at first instance is either the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court, with a right of appeal to the Court of Appeal and finally to the Supreme Court.[12]

4.1.2. The role of the 'competent authority'

The issue to determine under this section is the extent of the role of the competent authority. This issue is examined in two fold thus: whether the competent authorities can enforce transnational commercial arbitral awards as a matter of discretion, and

11. [2005] All FWLR (Pt. 267) 1367.
12. Onyema, E. (2010) "Enforcement of Arbitral Awards in Sub-Sahara Africa", *Arbitration International*, vol. 26, No. 1, pp. 115 – 137; Nwkoby, G. C. (2004) "The Courts and Arbitral Process in Nigeria", *Unizik Law Journal*, Vol. 4, No. 1, pp. 21 – 37.

whether the competent authorities are allowed to re-examine the subject matter of the arbitration which has been determined by the arbitrator.

According to van den Berg, under the NYC, the accepted interpretation is that the competent authority before which enforcement is sought may restrain from reviewing the merits of an arbitral award.[13] This principle according to Born:

> … is an almost sacrosanct principle of international arbitration that the court will not review the substance of arbitrator's decisions contained in foreign arbitral awards in recognition proceedings.[14]

The explanation for such interpretation is the explicit provision of article V of the NYC, which makes no reference to a review of an award as a ground for refusing enforcement of the arbitral award. Thus, van den Berg argues that a competent authority may only refuse enforcement of foreign arbitral award based upon the limited grounds under article V of the NYC, which does not include a review of the merits of the arbitral award.[15] Consequently, a competent authority engaging in a review of the merits of a foreign arbitral award may diminish the essence of the NYC, which is to facilitate recognition and enforcement of arbitral awards globally.[16] This is because such review may result in a protracted process and also involve a review of the merits of the underlying dispute.

The rule that a competent authority may not review the substance of an arbitral award in enforcement proceedings is illustrated in *Open Type Joint Stock Company Efirnoye-EFKO (Russian Federation) v Alfa Trading Ltd. (Malaysia)*.[17] The parties' contract provided that disputes would be resolved by arbitration under the International Commercial Arbitration Court at the Chamber of Commerce and

13. van den Berg, A. J. (1981) The NYC of 1958: Towards a Uniform Judicial Interpretation, Kluwer Law and Taxation Publishers, The Hague, pp. 265, 269 – 273; Blackaby, N., *et al* (2009) Redfern and Hunter on International Arbitration, 5h ed., Oxford University Press, Oxford, p. 638.
14. Born, B.B. (2014) International Commercial Arbitration, 2nd ed., vol. III, Kluwer Law International, The Netherlands, p. 3707.
15. van den Berg, A. J. (1981) at p. 269.
16. Davidson, F. P. (2012) Arbitration, 2nd ed., W. Green, Edinburgh, p. 392; Garnett, R., *et al* (2000) A Practical Guide to International Commercial Arbitration, Oceana TM Publications, New York, pp. 130 – 131.
17. (2012) Yearbook Commercial Arbitration, Vol. XXXVII, pp. 264-267; MK2 S.A (France) v Wide Pictures, S. L (Spain) (2012) Yearbook Commercial Arbitration, Vol. XXXVII, pp. 297 – 299; Scandinavian Reinsurance Co. Ltd. v Saint Paul Fire and Marine Insurance Company & 2 ors. (2012) Yearbook Commercial Arbitration, Vol. XXXVII, pp. 368 – 372.

Industry of Ukraine (ICAC of Ukraine), if the claimant were the defendant, and at the Chamber of Commerce and Industry of the Russian Federation (ICAC of Russia), if the claimant were the plaintiff. When disputes arose, the defendant commenced arbitration at the ICAC of Ukraine. While the arbitral proceeding was pending, the plaintiff commenced another arbitration at ICAC of Russia.

Initially, the defendant objected to the ICAC of Russia proceedings contending that the arbitral panel lacked jurisdiction because of the pending ICAC of Ukraine arbitration. Nonetheless, the defendant later filed a counterclaim in the ICAC of Russia proceedings. The ICAC of Russia panel held that they had jurisdiction to hear the dispute before them, and rendered an award in favour of the plaintiff (the Russian award). The ICAC of Ukraine panel also rendered an award in favour of the defendant (the Ukraine award). The defendant applied to set aside the Russian award at the Moscow Arbitrazh (Commercial) Court, the application was rejected. The plaintiff then sought recognition and enforcement of the Russian award in the High Court of Malaya, Kuala Lumpur, Malaysia.

The court granted enforcement of the Russian award and rejected the defendant's argument that the arbitration had not been in accordance with the parties' agreement. On the defendant's argument that it was the first to file a claim with ICAC of Ukraine under the contract, the court noted that the issue had already been raised in the proceedings before the ICAC of Russia and ICAC of Ukraine and an award rendered on the issue. Thus, the court stated that its function at the enforcement stage is not "to re-hear or re-assess" the award.

However, the rule that a competent authority may not subject an arbitral award to a review on the merits is not unfettered. The competent authority may re-examine the award for purposes of substantiating the grounds for refusal of recognition and enforcement as listed in article V of the NYC.[18] For example, if a party under article V (1) (c) of the NYC claims that enforcement should be refused because the award dealt with an issue not contemplated by the terms of the arbitration, a competent authority may have to scrutinise the award in order to determine the validity of such

18. van den Berg (1981) at p. 270;

a claim.[19] Nevertheless, the court is not precluded from reviewing whether the arbitrator has exceeded the limits of its authority and, in particular, the arbitrator's competence, which has to be done in an autonomous and independent manner.[20]

In England, there are no stipulations under the AA 1996 that the court is permitted to re-examine facts determined by an arbitrator.[21] Nonetheless, the Act allows parties to agree to the review of an arbitral award for errors of law. Thus, a party to arbitral proceedings may upon notice to the other party and the arbitrator, appeal to the court on a question of law arising out of an award rendered in the proceedings.[22]

The reason for non-re-examination of the merits of an award touches on the issue of finality of the arbitral award.[23] A fundamental policy of the AA 1996 is that once parties have agreed to arbitrate their dispute, the court should give effect to that decision and the resulting award.[24] This point was stressed in *Aoot Kalmneft v Glencore International A G & anor*[25] where Colman, J stated that the policy of the AA 1996 is to preserve party autonomy, (as well as autonomy of the arbitration agreement) and ensure the finality of the arbitral award.[26]

According to Zuleta, another justification for non-re-examination of the merits of an award is the doctrine of *res judicata*. Like judgements delivered in national courts, a final and binding arbitral award has a *res judicata* effect.[27] Short of the arbitral

19. This point was demonstrated by the Italian Corte di Apello, Civil Section, of Trento (Court of Appeal of Trento), in *General Organisation of Commerce and Industralization of Cereals of the Arab Republic of Syria v S. p. a SIMER (Societa delle Industrie Meccaniche di Rovereto* (Italy) (1983) Yearbook Commercial Arbitration, vol. VIII, pp. 386 – 393. In that case, the respondent argued that the arbitrators had exceeded their authority by deciding on "technical" disputes contrary to the parties' arbitration agreement that such "technical" disputes would be resolved according to the Arbitration Rules of the International Chamber of Commerce in Paris. The court noted that, a court deciding on the enforcement of a foreign arbitral award is not allowed to review the merits of the award.
20. van den Berg, A. J. (1981) at p. 387.
21. Sections 66 and 101 of the AA 1996.
22. Section 69 (1) of the AA 1996; Johnson, A. (1999) "Illegal Contracts and Arbitration Clauses", *International Arbitration Law Review,* vol. 2, No. 1, pp. 35 – 37**;** Ahmed, M. (2010) "Arbitration Clauses: Fairness, Justice and Commercial Certainty" *Arbitration International,* Vol. 26, No. 3, pp. 409 – 420.
23. Section 1 (c) of the AA 1996; Johnson, A. (1999), p. 36.
24. The Department Advisory Committee on Arbitration Law Report on the Arbitration Bill (Report of February 1996) paras. 273 – 283.
25. [2002] 1 Lloyd's Rep. 128 at pp. 136 – 140.
26. The Department Advisory Committee on Arbitration Law Report on the Arbitration Bill, pp. 136 – 140.
27. *Henderson v Henderson* [1843] 3 Hare 100; Zuleta, E. (2011) "Post-Award Advocacy: The Relationship Between Interim and Final Awards – Res Judicata Concerns", in van den Berg,

award being vacated, the same issues submitted to arbitration cannot be re-arbitrated or re-litigated between the same parties or their privies.[28] Thus, the doctrine of *res judicata* judicially puts an end to repetitious litigation or arbitration. However, *res judicata* or finality of the award does not constitute a preclusion of parties' statutory right to appeal in relation to a question of law under section 69 of the AA 1996.[29]

In *Shell Egypt West Manzala GmbH & anor. v Dana Egypt Ltd*.[30], the claimant, under a Cooperation Agreement, was to acquire from Centurion (the defendant's predecessor in title) a 50 per cent interest in the concessions for two crude oil and gas explorations in the Nile Delta. The contract referred to arbitration under the UNCITRAL Arbitration Rules with a clause that "the decision of the majority of the arbitrators, rendered in writing, shall be final, conclusive and binding on the parties…" The arbitrators rendered their award in favour of the defendant and the claimant sought permission to appeal against the award under section 69 of the AA 1996. The defendant applied for an order that the court had no competence to grant the permission because parties had otherwise agreed that there should be no right of appeal. The court dismissed the defendant's application and granted the claimant's application for permission to appeal the award on point of law under section 69. The court reasoned that the texts "final, conclusive and binding", as it appeared in the context of the parties' agreement, was not to be interpreted as an agreement precluding the parties' right of appeal regarding a point of law under section 69.

Nonetheless, there are circumstances which may require an enforcing court to re-examine the merits of an arbitral award. One of such circumstances is where the arbitrator has made or ignored an obvious error which is clear from the arbitral award itself. Another is where illegality or fraud (serious irregularity) is apparent from the award.[31] Others are where the arbitral award is contrary to international

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A. J (ed.) Arbitration Advocacy in Changing Times, Kluwer Law International, The Netherlands, pp. 231 – 274.

28. Brekoulakis, S. (2006) "The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited" *American Review of International Arbitration*, Vol. 16, No. 1, pp. 177 – 209.
29. Roodt, C. (2012) "Border Skirmishes Between Courts and Arbitral Tribunals in the EU: Finality in Conflicts of Competence", in Bonomi, A. and Romano, G. P. (eds.), Yearbook of Private International Law, Vol. 13, 2011, Seller European Law Publishers, pp. 91 – 144.
30. [2010] 1 Lloyd's Rep 109.
31. Lu, M. (2006) "The NYC on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defences to Oppose Enforcement in the United States and England", *Arizona Journal of International and Comparative Law*, Vol. 23, No. 3, pp. 747 – 785.

public policy or obtained contrary to the rules of natural justice.[32] The justification for re-viewing the merits of an award on these grounds is not for the sake of the parties, but the court's inherent responsibility to preserve the integrity of its process, and to ensure that it is not abused.[33] These concerns cannot be overridden by parties' private agreement or the fact that an arbitral award is final and binding as illustrated in the Court of Appeal cases *Soleimany v Soleimany*[34] and *Westacre Investment Inc. v Jugoimport – SPDR Holding Co. Ltd & Ors*.[35]

In both cases, the cardinal issue was whether an enforcing court is allowed to re-examine the merits of an award, and if yes, what must the court consider? In *Soleimany* the Court of Appeal stated that there are circumstances in which an English court could go behind an arbitral award to review the merits of the award. One of such circumstances is where public policy is involved. Hence, the final and binding element of an arbitral award cannot insulate the award from the illegality which gave rise to it.[36] In *Westacre Investment Inc* Waller, LJ stated:

> There are authorities which in my view support the proposition that where illegality is raised and at least where evidence of illegality is so strong that if not answered it would be decisive of the case, the court would not allow reliance on issue estoppel, or on the principle in Henderson v Henderson to prevent the point being ventilated. In other words, illegality can if raised provide the special circumstances in which an estoppel will not provide a defence.[37]

Another question to consider is whether an English court could be allowed to re-examine the merits of an award where the arbitrator has determined the issue of illegality, and found that there was none, or render a non-speaking award without been asked to give reasons. After a lengthy consideration of the authorities, Colman J in *Westacre Investment Inc v Jugoimport-SPDR Holding Co. Ltd* stated that it:

32. Halsbury's Law of England, IV ed., Vol. 8, paras. 6 – 8.
33. Per Waller L. J in Soleimany v Soleimany [1998] EWCA Civ 285; [1999] QB 785 at p. 800; Maurer, A. G. (2013) The Public Policy Exception under the New York Convent: History, Interpretation and Application, (Revised Edition), JurisNet Publishing, New York, pp. 86 – 96.
34. [1998] EWCA Civ 285; [1999] QB 785.
35. [1999] EWCA Civ 1401; [2000] QB 288.
36. *Soleimany v Soleimany* [1998] p. 800.
37. *Westacre Investment* [1999] p. 311.

> Depends upon whether the nature of the illegality is such that, in the case of statutory illegality the statute has the effect of impeaching that agreement as well as the underlying contract, and, in the case of illegality at common law, public policy requires that disputes about underlying contract should not be referred to arbitration.[38]

In *Soleimany v Soleimany*,[39] Waller LJ endorsed this passage and further stated that:

> The difficulties arise when arbitrators have entered upon the topic of illegality, and have held that there was none or perhaps they have made a non-speaking award, and have not been asked to give reasons. In such a case, there is a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced. We do not propound a definitive solution to this problem…if there is a prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality.[40]

Therefore, it seems that if there is *prima facie* evidence of illegality of the principal contract, the enforcing judge will engage in a preliminary inquiry to determine whether the arbitral award should be accorded full faith and credit. A full-scale inquiry is only necessary if the enforcing judge decides not to give the award full faith and credit. However, more importantly, an enforcing judge should be concerned in the first instance with enforcing an award before it than otherwise. But if the award refers on its face to an illegality which the enforcing judge considers as being contrary to public policy, the court will not enforce such award.

Again, the reason upon which a court may review the merits of an award as found in *Westacre Investmnet Inc*.[41] is a balancing exercise between the competing public interests of finality and illegality. There are some factors the judge must consider when it engages in such balancing exercise before arriving at a conclusion of

38. [1998] 2 Lloyd's Rep 111 at p. 112.
39. [1998] EWCA Civ 285.
40. *Soleimany v Soleimany* [1998] p. 800.
41. [1999] EWCA Civ1401.

whether to re-examine the merits of the award or not. These factors include but are not limited to, the nature of the illegality, the weight of the alleged illegality, the strength of the case in which there was illegality, and the measure to which it can be held that the alleged illegality was addressed by the arbitrator.[42] Nonetheless, the illegality must be sufficiently strong to override the presumption in favour of the public interest of the finality and enforceability of the arbitral award. A strong case will exist where the alleged illegality is of a kind which is globally excoriated, such as human trafficking, corruption, terrorism. However still, less strong cases will be where the principal contract is legal in the place of performance, but unlawful in England.[43]

Nigerian courts are also not empowered to re-examine the merits of arbitral awards. There is no provision in the ACA which permits a court to reopen issues of facts (and or law) resolved by an arbitrator.[44] The non-re-examination of the merits of the award by the courts at this stage accords with the cardinal policy of the ACA that, a court shall not interfere in any matter regulated by the Act save where so stipulated by the Act itself.[45] One of the effects of section 34 of the ACA is to ensure that a valid arbitral award on a voluntary submission operates between parties as a final and conclusive judgement of all issues submitted to arbitration.[46]

The doctrine of *res judicata* also accounts for the non-re-examination of the merits of an arbitral award in Nigeria. The law is that parties to the proceeding are prohibited from arguing the same issues in future proceedings between the parties over the same subject matter. In *Oyeroba v Olaopa*,[47] the court held that issue *estoppel* will arise in respect of matters which were raised, or ought to have been

42. Enonchong, N. [2000] "Enforcement in England of Foreign Arbitration Awards Based on Illegal Contracts" *Lloyds Maritime and Comparative Law Quarterly*, pp. 495 – 503; Hill, J. (200) "Illegality Under the Law of the Place of Performance and the Enforcement of Arbitration Awards" *Lloyds Maritime and Comparative Law Quarterly*, pp. 311 – 318.
43. Mustill, M. J. and Boyd, S. C. (2001) Commercial Arbitration: 2001 Companion Volume to the Second Edition, Butterworths, London, p. 90.
44. Asouzu, A. A. (2001) "Arbitration and Judicial Powers in Nigeria", *Journal of International Arbitration*, vol. 18, No. 6, pp. 617 – 640.
45. Section 34 Arbitration and Conciliation Act 2004; Okekeifere, A. I. (1997) "The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria" *Journal of International Arbitration*, vol. 14, No. 3, pp. 223 – 242.
46. *Ral Pal Gazi Construction Company Ltd v Federal Capital Development Authority* (2001) 5 SC (Pt. II) 16; Asouzu, A. A. (1999) "The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards", *Journal of Business Law*, March Issue, pp. 185 – 204.
47. [1998] 13 NWLR (Pt. 583) 512.

raised in the former proceedings but were not raised. It also applies to issues raised but not expressly determined as such matters are deemed to have been determined by implication and therefore *res judicata.*

From the provisions of section 31 of the ACA, it can be implied that an arbitral award has the same effect as a court judgement. The provisions of section 31(1) and (3) of the ACA is to the effect that an arbitral award shall be recognised as binding and may be enforced in the same manner as a court judgment or order. Like a court judgement, a valid arbitral award disposes of all issues between the parties that are submitted to arbitration. If a party sues on the same issues that have been disposed of by arbitration and on the same cause of action, the court will dismiss the action on the ground that the issues are *res judicata* on the basis of *issue estoppel*.[48]

In *Aye-Fenus Ent. Ltd. v Saipem Nig. Ltd*,[49] parties entered into a frame contract which contained an arbitration clause. When disputes arose, the parties referred the matter to arbitration. The arbitrators rendered a consensus award in favour of the appellant. While the appellant sought the leave of court to enforce the award against the respondent, the respondent filed a motion on notice for an order of court for extension of time within which to apply to set aside the arbitral award. The respondent's application was premised on the grounds *inter alia* that parties were not *ad idem* on the subject matter of the arbitration. The trial court refused the appellant's application for leave to enforce the award on grounds that the arbitral proceedings and the award were improperly procured and thus, granted the respondent's application to set aside the award. On appeal, Kekere-Ekun JCA in the lead judgement relied on the Supreme Court case of *Ras Pal Gazi Construction Company v FCDA*[50] and stated that:

> By virtue of Section 34 of the ACA, a court shall not intervene in any matter governed by the Act except where so provided in the Act. If, in an arbitration proceeding, an issue is raised for decision and has been decided, that makes it final. The parties cannot be allowed thereafter to re-open it. The reason is that just

48. Walters, G. L. (2012) "Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problem?" *Journal of International Arbitration*, Vol. 29, No. 6, pp. 651 – 680.
49. [2009] All FWLR (Pt. 460) 767.
50. [2001] FWLR (Pt. 58) 2027.

> as the parties would not be allowed to do so in the case of a judgement not appealed from, the point so decided is *res judicata*. The only jurisdiction conferred on the court is to give leave to enforce the award as a judgement unless there is a real ground for doubting the validity of the award.[51]

From the Court of Appeal and the Supreme Court judgements above, it is not clear what constitutes "a real ground for doubting the validity of the award." Thus, it is suggested that illegality, fraud, serious irregularity, or non- arbitrability of the subject-matter, that is apparent on the face of an award will constitute 'a real ground for doubting the validity of the award.' This view is fortified by the English Court of Appeal cases of *Soleimany* and *Westacre* cited above as persuasive authorities. Nevertheless, the implication of sections 31(1) and (3) and 34 of the ACA together with the Nigerian appellate courts' statements in Aye-*Fenus Ent. Ltd. v Saipem Nig. Ltd*; and *Ras Pal Gazi Construction Company v FCDA, a*re that the courts are not allowed to re-examine the merits of an award, except there is 'a real ground for doubting the validity of the award.' Hence, it remains to be seen what the Nigerian courts will designate 'a real ground for doubting the validity of an award' and thus, permit a re-examination of the merits of an award.

4.1.3. Residual powers of the competent authority in England and Nigeria

The text of article V (1) of the NYC indicates that recognition and enforcement of arbitral awards is at the discretion of the competent authority. The text provides that:

> Recognition and enforcement of the award *may be refused*, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought…[52]

According to Smith, the word "may" under article V of the NYC implies that a court must not necessarily grant an application for the non-enforcement of an arbitral award.[53] Accordingly, Redfern and Hunter noted that the text of article V (1) is

51. *Raz Pal Gazi* [2001] at pp. 799 – 800.
52. Article V (1) of the NYC.
53. Smith, S. L. (2007) "Enforcement of International Arbitral Awards under the NYC", in Practitioner's Handbook on International Arbitration and Mediation, ed. Rufus von Thulen Rhodes, *et al*, 2nd ed., Juris Publishing, New York, p. 318.

permissive and not mandatory.[54] Such discretion according to Alfons enables a competent authority to uphold the pro-enforcement bias of the NYC, though in many cases where a ground for refusal is established, the discretion is unlikely to be exercised in favour of recognition and enforcement.[55] This interpretation appears to be widely accepted by both common law and civil law commentators.[56]

However, notwithstanding this interpretation, some countries have adopted a different view. This may be attributed to the difference in the official translation of the NYC.[57] For example, the same text is read in French as "… ne seront refusee …que si …" (interpreted as "will only be refused if"). In German, it is read as "shall". Therefore, the competent authorities in those countries are precluded from exercising any discretion in respect of the same article V of the NYC. Nevertheless, according to Hass, they are allowed, pursuant to the effect of the text, to exercise their discretion in relation to granting leave for recognition and enforcement.[58] For Paulsson, to accomplish the aim of the NYC, which is to facilitate the recognition and enforcement of foreign arbitral awards, competent authorities must exercise the discretion necessary to enforce awards.[59] However, if there are serious oppositions to enforcement and a ground for refusal is established, competent authorities should

54. Blackaby, N., *et a*l (2009) Redfern and Hunter on International Arbitration, 5th ed., Oxford University Press, Oxford, pp. 638 – 640.
55. Alfons, C. (2010) Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and its Interpretation in case law and literature, Peter Lang GMbH, pp. 75 – 81.
56. *Hebei Import and Export Corp. v Polytek Engineering Corp. Ltd.* (1999) Yearbook Commercial Arbitration, vol. XXIII, pp. 652 – 667; *Pacific China Holding Ltd (British Virgin Islands) v Grand Pacific Holding Ltd.* (Hong Kong) (2011) Yearbook Commercial Arbitration, Vol. XXXVI, pp. 262 – 265; *China Nanhai Oil Joint Service Corp. Shenzhen v Gee Tai Holdings Co. Ltd* (1995) Yearbook Commercial Arbitration, Vol. XX, pp. 671 - 677;Paulsson, J. (1998) "May or Must under the NYC: An Exercise in Syntax and Linguistics", *Arbitration International*, Vol. 14, No. 2, pp. 227 – 230; Collins, L. *et al* (eds.) (1993) Dicey & Morris on The Conflict of Laws, 12th ed., Vol. 1, Sweet and Maxwell, p. 624; Lamm, C. B. and Spoorenberg, "The Enforcement of Foreign Arbitral Awards under the NYC, Recent Developments", a paper delivered at ICC Conference on International Arbitration, New Orleans, November 5, 2001; Kroll, S. (2007) "Recognition and Enforcement of Awards", in Arbitration in Germany: The Model Law in Practice, ed. Bockstiegel, K-H, *et al*, Kluwer Law International, S. 1061, para. 42.
57. Article XVI of the NYC *inter alia* provides "This Convention of which the Chinese, English, French, Russian and Spanish text shall be equally authentic …"
58. Hass, U. (2002) "Convention on Recognition and Enforcement of Foreign Arbitral Awards, New York 1958", in Weigand, F – B (ed.) Practitioners Handbook on International Arbitration, CH. Beck, Munich, p. 401.
59. Paulsson, J. (1998), pp. 227 – 230.

decline enforcement. In doing so, according to Sampliner and this thesis agrees, the ends of justice and the objective of the NYC are met.[60]

This conclusion leads to an examination of when this discretion should be exercised. This is important because the NYC does not provide guidelines on how it should be exercised.

Di Pietro and Platte have suggested three ways by which a competent authority can exercise the discretion.[61] Firstly, the discretion can be exercised pursuant to article VII (1) of the NYC which provides:

> The provisions of the present Convention shall not affect the validity of multi-lateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.[62]

According to the authors, the text of article VII (1) provides for recognition and enforcement under the national law or another treaty in the country where enforcement is sought if such law or treaty is more favourable than the NYC. In effect, the more favourable law will override the rules of the NYC. An example is where a competent authority may exercise its discretion to recognise and enforce an award that has been annulled at the seat of arbitration.[63] Secondly, the competent authority may rely on the doctrine of *estoppel* and waiver, regardless of whether one

60. Sampliner, G. H. (1997) "Enforcement of Nullified Foreign Arbitral Awards: Chromalloy Revisited" *Journal of International Arbitration*, Vol. 14, No. 3, pp. 141 – 149.
61. Di Pietro, D. and Platte, M. (2001) Enforcement of International Arbitration Awards: The NYC of 1958, Cameron May, London, p. 134.
62. Article VII (1) of the NYC.
63. In the *Netherlands, v OAO Rosneft* (Court of Appeal, Amsterdam) (2009) Yearbook Commercial Arbitration, vol. XXXIV, pp. 703-705; in Austria, *XZY v ABC* (Supreme Court) (2005) Yearbook Commercial Arbitration, Vol. XXX, pp. 421-426; in Belgium, *SONATRACH v Ford Bacon & Davis Inc.* (Court of First Instance) (1997) Yearbook Commercial Arbitration, vol. XV, pp. 370-375; in USA, *Chronmalloy Aero-services Inc. v Arab Republic of Egypt* 939 F. Supp 907, (US District Court 1996); in France, *Hilmarton Ltd. v Omnium de Traitement et de Valorisation OTV* (Supreme Court) (1994) Yearbook Commercial Arbitration, vol. XIX, pp. 655 – 661.

of the grounds under article V (1) was established.[64] Thirdly, a competent authority can rely on the distinction between domestic public policy and transnational public policy, even where a ground under article V (1) was satisfied. Thus, an award may offend domestic public policy, but not violate transnational public policy.[65]

With regards to England, the word "may" in the text of sections 66 and 103 of the AA 1996 is to the effect that the Court has discretion to either enforce an award by leave of court, in the same respect as a judgement, or as an order of the court.[66] It also implies the courts' discretion to refuse enforcement even where a ground for refusal is established by the unsuccessful party in the arbitration. The exercise of this discretion depends on the merit of each case and whether the court deems it appropriate to enforce or not to enforce the award as illustrated in *Soleimany and Westacre*.

Section 103 of the AA 1996 stipulates grounds upon which the court may refuse to grant leave to enforce a NYC award. Accordingly, even if the unsuccessful party in the arbitration establishes a ground for refusal as contained in subsection 2 (a) to (f), the court may still enforce the arbitral award. However, according to Mustill and Boyd, the approach of the court will necessarily depend on whether subsection (2) or (3) is applicable.[67] This is because under subsection (2), the court is weighing, at a distance, the repercussion of things which are said to have gone wrong at the seat of the arbitration. On the other hand, the intent of subsection (3) is to stipulate avenues of protecting the specific interest of the State of which the court is an integral part.[68] According to Clarkson and Hill, in exercising its discretion under subsection (3), the court is persuaded by an argument whether or not the award is in regard to a dispute which is not arbitrable, or whether or not it would be contrary to the public policy of

64. *Hebei Import & Export Corp. v Polytek Engineering Corp. Ltd* (1999) Yearbook Commercial Arbitration, vol. XXIII, pp. 652 – 667.
65. *Renusagor Power C. Ltd v General Electric Co*. (1994) Supp (1) S.C.C. 644; *ONGC v SAW Pipes Ltd*. (2003) 5 S.C.C. 705; Malhotra, O. O. (2007) "The Scope of Public Policy under the Arbitration and Conciliation Act, 1996", *Student Bar Review*, vol. 19, No. 2, pp. 23-29; *Kersa Holding Co. Luxembourg v Infancourtage and Famajuk Investment & Isny* (Luxembourg Court of Appeal) (1996) Yearbook Commercial Arbitration, Vol. XXI, pp. 617 – 625.
66. Section 66 relates specifically to leave to enforce an arbitral award, while section 103 relates to refusal of NYC awards.
67. Mustill, M. J. and Boyd, S. C. (2001), pp. 90 – 95.
68. As regards section 103 (2) of the AA 1996, Mustill and Boyd at pp. 90 – 91 suggest a list representing some of the considerations that mostly occur in practice.

England to recognise or enforce the award.[69] However, Lord Collins and others opine that the court's discretionary power to refuse enforcement where one of the grounds under section 103(2) and (3) is established is not open-ended.[70] Accordingly, Zaiwalla and Mayer respectively explained that the court in exercising its discretion under article V of the NYC will balance the interests between upholding the arbitral award as final and binding on the parties and protecting the public policy interest of the State.[71]

4.2. Procedures for enforcement of arbitral awards

Having identified the competent authority to determine an application for the enforcement of an arbitral award, this section examines the issue of the assignment of enforcement to the *lex fori* under the NYC (4.2.1.), the methods of enforcement of arbitral awards in England (4.2.2.) and Nigeria (4.2.3.), the time limit to enforce awards (4.2.4.) and evidential documents (4.2.5.) necessary for such enforcement. This section interrogates whether those procedures are adequate and capable of ensuring the enforcement of transnational commercial arbitral awards in England and Nigeria.

4.2.1. Enforcement under the *lex fori*

Article III of the NYC contains the key provision that Contracting States shall recognise arbitral awards as binding. Article III permits the *lex fori* (the enforcing court) to apply its own rules of procedure for the recognition and enforcement of foreign arbitral awards.[72] However, enforcing courts are mandated to recognise arbitral awards as binding and enforce them under the conditions set out in the NYC.[73] The affirmative obligation is evidenced by the use of the word "shall". Hence, Contracting States are obliged to recognise and enforce arbitral awards, save

69. Clarkson, C. M. V. and Hill, J. (2006) The Conflict of Laws, 3rd ed., Oxford University Press, Oxford, pp. 260 – 264.
70. Collins of Mapesbury, et al (eds.) (2012) Dicey, Morris and Collins on Conflict of Laws, 15th ed., Vol. 1, pp. 888 – 889.
71. Zaiwalla, S. (2003) "Challenging Arbitral Awards: Finality is Good but Justice is Better", *Journal of International Arbitration*, Vol. 20, No. 2, pp. 199 - 204 ; Mayer, P. (2003) "Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards" *Arbitration International*, Vol. 19, No. 2, pp. 249 – 262.
72. Schever, M. (2012) "Article III (Recognition and Enforcement of Arbitral Awards: General Rule)" in Wolff, R. (ed.), NYC on the Recognition and Enforcement of Foreign Arbitral Awards: A Commentary, C. H. Beck/Hart Publishing, pp. 193 – 206.
73. Cuniberti, G. (2009) "The Law Governing the Modality of Arbitral Awards" Arbitration International, Vol. 25, No. 3, pp. 347 – 364.

where the conditions in article IV are not satisfied or one of the exceptions in article V applies.[74]

4.2.2. Methods for enforcement in England

The procedure for the recognition and enforcement of arbitral awards is dependent upon where the award was rendered and the arbitration law that applied.[75] The procedure for enforcement can be by an action on the award at common law (i) and by summary procedures (ii). Enforcement by an action on the award at common law is not regulated by legislation. However, enforcement by summary procedure is regulated by legislation. In *National Ability SA v Tunna Oils & Chemicals Ltd (The Amazon Reefer)*[76] Thomas LJ of the Court of Appeal stated this point thus:

> It is necessary to say a little more about the two methods of enforcing awards obtained under the Arbitration Act 1950 (which continue to apply under the Arbitration Act 1996). (i) Enforcement of an award by action is by an ordinary action brought in the High Court. The procedure is not subject to any statutory provision, but it has long been established at common law as an action founded upon the implied promise to pay the award. It is given statutory recognition in section 66 (4) of the 1996 Act. (ii) Enforcement of the award in the same manner as a judgement is a statutory process…[77]

(i) Action on the award at common law

Generally, an arbitration agreement whether in writing or oral, presupposes a promise to honour a valid award.[78] Nevertheless, for an award to be recognised and enforced under the AA 1996 the arbitration agreement together with the award must

74. Borner, A. (2010) "Article III", in Kronke, H., *et al* (eds.) Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the NYC, Kluwer Law International, The Netherlands, pp. 115 – 141; Jinqzhou, T. (2008) "One Award – Two Obstacles: Double Trouble when Enforcing Arbitral Awards in China", *Asian International Arbitration Journal*, Vol. 4, No. 1, pp. 83 – 103.
75. Tevendale, C. and Cannon, A. (2013) "Enforcement of Awards", in Lew, J. D. M, *et al*, (ed.), Arbitration in England with Chapters on Scotland and Ireland, Kluwer Law International, The Netherlands, pp. 563 – 594.
76. [2010] 1 Lloyd's Rep 222.
77. *National Ability SA* [2010] at 223; concerning enforcement by registration, sections 1 and 2 of the Arbitration (International Investment Disputes) Act 1996 applies.
78. *Bremer OeI Transport GmbH v Drewry* [1933] 1 K. B. 753; *Bloemen v Gold Coast City Council* [1973] AC 115; Sutton, D. S. J. and Gill, J., (eds.) (2003) Russell on Arbitration? Sweet and Maxwell, London, pp. 228 – 229.

comply with the requirements of the Act.[79] However, where a valid award is not voluntarily implemented and the successful party cannot obtain enforcement or elect not to enforce the award pursuant to the AA 1996, it may sue on the award.[80] The idea of suing on the award at common law is predicated on the violation of the implied or express obligation in the arbitration agreement to honour the award.[81]

It seems there are two principal reasons why the successful party may want to sue on the award rather than utilise the summary procedure under the AA 1996. Firstly, where the arbitration agreement is not in writing, and secondly, where there is a defect in the arbitral award so that it does not comply with the provisions of the AA 1996.[82] In respect to the latter, it is unlikely that a court will grant leave to enforce the award especially, where such defect is determined as fundamental.[83] For example, a defect that relates to a breach of fair hearing will be determined as fundamental. In respect to the former, a court will most likely grant leave for the enforcement of the award, provided, it is satisfied that there was a valid oral arbitration agreement between the parties.

Action on the award at common law raises the question of whether or not the arbitration agreement and the principal contract are merged in the award as the basis for the cause of action. There is no clear authority on the issue as it has been the subject of many (at times conflicting) decisions and commentaries. For example, in *Norske Atlas Insurance Co. Ltd. v London General Insurance Co. Ltd*,[84] the plaintiffs based their action on the award and not the arbitration agreement. The court in its judgement stated thus:

> I quite agree that if the plaintiff were suing upon this treaty for marine losses sustained by them under insurances they were making, and were claiming as reinsurers, these pleas in defence would be fatal to the

79. Section 5 (1) of the Arbitration Act 1996, requires an arbitration agreement to be in writing or at least evidenced in writing. While section 52 (1) stipulates that parties are free to determine the form of an award, section 52 (2) provides that in the absence of any agreement to that effect, the default requirements of the section apply.
80. Sutton, D. S. J. and Gill, J., (eds.) (2003) Russell on Arbitration, 22nd ed., Sweet and Maxwell, London, pp. 228 – 229.
81. Pinkston, J., *et al*, (2012) "Jurisdictional Requirements for The Enforcement of Arbitral Awards against Defendants and their Ownership Interest in Subsidiaries: A Comparative Review". *International Arbitration Review*, No. 3, pp. 97 – 117.
82. Sutton, D. S. J. and Gill, J., (eds.) (2003), pp. 228 – 229.
83. Pinkston, J., *et al*, (2012), p. 101.
84. [1927] 28 Li. L. R. 104.

> plaintiffs. They would be suing upon a contract of marine insurance which, first of all, was not expressly in a policy, and secondly, was not stamped, and could not be stamped, as a policy needs to be. But in my judgement the question is not that at all. The plaintiffs here are suing on the award, it is, I think, necessary for the plaintiffs to prove, first, that there was a submission, secondly, that the arbitration was conducted in pursuance of the submission; and thirdly, that the award is a valid award, made pursuant to the provisions of the submission, and valid according to the *Lex fori* of the place where the arbitration was carried out and where the award was made.[85]

However, in *Bremer Oel Tansport GmbH v Dewry*[86] the plaintiffs' cause of action was based on the arbitration agreement and not the award, and the Court of Appeal per Slesser LJ stated that:

> The few cases which appear to support the view that an action may be brought upon the award in my view do not exclude in any event an action brought upon the agreement to refer differences and for this purpose, in my view, the submissions are here sufficiently stated to be in the charter party of November 19, 1929. Without, therefore, finally determining whether an action may or may not be brought on an implied contract in the award itself, I am clearly of the opinion that it may be brought upon an agreement containing a term to refer disputes, and that the present claim is properly pleaded as arising from such an agreement…[87]

Besides, in *Agromet Motorimport v Maulden Engineering Co.(Beds.)*[88] the issue was about application for leave to enforce an award made more than six years after the breach of contract to which the arbitral award related. Hence, the argument that the cause of action occurred upon a breach of the principal contract on which the award was based was rejected, and the court held:

> That an action to enforce an arbitrator's award was an independent cause of action, arising from the breach of an implied term in the arbitration agreement that the award would be honoured and not from the breach of the contract which had been the subject of the arbitration; that the six year limitation period imposed by section 7 of the Limitation Act 1980

85. *Norske Atlas* [1927] per Mr. Justice Mackinnon at pp. 106 – 107.
86. [1933] 1 K. B. 753.
87. *Bremer Oel Transport* [1933] at p. 765.
88. [1985] 1 W. L. R. 762.

> upon bringing of an action to enforce an award therefore began to run from the date of the failure to honour the award … [89]

The effect of the above cases is that the plaintiff in its case must plead and prove both the arbitration agreement and a valid arbitral award. It also implies, depending on the context, that the proceedings is classified, either as an action on the award or an action on the arbitration agreement.[90] Mustill and Boyd, writing from a merger of the arbitration agreement with the arbitral award perspective, stated:

> It has been sometimes necessary to decide whether the action is 'ground upon a contract' or brought 'to enforce contract.' This point would give greater weight to one or other element of the cause of action, depending on the circumstances, but at the end both of them must be present before the plaintiff can sue.[91]

Lord Collins of Mapesbury, *et al* in addressing the issue of whether or not the non-merger applies to foreign arbitral awards noted that:

> An English award may give rise to a cause of action estoppel or an issue estoppel, and if the award is a final award under the law governing the arbitration proceedings the claimant in the arbitration should not be entitled to sue on the original cause of action. There is no reason of legal policy why the same should not be true in the case of foreign award. In relation to foreign judgement the non-merge rule has been abolished by statute and there is no reason of policy or principle why the obsolete and anomalous rule of non-merge in relation to foreign judgement should not be extended to foreign awards. Indeed the consensual and contractual character of arbitration means that parties to an arbitration agreement impliedly promise to perform a valid award, and it should follow that they also promise not to take any action inconsistent with the submission to arbitration. Bringing proceedings on the original cause of action would be wholly inconsistent with the obligation under the submission and the subsequent award. If, therefore, under the law governing the arbitration proceedings the original cause of action is merged in the award, a claimant should not be entitled to rely on the original contract.[92]

The above authorities raise the question whether there is a particular ground (whether on the principal contract, arbitration agreement, or the award) upon which

89. *Agromet Motorimport* [1985] p. 763.
90. Collins of Mapesbury, *et al,* (eds.) (2012) at pp. 875 – 876.
91. Mustill, M. J. and Boyd, S. C. (1989) The Law and Practice of Commercial Arbitration in England, 2nd ed., Butterworths, p. 440
92. Collins of Mapesbury, *et al,* (eds.) (2012) at pp. 876 – 877

the successful party must bring its action on the award before the English Court. The argument whether or not the foreign arbitral award is merged in the principal contract or the arbitration agreement as the cause of action is linked to its counterpart, foreign judgement. The position in respect of a foreign judgement was to adopt the non-merger rule.[93] Hence, the successful party can rely on the original cause of action or on the judgement recovered to enforce the judgement. The non-merger rule has since been abolished by statute.[94] Thus, there is a gap on judicial authority in this regard at common law. To close this gap, Lord Collins of Mapesbury, *et al*, suggest that the law that regulates the arbitration proceedings should determine the ground upon which the action should be brought.[95] If the law takes the view that the original cause of action is merged into the arbitral award, then, the successful party can depend on such cause of action to enforce the foreign award.

It appears the current position of the English Courts is to enforce the arbitral award, and not the principal contract. This is evidenced in *Westacre Investments Inc. v Jugoimport – SDPR Holding Co. Ltd*.[96] The 1st and 2nd defendants appointed the plaintiffs as consultants in respect of procurement contracts for the sale of military equipment by Yugoslavia to Kuwait. The consultancy agreement stipulated that the contract 'shall be governed and construed under the laws of Switzerland' and any dispute arising out of the contract shall be settled by arbitration in accordance with the Arbitration Rules of the ICC in Geneva. When disputes arose, the parties referred to arbitration in Switzerland. The ICC arbitrators found in favour of the plaintiffs and held that the defendants failed to establish that the parties to the contract procured it by illicit means such as bribery.

To enforce the award, the plaintiff commenced legal proceedings on the award. The defendants challenged the enforcement of the award and argued that the principal contract was procured by illicit means. The Commercial Court held *inter alia*:

> …this was not a case of direct enforcement of the underlying contract, but of enforcement of the award

93. Hascher, D. T. (1996) "Recognition and Enforcement of Arbitration Awards and the Brussels Convention", *Arbitration International*, Vol. 12, No. 3, pp. 233 – 250.
94. Section 34 of the Civil Jurisdiction and Judgements Act 1982.
95. Collins of Mapesbury, *et al*, (eds.) (2012) at p. 877
96. *Westacre Investment* [1999].

> which was a valid award in accordance with the law, Swiss Law, chosen by the parties and one made by arbitrators having jurisdiction in respect of a contract governed by Swiss Law; the arbitrators addressed the issue whether the consultancy agreement was illegal under Kuwait law and whether under Swiss Law it was invalid because of lobbying by the plaintiffs, and they concluded that it was neither …[97]

On appeal, the Court of Appeal upheld the lower court's decision and stated that:

> Although the award was not isolated from the underlying contract, it was relevant that the court was considering the enforcement of the award, not the underlying contract…[98]

In the light of the above cases, it is argued in this thesis that the cause of action of the arbitration in the principal contract is merged with the award. Accordingly, the court will consider the award and not the principal contract. The cause of action will not be re-litigated or re-arbitrated as the award may give rise to a cause of action estoppel or an issue estoppel.[99] All the more so, an action on the award is a fresh cause of action which requires the plaintiff to prove its case. This position of the law is demonstrated in *Noble Assurance Co. v Gerling-Konzern General Insurance Co.*[100]

Noble Assurance concerned an application by the claimants to continue a temporary injunction restraining the defendant from taking further steps in an action against the claimant in Vermont. The claimant provided cover for Shell under an insurance policy which contained an arbitration clause. The defendant reinsured the claimant and the reinsurance policy stated that "all provisions of the underlying policy … shall apply to this policy as though this policy was a direct insurance", and "the insurance provided by this policy shall follow all the terms and conditions of the Noble Policy." When disputes arose between the parties, arbitration proceedings were commenced by the claimant and Shell against the defendant. The arbitrators

97. *Westacre Investment* [1999] p. 112.
98. [1999] EWCA Civ 1401; [2000] QB p. 288 at 289; In *The Bumbesti* [1999] 2 Lloyd's Rep. 481, the Court of Appeal also held that an action on the award is not one on an agreement which is in relation to the principal contract.
99. Erk. N. (2014) Parallel Proceedings in International Arbitration: A Comparative European Perspective, Kluwer Law Int'l., The Netherlands, pp. 164 – 165; Ramaswamy, P. (2002) "Enforcement of Annulled Awards an Indian Perspective", *Journal of International Arbitration*, Vol. 19, No. 5, pp. 461 – 472.
100. [2008] Lloyd's Rep. I R 1.

rendered a partial award in favour of the claimant. Dissatisfied with the award, the defendant commenced legal proceedings in Vermont against the claimant and Shell seeking *inter alia*, a temporary injunction restraining the claimant and Shell from taking any steps to confirm the award. The Vermont court granted the temporary restraining order. In a later judgement, the order was set aside on the ground that the defendant's allegations in the suit had been put to the arbitrators and same dismissed by the arbitrators. The court held that the doctrine of *res judicata* applied. Toulson LJ stated that:

> Judge Sessions has already concluded that Gerling's claim did not pass the test of being likely to succeed on the merit or even raising sufficiently serious questions to make them a fair ground for litigation, because of the probability that they are defeated by the doctrine of *res judicata*. A declaration of this court declaring the scope and affirming the validity of the award would provide a further foundation on which Noble and Shell would be entitled to rely. It could … provide a platform not only for *res judicata* but for collateral *estoppel*.[101]

Thus, an action on the award constitutes a fresh cause of action based upon a breach of the implied or express promise in the arbitration agreement to honour the award.[102] This requires the successful party to prove its case as illustrated in *Delta Civil Engineering Co. Ltd. v London Docklands Dev. Corp.*[103] Staughto LJ quoting Devlin J[104] stated thus:

> The matter which the plaintiffs have to prove in order to succeed are, first, the making of the contract which contains the submission, secondly, that the dispute arose within the terms of the submission, thirdly, that arbitrators were appointed in accordance with the clause which contain the submission, fourthly, they

101. *Noble Assurance Co* [2008].
102. Karali, M. and Ballantyne, J. (2009) "England" in Weigand, F-B. (ed.) Practitioner's Handbook on International Commercial Arbitration, 2nd edn., Oxford University Press, p. 408.
103. [1999] EWCA Civ 698.
104. *Christopher Brown Ltd* v Genossenschaft Oesterrecihischer GmbH [1954] 1 QB 8.

> must prove the making of the award, and lastly, that the amount awarded has not been paid.[105]

(ii) Summary procedures

Summary procedures entail seeking the court's permission to enforce an award in the same manner as a judgement of the court or to have the award entered as a judgement or order of the court to the same effect.[106] The procedures are stipulated under sections 66 and 101 of the AA 1996.[107] These provisions are mandatory and follow successively.[108] Thus in order to benefit from the provisions, the enforcing party must first seek and obtain leave [now known as 'permission' under the Civil Procedure Rules (CPR) 1998] of court to enforce the arbitral award as a judgement or order of the court. Secondly, the court may enter judgement in terms of the arbitral award. [109]

The method of enforcement pursuant to sections 66 and 101 of the AA 1996 is set out in Part 62 of the CPR 1998. Under rule 62.3, an enforcing party is required to apply to the court for permission to enforce an award in an 'Arbitration Claim Form'. Such application may be made without notice to the defendant. In *National Ability SA v Tinna Oils & Chemicals Ltd (The 'Amazon Reefer')*[110] the Court of Appeal stated that:

> For many years it has been the practice of parties who seek to use the enforcement mechanism of the court in England and Wales to use the procedure under section 26 of the 1950 Act and section 66 of the 1996 Act to enforce an award. The procedure is straight forward.

105. *Delta Civil Engineering* [1999].
106. Mustill, M. J. and Boyd, S. C. (2001) at p. 210.
107. Pursuant to section 2 (2) (b) of the AA 1996, section 66 of the Act applies even if the seat of arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined. Section 101 of the AA 1996 relates to recognition and enforcement of NYC awards. While section 36 concerns recognition and enforcement of certain foreign awards which are not NYC awards.
108. Mustill, M. J. and Boyd, S. C. (2001) at p. 210.
109. Section 66(1) and section 101(2) of the AA 1996 respectively; Tevendale, C. and Cannon, A. (2013) pp.563 – 594.
110. [2010] 1 Lloyd's Rep 222.

> The parties make an application to the court on an *ex parte* (or without notice) basis…[111]

However, the enforcing party must ensure that the appropriate arbitration claim form is served on the defendant within one month from the date of issue. The claim form must disclose all material facts to the court. Failing which, the court's order granting leave may be set aside. In the recent case of *Y v S*[112] the court's decision suggests that a failure on the part of the claimant to use the appropriate claim form for an application for leave to enforce an award would be fatal to the success of the application. However in this case, following a concession from the defendant's counsel that the failure to comply was not fatal to the application for leave to enforce, the court granted the application though not on terms sought. It remains to be seen whether such waiver and the court's flexibility will excuse an applicant that breaches the requirements of rule 62.18 of the CPR 1998.

A court enforcement order with regards to an applicant's motion for permission to enforce an arbitral award against the defendant must be in terms of the award. The order must not change the content of the award in any form. For example, such order must not change the names of the parties or award interest, if such alteration was not mentioned in the arbitral award. In *Norsk Hydro ASA v State Property Fund of Ukraine and ors.*,[113] the parties' contract for the development of Hydro TIS Yuzhny Terminal in Ukraine contained an arbitration clause. When disputes arose, the applicants commenced arbitration against 'the Republic of Ukraine, through the State Property Fund of Ukraine'. An award was rendered in favour of the applicants against 'the Republic of Ukraine through the State Property Fund of Ukraine.' The applicants sought the leave of court to enforce the award against 'the State Property Fund of Ukraine' and 'the Republic of Ukraine'. Though the parties were different from the ones named in the arbitral awards, leave was granted. The respondent brought this action to set aside the leave to enforce the award. One of the issues the court considered was whether an enforcement order (leave to enforce an award) granted against a party not named in the award itself can be sustained. The court set aside the enforcement order because it provided for enforcement of the award against

111. *National Ability SA* [2010]; also in *Walker & ors. v Rowe & ors*. [2000] 1 Lloyd's Rep. 116. at p. 119, Aikens J stated that, "an application to enforce an award pursuant to section 66 of the AA 1996 can be made without notice by using the practice form specified."
112. [2015] EWHC 612 (Comm).
113. [2002] EWHC 2120 (Comm).

different parties, 'the Republic of Ukraine and the Ukraine State Property Fund', whereas, the arbitrators rendered the award against 'the Republic of Ukraine through the State Property Fund'. Gross, J stated the law thus:

> … an order providing for enforcement of award must follow the award. No doubt, true "slips" and changes of name can be accommodated; suffice to say, that is not this case. Here it is sought to enforce an award made against a single party, against two separate and distinct parties…In my judgement, this is all inappropriate…The right approach is to seek enforcement of an award in terms of the award. Such considerations are reinforced and put beyond argument when regard is had to section 101 and [section 66] of the 1996 Act … It seems to me, the … order was not an order "in terms of the award"; it was an order in different terms … that difference matters. There was no jurisdiction to enforce the award in the terms of the … order and that order must be set aside.[114]

Also, in *Walker & ors. v Rowe & ors*,[115] the applicants sought to set aside the rate of interest as contained in a High Court Order of May 7, 1999 granted to enforce an arbitral award as a judgement of the court against the respondents. The respondents (counter applicants) also sought to set aside the High Court Order mandating them to pay interest on the arbitral award. One of the issues before the court was whether the court can order a "post-award" interest where there is no reference in the arbitral award to "post-award" interest on the sum awarded by the arbitrator. The court held that under the AA 1996, if an award is to be entered by a court as a judgement or order of the court, it has to be entered "in terms of the award". The court reasoned that section 49(4) of the Act makes it the sole responsibility of the arbitrator to decide whether or not to award "post-award" interest. To add "post-award interest" which is not part of the terms of the award will amount to an alteration of the arbitral award by the court.

The court's decision is consistent with the provisions of section 1(c) of the AA 1996 which indicates that the court should not intervene in matters that are covered by Part I of the Act which includes sections 49(4) and 66. Thus, it is submitted in this thesis that the combined effect of sections 1(c), 49(4) and 66 of the AA 1996 is that the court lacks jurisdiction to alter the content of an arbitral award provided.

114.*Norsk Hydro ASA* [2002].
115.[2000] 1 Lloyd's Rep 116.

It is noted that section 66(3) of the AA 1996 precludes enforcement of an arbitral award rendered outside the substantive jurisdiction of the arbitrator, provided the party contesting jurisdiction has not lost the right to do so.[116] Loss of right to contest the jurisdiction of the arbitrator varies from case to case. Any objection to the arbitral award on the question of jurisdiction has to be made within 28 days of the publication of the award or as agreed by the parties. Failing which, the party contesting jurisdiction will lose that right. Such loss of right is subject to the court's discretion to extend time.[117]

In *People's Insurance Co. of China and another v Vysanthi Shipping Co. Ltd.*,[118] the defendant commenced arbitration in London against the claimants pursuant to an arbitration clause contained in a bill of lading. The defendant appointed its arbitrator, but the claimants did not. The defendant's arbitrator pursuant to section 17(2) of the AA 1996 became the sole arbitrator. Though the claimants objected to the jurisdiction of the arbitrator, they appeared and defended the claim under reservation. The arbitrator after hearing and considering evidence from both parties held that he had jurisdiction under the arbitration clause. Consequently, the arbitrator rendered an award in favour of the defendant. The defendant obtained leave of court to enforce the award subject to the right of the claimants to apply to set aside that order. The claimant brought this action to set aside the arbitral award on the grounds that the arbitrator lacked jurisdiction to render the award. They also requested the court under section 80(5) of the AA 1996 to exercise its discretion by extending time for them to challenge the arbitrator's award on the question of jurisdiction. The court held that pursuant to the AA 1996, any challenge to the arbitrator's award on jurisdiction has to be made within 28 days of the publication of the award. The consequence of a failure to do so is that the party objecting to the jurisdiction loses that right.[119]

Another instance where a party may forfeit its right to challenge the jurisdiction of the arbitrator is where it intentionally participated in arbitral proceedings that are improperly conducted.[120]. Alternatively, if the objecting party participated in the

116. Merkin, R. and Flannery, L. (2008) Arbitration Act 1996, 4th edn., Informa, London, p. 150.
117. Sections 73(2) and 79 of the AA 1996.
118. [2003] 2 Lloyd's Rep 617.
119. *People's Insurance Co. of China and another* [2003].
120. Section 73(1) of the AA 1996.

arbitral proceedings, it must satisfy the court that it raised the objection timeously during the arbitral proceedings.[121] However, if a jurisdictional issue has been raised and the issue resolved by a preliminary ruling during the arbitral proceedings such issue cannot be reopened at the enforcement stage of the award.[122] This is because the resolution of such jurisdictional issue by the arbitrator will constitute *res judicata* precluding parties from raising it at the enforcement stage of the award.

4.2.3. Methods for enforcement in Nigeria

Commercial arbitral awards may be enforced by a common law action on the award (i), by summary procedure (ii)[123] and by registration (iii).[124]

(i) Common law action on the award

Commercial arbitral awards in Nigeria may be enforced by suing upon the award at common law. It is irrelevant that the award is domestic or was rendered in a country that has no reciprocal arrangement with Nigeria.[125] According to Ezejiofor, where the award is rendered in a country that has no reciprocal arrangement with Nigeria, enforcement of such award may be possible by bringing a fresh action on the foreign arbitral award itself as the cause of action.[126] The action for enforcement is premised upon the fact that the arbitration agreement contains an implied or express obligation to perform the resulting award. Thus, failure to perform a valid arbitral award may constitute a breach of the arbitration agreement. Hence according to Orojo and Ajomo, the successful party may be entitled to sue in respect of such breach and to obtain judgement in terms of the award.[127]

To succeed in the action, the successful party must prove four issues: (i) the existence of the arbitration agreement, (ii) parties' submission to the arbitration

121. Under section 72 of the AA 1996, a party may decide not to participate in the arbitral proceedings and still challenge the proceedings or the arbitral award in court.
122. Aeberli, P. (2005) "Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map", *Arbitration International*, Vol. 21, No. 3, pp. 253 – 299.
123. Sections 31(1) and 51 of ACA 2004 and Article IV of the NYC.
124. Sections 3 and 4 Foreign Judgement (Reciprocal Enforcement) Act 1960.
125. In *Alfred Toepper Inc. (New York) v Edokpolor* (1965) 1 All NLR 292, the Supreme Court upheld the validity of a claim brought by the plaintiff, though no reciprocity arrangement had been concluded between Nigeria and the United States of America.
126. Ezejiofor, G. (1981) "Enforcement of Arbitration Awards in Nigeria". *The Journal of Business Law*, pp. 319 – 323; Ojukwu, E. (1996) "Enforcement of Foreign Judgement in Nigeria", International Legal Practitioner, Vol. 21, No. 4, pp. 131 – 140.
127. Orojo, J. O. and Ajomo, M. A. (1999) Law and Practice of Arbitration and Conciliation in Nigeria, Mbeyi & Associates Nigeria Limited, Lagos, pp. 302 – 304.

proceedings, (iii) the proper conduct of the arbitration proceedings in accordance with the agreement and, (iv) the validity of the arbitral award.[128] A successful party who seeks to enforce its award by suing on the award at common law need not obtain leave of the court or judge. There is also no need to commence a fresh action on the principal contract.[129] This is because the arbitral award, just like a court judgement constitutes a cause of action and is enforceable at common law upon proof. In *Alfred Toepfer Inc. (New York) v Edokpolor*,[130] the Supreme Court of Nigeria held that a foreign arbitral award is enforceable in Nigeria by suing upon the award. The court further stated that for the enforcing party to succeed in the action, it must prove the existence of the arbitration agreement, the proper conduct of the arbitration in accordance with the agreement and the validity of the award.

The successful party in the arbitration can sue on the award through a summary judgement procedure or an undefended list procedure.[131] Where such procedure is chosen then, the successful party must show that the unsuccessful party has no defence to its action. If the action succeeds, judgement may be entered without the successful party going through the cumbersome process of calling witnesses to prove its case.[132] However, if the action fails, the successful party may then need to prove its case and the proceedings will go to full trial.

(ii) Enforcement through summary procedures

Enforcement of arbitral awards under section 31 of the ACA relates to domestic arbitration only.[133] As highlighted earlier in this thesis, recognition and enforcement is not the same thing.[134] An arbitral award may be recognised without being enforced, yet an award enforced is an award recognised.[135] Under section 31(1), an award though recognised as binding between the parties to the arbitration, can only

128. *Alfred Toepfer Inc. (New York)* (1965).
129. Dakas, C. J. D. (1998) "The Legal Framework for Recognition and Enforcement of International Commercial Arbitral Awards in Nigeria: Dilemmas and Agenda for Action", *Journal of International Arbitration*, vol. 15, No. 2, pp. 95 – 116.
130. (1965) 1 All NLR 292; *Murmansk State Steamship Line v Kano Oil Millers Ltd* [1974] NCLR 1; [1974] 1 All NLR 402.
131. Nwakoby, G. C. (2004) The Law and Practice of Commercial Arbitration in Nigeria, Iyke Ventures Production, Enugu, Nigeria, pp. 225 – 227.
132. *Peenok Investments Ltd. v Presidential Hotel Ltd* [1982] 12 S. C. 1.
133. *Commerce Assurance Ltd. v Alli* [1992] 3 NWLR (Pt. 233) 710.
134. Blackaby, N., *et al*, (2015) Redfern and Hunter on International Arbitration, 6th edn., Oxford University Press, Oxford, pp. 610 – 612.
135. Akpata, E. (1997) The Nigeria Arbitration Law in Focus, West African Book Publishers Limited, Lagos, Nigeria, pp. 91 – 92.

be enforced against the unsuccessful party upon a written application to the court by the successful party. The written application for enforcement may be to enforce the award directly, or to enter judgement in terms of the award.[136]

Though section 51 of the ACA relates to the recognition and enforcement of foreign arbitral awards, it is a re-enactment of section 31. However, like section 31, the application for enforcement of arbitral award under section 51 must be made to the court in writing. Nonetheless, a major difference between sections 31 and 51 is that no rule of the Schedules to the ACA relates to section 31. The provision of the Second Schedule to the ACA which re-enacts the NYC verbatim relates to section 51. According to Idornigie the conditions for enforcement are in actual fact subject to the provision of article IV of the NYC as contained in the Second Schedule to the ACA.[137] These conditions are examined under the evidential requirements (3.2.4) below.

However, unlike article I(3) of the NYC, section 51 of the ACA makes no reciprocity qualification.[138] In effect, the text of section 51(1) of the ACA which reads *inter alia* "irrespective of the country in which it is made" indicates that a foreign arbitral award pursuant to section 51 is made subject to section 32 of the ACA only.[139] Thus, it can be argued that by virtue of section 51(1) of the ACA, all foreign arbitral awards, non-NYC awards inclusive, are enforceable in Nigeria. In *Tulip Nigeria Limited v Noleggioe Transport Maritime SAS*, the Court of Appeal stated that:

> By the provision of section 51(1) of the Arbitration and Conciliation Act, an arbitral award shall irrespective of the country in which it is made, be recognised as binding subject to the provisions of the Act, and shall upon application in writing to the court, be enforced by the court.[140]

136. Section 31 (3) of the ACA provides: "an award may by leave of the court or a judge, be enforced in the same manner as a judgement or order to the same effect."
137. Idornigie, P. O. (2002) "The Relationship between Arbitral and Court Proceedings in Nigeria" *Journal of International Arbitration*, Vol. 19 No. 5, pp.443 – 460.
138. Section 51(1) of the ACA 2004 provides thus: "An arbitral award shall, irrespective of the country in which it is made, be recognised as binding and subject to this section 32 of this Act, shall, upon application in writing to the court, be enforced by the court."
139. Idorinigie, P. O. (2002), p. 448.
140. [2011] 4 NWLR (Pt. 1237) at p. 254.

Conversely, Nwakoby has argued that:

> Knowing the attitude of the Nigerian courts and the decisions of the Supreme Court of Nigeria in *M. S. S. Line v Kano Oil Millers* [1974] NNLR 1 and *A. C. Toepter Inc of New York v John Edokpolor* [1965] 1 All NLR 292, reciprocity of treatment shall also be required in enforcement of awards pursuant to section 51 of the Act. It may be wrong to think that because the legal draftsmen failed to include reciprocity clause in that section of the law, that all international awards are enforceable pursuant to it … reciprocity of treatment had been interpreted by the Supreme Court … to be material before any foreign judgement including arbitral awards could be enforced in Nigeria and this is an acceptable practice recognised internationally.[141]

This thesis argues differently. Firstly, the decisions of the Supreme Court in *Murmansk State Steamship Line v Kano Oil Millers*[142] and *A. C. Toepter Inc New York v John Edokpolor*[143] were not based on the interpretation of section 51(1) of the ACA. Both cases pre-dated the ACA.[144] And section 51 of the ACA is not subject to the Kano State Arbitration Law or the Foreign Judgements (Reciprocal Enforcement) Act which the Supreme Court interpreted in the cases. Secondly, the text of section 51(1) of the ACA which is premised on article 35(1) of the UNCITRAL Model Law is precise and unequivocal. To this end, it is clear that the legal draftsmen did not fail to include reciprocity clause but drafted the said section 51 according to the intentions of the lawmakers. Therefore, it can be argued that the effect of section 51(1) of the ACA is that an arbitral award shall, regardless of the country in which it is rendered, be recognised as binding and subject to sections 32 and 51, shall, upon written application to the high court, be enforced by the court. To include or imply a reciprocity requirement means to include a clause not contemplated by the

141. Nwakoby, G. C. (2004) supra pp. 223 – 224; Nwakoby, G. C. and Aduaka, C. E. (2015) "The Recognition and Enforcement of International Arbitral Awards in Nigeria: The Issue of Time Limitation" *Journal of Law, Policy and Globalization*, vol. 35, pp. 116 – 125.
142. [1974] NNLR 1.
143. *Alfred Toepter Inc. (New York).*
144. *M. S. S. Line v Kano Oil Millers* was decided pursuant to Kano State Arbitration Law, while *A. C. Toepter Inc. New York v John Edokpolor* was decided pursuant to the Foreign Judgements (Reciprocal Enforcement) Act 1960.

lawmakers. Clearly if the lawmakers intended to include a reciprocity requirement, they would have used express terms.

(iii) Registration before a High Court

Foreign commercial arbitral awards can also be enforced by application to the high court for registration of the award. Such registration must be done either pursuant to the Reciprocal Enforcement of Judgements Act 1958 (REJA 1958) or the Foreign Judgements (Reciprocal Enforcement) Act 2004 (FJREA 2004).[145] The REJA 1958 provides a simplified registration procedure. The procedure is to expedite the reciprocal recognition and enforcement of judgements obtained in certain commonwealth countries.[146] The application of the REJA 1958 covers arbitral awards, if the award becomes enforceable at the seat of arbitration in the same manner as a judgement given by the court.[147]

Before a judgement or arbitral award can be enforced under the REJA 1958, it must first be registered in the high court. There are four fundamental conditions for the registration and consequent enforcement of an award under the Act. Firstly, the arbitral award must be a final and conclusive award of an arbitration proceeding. Such arbitral award must order a definite and fixed sum payable.[148] Unliquidated arbitral awards are normally not enforceable under this Act. This is because, according to Bamodu, it would require the registering court to police and supervise the terms of the original award.[149] However, it may be possible to obtain the same or similar relief from the court in certain circumstances. If a foreign judgement or arbitral award is not conclusive or is for an unliquidated sum, the applicant may commence fresh action at the high court relying on the arbitral award as the original

145. In *Marine and General Assurance v Overseas Union & 7 ors* [2006] 4 NWLR (Pt. 971) 641, the Supreme Court held that the law applicable to the proceedings for the recognition of foreign judgements in Nigeria is the Reciprocal Enforcement of Judgements Act 1958 and the Foreign Judgements (Reciprocal Enforcement) Act. The Supreme Court's decision has been followed by the Court of Appeal in *Conoil Plc v Vitol S. A*. [2012] 2 NWLR (Pt. 1283) 50.
146. Section 9 of the Reciprocal Enforcement of Judgements Act 1958.
147. Section 2(1) of the REJA 1958 provides *inter alia*: "judgement … includes an award in proceedings, on an arbitration if the award has in pursuance of the law in force in the place where it was made, become enforceable in same manner as a judgement given by a court in that place."
148. Section 2(1) of the REJA 1958.
149. Bamodu, O. O. (2012) "The Enforcement of Foreign Money Judgements in Nigeria: A Case of Unnecessary Judicial Pragmatism?" *Commonwealth Law Journal*, Vol. 12, No. 1, pp. 1 – 31.

cause of action. To this end, the applicant must have a cause of action under Nigerian law and be able to show that the registering court has jurisdiction to hear the dispute.[150] If the action is defended, the applicant may seek to rely upon an 'issue estoppel' regarding the findings of fact by the arbitrator to prevent a retrial of the issues.[151] Secondly, the application for registration and consequent enforcement must be made within 12 months from the date the arbitral award was rendered (or such longer period as the court may allow).[152] Thirdly, the award debtor must not have asked a competent court to set aside the award. In effect, the arbitral award must not have been set aside by a competent court or a set aside application pending.[153] Lastly, it must be 'just and convenient' that the arbitral award should be enforced in Nigeria.[154]

Where an arbitral award is registered pursuant to the REJA 1958, it has for the purposes of enforcement the same consequences as the judgement of the registering court. The registering court has the same control and jurisdiction over the arbitral award as it does over one of its own decisions. However, the registering court's control and jurisdiction is only to the extent it relates to execution.[155]

Enforcement of foreign arbitral awards under the FJREA 2004 is similar to the REJA 1958. Like REJA 1958, the application of FJREA 2004 covers foreign arbitral awards if the award becomes enforceable at the seat of arbitration in the same manner as a judgement of a court.[156] However, the scope of application of the FJREA 2004 is wider than the REJA 1958. Unlike REJA 1958, it applies to countries other than the United Kingdom and other parts of Her Majesty's protection (now commonwealth countries).[157] Pursuant to section 3(1) of the FJREA 2004, it seems that the deciding factor of countries that would benefit from the Act is substantial reciprocity arrangement with Nigeria. This is made possible if the Minister of Justice is satisfied that a foreign country will accord Nigerian judgements substantial reciprocity treatment. If satisfied, the Minister may by order direct that,

150. Ojukwu, E. and Ojukwu, C.N. (2009) Introduction to Civil Procedure, 3rd ed., Helen-Roberts Press, Abuja, p. 54.
151. Bamodu, O. O. (2012), pp. 10 – 15.
152. Section 3(1) of the REJA 1958.
153. Section 3(2)(e) of the REJA 1958.
154. Section 3(1) of the REJA 1958.
155. Section 3(3) of the REJA 1958.
156. Section 2(1) of the FJREA 2004.
157. Bamodu, O. O. (2012), p. 25.

judgements of the superior courts or arbitral awards made in that country be enforced in Nigeria.[158]

4.2.4. Time for application to enforce an award

Time to apply for enforcement of the award is regulated under national law and this varies from country to country.[159] This is because the NYC is silent on the issue. In a bid to harmonise the time within which an enforcing party may seek to enforce its award, the suggestion of a ten year period was rejected by the UNCITRAL Model Law working group. The working group reasoned that:

> Many legal systems already had rules on the period for enforcement of arbitral awards, either by assimilating for this purpose arbitral awards to court judgements or by special legislation. Harmonisation of these rules would be difficult to achieve since they were based on the differing national policies closely linked to the procedural law aspects of state.[160]

In England, limitation period for action to enforce an arbitral award is imposed as a matter of substantive law. The Limitation Act 1980 applies to arbitration proceedings in the same manner as court proceedings. Section 7 of the Limitation Act 1980 provides that:

> An action to enforce an award, where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued

The issue that then arises is the determination of the text, "cause of action accrued." Is it when the breach of the principal contract or the arbitration agreement, or the

158. Section 3(1) of the FJREA 2004; The Minister is yet to make any such order extending the provisions of Part 1 of the Act to other countries outside of the commonwealth. This is so because such an 'order' can only be made to cover a country which offers reciprocal treatment to the judgments of Nigerian courts.
159. For example, in Australia it is six years pursuant to the Limitation Law of each state and territory; Gary, S. (2000) "International Enforcement of Arbitral Awards", *International Company and Commercial Law Review*, Vol. 11, No. 7, pp. 253 – 259.
160. Quoted in Davidson, F. P. (1991) International Commercial Arbitration: Scotland and the UNCITRAL Model Law, Sweet and Maxwell, Edinburgh, p. 257.

award occurred? In *Agromet Motorimport Ltd (Poland) v Maulden Engineering Co. (Beds) Ltd*,[161] Otton J answered the question thus:

> That an action to enforce an arbitrator's award was an independent cause of action, arising from the breach of an implied term in the arbitration agreement that the award would be honoured and not the breach of the contract which had been the subject of the arbitration; that the six year limitation period imposed by section 7 of the Limitation Act 1980 upon the bringing of an action to enforce an award therefore began to run from the date of the failure to honour the award …[162]

In *Minerals and Metal Trading Corp. of India v International Bulk Shipping and Services Ltd*,[163] the Court of Appeal agreed with the conclusion reached by Otton J in *Agromet Motorpoint Ltd*. The court held that time begins to run from the date on which the implied promise to perform the arbitral award is breached and not from the date of the arbitration agreement or from the date of the arbitral award. Accordingly, where the six year limitation period expires, the successful party may lose its right to enforcement. This point was illustrated in *International Bulk Shipping and Services Ltd. v Minerals and Metals Trading Corp. of India*[164] where the Court of Appeal held that:

> The six year limitation period began whenever the claimants became entitled to enforce the awards; in legal terms, when their cause of action arose; conceptually the claim arose under a contractual undertaking to honour the award; the relevant cause of action arose sometime before the end of 1984 and the limitation period had expired before the applications were made; this factor alone meant that the order of Mr Justice Waller setting aside the leave given ex parte by Mr Justice Saville to issue and serve fresh proceedings in 1993 should be upheld.[165]

161.*Agromet Motorimport* [1985].
162.*Agromet Motorimport* [1985] at p. 763
163.(1996) 1 All E. R. 1017.
164.[1996] 2 Lloyd's Rep 474.
165.*Shipping and Services Ltd* [1996] at p. 474.

From the above decisions, the time to enforce the arbitral award starts to run from the day the implied promise to perform the award is breached. It is not from the date the principal contract was breached, nor from the date of the arbitral award.[166]

To determine the time for commencing an action on the arbitral award, it will be necessary to establish, as suggested by McGee, that one of the following events has occurred. (i) that the time (if any) for implementing the arbitral award as stipulated in the principal contract has elapsed; (ii) where (i) does not apply, that time (if any) as contained in the arbitral award for implementing the award has elapsed; (iii) where neither (i) nor (ii) applies, that a reasonable time for implementing the arbitral award since the award was rendered as elapsed and; (iv) in any of (i), (ii), or (iii) above, that the unsuccessful party has shown a clear and unequivocal intention not to perform the arbitral award.[167]

However, sections 29 and 30 of the Limitation Act contain an exception to the six year limitation rule. The limitation period of six years can be postponed where there is an acknowledgement or part payment of the arbitral award by the unsuccessful party. This is evidenced in the case of *Good Challenger Navegante S. A. v Metal Exportimport S. A.*[168] The respondent owners of the vessel (the Good Challenger) claimed demurrage and damages for detention against the appellant charterers of the Good Challenger. The dispute was referred to arbitration in London. On June 15, 1983 the arbitrators rendered their award in favour of the respondents. In 2001, the respondents sought to serve an order *ex parte* issued by Mr. Justice Saville in 1993 against the appellants. The appellant opposed the application and contended *inter alia* that the proceedings to enforce the award had become statute barred. The issue before the court *inter alia* was whether the telex sent by the appellant's agents on the 17th of February 1988 constituted an acknowledgement of the award by the appellant so as to extend the limitation period of six years. In dismissing the appeal, the Court of Appeal considered the provisions of sections 29(5) and 30 of the Limitation Act 1980 and held that:

166. Mustill, M. J. and Boyd, S. C. (1989) at p. 418; Sutton, D. S. J. and Gill, J., (eds.) (2003) at p. 367.
167. McGee, A. (1998) Limitation Periods, 3rd edn., Sweet and Maxwell, London, p. 276.
168. [2004] 1 Lloyd's Rep. 67.

> …the [trial] judge was correct to hold that the owners [claimant/respondent] are not estopped from asserting in England that the claim was not time barred under the 1980 Act when they commenced proceedings in England in January, 1993. He was also correct to hold that the claim was not time barred because the six year time limit had been extended by an acknowledgement in the telex dated February 17, 1988, which extended the time to a date later than January, 1996…[169]

In Nigeria, the limitation period is also regulated by legislation. Each state has its own statute governing limitation periods.[170] Using Lagos State as an example, section 8(1) of the Limitation Laws of Lagos State imposes a limitation period of six years for causes of action founded on contract or tort.[171] These Limitation Laws of the states apply to arbitration in the same manner as court proceedings. The periods specified are dependent on the nature of the underlying cause of action, such as in contract or tort and the state where the arbitral award is sought to be enforced.[172]

In *City Engineering Nig. Ltd. v Federal Housing Authority*,[173] the parties entered into a contract to build housing units at Festac Town, Lagos. The contract contained arbitration clause. When disputes arose, the contract was terminated on December 12, 1980. The dispute was then referred to arbitration. Arbitration proceedings commenced on December 11, 1981 and the arbitrator rendered his award in favour of the appellant in November 1985. Sometime in 1988, the appellant sought to enforce the arbitral award at the High Court of Lagos State. The trial judge dismissed the appellant's application for enforcement and held that by virtue of the Limitation Law of Lagos State, the action had become statute barred. The court reasoned that the action to enforce the award was bought in excess of six years after December 12,

169. *Good Challenger Navegante S. A* [2004] at p. 87.
170. This is because under the present constitution, the power to legislate limitation laws is is within the legislative competence of the state lawmakers. By virtue of Parts I and II of the Second Schedule to the 1999 Constitution (as amended) limitation is neither in the exclusive legislative list nor in the concurrent legislative list.
171. The provision of this section is materially the same with the Limitation Laws of other states in Nigeria as well as the Federal Capital Territory, Abuja.
172. In *Murmansk State Steamship Line* (1974); the appellants commenced enforcement proceedings on the award against the respondents in Kano State. The proceeding was commenced after six years from the date underlying the cause of action to enforce the award. The court dismissed the appeal and held that the appellants failed to comply with the Limitation Law of Kano State.
173. [1997] 9 NWLR (Pt. 520) 224.

1980 when the cause of action accrued. On appeal, the Court of Appeal dismissed the appeal and upheld the decision of the trial court.

The appellant further appealed to the Supreme Court. In its argument, the respondent referred the Supreme Court to its earlier decision in *Murmansk State Steamship Line* where the court held that time starts to run from the date of the accrual of the original cause of action in the arbitration agreement, and not from the date of the arbitral award.[174] However, the appellant argued that *Murmansk State Steamship Line* was in conflict with *Obembe v Wemabod Estates Ltd*[175] and *Kano State Urban Development Board v Fanz Construction Co. Ltd*,[176] two Supreme Court cases after the *Murmansk State Steamship Line*. The appellant further urged the court to consider the English position as evidenced in *Argomet Motorpoint Ltd*.[177]

After a review of the relevant section of the Limitation Law and case law, the Supreme Court held that *Murmansk State Steamship Line* was correctly decided and thus binding on the lower courts. The court was not persuaded by Otton J, theory of "breach of the implied term to honour the arbitral award" in *Agromet Motorpoint Ltd*. The court further held that the decisions in *Obembe* and *Kano State Urban Development Board* respectively are not in conflict with *Murmansk State Steamship Line* case. The court reasoned that neither case touched on the issue of time bar and therefore were irrelevant to the instant case.[178]

The implication of the Supreme Court decisions in the *Murmansk* and *City Engineering* cases is that the arbitration proceedings and the enforcement of the arbitral award constitute a single cause of action. This cause of action in an appropriate case must be prosecuted and enforced within the statutory limitation period of six years.

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174. *Murmansk State Steamship Line* (1974).
175. [1977] 5 S. C. 115.
176. [1990] 4 NWLR (Pt. 142) 1.
177. *Agromet Motorimport* [1985].
178. The Supreme Court was not also persuaded by the appellant's reliance on the dicta of Agbaje JSC, in the *Kano State Urban Development Board* case where His Lordship quoted with approval the following text from Halsbury's Laws of England, 4th edn., para. 611, p. 323, thus:

> "… [an] award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement …"

The court took the review that the reference to Agbaje JSC dicta in *Kano State Urban Development Board* case was unconnected to the time bar issue under consideration.

This thesis argues that the Supreme Court's position portends substantial difficulty not only for contracting parties, but also for the future of arbitration in Nigeria. For example, it is not unlikely that the limitation period can elapse before the award is actually rendered. Where a party commences arbitral proceedings before the six year time bar, the limitation period ought to stop running. Otherwise, if the arbitral award is rendered after six years from the date the cause of action arose, the award will be useless or dead on arrival. What then is the use of the award if the successful party cannot enforce the award, maybe as a result of the arbitral proceedings lasting beyond the limitation period?

Adaralegbe has observed that though at the time *Murmansk State Steamship* was decided, the preponderance of authority even in England seemed to support the decision in the case.[179] For example the 18th edition of *Russell* stated:

> The period of limitation runs from the date on which the 'cause of arbitration accrued'; that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned.[180]

However, this position of the law has since changed in England as illustrated in the case of *Agromet Motorpoint Ltd*.[181] Thus, Sutton and Gill in the 22nd edition of *Russell* stated the current position of the law in line with *Agromet Motorpoint Ltd* case thus:

> The limitation period for an action on the award will usually be six years… Time runs from the date of the breach of the arbitration agreement – this is not the current law from the Agromet decision, not from the date of the arbitration agreement or the date of the award.[182]

179. Adaralegbe, A. (2006) "Limitation Period for the Enforcement of Arbitral Awards in Nigeria", Arbitration International, Vol. 22, No. 4, pp. 613 – 626.
180. Russell, F. (1970) Russell on the Law of Arbitration, 18th edn., Stevens, pp. 4 – 5.
181. The "cause of action" referred to in Section 7 of the Limitation Act 1980 (England) is an independent cause of action for breach of the implied term to perform the arbitral award, and not the original cause of action for breach of the principal contract, which resulted in the arbitration.
182. Sutton, D. S. J. and Gill, J., (eds.) (2003) at para 8 – 008, p. 367.

Therefore, it remains to be seemed whether the Supreme Court of Nigeria will in subsequent cases adopt the dicta of Agbaje JSC in *City Engineering* and the position of the English law as expressed by Otton J in *Agromet Motorpoint Ltd*.

4.2.5. Evidential requirements for enforcement of arbitral awards

The effect of article IV of the NYC is that a party seeking the recognition and enforcement of an award under the Convention must produce some material evidence.[183] The material evidence include, a duly authenticated original award or a duly certified copy thereof (i); the original arbitration agreement or a duly certified copy thereof (ii) and; if the award or agreement is in a language other than that of the enforcing court, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent (iii).[184] This subsection examines these requirements.

(i) A duly authenticated original or a duly certified copy of it

According to Onyema, the logic behind the requirement to produce the arbitral award is that, the award is a documentary evidence of facts contained therein.[185] To this end, the award further indicates or corroborates the existence of an arbitration agreement between the parties. Thus, a valid arbitral award is conclusive evidence between the parties to the arbitration of facts contained in it.[186] Under article IV (1) (a) of the NYC, the award must be supplied as a 'duly authenticated original' or as 'a duly certified copy' thereof.[187] According to van den Berg, authentication denotes the 'formality by which the signature thereon is attested to be genuine'.[188]For Scherer,

183. Report by the Secretary-General; UN DOC E/2822 (January 31, 1956), at Annex I, 26 reprinted in Gaja, G. (1978) International Commercial Arbitration – NYC, Part III: Preparatory Works, Oceana Publications New York, at III, A. 27.
184. The above requirements were mentioned in *Union Nationale des Cooperative Agricoles de cereals v Robert Catterall & Co. Ltd.* [1959] 2 Q. B. 44 at p. 54.
185. Onyema, E. (2010), pp. 120 – 123.
186. In *Bremer Oil Transport GmbH v Drewry?* [1933] 1 K. B. 753 Slesser LJ stated that an arbitral award represents an agreement made between the parties, and is no more and no less enforceable than any agreement made between the parties (contractualist view).
187. These requirements are also contained in section 102 (1) (a) of the AA 1996; and article IV (1) (a) of the Second Schedule of the ACA 2004.
188. van den Berg, A. J. (1994) The New York Arbitration Convention of 1958:Towards a Uniform Judicial Interpretation, 2nd edn., Kluwer Law International, p. 251.

the purpose of authenticating an award is to inform the court that the award is genuine.[189]

The provision of article IV (1) (a) of the NYC presupposes the existence of a written arbitral award that must, according to Born, be 'duly' and not 'simply' authenticated.[190] Arguably, this provision would seemingly allow a Contracting State to deny recognition to an "award" that falls short of this condition, though oral awards are practically never made in international arbitration. To satisfy this requirement, an arbitral award is usually in writing. The NYC does not prohibit Contracting States from imposing form requirements with respect to arbitral awards. Various national laws require the award to include the names of the parties, date on which the award was rendered, signature(s) of the arbitrator(s), the issue(s) decided and the relief granted by the arbitrator.[191]

Pursuant to article IV (1) (a) of the NYC, if the enforcing party cannot supply a duly authenticated original award, production of a duly certified copy of the award will suffice. According to van den Berg, a certified copy means 'the formality by which the copy is attested to be a true copy of the original'.[192] Though, it appears that this means of producing an original copy of the award is for the purpose of convenience and flexibility. A certified copy of the award is a reassurance of the genuineness of the copy as being from the original provided by an independent third party, so it goes beyond convenience.[193]

This raises the question of who will certify the award in circumstances where the arbitrator is dead or cannot be reached. It is suggested in this thesis that if it is an institutional arbitration, the institution under which the arbitration was conducted will do the certification. This is because arbitration under an institution is conducted by arbitrators on behalf of the institution. Thus, the institution will be the appropriate authority to certify the award. If the arbitration is *ad hoc*, then the enforcing party

189. Scherer, M. (2012) "Article IV [Formal Requirements for Recognition and Enforcement of Arbitral Awards]" in Wolff, R. (ed.), NYC on the Recognition and Enforcement of Foreign Arbitral Awards: A Commentary, C. H. Beck/Hart Publishing, pp. 207 – 224.
190. Born, G. (2012) International Arbitration: Law and Practice, Kluwer Law International, The Netherlands, pp. 280 – 282.
191. Born, G. (2014) at pp. 3029 – 3036.
192. van den Berg, A. J. (1994), p. 252.
193.Born, G. (2012), p. 280.

must adduce credible evidence to prove the existence of the award and that the arbitrator actually rendered the award.

(ii) The original arbitration agreement or duly certified copy thereof

The enforcing party must also produce the original or a duly certified copy of the arbitration agreement.[194] The question that arises from this requirement is, why is the arbitration agreement not required to be duly authenticated like the award? Arguably, the answer to the question is hinged on the description of arbitration agreement as stipulated under article II (2) of the NYC.[195] For Otto, the text of article II (2) takes into account the possibility of providing an arbitration agreement which is not authenticated by the parties' signatures.[196] For example, it may be difficult for parties who agreed to arbitrate their dispute via email (or other electronic medium) to produce a signed arbitration agreement. Thus, the production of an unauthenticated original or a certified copy of the original arbitration agreement will suffice. To this end, if the opposing party intends to challenge the validity of the arbitration agreement then, the onus should be on him to show that parties did not consent to resolve their dispute via arbitration. Accordingly, Scherer remarked that:

> …the combined reading of Article IV, which provides that the applicant needs to "supply" the arbitration agreement (in one of the forms prescribed by that Article), and Article V, which requires the party resisting recognition or enforcement to "furnish [ ] … proof" that the agreement was invalid…[197]

However, in the United States of America courts hold the view that the enforcing party must prove the validity of the arbitration agreement and also satisfy the article II (2) formal requirements.[198] Their view is premised on their interpretation of the article IV (1) (b) requirement that the enforcing party supply the arbitration

194. Article IV (1) (b) of the NYC. Also stipulated in section 102 (1) (b) of the AA 1996 and Article IV (1) (b) of the Second Schedule of the ACA.
195. Sections 5 and 6 of the AA 1996 and Section 1 of the ACA also define arbitration agreement in similar language.
196. Otto, D. (2010) Article IV in Kronke, H.,et al (ed.) Recognition and Enforcement of Foreign Arbitral Award: A Global Commentary on the NYC, Kluwer Law International, The Netherlands, pp. 159 – 177.
197. Scherer, M. (2012) at p. 216.
198. *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp*., 334 F.3d 274, 277 (3d Cir. 2003); Guang Dong Light Headgear Factory Co., Ltd. v. ACI Int'l Inc., 2005 U.S. Dist. LEXIS 8810, at *14–15 (D. Kan. 2005).

agreement referred to in article II. Such proposition, according to Scherer, is conflicting to the unambiguous text of articles IV and V, the pro-arbitration bias of the Convention and the intent of the drafters of the Convention. Accordingly, she reasoned that:

> The reference in Article IV (1) (b) to the arbitration agreement "referred to in [A]rticle II" is merely aimed at ensuring "a linguistically proper and consistent wording of the text of the Convention." It was not intended to require the applicant to meet the burden of proving Article II's form requirements. Therefore, the better view is to interpret Article IV (1) (b) as not obliging the applicant to prove that the arbitration agreement complies with the written form requirement of Article II (2); rather the burden is on the party challenging the validity of the arbitration agreement on Article II (2) grounds to provide evidence to that effect.[199]

(iii) Translation of arbitration award and/or arbitration agreement

The idea of supplying the enforcing court a translation of an award and/or the arbitration agreement if not made in the official language of the court is to enable the court to read and understand the contents of the said arbitral evidence.[200] The use of the word "shall" makes it mandatory for the enforcing party to supply the court with a translated and certified copy of the award or arbitration agreement.[201] This requirement is statutory and cannot be dismissed by the court's familiarity with the foreign language of the award or arbitration agreement. Though, van den Berg argues that a translation of the award or arbitration agreement is not necessary except the court thinks otherwise.[202] For the translated award and/or agreement to be admissible evidence, it must be certified by an official or sworn translator or by a diplomatic of consular agent.[203] In this regard, Otto argues that the purpose of

199. Scherer, M. (2012), p. 216.
200. Gaillard, E. and di Pietro (2008) Enforcement of Arbitration Agreements and International Arbitral Awards, (eds.) Cameron May, London, p. 610.
201. The provision of article IV (2) of the NYC is similar to section 102 (2) of the AA 1996 and article IV (2) of the Second Schedule of the ACA.
202. van den Berg, A. J. (1994) pp. 258 – 262.
203. Gaillard, E. and di Pietro (2008), p. 610.

requiring a certified translation is to ensure the reliability of the translated award or arbitration agreement.[204]

In England, a party seeking the enforcement of a NYC award must comply with the provisions of section 102 of the AA 1996.[205] Pursuant to *Hiscox v Outhwaite*,[206] to rely on this section, the enforcing party must first prove that the award sought to be enforced is a NYC award. This can be established by showing that the award was rendered pursuant to a written arbitration agreement, in a country, other than the United Kingdom which is a party to the NYC. To this effect, Harris, Planterose and Tecks have expressed the view that the place where the arbitration agreement is signed, despatched, or delivered to any of the parties is immaterial.[207]

To obtain recognition and enforcement, the enforcing party must submit along with its application, cumulatively and not alternatively, the following evidence: (1) a duly authenticated original award or a duly certified copy of it, (2) an original arbitration agreement or a duly certified copy of it and (3) if the award or agreement is in a foreign language, a translation of such document certified by an official or a sworn translator or by a diplomatic or consular agent.[208] This point is evidenced in *Dardana Ltd v Yukos Oil Company*. [209] The court in that case held that a party seeking recognition and enforcement of a NYC award must produce the award rendered by the arbitrator together with the arbitration agreement which gave rise to the arbitral proceedings.

With regard to Nigeria, the enforcement of NYC award is regulated by the provisions of section 54 of the ACA. A party seeking recognition and enforcement of its NYC award in Nigeria will do so pursuant to article IV to the Second Schedule of the ACA.[210] By the provision of section 54 (1) of the ACA, only awards arising out of a contractual relationship rendered in a country that has reciprocal legislation

204. Otto, D. (2010), pp. 163 – 168.
205. Section 102 of the AA is the same with article IV of the NYC, and article 35 (2) of the UNCITRAL Model Law.
206. In *Hiscox v Outhwaite* [1991] 3 All ER 641, though not a case under the AA 1996, the main question was whether the award sought to be enforced was a Convention award or not under the AA 1950.
207. Harris, B., Planterose, R. and Tecks, J. (2007) The Arbitration Act 1996: A Commentary, 4th edn., Blackwell Publishing, Oxford, pp. 46 – 50.
208. Rule 62.18 of Part 62 of the Civil Procedure Rules requires the documents mentioned in section 102 of the AA 1996 to be exhibited to the evidence in support of the application.
209. [2002] 2 Lloyd's Rep. 326.
210. Onyema, E. (2010), p. 115.

recognising the enforcement of awards rendered in Nigeria in accordance with the Convention can be enforced in Nigeria.

In accordance with article IV to the Second Schedule of the ACA, a party seeking recognition and enforcement must supply the court together with its written application: (a) a duly authenticated original arbitral award or a duly certified copy thereof, (b) an original arbitration agreement of a duly certified copy of it and, (c) if the award or agreement is not in English language, a translated copy of the award or agreement certified by an official or sworn translator or by a diplomatic or consular agent. The production of these documents by the enforcing party is cumulative and not alternative.[211]

In *Ebokam v Ekwenibe and Sons Trading Co*., the Court of Appeal stated that a party seeking the recognition and enforcement of an arbitral award needs to exhibit in support to its written application the arbitral award and the arbitration agreement.[212] Further to its decision, the court made a list of five items the enforcing party needs to prove to obtain recognition and enforcement, thus: (i) the making of the contract which contains the submission, (ii) that the dispute arose within the terms of the submission; (iii) that arbitrators were appointed pursuant to the clause which contains the submission; (iv) the making of the award; and (v) that the amount has not be paid.[213]

Although, *Ebokam* was not decided pursuant to the NYC, it appears that the conditions stipulated therein amount to additional conditions not stipulated in the relevant provision of the ACA. Thus, this thesis agrees with the views expressed by Onyema that the requirements of (i) and (ii) will be evidenced by the production of the arbitration agreement, thus further proof of facts contained in the arbitration agreement is irrelevant.[214] Furthermore, requirement (iii) is not contemplated by the relevant sections of the ACA, however, it is a ground on which the award may be set

211. Dakas, C. J. D. (1998) "The Legal Framework for the Recognition and Enforcement of International Commercial Arbitral Awards in Nigeria: Dilemmas and Agenda for Action", Journal of International Arbitration, Vol. 15, No. 2, pp. 95 – 116.
212. [2001] 2 NWLR (Pt. 696) 32.
213. Though the case involved recognition and enforcement under section 31 which related to domestic arbitration yet the provision of that section particularly subsection 2 is in some material terms the same with section 51 and article IV of the Second Schedule to the ACA.
214. Where the unsuccessful party challenges the contents of the arbitration agreement, then the onus of proof lies with such party.

aside,[215] requirements (iv) and (v) are evidenced in the arbitral award, copy of which is attached to the written application to the court for the enforcement of the award, therefore, should be conclusive proof of facts contained therein.[216] Nevertheless, it remains to be seen whether the Supreme Court will lift these extra burden placed on the enforcing party by the Court of Appeal.

4.3. Enforceability of awards rendered purely on transnational rules

The NYC is silent as to enforceability of arbitral award based on either procedural or substantive transnational rules or both. Neither article I of the Convention which outlines the field of its application, nor article V which provides defences to the enforcement of an award, specifically refers to reliance on either procedural or substantive transnational law or both. The question that then arises is whether an arbitral award rendered on the basis of either procedural or substantive transnational rules or both is enforceable in England and Nigeria.

According to van den Berg, 'a-national' or 'denationalised' arbitral awards do not fall within the ambit of the NYC.[217] He defines a-national award as resulting from an arbitration which is detached from the ambit of a national arbitration law by means of parties' agreement.[218] An examination of van den Berg's definition of a-national award indicates that such de-nationalisation is purely procedural.[219] In effect, only those awards which are detached from the procedural arbitration law of a particular state are to be regarded as a-national and outside the ambit of the NYC. In his argument against the enforceability of such arbitral awards under the NYC, van den Berg stated that:

> It should be emphasized that the question whether arbitration can be 'de-nationalised' must be distinguished from the question whether the parties are free to provide that the arbitrator is not bound to apply

215. Sections 48 (a) (iii), 52 (2a) (iii) and article V (1a) of the Second Schedule to the ACA, places the onus of proof on the party seeking to set aside the award and not the party seeking to enforce the award.
216. Onyema, E. (2010), p. 124.
217. van den Berg, A. J. (1981), p. 29.
218. van den Berg, A. J. (1981), pp. 29 – 30.
219. Zumbansen, P. (2002) "Piercing the Legal Veil: Commercial Arbitration and Transnational Law". *European Law Journal*, Vol. 8, No. 400 - 432; Rivkin, D. W. (1993) "Enforceability of Arbitral Awards Based on Lex Mercatoria", *Arbitration International*, Vol. 9, No. 1, pp. 67 – 84.

> a national law to the substance of the dispute. Whilst the legal status of 'de-nationalised' arbitration is uncertain, the detachment of the substance from the ambit of national laws will generally not encounter difficulties. The main reason is that the national courts will as a rule not review the merits of the arbitrator's decision. The 'de-nationalization' of the substance in international arbitration is, in fact, increasingly gaining acceptance. This is a welcome development which may eventually lead to the establishment of a new arbitral *lex mercatoria*.[220]

Clearly, van den Berg encourages the use of non-national rules or principles by international arbitrators in deciding international commercial disputes. However, he argues against the enforcement of procedurally 'de-nationalized' arbitral awards alluding that such awards are stateless. Admittedly, the NYC applies to the enforcement of arbitral awards made in a state other than where the recognition and enforcement are sought.[221] Nonetheless, there is a difference between making an award in a state and rendering an award pursuant to the law of that state. An award may be rendered in a state without the arbitrator applying the law of that state. This is because the place where the award is made may have been elected on the basis of neutrality and convenience. A better approach according to Paulsson is that if an award based on transnational principles is not contrary to the law of the state where it was rendered and the provisions of article V of the NYC, enforcement should not be denied under the Convention.[222]

Again, the proponents of the unenforceability of award that is based on procedural transnational rules hold the view that because of the provisions of article V (1) (e) of the NYC, a-national awards are unenforceable.[223] For instance, Lord Collins and others argue that:

> …it is still always necessary to connect the conduct of the arbitral proceedings to a national legal system, which will regulate, for example, the extent of autonomy which the parties are permitted to exercise

220. van den Berg, A. J. (1981), pp. 29 – 30.
221. Article 1 of the NYC.
222. Paulsson, J. (2013) The Idea of Arbitration, Oxford University Press, Oxford, pp. 29 – 50.
223. Lord Collins, *et al*,(eds.) (2012) at pp. 829 – 843; Petrochilos, G. (2004) Procedural Law in International Arbitration, Oxford University Press, Oxford, p. 358; Goode, R. (2001).

> in selecting the arbitral procedure (and any mandatory rules from which the parties cannot derogate); the assistance which the national courts will provide to the arbitration in the grant of provisional measures, collection of evidence, etc., and procedures for the review of awards.[224]

However, a careful reading of the provisions of article V (1) (e) of the NYC does not support the view of unenforceability of a-national arbitral awards. Article V (1) (e) of the Convention does not specifically require that an arbitral award must be made pursuant to the procedural or substantive national law of the seat of arbitration. Rather, according to Paulsson, article V (1) (e) of the Convention advances the concept that an arbitral award becomes binding immediately it is rendered until annulled by a competent authority at the seat of the arbitration.[225] The fact that an award was rendered based on transnational rules does not necessarily translate that such arbitral award was rendered contrary to the national law of the seat of arbitration. A-national awards are not products of lawless laws either.[226] In any case, to avoid annulment of a transnational award, if challenged at the seat, arbitrators are generally obliged to observe the cardinal rules of fairness and principles of public policy of the seat of arbitration.[227]

To insist that an arbitral award must be rendered pursuant to the law of the seat of arbitration seems to contradict the provisions of the NYC. More so, it means compelling the parties to arbitrate on the basis of law, the effect of which may not have been contemplated by the parties. Arguably, the intendment of the NYC is not to compel parties to arbitrate according to the law of the seat which may not have direct nexus with the contract, the parties and the subject matter in dispute. Rather,

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224. Lord Collins, *et a*l, (eds.) (2012) at pp. 832 – 833.
225. Paulsson, J. (1981) "Arbitration Unbound: Award Detached From the Law of its Country of Origin", *International and Comparative Law Quarterly*, Vol. 30, No. 2, pp. 358 – 387; Paulsson, J. (1983) "Delocalization of International Commercial Arbitration: When and Why it Matters", *International and Comparative Law Quarterly*, Vol. 32, No. 1, pp. 53 – 61; Lew, J. D. M. (2006) "Achieving the Dream: Autonomous Arbitration", *Arbitration International*, Vol. 22, No. 2, pp. 179 – 204.
226. Mistelis, L. (2013) "Delocalization and Its Relevance in Post-award Review", in Bachand, F. and Gelinas, F. (eds.), The UNCITRAL Model Law after Twenty-Five Years: Global Perspectives on International Commercial Arbitration, Juris Net, LLC, New York, pp. 167 – 182.
227. Schultz, T. (2014) Transnational Legality: Stateless Law and International Arbitration, Oxford University Press pp. 102 – 117; Lando, O. (1985) "The Lex Mercatoria in International Commercial Arbitration", International and Comparative Law Quarterly, Vol. 34, No. 4, pp. 747 – 768.

arbitrators are expected under the NYC to act in accordance with the terms of parties' agreement. While keeping to the terms of parties' agreement, arbitrators are also expected to have regard to the principles of public policy of the country closely connected to the contract and the parties. Thus, it is contended that to render an award pursuant to transnational rules is to base the decision on legal consideration with regard to parties' interest and public interest of the country closely connected to the contract, the subject matter and the parties.

4.3.1. English courts approach

Prior to the AA 1996 the predominant understanding was that, English arbitrators must apply English conflict of law rules to find the law applicable to the merits of a dispute. Arbitrators could not apply any substantive law other than that of a fixed and recognisable system.[228] Thus, transnational rules were not considered a fixed and recognisable system because transnational rules are not attached to any particular legal system. However, the AA 1996 changed the dynamics of English law on this point.

As a foundation to clarify the change under the AA 1996, it is instructive to set out the text of article 28 (1) of the UNCITRAL Model Law which stipulates that, "the arbitral tribunal shall decide the dispute in accordance with the *rules of law* as are chosen by the parties." The highlighted *rules of law* include the transnational rules. In effect, the parties may choose transnational rules, or in default of any express

228. In *Orion Cía Española de Seguros v Belfort Maatschappij* [1962] 2 Lloyd's Rep. 257, Megaw J held that arbitrators are bound, in general, to apply a fixed and recognisable system of law. When the same clause came for interpretation before the Court of Appeal in *Eagle Star Insurance Co. Ltd. v Yuval Insurance Co. Ltd*. [1978] 1 Lloyd's Rep. 357, Lord Denning's positive remark of Megaw J decision, at p. 361 was that, "He was of opinion that such a clause was invalid and should be given no effect. Despite its presence, the arbitrators were to decide in accordance with the ordinary rules of law. If the arbitrators did not do so, their award could be set aside by means of a case stated." Also in *Czarnikow v Roth, Schmidt & Co.* [1922] 2 KB 478 the court declared that, "Arbitrators must understand that parties before them have a right to take the opinion of the Court as to whether the arbitrators should be given the guidance of the Court in matters of law, and that they must not attempt to stop the action of the Courts by interfering with or hindering such a right of parties." Accordingly, Clarkson, C. and Hill, J. (2006) The Conflict of Laws, 3rd edn., Oxford University Press, Oxford, pp. 254 – 255, remarked about this orthodox doctrine that, "At common law, it was assumed that English arbitrators were bound to apply the choice of law rules which were binding on the English courts. This rule was the consequence of the traditional English approach that awards could be reviewed by the courts on points of law, including choice of law issues."

choice, the arbitrator may elect transnational rules, to govern the determination of the dispute referred or submitted to arbitration.

Unlike the NYC, the AA 1996 is not silent as to the legal validity and authority of the disputing parties or the arbitrator to apply transnational rules in the determination of disputes referred or submitted to the arbitrator by the parties. Section 46 of the AA 1996 stipulates that:

> (1) The arbitral tribunal shall decide the dispute-
>
> (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
>
> (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
>
> (2) For this purpose the choice of laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.
>
> (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

The question that arises from the above provisions is whether transnational law can be regarded as a 'law' under section 46 (1) (a) of the AA 199. In the explanatory notes to the AA 1996 made by the Departmental Advisory Committee on Arbitration, it was stated that section 46 of the Act (then a Bill) mirrors article 28 of the Model Law.[229] Also, the 14th edition of Dicey, Morris & Collins the Conflict of Laws notes the changes made by the AA 1996 and asserted that:

> …prior to the 1996 Act, it was axiomatic that an English arbitrator was bound to apply English law, including the English conflict of laws rules to decide the substance of any dispute, and many of the most important cases in the conflict of laws arose by way of appeal on matters of law from arbitral awards. The

229. Department of Trade and Industry, Consultative Paper on Arbitration Bill (July 1995), Section 1 and Section 2: Draft Clauses of an Arbitration Bill, 38.

> other consequence of this approach was that, just as in the English courts an English arbitrator could only apply a national legal system, designated as applicable by the relevant choice of law rule. The tribunal could not apply non-national rules, still less decide the dispute 'ex aequo et bono' or as an 'amiable compositeur', on the basis of general principles of justice and fairness…[230]

Although, there is no case law on the interpretation of whether section 46 (1) (a) of AA 1996 relates to a choice of transnational rules, it is submitted in this thesis that disputing parties may on the provision of that section choose a fixed and recognisable legal system or transnational rules to regulate their dispute.[231]

In the alternative, are transnational rules regarded as 'such other considerations' under section 46 (1) (b) of the AA 1996? For Harris, *et al*, the text of section 46 (1) (b) contemplates the likelihood of the parties agreeing that their dispute should be determined not in accordance with any system of law, but pursuant to, for example, transnational rules, equity and good conscience.[232] Admittedly, the editors of the 14th edition of Dicey, Morris & Collins the Conflict of Laws further confirmed that:

> This option allows the parties the freedom to apply a set of rules or principles which do not in themselves constitute a legal system. Such a choice may thus include a non-national set of legal principles (such as the 1994 UNIDROIT Principles of International Commercial Contracts) or, more broadly, general principles of commercial law or the *lex mercatoria*.[233]

Unlike section 46 (1) (a) of the AA 1996, English courts have considered the meaning of 'such other considerations' under section 46 (1) (b) of the Act. The courts have recognised that on the basis of the section 46 (1) (b) of the AA 1996, parties (or arbitrators in absence of parties' express choice) are permitted the autonomy to apply transnational rules to determine the merits of a dispute in arbitration. This was demonstrated in the case of *Musawi v RE International (UK)*

230. Collins, L. *et a*l (eds.) (2006) Dicey, Morris and Collins on The Conflict of Laws, 14th edn., Vol. 1, Sweet & Maxwell, London, paras 16 – 047.
231. Lord Collins, *et al* (eds.) (2012) at pp. 851 – 852.
232. Harris, B., *et a*l, (2014) The Arbitration Act 1996: A Commentary, 5th edn., Wiley Blackwell, UK, p. 245.
233. Collins, L. *et a*l (eds.) (2006) at paras. 16 – 053.

Ltd.[234] where the court held that section 46(1) (b) of the AA 1996 permits the parties to require the arbitrator to apply to the subject matter of the dispute and its determination the principles of Shia Sharia law. The court quoted with approval the text of paras. 16 – 053 of the 14th edition of Dicey, Morris & Collins the Conflict of Laws thus:

> Section 46 (1) (b) allows the parties the freedom to apply a set of rules or principles which do not in themselves constitute a legal system. Such a choice may thus include a non-national set of legal principles (such as the 1994 UNIDROIT Principles of International Commercial Contracts) or, more broadly, general principles of commercial law or the *lex mercatoria.*[235]

Also, in *Halpern v Halpern*[236] which concerned the application of Jewish law, the Court of Appeal stated that if the seat of arbitration is England, then section 46(1) (b) of the AA 1996 would authorise the arbitral tribunal to apply the parties' choice of transnational rules to regulate the merits of their dispute.[237] The courts' interpretation of section 46 of the AA 1996 is apt and it suggests that English courts will enforce arbitral awards that are rendered pursuant to transnational rules.[238]

4.3.2. Nigerian courts' approach

The legal validity of parties to elect and the arbitrator to apply transnational rules in the determination of dispute is guaranteed under the ACA. Section 47 of the ACA provides that:

> (1) The arbitral tribunal shall decide the dispute in accordance with the rules in force in the country whose laws the parties have chosen as applicable to the substance of the disputes

234. [2008] 1 Lloyd's Rep. (Ch) 326.
235. *Musawi* [2008]; Collins, L. *et a*l (eds.) (2006) at paras. 16 – 053.
236. [2007] EWCA Civ 291.
237. In the case of *Deutsche Schachtbau-und Tiefbohrgesellschaft v Ras Al Khaimah National Oil Co*. [1987] 3 WLR 1023, (decided under the relevant provisions of AA 1950 and AA 1975 respectively) enforcement of a foreign award was resisted on the premise that the arbitral tribunal had determined as the governing law a common denominator of rules underlying the laws of various countries regulating contractual relations. The court of Appeal held that this did not affect the validity and enforceability of the award in England.
238. Baron, G. (1999) "Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?" *Arbitration International*, Vol. 15, No. 2, pp. 115 – 130.

(2) Any designation of the law or legal system of a country shall, unless otherwise expressed, be construed as directly referring to the substantive law of that country and not to its conflict of laws rules

(3) Where the laws of the country to be applied is not determined by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable

(4) The arbitral tribunal shall not decide ex aequo et bono or as amiable compositeur unless the parties have expressly authorised it to do so

(5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of the usages of the trade applicable to the transaction

(6) If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the arbitral tribunal shall comply with this requirement within the period of time required by law

The question that arises from section 47 (5) is whether the text "usages of the trade applicable to the transaction" contemplates transnational rules. According to Oduntan, 'trade usages' constitute the core of transnational rules and they are capable of filling in gaps in contract and interpreting contract terms.[239] Viewed from this context, Nwakoby contend that the text "the usages of the trade applicable to the transaction" contained in section 47 (5) imply elements of transnational rules.[240]

The provision of section 47 of the ACA modelled upon article 28 of the UNCITRAL Model Law is primarily directed to questions of choice of law applicable to substance of dispute. Accordingly, the provision of article 28 (4) of the UNCITRAL Model Law, which is section 47 (5) of the ACA, underpins the provision of article 28 (2) and (3) of the Model Law, which is section 47 (3) and (4) of the ACA. To this end, Davidson remarks that the arbitrator's choice of conflict of law rules or approach to amiable composition must be informed by the terms of the contract and

239.Oduntan, G. (2016), p. 79.
240.Nwakoby, G. C. (2004) at pp. 245 – 247.

any usages of trade applicable to the transaction.[241] Arguably, Davidson's view demonstrates a fair clarification of the drafters' intent and purpose of article 28 (4) of the Model Law and by extension section 47 (5) of the ACA. This observation is against the backdrop of the clear mandatory stipulation of article 28 (4) of the Model Law and section 47 (5) of the ACA.

Though presently, there is no reported case law in Nigeria to aid an examination of the court's interpretation of section 47 of the ACA. However, in *TCL Air Conditioner (Zhongshan) Co. Ltd. v The Judges of the Federal Court of Australia & anor.,* [242] the High Court of Australia interpreted the provision of article 28 (1) of the UNCITRAL Model Law as not precluding arbitrators from applying transnational rules. *TCL* argued that article 28 of the Model Law which requires the arbitrators to "decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute", limited arbitrators' authority under an arbitration agreement to deciding a dispute base on the law chosen by the parties. *TCL* contended that an award based on laws or rules not chosen by the parties is not binding on the parties pursuant to article 34 (2) (iv) of the Model Law. The court rejected *TCL's* argument and found that the working papers of the UNCITRAL working group for the preparation of the Model Law reveal that the understanding of article 28 is that a miss-application (as distinct from a non-application) of the rules of law chosen by the parties does not amount to an excess of power leading to nullification of an arbitral award.

4.4. Summary

This chapter examined English and Nigerian courts attitudes to enforcement of arbitral awards. It also discussed whether the methods for enforcement of awards in both countries are effective. The chapter also demonstrated that arbitral awards rendered pursuant to transnational legal principles are enforceable in England and Nigeria, provided, such award did not violate the provisions of the AA 1996 and the ACA respectively. It concludes that the enforcement methods in both countries are effective and reflect the pro-enforcement regime of the NYC. The next chapter will examine attitudes of courts towards annulment of arbitral awards.

241. Davidson, F. P. (1991) International Commercial Arbitration: Scotland and the UNCITRAL Model Law, W. Green/Sweet & Maxwell, Edinburgh, pp. 142 – 152.
242. [2013] HCA 5.

Chapter five

Attitudes of courts towards setting aside arbitral awards

5.0. Introduction

Most arbitration agreement, laws and rules stipulate that the arbitral award that result from arbitration under those laws or rules are 'final and binding on the parties.' Yet there is almost always the likelihood that a party will challenge the award. This is because no arbitration process guarantees due process and justice in every instance. Thus, a party to arbitration would need to have the opportunity to challenge the award if it has reason to do so. Such active challenge may be to set aside, or suspend or remit the award back to the arbitrator pursuant to an error within the award or some injustice that has led to the rendering of the award.[1] This challenge process has been remarked by Kerr as a "bulwark against corruption, arbitrariness and bias."[2] For Tweeddale and Tweeddale, it is "a fundamental part of the arbitral process because it provides a system of checks and balances."[3] A successful challenge against the award will usually result in the award being set aside,[4] and thus cease to exist, at least within the jurisdiction of the country of annulment.

What is more important in the setting aside scheme is courts' attitude towards a challenge to annul an award. This thesis argues that courts' supportive and pragmatic approach to such annulment will improve the efficacy of international arbitration instead of abolishing the annulment scheme. This chapter is a precursor to the examination of courts' attitude towards refusing enforcement of arbitral award that has been set aside at the seat of arbitration under 6.1.6.2 of chapter six. On one hand, it fleshes out the policy considerations of the English and Nigerian courts when asked to set aside an award. On the other hand, it engages whether the courts would be mindful of those considerations when moved to enforce an award set aside at the seat of arbitration on other grounds. Thus, this chapter examines the issue of the seat as the proper forum for challenging an award (5.1), the notion of setting aside awards

1. Tweeddale, A. and Tweeddale, K. (2005) Arbitration of Commercial Disputes: International and English Law and Practice, Oxford University Press, Oxford, pp. 372 – 373.
2. Kerr, M. (1985) "Arbitration and the Courts: The UNCITRAL Model Law", *International and Comparative Law Quarterly*, Vol. 34, No. 1, pp. 1 – 24 at p. 15.
3. Tweeddale, A. and Tweeddale, K. (2005), pp. 372 – 373.
4. The phrase 'set aside' is used interchangeably with 'annulment' in this thesis.

(5.2), and the attitude of courts toward a challenge to set aside arbitral awards (5.3), particularly the English and Nigerian courts.

5.1. Establishing the nationality of an arbitral award

The first step in challenging an international arbitral award is to determine the nationality of the award. Thereafter, the unsuccessful party in the arbitration may then seek to challenge the award in the courts of the country where the award was rendered. Article V (1) (e) of the NYC relates to an award being "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". Article V (1) (e) of the Convention raises the issue of identifying the nationality of an award either by territorial criterion (the country in which that award was made), or applicable law criterion (under the law of which that award was made). The NYC provides no assistance as to how this issue may be determined. This gap has led to many debates amongst commentators and divergent judicial decisions.

Under the UNCITRAL Model Law, the seat of arbitration is usually the country that the parties have specified in their arbitration agreement as the place of arbitration. In the absence of an agreement between the parties, the seat of arbitration is then determined by the arbitrator having regard to the circumstances of the case and the convenience of the parties.[5] In *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.*,[6] the Indian Supreme Court abandoned its earlier decision in *National Thermal Power Corp.*,[7] and held that Indian courts are not empowered to set aside foreign arbitral awards. The Supreme Court clarified that this would be the case even if the law applicable to the substantive dispute was Indian law. The court further reasoned that holding otherwise would be consistent with article V (1) (e) of the

5. Article 20 (1) of the UNCITRAL Model Law.
6. (2012) 9 SCC 522.
7. In *National Thermal Power Corp. v The Singer Co*., the Indian Supreme Court held on appeal that an award rendered in England was nonetheless a domestic Indian award, not subject to the NYC in Indian Courts. The court reasoned that the award was made pursuant to an arbitration agreement regulated by Indian law. India's enactment of the Model Law notwithstanding, the court further held that India is the proper forum for challenging awards rendered abroad. Thus, the court stated, at pages 407 – 409, that:

> … the overriding principle … that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arsing under the arbitration agreement … An award is 'foreign' not merely because it is made in the territory of a foreign state, but because it is made in such a territory on an arbitration agreement not governed by the law of India.

NYC. To this end, the arbitral award is deemed rendered at the seat of arbitration elected by the parties or determined by the arbitrator. Tweeddale and Tweeddale arguing in support of the territorial criterion stated that, "treating the seat of arbitration as the place where the award is made provides a relatively certain method of ascertaining the country in which to challenge an award."[8] Though this view has been widely canvassed, it is still controversial whether parties can choose a procedural law other than that of the place of arbitration.[9]

In relation to the applicable law criterion, views are divided as to whether the text of article V (1) (e) of the NYC which stipulates, "… under the law of which, that award was made," relates to the procedural law or the law applicable to the arbitration agreement (or principal contract). For example, Swiss law provides that the parties to arbitration may, "subject the arbitral procedure to the procedural law of their choice."[10] Conversely, in *Hitachi Ltd and Mitsui & Co. Deutschland v Rupali Polyster,*[11] the Pakistan Supreme Court held on appeal that the choice of law clause governing the principal contract also determined the law applicable to the arbitration agreement. The choice of law clause referred to Pakistan and on that ground, the Supreme Court held that the Pakistan court had jurisdiction to determine a motion to set aside an award rendered in England.

This thesis argues that the position adopted by the Pakistan Supreme Court in *Hitachi Ltd* seems to misinterpret the second alternative of article V (1) (e) of the NYC. Article V (1) (e)'s second alternative, "under the law of which, [the] award was made", denotes the country whose law the procedural law of the arbitration applies. The NYC clearly distinguishes between the law regulating the arbitration agreement and the law regulating the procedure of the arbitration. Article V (1) (a) of the Convention provides for the law regulating the arbitration agreement, while article V (1) (e) of the Convention provides for the law regulating the procedure of

8. Tweeddale, A. and Tweeddale, K. (2005) at p. 373.
9. Mann, F. A. (1992) "Where is an Award Made?" in Mann, F. A. Notes and Comments on Cases in International Law, Commercial Law and Arbitration, Clarendon Press, Oxford, p. 29; Sammartano, M. R. (1990) International Arbitration Law, Kluwer Law and Taxation Publisher, Deventer, pp. 15 – 24.
10. Article 182, Ch. 12, Swiss Private International Law 1987.
11. (2000) Yearbook Commercial Arbitration, Vol. XXV, 486.

the arbitration, which includes procedural transnational rules.[12] Hence, Born remarked that:

> The correct interpretation of Article V (1) (e)'s second alternative is that it refers to procedural law of the arbitration, and not to other possible laws (such as the substantive law governing the parties' underlying dispute or the arbitration agreement)… that is evident from the phrase "under the law of which [the] award was made", which refers to the process of making the award (ie. the arbitral proceedings), rather than to the formation or validity of the arbitration agreement (much less the underlying contract).[13]

5.1.1. English courts' approach

The seat of the arbitration is defined by section 3 of the AA 1996, thus:

> … 'the seat of the arbitration' means the juridical seat of the arbitration designated –
>
> (a) by the parties to the arbitration, or
>
> (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
>
> (c) by the arbitral tribunal if so authorised by the parties,
>
> or determined in the absence of any such designation, having regards to the parties' agreement and all the relevant circumstances.

In effect, the seat of arbitration is the place or country expressly or impliedly designated as such. The seat may be determined by express agreement of the parties, by the arbitrator or an arbitration institution, if the arbitration is institutional, pursuant to powers delegated by the parties. In default of section 3 (a) (b) and the first limb of (c) of the AA 1996, the court on an application by either party can designate the seat of the arbitration taken into consideration all the relevant

12. Scherer, M. (2005) "The Recognition of Transnational Substantive Rules by Courts in Arbitral Matters", in Gaillard, E., Schlaepfer, A. V., Pinsolle, P. and Degos, L. (eds.), Towards a Uniform International Arbitration Law?, Juris Publishing, New York, pp. 91 – 334.
13. Born, G. B. (2012) International Arbitration: Law and Practice, Kluwer Law International, The Netherlands, p. 309.

circumstances.[14] In *U & M Mining Zambia Ltd. v Konkola Copper Mines Plc*[15] the court held that a clause referring dispute to LCIA and further stipulating that "the place of the arbitration shall be England …" made it plain that the parties had elected the seat of the arbitration to be England.

According to Merkin and Flannery, the text "having regard to the parties' agreement and all the relevant circumstances" under section 3 (c) of the AA 1996, implies that common law rules continue to apply to the determination of the seat of the arbitration.[16] Under the common law, there is a presumption that the seat of the arbitration will be determined in the absence of any express choice of seat, by express choice of procedural law.[17] An arbitral award is made in England and Wales or Northern Ireland if the juridical seat of the arbitration is designated or determined as England and Wales or Northern Ireland. It is immaterial where the award was signed, dispatched or received by the parties.[18]

Furthermore, section 100 (2) (b) of the AA 1996 stipulates that "an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties." The section is for purposes of enforcing a NYC award in England. The effect of the text "regardless of where it was signed, dispatched or delivered to any of the parties" contained in both sections 53 and 100 (2) (b) of the AA 1996 is to outlaw the decision of the House of Lords in *Hiscox v Outhwaite*.[19]

5.1.2. Nigerian courts' approach

The place of arbitration will be the place elected by the parties, or in default, a place determined by the arbitrator. The parties' freedom to choose the place of the

14. Merkin, R. and Flannery, L. (2014) Arbitration Act 1996, 5th edn., Informa Law from Routledge, Oxon, pp. 18 – 21.
15. [2013] EWHC 260 (Comm).
16. Merkin, R. and Flannery, L. (2014), pp. 18 – 21.
17. *Naviera Amazonica Peruana SA v Compania International de Seguros de Peru* [1988] 1 Lloyd's Rep 116.
18. Section 53 of the AA 1996 also provides that:
    > Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, dispatched or delivered to any of the parties.
19. In *Hiscox v Outhwaite* [1992] an award was held to have been rendered in Paris, France, mainly because the award was signed in Paris, even though the arbitration was conducted in London and had no link with France.

arbitration, or the arbitrator's power to determine or designate a place of the arbitration, where the parties have not chosen one, is regulated by the provisions of section 16 of the ACA.[20]

Nonetheless, section 16 of the ACA is silent as to circumstances where an arbitrator fails to designate a seat in the absence of parties' agreement to that effect. The question that then arises is how to identify the seat of arbitration (or the nationality of the award) for purposes of setting aside the award. In such a case, this thesis argues that the effective place of arbitration should be held as the seat of arbitration. The effective place of arbitration in this context should be the place where all relevant actions in the arbitration took place, or if this cannot be ascertained, the place where the last hearing was conducted. This proposition is illustrated in *Oberlandesgerich Dusseldorf*.[21] In *Oberlandesgerich,* the seat of arbitration was neither agreed upon by the parties nor determined by the arbitrators as stipulated by article 20 (1) of the Model Law. A German court held that the seat of arbitration was the effective place of arbitration or, if this cannot be determined, the place of the last oral hearing.[22]

5.2. Setting aside vs non-enforcement of award

This section distinguishes setting aside an award from resisting the enforcement of the award. Although the two schemes overlap and complement each other, they are distinct. Thus, Asouzu remarked that, the notions of setting aside (or annulment) of an award and the recognition or enforcement of an award are two distinct procedures, though they are closely inter-related.[23] The general rule is that a party to the arbitration may bring an action before a competent court to set aside the award if

20. Section 16 corresponds with article 20 of the UNCITRAL Model Law and according to Akpata, it is designed primarily for international commercial arbitration. Akpata, E. (1997) The Nigerian Arbitration Law in Focus, West African Bok Publishers Ltd., Lagos, pp. 50 – 52.
21. 6 Sch 02/99, 23 March 2000; CLOUT Case No. 374.
22. Though not expressly stated, it appears that pursuant to section 47 (6) of the ACA, which makes reference to "the arbitration law of the country where the award was made…," Nigeria courts will hold that the nationality of an award is the law of the country where the award was made.
23. Asouzu, A. A. (1995) "The National Arbitration Law and International Commercial Arbitration: The Indispensability of the National Court and the Setting Aside Procedure", *African Journal of International and Comparative Law,* vol. 7, No. 1, pp. 68 – 97.

it believes it has a valid reason to do so.[24] However, legal proceedings to set aside awards are most often sought by the unsuccessful party in the arbitration.[25] With enforcement proceedings, the successful party commences the action against the unsuccessful party in a country in which it believes the unsuccessful party has assets.

In international arbitration, there is a difference in terms of the place where legal action for setting aside an award and resistance against an award are sought. Legal action for the setting aside of an award is usually sought before a competent court where the arbitration took place. On the other hand, resisting enforcement of an award always take place before a competent court in an enforcing country.[26] Accordingly, Asouzu noted that in most cases, the very common situations, an action to set aside an award and an application to recognise or enforce an award takes place in different countries at different times.[27] However, in domestic arbitration, both actions are taken before a competent court in the country where the arbitral award was rendered.

The consequence of setting aside an award and the implication of non-enforcement of an award differ considerably.[28] For instance, if an award is successfully annulled, it follows that such award loses its legal force and effect, at least, in the country where the award was rendered.[29] On the other hand, a refusal to enforce an award by a competent court would appear to be effective only in the country where such enforcement was sought.[30] In *Astro Nusantara International v PT Ayunda Prima Mitra*[31] the Hong Kong Court of First Instance stated that:

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24. Article 34 (2) (a) of the UNCITRAL Model Law "if the party making the application …" sections 67 (1), 68 (1) and 69 (1) of the AA 1996, "A party to arbitral proceedings may …" sections 29 (1), 30 (1) "a party" and section 48 (a) of the ACA, "the party making the application."
25. Morrissey, J. F. and Graves, J. M. (2008) International Sales Law and Arbitration: Problems, Cases and Commentary, Kluwer Law International, The Netherlands, pp. 460 – 462.
26. van den Berg, A. J. (2014) "Should the setting aside of the Arbitral Award be Abolished?" *ICSID Review*, pp. 1 – 26.
27. Asouzu, A. A. (1995), p. 77.
28. Thadikkaran, M. (2014) "Enforcement of Annulled Arbitral Awards: What is and What Ought to Be?" *Journal of International Arbitration*, vol. 31, No. 5, pp. 575 – 608.
29. However, in *Astro Nusantara International* [2015] the courts took a pragmatic view that an award annulled at the seat of arbitration still remains effective.
Societe *Hilmarton v Societe Ominum de traitement et de valorisation* (1994) Yearbook Commercial Arbitration, vol. XIX, p. 655; *Chromallory Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996).
30. Scherer, M. (2016) "Effects of International Judgments Relating to Awards", *Pepperdine Law Review*, Vol. 43, pp. 637 – 646.
31. [2015] HCCT 45/2010 [28] (C.F.I.) (Legal Reference System) (H.K).

> The fact that an award has been refused enforcement by a court in another jurisdiction … is not a ground for resisting enforcement of the arbitral award… under the NYC…[32]

5.3. The attitudes of courts

Arising from the provisions of article V (1) (e) of the NYC is the enforcing court's discretion to refuse enforcement of an award that has been set aside at the seat of the arbitration. Clearly, the text of the Convention provides no assistance in relation to the grounds that may be relied upon to set aside an award at the arbitral seat. Thus, the grounds upon which an international arbitral award may be set aside are stipulated by national legislations as interpreted by the courts. A statement of the Supreme Court of India in *Shin-Etsu Chemical Co. Ltd v Aksh Optifbre Ltd. & anor*[33] is illustrative of this position, thus:

> …under the new law [Arbitration and Conciliation Act 1996] the grounds on which an award of an arbitrator could be challenged before the court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the Arbitrator or want of proper notice to a party of the appointment of the Arbitrator or of Arbitral proceedings.[34]

Also, in *Yusuf Ahmed Alghanim & Sons WLL v Toys "R" Us, Inc*.[35] the United States Court of Appeals, Second Circuit stated that:

> We read Article V (1) (e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to motion to set aside or vacate that arbitral award… There is no indication in the Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law… The Convention specifically contemplates that the state in which, or under the law

32. *Astro Nusantara International* [2015].
33. [2005] 1 NSC 417.
34. *Shin-Etsu Chemical Co. Ltd* [2005].
35. 126 F.3d 15, (2d Civ. 1997).

> of which, the award is made, will be free to set aside or modify an award in accordance with domestic arbitral law and its full panoply of express and implied grounds of relief.[36]

Although, it is clear that the NYC does not expressly restrict the scope of national courts' review of awards in setting aside proceedings, Born has suggested that a better approach would be to construe the Convention as impliedly doing so. He based his argument on the fact that the Convention requires Contracting States to recognise arbitration agreement pursuant to article II of the Convention, which reflects parties' consent to a final and binding award.[37] Born further reasoned that, concluding that the Convention does not impose limits on the setting aside of awards at the arbitral seat, an annulling court would, at least in principle, be free to subject all international awards rendered in its territory to *de novo* judicial review.[38] Hence, he remarked that:

> …most national arbitration regimes have adopted broadly similar approaches to the grounds for annulment of international awards – generally, but not always, limiting such review to bases paralleling those for non-recognition of awards in Article V of the Convention.[39]

5.3.1. Common grounds for setting aside international arbitral awards

According to van den Berg, up until in the 1980s, national arbitration legislations stipulated different grounds for setting aside arbitral awards.[40] Apparently, that changed with the introduction of the UNCITRAL Model Law of 1985. Admittedly, the Model Law proved to be successful with arbitration legislations based on it implemented one way or the other, in 72 countries in a total of 102 jurisdictions.[41]

The grounds on which arbitral awards may be set aside as stipulated in article 34 (2) of the UNCITRAL Model Law are: lack of validity of the arbitration agreement, lack

36. *Yusuf Ahmed Alghanim & Sons WLL* [1997] at pp. 22 – 23.
37. Article II of the NYC requires Contracting States to recognise arbitration agreements; Born, G. B. (2012), p. 312.
38. Born, G. B. (2009) International Commercial Arbitration, Vol. II, Kluwer Law International, The Netherlands, pp. 2556 – 2560.
39. Born, G. B. (2012) at p. 311.
40. van den Berg, A. J. (2014), p. 15.
41. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html [accessed 27/09/2016].

of due process in the arbitral proceedings, excess of authority concerning relief sought, irregularity in the appointment of the arbitral tribunal; irregular procedure or a violation of the applicable arbitral rules or law, arbitrability of the subject-matter of the dispute, and the award in conflict with the public policy of the country where the award was rendered. Nonetheless, the implementation of the UNCITRAL Model Law is not uniform around the globe. Although England is not part of the countries that adopted or implemented the Model Law, the grounds for setting aside an award, particularly sections 67 and 68 of the AA 1996 reflect the grounds set out under article 34 (2) of the UNCITRAL Model Law. As highlighted in Chapter One of this thesis, the Nigerian ACA is drafted to implement the UNCITAL Model Law.

5.4. English courts approach to setting aside arbitral awards

The AA 1996 contemplates three main grounds for the setting aside of an award. These grounds are; lack of jurisdiction, serious irregularity and error of law. Before a party can challenge the arbitral award on any of these grounds, the party must satisfy the court of three things. Firstly, the party must show that it has exhausted all the internal remedies with the arbitration process, if any. Secondly, the party should also have exhausted its right pursuant to section 57 of the Act. Thirdly, such challenge must be brought within 28 days of the date of the award.

5.4.1. Lack of substantive jurisdiction

Section 67 of the AA 1996 provides:

> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court
> (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
> (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.
(3) On application under this section challenging an award of the arbitral tribunal is to its substantive jurisdiction, the court may by order –
(a) confirm the award,
(b) vary the award, or
(c) set aside the award in whole or in part.
(4) The leave of the court is required for any appeal from a decision of the court under this section.

In determining whether the arbitrator had jurisdiction, the courts are guided by section 30 of the Act which relates to the competence of the arbitrator to rule on its own jurisdiction. The questions the court is called upon to address regarding the arbitrator's jurisdiction are: whether there was a valid arbitration agreement between the parties, whether the arbitrator was properly appointed, and whether the arbitrator determined disputes which were not submitted or referred to arbitration by the disputing parties.[42] The reason for the determination of whether an arbitrator has jurisdiction is strikingly because of the fact that arbitration is a creation of contract and parties must mutually agree to resolve their dispute by arbitration.

In *Republic of Serbia v Imagesat International NV*[43] the High Court considered an application pursuant to section 67 of the AA 1996. The matter was in respect to a challenge to the substantive jurisdiction of an ICC tribunal. The arbitrator had initially ruled *inter alia*, that it had jurisdiction to determine whether the applicant had vested on the tribunal jurisdiction to rule if the applicant was a party to the arbitration agreement. In arriving at its decision, the court relied on *Azov Shipping Co. v Baltic Shipping Co.*,[44] and held that if the seat of the arbitration is England and Wales or Northern Ireland, the court will examine the issue of jurisdiction brought under sections 32 and 67 of the Act as a full review. In *Republic of Serbia*, though the court dismissed the challenge, it stated that in hearing an application pursuant to section 67, "it is for the court to determine whether the arbitrator had jurisdiction and whether he was correct in deciding that he did." Following the approach in *Azov*, the

42. Merkin, R. and Flannery, L. (2014) at p. 101.
43. [2009] EWHC 2853 (Comm).
44. [1999] 1 LR 68.

court also pronounced that the decision of the arbitrator concerning jurisdiction is only provisional.

Also in *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL*[45] and *Norscot Rig Management PVT Ltd. v Essar Oilfields Services Ltd*[46] respectively, the High Court considered the effect of section 67 of the Act. Though, the cases were respectively dismissed, the court had no reservations for conducting a full review of the jurisdiction challenges.

5.4.2. Serious irregularity

Section 68 of the Act provides that:

> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> A party may lose the right to object (see section 73), and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2) Serious irregularity means irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal)
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction; see section 67);
>
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties
>
> (d) failure by the tribunal to deal with all the issues that were put to it;
>
> (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
>
> (f) uncertainty or ambiguity as to the effect of the award;
>
> (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
>
> (h) failure to comply with the requirements as to the form of the awards; or
>
> (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other

45. [2010] EWHC 29 (Comm).
46. [2010] EWHC 195 (Comm).

institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may –

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

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

(4) The leave of the court is required for any appeal from a decision of the court under this section.

A challenge of irregularity can relate to the arbitrator, the arbitral proceedings or to the arbitral award. Accordingly, the presence of any one or more of the grounds set out in section 68 (2) (a) to (i) of the Act will be deemed to have given rise to serious irregularity, provided that they caused or will cause substantial injustice to the applicant. The grounds as spelt out under section 68 (2) of the AA 1996 are exhaustive and materially the same with section 103 grounds for refusing enforcement of foreign arbitral awards in England. These grounds, at least in principle, mirror article 34 (2) of the UNCITRAL Model Law grounds for setting aside arbitral awards. The sections 68 (2) (a) to (i) and 103 grounds are examined in detail under chapter 6 of this thesis.

Under section 68 (2) there are high evidentiary hurdles in the way of a party seeking to set aside an award to satisfy.[47] The DAC in its report set out the threshold on how to overcome the hurdles and the approach to be adopted by the courts to application pursuant to section 68. The report stated that:

> The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus, it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. The test is not what would have happened had the matter been litigated. To

47. Harris, B, et al, (2014) The Arbitration Act 1996: A Commentary, 5th edn., Wiley Blackwell, Oxford, pp. 336 – 337.

> apply such, a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happen simply cannot on any view be defended as an acceptable consequence of that choice. In short [section 68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.[48]

In *Lesotho Highlands v Impregilo SpA*[49] Lord Steyn remarked that the requirement of 'serious irregularity' imposes a high threshold and it must be established that the irregularity caused or would cause substantial injustice to the claimant. He pointed out that these requirements were "designed to eliminate technical and unmeritorious challenges". Thus, the irregularity complained of must fall within the closed list of categories in section 68 (2) of the Act. A recent court decision in *The Secretary of State for the Home Department v Raytheon Systems Ltd.*[50] demonstrates English courts attitudes towards annulment of arbitral award pursuant to section 68 of the AA 1996. It also contains helpful guidance on the high evidentiary tests which a party seeking to set aside an award will need to satisfy in order for a challenge under section 68 to succeed.

In *The Secretary of State for the Home Department v Raytheon Systems Ltd,* the defendant was engaged by the claimant to design, develop and deliver a new e-border technology equipment to reform border control in the UK. The contract contained arbitration clause. When the claimant terminated the contract, a dispute arose concerning the liability for the termination of the contract. The dispute was referred to arbitration by the claimant. The arbitral tribunal rendered a partial award and subsequently corrected the award twice by a memorandum. The tribunal found that the claimant had unlawfully terminated the contract between the parties and thus, awarded damages in excess of £126 million plus approximately £60 million as interest in favour of the defendant.

The claimant challenged the partial award and moved the court to set aside the award. The claimant relied on section 68 (2) (d) of the AA 1996, and argued that the arbitral tribunal had failed to deal with two issues of liability and three issues of

48. The Departmental Advisory Committee on Arbitration (DAC) Report on Arbitration Bill 1996, para. 280 .
49. [2005] UKHL 43; [2005] 3 WLR 129 at paras. 28 and 29.
50. [2014] EWHC 4375 (TCC).

quantum in respect of the £126 million awarded. It further argued that those issues had been put to the tribunal and were critical to the determination of the arbitration. The court in *The Secretary of State for the Home Department* quoting with approval the House of Lords case of *Lesotho Highlands v Impregilo SpA*[51] noted that section 68 of the AA 1996 reflects "internationally accepted view that the court should be able to correct serious failures to comply with the due process of arbitral proceedings." The court further remarked that courts should strive to uphold arbitral awards and should not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults on award with the objective of upsetting or frustrating the process of arbitration."[52]

However, on what will constitute substantial injustice under section 68 of the Act, the court in *The Secretary of State for the Home Department* reiterated that there was a 'high threshold' to be met to establish that a failure to address an issue amounts to a serious irregularity causing substantial injustice to the applicant. The court reasoned that there would be a failure to deal with an issue where the determination of that issue is essential to the decision reached in the award. The court then added that:

> An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes.[53]

Relying on *Vee Network Ltd v Econet Wireless International*,[54] the court held that in order to satisfy the substantial injustice test, a claimant do not need to demonstrate that it would have succeeded on the issue which the tribunal failed to deal with. Nonetheless, it is necessary for the claimant to show that, "…[its] position was reasonably arguable; and had the tribunal found in [its] favour, the tribunal might

51. *Lesotho Highlands v Impregilo SpA* [2005].
52. Quoted the judgement in *Fidelity Management v Myriad International* [2005] 2 Lloyd's Rep. 508.
53. *The Secretary of State for the Home Department v Raytheon Systems Ltd*. [2014].
54. [2005] I Lloyd's Rep 192.

well have reached a different conclusion in its award."[55] In the final analysis, the court found in favour of the claimant.

5.4.3. Appeal on point of law

An award may also be set aside by the court if satisfied that the decision of the arbitrator on a legal point is evidently wrong. In this context according to the decision in *London Underground Ltd v City Link Telecommunications Ltd*,[56] the test is not based on the probable conclusion of a court but on the expected decision of a reasonable arbitrator. Challenging the award on point of law is stipulated in section 69 of the AA 1996, thus:

> (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
>
> An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> (2) An appeal shall not be brought under this section except –
> (a) with the agreement of all the other parties to the proceedings, or
> (b) with the leave of the court
>
> The right to appeal is also subject to the restrictions in section 70 (2) and (3)
>
> (3) Leave to appeal shall be given only if the court is satisfied –
> (a) that the determination of the question will substantially affect the rights of one or more of the parties
> (b) that the question is one which the tribunal was asked to determine,
> (c) that, on the basis of the findings of fact in the award –
> i. the decision of the tribunal on the question is obviously wrong, or
> ii. the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all circumstances for the court to determine the question.

55. *The Secretary of State for the Home Department v Raytheon Systems Ltd.* [2014].
56. [2007] EWHC 1749 (TCC).

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
(5) The court shall determine an application for leave to appeal under the section without a hearing unless it appears to the court that a hearing is required.
(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal
(7) On an appeal under this section the court may by order –
(a) confirm the award
(b) vary the award
(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
(d) set aside the award in whole or in part

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgement of the court for the purposes of further appeal.

But to such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

The effect of section 69 of the Act is that an appeal to the court on point of law can be brought if the parties agree or with the leave of the court. Where parties do not agree, the court will not grant leave for an appeal unless all of the following are established. First, the question will significantly affect the rights of one or more parties. Secondly, the question is one that the arbitrator was asked to determine. Thirdly, premise on the arbitrator's finding of fact, the arbitrator's decision is evidently wrong. In the alternative, the question is one of general public importance and the decision of the arbitrator is open to doubt. Lastly, it is just and proper in all the circumstances for the court to hear the appeal.

Where the appeal is allowed, the court has the power to confirm the award, or vary the terms of the award, or remit the award in whole or in part to the arbitrator for reconsideration, or set aside the award in whole or in part. Nonetheless, the court shall only set aside an award in whole or in part, where remission would be inappropriate. To this end, it seems that there is an obvious bias in favour of

remission than other remedies available to the party challenging the award. However, remission may be inappropriate where, for example, following the appeal, the outcome of the case, if remitted, is obvious and to remit the award would merely increase the cost.[57] In *Vrinera Marine Co. Ltd v Eastern Rich Operations Inc.*[58] the court gave indication that remission is preferred over setting aside, thus:

> … the drafting of subsection (7) discloses a bias in favour of remission of an award no doubt on the well-established principle enshrined in section 1 of the Act that it is for the parties' chosen tribunal to determine its disputes and section 69 gives the court the limited jurisdiction to address questions of law not fact. On the other hand, the matter remains one for my discretion provided I am satisfied that to remit the award would be "inappropriate". Section 1 of the Act also, of course, entitles the court to take account of delay and expense.[59]

English courts will not set aside, or remit, or vary the terms of an award on the basis of entirely hypothetical matter in regard of which the court has no evidence before it. In *MRI Trading AG v Erdenet Mining Corp. LLC*,[60] the claimant challenged the award on point of law pursuant to section 69 of the AA 1996. The defendant in its submission urged the court to remit the award to the arbitrators because the conclusion reached by the arbitrators is, or might be, justified by reasons not set out in the award. The court in setting aside the award stated that:

> … a party who wishes to contend that an award should be upheld for reasons not expressed (or not fully expressed) in such award is required to file a respondent's notice at the stage of the application for permission to appeal in accordance with CPR PD 62 para 12.6 … it would be wrong in principle and certainly "inappropriate" … to order remission on the basis of entirely speculative matters in respect of which the court has no material before it and which, if such matters were to be relied upon to seek to uphold the award, should have been included in a respondent's

57. Harris, B. *et al* [2014] at p. 372.
58. [2004] EWHC 1752 (Comm).
59. *Vrinera Marine Co. Ltd* [2004].
60. [2012] EWHC 1988 (Comm).

> notice served in accordance with the rules and within the appropriate time limits in opposition to the original application for leave to appeal.[61]

On appeal, the Court of Appeal upheld the decision of the High Court and took the view that the arbitrator's decision on the issue was such that no reasonable tribunal could reach.[62]

MRI Trading AG highlights the attitude of the court as to whether a court will set aside or remit an award to the arbitrator when it finds that the decision of the arbitrator on a question of law was manifestly wrong. First, it demonstrates that the CPR PD as rules of court are made to be obeyed and no favour would be shown for not obeying same. The respondent's notice in accordance with the CPR PD 62 para 12.6 is a key factor as to how the court will exercise its discretion on the issue of remission or annulment of an award.

5.5. Nigerian courts approach

The grounds for setting aside arbitral awards are stipulated under sections 29, 30 and 48 of the ACA. Under section 29 (2), a party may apply to court to set aside an award where the award is beyond the scope of matters submitted or referred to arbitration. Under section 30 (1), an award may also be set aside on the application of a party where the arbitrator has misconducted himself, or where the arbitral proceedings, or award, has been improperly procured. Other grounds which ranges from incapacity of a party to the arbitration agreement, to the award been against public policy of Nigeria are listed under section 48 of the Act. The section 48 grounds are substantially the same with article 34 (2) of the UNCITRAL Model Law. These grounds are also similar to section 52 and article V of the Second Schedule to the ACA grounds for resisting enforcement of international arbitral awards in Nigeria. The sections 48 and 52 grounds are examined in-depth under chapter six.

Opinion differs as to whether sections 29 and 30 of the ACA can be relied upon by a party seeking to set aside an international arbitral award rendered in Nigeria. According to Akpata, sections 29 and 30 of the Act pertain solely to domestic

61. *MRI Trading AG v Erdenet Mining Corp LLC* [2012].
62. *MRI Trading AG v Erdenet Mining Corp. LLC* [2013] EWCA Civ 156.

commercial arbitration.[63] He based his argument on the fact that the ACA is divided into four parts and sections 29 and 30 are within Part I which regulates domestic arbitration only.[64] However, Idornigie contends that although the provisions of Part III of the Act relates to international commercial arbitration, the import of section 43 is that Part III provisions are in addition to Part I provisions which regulate domestic arbitration.[65] From the provisions of section 43 of the Act, Part III applies solely to international commercial arbitration and conciliation in addition to the other provisions of the Act. While Part III of the Act cannot apply to other provisions of the Act, other provisions of the Act can apply to matters relating to Part III. Therefore, the better view is that sections 29 and 30 are applicable, in an appropriate case, to an application to set aside an international arbitral award rendered in Nigeria.

To have an insight of the attitudes of Nigerian courts towards setting aside an award, section 30 of the ACA poses two questions, first, what is misconduct? Secondly, what will amount to improper procurement of arbitral proceedings or award?

5.5.1. Misconduct

The first limb of section 30 (1) of the ACA stipulates that the court may set aside an award where an arbitrator has misconducted him. However, the problem with the section is that it lacks clarity on how 'misconduct' should be interpreted or what constitutes 'misconduct' for purposes of setting aside an award in Nigeria. As a result of this gap, courts have resorted to the definition of 'misconduct' under common law and have given the term a wide meaning. The Supreme Court in *Taylor Woodrow (Nig.) Ltd. v Suddeutch Etna-Werk GmbH*[66] stated:

> The word misconduct is not defined in law nor is it stated therein what would amount to misconduct on the part of an arbitrator to necessitate the setting aside of his award. It will be necessary therefore, to fall back

63. Akpata, E. (1997) at pp. 84 – 90.
64. Part I of the Act which is sections 1 – 36 regulates domestic Arbitration, Part II which is sections 37 – 42 relates to Conciliation, Part III which is section 43 – 55 concerns Additional Provisions Relating to International Commercial Arbitration, and Part IV which is section 56 – 58 deals with Miscellaneous matters.
65. Idornigie, P. O. (2015) Commercial Arbitration Law and Practice in Nigeria, LawLords Publication, Abuja, pp. 274 – 275.
66. [1993] 4 NWLR (Pt. 286) 127.

> on the common law to determine what constitutes misconduct.[67]

The Supreme Court in *Taylor Woodrow Ltd* relied on the reasoning of the authors of the Halsbury's Laws of England, 4th edition, and gave an exhaustive definition of misconduct. In *A. Savoia Ltd v A. O. Sonubi*[68] the Supreme Court followed its decision in *Taylor Woodrow Ltd*. and stated that misconduct may be said to have arisen:

> (a) Where the arbitrator fails to comply with the terms, express or implied, in the arbitration agreement
> (b) Where, even if the arbitrator complies with the terms of the arbitration agreement, the arbitrator makes an award which on grounds of public policy ought not be enforced;
> (c) Where the arbitrator has been bribed or corrupted;
> (d) Technical misconduct, such as where the arbitrator makes a mistake as to scope of the authority conferred by the agreement of reference. This, however, does not mean that every irregularity of procedure amounts to misconduct;
> (e) Where the arbitrator fails to decide all the matters which were referred to him;
> (f) Where the arbitrator or umpire has breached the rules of natural justice;
> (g) If the arbitrator or umpire has failed to act fairly towards both parties, as for example:
> i. By hearing one party but refusing to hear the other; or
> ii. By deciding the case n a point not put by the parties.[69]

5.5.2. Improper procurement of arbitral proceedings or award

With regards to the second limb of section 30(1), ACA is also silent on what will amount to improper procurement of arbitral proceedings or award. In *Aye-Fenus Ent. Ltd. v Saipem (Nig) Ltd*.,[70] the appellant entered into a contract to supply skilled and

67. *Taylor Woodrow* [1993].
68. [2000] 12 NWLR (Pt. 682) 539.
69. *A. Savoia Ltd* [2000].
70. [2009] 2 NWLR (Pt. 1126) 483.

unskilled workers to the respondent for a drilling project on Perro Negro Rig V. Dispute arose when the appellant alleged a breach of contract resulting from the respondent's failure to pay the appellant a total debt of N24, 473,070.47. The respondent counter claimed the sum of $672,546.00 alleging that it was loss incurred by them as a result of the strike action and hostage taking embarked upon by the workers supplied by the appellant. The dispute was referred to arbitration and the arbitrators rendered their award in favour of the appellant. Dissatisfied, the respondent applied to the High Court to set aside the award on grounds that the arbitral proceedings and the award were improperly procured. The High Court granted the application and the award was set aside. On appeal, the Court of Appeal in construing the text "arbitral proceedings or award … improperly procured…" held that:

> An arbitral award will be set aside where the arbitration has been improperly procured, e.g. where the arbitrator has been deceived or material evidence has been fraudulently concealed.[71]

From case law on the meaning of misconduct of the arbitrator, improper procurement of arbitral proceedings or award under section 30 of the ACA, it is clear that Nigerian courts have wide powers to set aside an award. Notwithstanding this wide power, Nigerian courts have demonstrated a readiness to support arbitration by refusing to set aside awards on mere allegations of misconduct, or arbitral proceedings or award been improperly procured.

In *Arbico (Nig.) Ltd. v Nigeria Machine Tools Ltd.*[72] dispute arose between the parties from a construction contract, and the dispute was referred to arbitration. The respondent and the appellant made various claims and counter claims respectively. The arbitrator incorporated the appellant's counterclaim in his determination of the respondent's claim. The arbitrator reasoned that the counter claim was based on whether there was a breach of the termination clause in the contract, which was also an issue in the main claim. The arbitrator rendered his award in favour of the respondent.

71. *Aye-Fenus* [2009].
72. [2002] 15 NWLR (Pt. 789) 24.

Dissatisfied, the appellant applied to the High Court of Lagos State to have the award set aside. The appellant argued that the arbitrator's refusal to determine its counter claim separately amounted to misconduct, alternatively, that the arbitral proceedings or the award was improperly procured. The respondent also applied to the same court for the enforcement of the award. The High Court rejected the appellant argument and dismissed its case. On appeal, the Court of Appeal upheld the decision of the High Court and unanimously dismissed the appellant's appeal on all grounds. The court reasoned that misconduct does not necessarily mean wilful misconduct or an act of wickedness, but rather conduct in the sense of mistaken conduct. The court reaffirmed the principles of misconduct as laid down by the Supreme Court in *Taylor Woodrow Ltd*., and stressed that, aside the courts' wide powers, courts would be reluctant to interfere with an arbitrator's jurisdiction as the sole judge of law and facts, except it is compelling to do so. Eneh JCA stated that:

> The court in spite of its wide powers has to bear in mind that the parties before it have provided in their agreement to have their dispute or difference referred to the arbitrator against the regular courts… and it has to show reluctance to interfere with the arbitrator's jurisdiction as the sole judge of law and facts unless it is compelled to do so… the stridency of this position is also cognisable from the letter and spirit of the Arbitration and Conciliation Act.

The attitude of Nigerian courts towards setting aside arbitral awards can therefore be summarised as pragmatic. It can be argued that this is because the arbitration agreement demonstrates the parties' intent to comply with the terms of the award as final and binding on them. This is evident from Ogundare JCA remark in *Clement C. Ebokan v Ekwenibe & Sons Trading Co.*,[73] thus:

> I would observe that we must not be over ready to set aside awards where parties have agreed to abide by the decision of a tribunal of their selection, unless we see that there has been something radically wrong and vicious in the proceedings.[74]

73. [2001] 2 NWLR (Pt. 696) 32.
74. *Clement Ebokan* [2001]; In *Guinness Nigeria Plc. v Nibol Properties Ltd*. [2015] 5 CLRN, Candide-Johnson J of the High Court of Lagos State remarked that: "I am in total agreement… that there is a live judicial policy of ascribing priority to the upholding of

5.6. Summary

This chapter examined the conditions under which an award will be set aside in England and Nigeria and the attitude of their courts to the issue. The next chapter will examine the attitude of courts of both jurisdictions towards the challenge of transnational commercial arbitral awards.

arbitral awards, by the regular courts, as a mainstream ADR procedure in the administration of justice for resolving disputes and that there is a narrow compass that attracts the courts to override this policy by setting aside an award. This argument is valid and is pivotal for a court to keep in mind in these types of matters for the reasons espoused in the case law…"

Chapter six

Courts attitude towards refusing enforcement of awards

6.0. Introduction

Article V of the NYC stipulates grounds on which enforcement of awards may be refused by courts. The texts of section 103 of the AA 1996 and article V of the Second Schedule to the ACA follow closely the provisions of article V of the NYC.[1] Article V of the NYC provides for two groups of grounds for refusing enforcement of awards. The first group are grounds which must be raised and proved by the resisting party for the court to exercise its discretion.[2] The second group are grounds which may be raised by the court *ex officio*.[3]

This chapter examines the manner in which the courts in England and Nigeria engage with the article V NYC ground. It also examines whether the grounds for the refusal of enforcement of awards in England and Nigeria are effective. Furthermore, it analyses whether case law in both countries have provided a consistent rule which future parties can follow when relying on the article V grounds. The first five grounds of article V which are procedural are discussed under the caption, 'procedural grounds' (6.1). The last two which are substantive defences are examined under the heading, 'substantive grounds' (6.2).

6.1. Procedural grounds

The party who challenges enforcement an award on any of the articles V (1) grounds, bears the burden of establishing the ground or of proof.[4] These grounds are: incapacity of either party (6.1.1), invalidity of the arbitration agreement (6.1.2), improper notice or lack of due process in arbitral proceedings (6.1.3), arbitral tribunal exceeded its competence or jurisdiction (6.1.4), improper appointment of the arbitral tribunal or incorrect arbitral procedure (6.1.5) and, arbitral award not yet binding or set aside or suspended (6.1.6). The challenging party is only required to

1. Section 52 of the ACA relates to refusal of both domestic and non-NYC awards. The section is also based on article V of the NYC.
2. Article V (1) of the NYC.
3. Article V (2) of the NYC.
4. Report of the Committee on the Enforcement of International Arbitral Awards, UN DOC E/2704, E/AC.42/4/Rev.1.

establish any one of these procedural grounds to have the court exercise its discretion in its favour.[5]

6.1.1. Incapacity of either party

To succeed under the first limb of this ground, the challenging party must plead and prove that one of the parties in the arbitration was under some incapacity at the time the arbitration agreement was made. This section examines the extent of incapacity (6.1.1.1) and the law that regulates the issue of capacity (6.1.1.2)

6.1.1.1. Extent of the incapacity

Article V (1) (a) of the NYC refers to, "under some incapacity." This text is also contained in the relevant sections of the AA 1996 and the ACA.[6] According to Bantekas, the interpretation of the text covers a wide range of legal incapacity, such as age, mental capacity, and diminished capacity.[7] Nonetheless, it is questionable whether the incapacity must relate to the time of concluding the arbitration agreement or the time of commencement of the enforcement proceedings. Though, there is no reported English or Nigerian case on the issue, it seems the incapacity will relate to the time of concluding the arbitration agreement and not at the time of enforcing the arbitral award.[8] This is because capacity of a party to enter into contract in both jurisdictions is determined at the time of concluding the contract.[9]

6.1.1.2. The law applicable to parties' incapacity

The second question relates to the law under which a party's (in)capacity will be determined. The NYC, the AA 1996 and the ACA respectively refer to the law applicable to "them" or "him" without more. Opinion is divided on the issue. Born and other commentators have argued that the law applicable to the question of

5. Smith, S. L. (2007) "Enforcement of International Arbitral Awards under the NYC" in Rufus von Thulen Rhoades, *et al* (eds.) Practitioner's Handbook on International Arbitration and Mediation, Juris Publishing, New York, p. 318.
6. Section 103 (2) (a) of the AA 1996 and article V (1) (a) of the Second Schedule to the ACA.
7. Banktekas, I. (2015) An Introduction to International Arbitration, Cambridge University Press, Cambridge, pp. 84 – 86.
8. Merkin, R. (2004) Arbitration Law, LLP, London, pp. 820 – 821.
9. Tweeddale, A. and Tweeddale, K (2005) Arbitration of Commercial Dispute: International and English Law and Practice, Oxford University Press, Oxford, pp. 127 – 133; Ajogwu, F. (2009) Commercial Arbitration in Nigeria: Law and Practice, Mbeyi and Associates Nig. Ltd., Lagos, pp.51 – 52.

(in)capacity of a party is the law of the enforcing court,[10] while Merkin and Flannery suggest the law of the place of the unsuccessful party's (the defendant's) domicile.[11] This thesis agrees with Tweeddale and Tweeddale that the applicable law ought to be the personal law of the party alleged to lack capacity.[12] In effect, it must not be the defendant's capacity that is questioned. It would appear to be sufficient from the text of the NYC that any party to the agreement is under some incapacity, and not necessarily the defendant.

All three laws refer to the word "party" without any indication as to the nature of the party, whether a natural person or a juristic person. Nevertheless, according to van den Berg, a "party" in the text refers to both natural and juristic persons.[13] The conflict of law rules to determine the law applicable to a party vary from country to country. Generally, a natural person's personal law is either the law of his or her habitual residence (domicile) or of his or her nationality. For a juristic person, it is the law of the country under whose law it is incorporated or where its headquarters is located.[14] In England and Nigeria, the personal law of a natural person are determined by reference to their domicile. While that of a juristic person is determined by reference to its place of incorporation.[15]

10. Born, G. B. (2014) International Commercial Arbitration, 2nd edn., Vol. III, Kluwer Law International, The Netherland, pp. 3488 - 3492; Di Pietro, D. and Platte, M. (2001) Enforcement of International Arbitration Awards: The NYC of 1958, Cameron May, London, at p. 144; Gaillard, E. and Savage, J. (eds.) (1999) Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International, The Hague, para. 1695**;** van den Berg, A. J. (1981) The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, Kluwer Law International, The Hague at p. 276; Redfern, A. and Hunter, M. (2004) Law and Practice of International Commercial Arbitration, 4th edn., Sweet and Maxwell, London, at para 3.25; Poundret, J. and Besson, S. (2007) Comparative Law of International Arbitration, Sweet and Maxwell, London, p. 831; Anzorena, I. (2008) "The Incapacity Defence under the NYC" in Gaillard, E. and Di Pietro, D. (eds.), Enforcement of Arbitration Agreements and International Arbitral Awards: The NYC in Practice, Cameron May, London, p.632.
11. Merkin, R. and Flannery, L. (2014) Arbitration Act 1996, 5th edn., Informa Law from Routledge, Oxon, p. 397.
12. Tweeddale, A. and Tweeddale, K. (2005), p. 130.
13. van den Berg (1981), p. 14.
14. Lew, J. D. M., *et al*, (2003) Comparative International Commercial Arbitration, Kluwer Law International, The Hague, para 6-51; van den Berg, A. J. (1981) supra at pp. 276-277
15. Briggs, A. (2013) The Conflict of Laws, 3rd edn., Oxford University Press, Oxford, pp. 64-66 and 367-373; Omoruyi, I. O. (2001) "The Determination of Applicable Law in International Contracts: A Nigerian Perspective", Modern Practice Journal of Finance and Investment Law, Vol. 5, No. 4, pp. 582 – 594.

6.1.2. Invalidity of the arbitration agreement

The second limb of article V (1) (a) of the NYC relates to the invalidity of the arbitration agreement as a ground for refusing the enforcement of an award. This ground is provided for under section 103 (2) (b) of the AA 1996 and Article V (1) (a) of the Second Schedule to the ACA. Two issues may arise for analysis in respect of this ground. Firstly, the meaning of invalidity of the arbitration agreement (6.1.2.1); and identifying the applicable law (6.1.2.2).

6.1.2.1. The meaning of invalidity of an arbitration agreement

In the context of article V (1) (a) of the NYC, an arbitration agreement is "not valid" where there is lack of legal consent.[16] According to van den Berg, lack of legal consent to arbitrate may arise as a result of misrepresentation, duress, fraud, or undue influence.[17] Thus, an arbitration agreement will not be valid where the initial consent to arbitrate dispute is lacking and the party resisting enforcement proves that it is not a party to the arbitration agreement. This point is illustrated in *Dallah Real Estate and Tourism Holding co. v Ministry of Religious Affairs, Government of Pakistan*.[18]

Dallah's case relates to the enforcement of an ICC award rendered in Paris against the Government of Pakistan (GoP). The principal contract containing the arbitration agreement had been signed by the GoP owned Awami Hajj Trust which subsequently ceased to exist. When dispute arose, Dallah sought arbitration against GoP. One of the issues before the arbitrators was whether there was a valid arbitration agreement between Dallah and GoP. The agreement between Dallah and the trust did not stipulate an express choice of law. In a partial award on jurisdiction, the arbitrators applied "transnational principles" and held that GoP could be deemed a party to the arbitration agreement even though the principal contract was signed with a legally separate entity, Awami Hajj Trust. Eventually, the arbitrators awarded US $20 Million to Dallah in a final award. Dallah sought to enforce the award in England against GoP. The court of first instance refused enforcement pursuant to article V (I) (a) of the NYC on the ground that the arbitration agreement was not valid. GoP successfully argued that it had not been a party to the arbitration agreement. Dallah's appeal was dismissed by the Court of Appeal upholding the

16. Anzorena, I. (2008), p. 632.
17. van den Berg (1981), p. 276.
18. [2010] UKSC 46; [2010] 2 Lloyd's Rep. 691.

decision of the lower court. Further dissatisfied, Dallah appealed to the Supreme Court. The Supreme Court dismissed the appeal and unanimously upheld the decision of the Court of Appeal. In reaching its judgment, the Court reasoned that on the proper application of French Law (as the law of the seat of the arbitration), GoP was not a party to the arbitration agreement and so was not bound by it. Thus, since there was no initial consent between Dallah and GoP, the alleged agreement is was held invalid.

6.1.2.2. Law applicable to the arbitration agreement

Under article V (1) (a) of the NYC, there are two ways by which the invalidity of an arbitration agreement may be determined. Firstly, the invalidity of the arbitration agreement may be determined under the law which has been elected by the parties. Second, if parties have not elected any particular law, the invalidity may be determined by the law of the place where the award was rendered. Particularly so because the issue of whether "the law to which the parties have subjected it" only permits for an express choice, or includes implied choices. And if parties have determined the law applicable to the principal contract, does that constitute an implied choice of the law applicable to the arbitration agreement? Or does electing a seat for the arbitration constitute an implied choice of the law applicable to the arbitration agreement? Opinion is divided on the issue.

For example, Lord Collins, *et al*, contend that the applicable law is the law which governs the principal contract, save the parties agree otherwise.[19] According to Davidson, the phrase "any indication" in the text of article V (I) (a) of the NYC suggests that the text imply, in the absence of an express choice of law, the law which regulates the principal contract.[20] Therefore, if the parties expressly elect the law that governs the principal contract as a whole and are silent on the applicable law to the arbitration agreement, it would be unusual to apply another law to regulate the arbitration agreement. This may be the case especially in respect of an arbitration clause, as it is only one clause of the many clauses in the contract. It therefore makes sense for the arbitration agreement to be regulated by the same law as the rest of the

19. Lord Collins of Mapesbury, *et al*, (eds.) (2012) Dicey, Morris and Collins on The Conflict of Laws, 15th edn., Vol. 1, Sweet and Marwell, London, p. 834 – 840.
20. Davidson, F. (2012) Arbitration, 2nd edn., W. Green, Edinburgh, pp. 693 – 697.

contract. Nonetheless, this is the presumption except the parties have contracted otherwise. Thus, Lew stated that:

> There is a very strong presumption in favour of the law governing the substantive agreement which contains the arbitration agreement. This principle has been followed in many cases. This could even be implied as an agreement of the parties as to the law applicable to the arbitration clause.[21]

In England, this presumption was applied in the case of *Sonatrach Petroleum Corp. (BVI) v Ferrell Int'l. Ltd.*[22] where the court held *inter alia* that:

> …where the substantive contract contains an express choice of law, but the agreement contains no separate choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract.[23]

This thesis supports the view that in the absence of an express choice of law, the arbitration agreement should be regulated by the same law as the principal contract. This underscores the point that if the arbitration agreement is considered as simply one of rights and obligations assumed by the parties in their contract, then it should be construed as the parties' common intention to make the law applicable to the principal contract, the law which should govern the arbitration agreement.[24]

For a contrary view, Pietro and Platte contend that the applicable law is either the proper law of the principal contract or the law of the place where the arbitral award was rendered. [25] In effect, in the absence of a law agreed by the parties, the law of the country where the award was rendered will apply. Against this view, is the fact that sometimes the link between the law which regulates the arbitration agreement and the seat of arbitration may be unconnected.[26] In Practice, it is often the case that parties in international commercial arbitration have no connection with the seat of

21. Lew, J. D. M. (1998) "The Law Applicable to the Form and Substance of the Arbitration Clause", ICCA Congress Series, No. 14, para. 136.
22. [2002] 1 All E. R. (Comm) 627
23. *Sonatrach Petroleum Corp. (BVI) v Ferrell International Ltd*. [2002] 1 All E. R. (Comm) 627 at 628.
24. Blackaby, N. *et al* (2015); Redfern and Hunter on International Arbitration, 6th edn., Oxford University Press, Oxford, pp. 158 – 165.
25. Di Pietro, D. and Platte, M. (2001), p. 144.
26. Gaillard, E. and Savage, J. (eds.) (1999), para. 433.

the arbitration. Parties sometimes elect a seat because it is neutral or for reasons of convenience, while in some cases the seat of arbitration may not even be selected by the parties themselves.[27] Thus in *West Tankers v Ras Riunione Adriatica Di Sicurata Spa (The Front Comor)*, Lord Hoffman observed that:

> …the situs and governing law are generally chosen by the parties on grounds of neutrality, availability of legal services and the unobtrusive effectiveness of the supervisory jurisdiction.[28]

This can be safely implied to mean that the law regulating the arbitration may generally differ from the law of the seat of the arbitration. However, this poses the question whether these views negate the principle of separability of the arbitration agreement discussed above. This disconnectedness of the arbitration agreement from the principal contract raises the issue, whether the law applicable to the arbitration agreement may be different from the law that governs the principal contract. Article V (1) (a) of the NYC points towards this conclusion thus:

> The parties to the agreement referred to in Article II were under the law applicable to them … or the said agreement is not valid under the law to which the parties have subjected to…

Nonetheless, the argument that since the arbitration agreement is independent of the principal contract, the law applicable to the arbitration agreement may be different from the principal contract has been opposed. According to Derains:

> The autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other, as evidenced by the fact that acceptance of the contract entails acceptance of the clause, without any other formality.[29]

27. Paulsson, J. (1981) "Arbitration Unbound: Award Detached from the Law of its Country of Origin", *International and Comparative Law Quarterly*, Vol. 30, No. 2, pp. 358 – 387; Verbist, H. (1996) "The Practice of the ICC International Court of Arbitration with regards to the Fixing of the Place of Arbitration", *Arbitration International*, Vol. 12, No. 3, pp. 347-358; Greenberg, S. *et al*, (2010) International Commercial Arbitration: An Asia-Pacific Perspective, Cambridge University Press, p. 1.
28. [2007] 1 Lloyd's Rep. 391 at para. 14.
29. Derains, Y. (1995) "The ICC Arbitral Process Part VIII: Choice of the Law Applicable to the Contract and International Arbitration " *ICC International Court of Arbitration Bulletin*, Vol. 6, No. 1, p. 10 at pp. 16 – 17.

Also, Pietro and Platte argue in opposition that the doctrine of separability is mainly important in circumstances where the principal contract is held invalid.[30] In effect, the invalidity of the principal contract has nothing to do with the arbitration agreement as a separate entity from the principal contract. For purposes of determining the applicable law of the arbitration agreement, reference can be made to the applicable law to the principal contract.

However, van den Berg has suggested that the invalidity of an arbitration agreement is not governed by the rules stipulated by article V (I) (a) but by those contained in article II of the NYC.[31] This thesis disagrees with this view and argues that article II of the NYC relates to the making of an arbitration agreement. To that effect, article II concerns the recognition of the arbitration agreement in writing, while article V (1) (a) relates to the validity of the arbitration agreement.[32] If the unsuccessful party wants to challenge the enforcement of the award on the basis of article II (2), it has to do so, on the argument of an existing arbitration agreement. On the other hand, if the challenge is on the basis of article V (I) (a), it has to do so, on the strength of the invalidity of the arbitration agreement. In the former instance, the arbitration agreement is deemed to exist pursuant to article II (2) of the NYC, whereas, in the later instance, the agreement is deemed valid.[33] Nonetheless, for the agreement to be held invalid, the unsuccessful party will need to establish lack of consent. Consent may be implied or express in form and scope as determined by the ordinary principles of contract law.[34] Moreover, the grounds for refusing enforcement of awards as contained in article V are exhaustive and are meant to be construed narrowly.[35]

In England, the text of Section 103 (1) AA 1996 makes it all the more exclusive that, "recognition and enforcement of a NYC award shall not be refused except in the following cases…" In effect, the invalidity of the arbitration agreement cannot be

30. Di Pietro, D. and Platte, M. (2001) at pp. 144 – 145.
31. van den Berg, A. J (1981) at pp. 287 – 291.
32. Yu, H-L. (2012) "Written Arbitration Agreements – What Written Arbitration Agreements?" *Civil Justice Quarterly*, Vol. 32, No. 1, pp. 68 – 93.
33. Yu, H-L (2012), p. 78.
34. Arfazadeh, H. (2001) "Arbitrability under the NYC: The Lex Fori Revisited" *Arbitration International,* Vol. 17, No. 1, pp. 73 – 80.
35. Paulsson, J. (1996) "The NYC in International Practice - Problems of Assimilation" in Blessing, M. (ed.) The NYC of 1958 (ASA Special Series No. 9, Swiss Arbitration Association, Zurich, pp. 100 – 116.

determined by Part 1 of the AA 1996. However, where the parties have elected English law or failing any indication thereon and the arbitral award was rendered in England then, English law will determine the (in)validity of the arbitration agreement. This approach in the opinion of Lord Mustill is irresistible because,

> "… there may sometimes be an express choice of curial law which is not the law of the place where the arbitration is to be held but in the absence of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that a choice was intended, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place…"[36]

In *XL Insurance Ltd v Owens Corning*[37] the Commercial Court stated that since the parties choose to conduct their arbitration in London under the AA 1996, the arbitration agreement would be determined by English law in the absence of an express choice of law chosen by the parties. Also in *Dallah*[38] though not an English arbitration, the Supreme Court applied the same principle when it concluded that pursuant to French law, as the law of the country where the award was rendered, the arbitration agreement was invalid. [39]

From the analyses of the authorities, it is appears that once the law regulating the invalidity of an arbitration agreement becomes questionable, English law will determine the invalidity, if expressly elected by parties, and in the absence of parties' express choice of law, it may be determined according to transnational rules or the law of the place where the award was rendered.

36. *Channel Tunnel Group v Balfour Beatty* [1993] AC 334 at 357 (HL).
37. [2000] 2 Lloyd's Rep. 500; in *Dardana Ltd v Yukos Oil Company* [2002] 1 Lloyd's Rep. 225 at p. 229 the Commercial Court,Queen's Bench Division, reached similar conclusion as it defined "not valid" as "simply meaning that the agreement is of no legal effect under the relevant law".
38. *Dallah Real Estate and Tourism Holding co. v Ministry of Religious Affairs, Government of Pakistan* [2010].
39. Furthermore, invalidity of the arbitration agreement may be relied upon as a ground for resisting enforcement of an award under section 66 of the AA 1996 or at common law. The invalidity of the arbitration agreement is determined according to the law elected by parties. However, where no such election is made, it has been argued that the fact that the parties agreed to have the arbitration conducted within a particular state, may imply their intention to have the law of that seat determine issues of invalidity of the agreement. This point is illustrated by a pre AA 1996 case of *Union of India v Mcdonnell Douglas Corp*. [1993] 2 Lloyd's Rep. 48 at p. 50.

6.1.3. Lack or violation of due process

The second ground for refusing enforcement of an award under the NYC is lack of due process in the arbitration proceedings.[40] This ground is also contained in section 103 (2) (c) of the AA 1996 and article V (1) (b) of the Second Schedule to the ACA. According to Scherer, the article V (1) (b) ground guarantees minimum requirements for a fair arbitral procedure and also integrates elementary concepts of due process into the NYC.[41]

Lack of due process refers to factual circumstances where the unsuccessful party in the arbitration was denied the minimum standard of fairness during the arbitration proceedings.[42] The essence of this fundamental requirement under the NYC is to give parties the opportunity to be heard at a meaningful time and in a meaningful manner.[43] Thus, for van den Berg due process "concerns the fundamental principle of procedures, that of fair hearing and adversary proceedings, also referred to as *audi alteram partem*"[44] Due process violations are instances where the unsuccessful party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.

Under this ground, five issues will be examined: the law governing lack of due process (6.1.3.1), what constitutes lack of proper notice (6.1.3.2), when is a party considered 'unable to present its case' (6.1.3.3), default of a party to present its case (6.1.3.4) and, the severity of due process violation on the application for enforcement (6.1.3.5).

6.1.3.1. The law governing due process.

The standard of due process in England and Nigeria may differ from the law of the seat of arbitration or the law governing the arbitration agreement. Thus, where

40. Article V (I) (b) of the NYC.
41. Scherer, M. (2012) "NYC: Violation of Due Process, Article V (1) (b)", in Wolff, R. (ed.), NYC on the Recognition and Enforcement of Foreign Arbitral Awards: A Commentary, C. H. Beck/Hart Publishing, pp. 279 – 309.
42. Bernardini, P. (2004) "The Role of the International Arbitrator", *Arbitration International*, Vol. 20, No. 2, pp. 113 – 122.
43. Inoue, O. (2000) "The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in the United States Federal Courts: A Proposal for a Standard", *America Review of International Arbitration*, Vol. 11, Nos. 1 – 2, pp. 247 – 286; Kleinleisterkamp, J. (2005) International Commercial Arbitration in Latin America, Oceana Publications Inc., New York, pp. 30 – 32.
44. van den Berg, A. J. (1981) at p. 297.

violation of due process is alleged as a ground for challenging the enforcement of an award, the question may arise as to which law the English or the Nigerian court should apply. Article V (I) (b) of the NYC is silent or at least unclear as to the law that will apply.[45]

It has been argued that article V (1) (b) of the NYC should be interpreted independently of any rules of national law.[46] Consequently, the proponents of this view reason that article V (1) (b) contemplates an autonomous substantive rule which is sufficient in itself as a standard of due process. All the more so, an autonomous interpretation of article V (1) (b) resonates with the overall objectives of the Convention. It establishes a uniform set of transnational standards that enables the recognition or enforcement of arbitral awards and also prevent the application of parochial rules that would render ineffective or even hinder the arbitral process. In effect according to this view, due process by virtue of article V (1) (b) should apply uniformly across Contracting States.

This view has been criticised on the grounds that article V (1) (b) would then impose a rather vague transnational substantive rule of due process.[47] It is also argued that there are possible choices as to the law governing the standard of due process. These choices include, the law elected by the parties to regulate the arbitration process, or in the absence thereof, the law of the place where the award was rendered.[48] Another view is that the law of the enforcing court should govern issues of violation of due process.[49] In addition, this view takes into consideration the law chosen by the parties as well as the law of the enforcing court.[50]

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45. Section 103 (2) (c) of the AA 1996 and Article V (I) (b) of the Second Schedule to the ACA are also not clear which law should govern the issue.
46. Mantilla-Serrano, F. (2004) "Towards a Transnational Procedural Public Policy", *Arbitration International*, Vol. 20, No. 4, pp. 333 – 363; Kaufman-Kohler, G. (2003) "Globalisation of Arbitral Procedure", *Vanderbilt Journal of Transnational Law*, Vol. 36, No. 4, pp. 1313 – 1333; Gaillard, E. and Savage, J. (eds.) (1999) at p. 1696; Lew, J. D. M., *et al* (2003) at para 26 – 81; van den Berg, A. J. (1981) p. 298.
47. von Mehren, R. B. (1998) "Enforcement of Foreign Arbitral Awards in the United States" *International Arbitration Law Review*, vol. 1, No. 6, pp. 198 – 225; Inoue, O. (2000); Lu, M. (2006) "The NYC on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defences to Oppose Enforcement in the United States and England", *Arizona Journal of International and Comparative Law*, Vol. 23, No. 3, pp. 747 – 785.
48. Garnett, R. (2002) "International Arbitration Law: Progress towards Harmonisation", *Melbourne Journal of International Law*, Vol. 3, pp. 400 – 414.
49. Di Pietro, D. and Platte, M. (2001) at p. 147.
50. *Hebei Import and Export Corp. (PR China) v Polytek Engineering Co. Ltd (Hong Kong*) [1999] 1 HKLRD 665 (Hong Kong Court of Final Appeal).

In England, an enforcing court will refuse enforcement of arbitral award where there is a violation of due process in accordance with English Laws. In *Irvani v Irvani,*[51] after the termination of a partnership business between two brothers Bahman Irvani and Ali Irvani, disputes arose over the distribution of the partnership assets. Parties agreed to submit the dispute to a sole arbitrator. The arbitrator rendered her award in favour of Bahman. Ali filed an application in the United States District Court for the Northern District of Georgia to dissolve the partnership and distribute assets. While the case was pending, Bahman brought an application before English Court to obtain a definitive statement on the arbitral award to use in his motion to dismiss the United States proceedings. The English Court treated Bahman's application as a request to recognise and enforce the arbitral award under the NYC. As one of his defences, Ali contended that he was unable to present his case before the arbitrator because the arbitrator was bias. The Court of Appeal noted that the meaning of the text "otherwise unable to present his case" in the NYC should have an international meaning since it is contained in an international document. Nonetheless, the court found that the award was neither based on reason nor on information available to Ali. Thus, instead of construing the due process defence narrowly, the court interpreted the defence liberally, applying the English principle of natural justice, to ensure that the arbitrator did not breach Ali's due process rights.[52]

In Nigeria, there is no reported case that deals with this issue. The ACA is also silent as to whether an enforcing court should apply the procedural law chosen by the parties, or the law of the seat of arbitration, or Nigerian law as the enforcing State. However, it is a constitutional requirement in Nigeria to observe due process in the determination of any matter affecting the rights and obligations of individuals.[53] This thesis suggests that such issue will be determined in accordance with Nigerian constitutional standard of due process and the provisions of the ACA. This view is based on the notion that any proceeding conducted in violation of due process is a

51. [2000] 1 Lloyd's Rep. 412.
52. Lu, M. (2006) at pp. 767 – 769.
53. *Bellview Airlines Ltd v Aluminium City Ltd* [2008]All FWLR 1599; Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that:

> In determination of his civil rights and obligations, including any question or determination by or against by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

breach of the constitutional principle of fair hearing.[54] Also, Section 14 of the ACA provides that "in any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity to present his case."

6.1.3.2. Lack of proper notice

As noted above, an enforcing court in England and Nigeria will apply its own national law to determine a breach of due process. This sub-section examines the provisions of the law in relation to (in)proper notice in both countries.

Generally, a notice of the appointment of an arbitrator(s) need not be in any particular form. The UNCITRAL Model Law requires, if the parties do not agree on a procedure, notice will be deemed proper if it is made by any written correspondence and delivered by ordinary post or registered letter or any other means which provides a record of delivery or attempt to deliver.[55] The standard of proper notice primarily depends on the parties' agreement. But where there is no agreement regarding the proper notice to issue, the standard of notice would be judged according to the law determined to govern the arbitration.[56]

In England, the procedure for the appointment of the arbitrator is determined by parties' agreement. Where parties have not agreed on a procedure, section 16 of the AA 1996 applies.[57] However, in the event that both parties are to appoint a sole

54. Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)**,** In *P.D.P. v K.S.I.C.* [2005] 15 NWLR (Pt. 948) at p. 240, the court held that fair hearing is in most cases synonymous to due process is an issue which clearly is at the threshold of our legal system. Once there has been a denial of due process, the whole proceedings automatically become vitiated with a basic and fundamental irregularity, which renders any outcome of such proceedings null and void. Also in *Alsthom v Saraki* [2005] MJSC, Vol. 3 at p. 128, the Supreme Court stated that the principle of due process is fundamental to all judicial or quasi-judicial proceedings and like jurisdiction, the absence of it will vitiate any proceedings however well conducted.
55. Article 3 of the UNCITRAL Model Law. A similar standard is stipulated under Article 2(1) of the UNCITRAL Rules and Article 3 (2) of the ICC Rules; Lew, J. D. M., *et al* (2003) at para 26.84.
56. van den Berg, A. J. (1981) at p. 303.
57. Section 16 of AA 1996 provides thus:
    1. Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties
    2. Notwithstanding the provisions of subsection (1) of this section and unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.

arbitrator but one party refuses or fails to do so within the time specified, the other party, having duly appointed its arbitrator, may in writing notify the party in default that it proposes to appoint its arbitrator to act as the sole arbitrator.[58] The provisions of sections 16 and 17 of the AA 1996 did not stipulate the form and content of notice required for a party to be deemed to have been properly notified of the appointment of the arbitrator and the commencement of the arbitration proceedings.

It is sufficient if on the face of a notice a reasonable person will construe the content as providing sufficient information that dispute has arisen and that the other party should take steps to appoint its arbitrator and defend the case against it. This was the decision in *Allianz Versicherungs Aktiengesellschaft & Ors.v Fortuna Co. Inc. (the Baltic Universal*)[59]. The case concerned the carriage of a cargo of fruit in the vessel Baltic Universal. The cargo was carried under three bills of lading in similar, but not identical form. The bills of lading incorporated arbitration clauses and also contained a general paramount clause which incorporated as appropriate Hague or Hague-Visby Rules. When dispute arose, the applicants through their London solicitors wrote the respondent refereeing the matter to arbitration. The applicants also in the same letter notified the respondent the appointment of their arbitrator. The respondent appointed its arbitrator and also notified that applicant of the appointment. However, after about ten months, the respondent wrote the applicants stating that they considered the applicant's letter ineffective to commence arbitration proceedings so as to satisfy the requirement of the Hague, or Hague-Visby Rules. One of the issues before the court was whether the letter satisfied the requirement of proper notice of appointment of arbitrator and commencement of arbitration proceedings. The court held thus;

> …a notice, in writing which, read in its context, makes it clear by whatever language that the sender was invoking the arbitration agreement and was requiring the recipient to take steps in response to enable the tribunal to be constituted, was sufficient to commence the arbitration, and was not necessary for the claimant

58. Section 17 of the AA 1996 provides thus:
    Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date the request to refer the dispute to arbitration is received by the other party.
59. [1999] 1 Lloyd's Rep 497; [1999] 2 All ER 625.

> to expressly call on the respondent to appoint his arbitrator in order to do so…[60]

In *Kanoria v Guinness*[61] the English Court of Appeal refused to enforce an arbitral award against the respondent, the majority shareholder of the company, who had been summoned jointly with the company to arbitration in India. The notice of arbitration issued by the claimant did not, at least, contain sufficient information regarding the allegation against the respondent. During the oral hearing, the claimant accused the respondent of fraud. The respondent did not attend the oral hearing because of illness. Apparently, the arbitrators on the basis of the fraud allegations lifted the corporate veil and personally found the respondent liable. An award was rendered in favour of the claimant. The claimant sought to enforce the award against the respondent in England. The trial court refused enforcement of the award because the respondent was unable to present his case due to ill health. On appeal, the Court of Appeal upheld the lower court's decision and further held that the refusal was reasonable because the respondent was not given proper notice of the fraud accusations made against him in his personal capacity.

In Nigeria, parties are free to agree on the number of arbitrators and the procedure for their appointment. But where parties do not agree on the number of arbitrator to be appointment, the number of arbitrators will be deemed to be three.[62] As to the arbitration proceedings, except otherwise agreed by parties, arbitration proceedings are begun by written notice by one of the parties to the contract. The proceeding is then governed by default provisions of the Arbitration Rules of the First Schedule to the ACA (Arbitration Rules). Unlike the English AA 1996, the ACA is not silent on

60. *Allianz Versicherungs Aktiengesellschaft* [1999] pp. 625 – 626.
61. [2006] EWCA Civ 222.
62. Section 6 of ACA. However, the combined effect of sections 7 and 44 of the ACA is that the method of selecting arbitrators is determined by the terms of parties' arbitration agreement. Section 7 applies to domestic arbitration while section 44 applies to international. However, where no mode is determined by the parties, the provisions of the ACA will apply by default. Under sections 7(2) and 44(5) of the ACA, if the arbitration proceedings are to be conducted by three arbitrators, each party to the arbitration must appoint one arbitrator and the two arbitrators appointed must then appoint the third arbitrator. If a party fails to appoint an arbitrator or the two arbitrators appointed by the parties fail to appoint the third arbitrator, within thirty days of being required to do so in a domestic arbitration, the appointment will be made by the court on application of any party to the arbitration agreement. If it is an international arbitration, the appointment would be made by an appointing authority designated by the parties to make the appointment. Adekoya, O. and Emagun, D. (2012) Arbitration Guide: Nigeria, IBA Arbitration Committee, AELEX, Nigeria, pp. 1 – 17.

the form and content of a proper notice of appointment of the arbitrator(s) and the arbitration proceedings. Article 3 (3) and (4) of the Arbitration Rules provide that.[63]

> 3. The notice of arbitration shall include the following:
> (a) a demand that the dispute be referred to arbitration
> (b) the names and address of the parties
> (c) a reference to the arbitration clause or the separate arbitration agreement that is invoked
> (d) a reference to the contract out of or in relation to which the disputes arises,
> (e) the general nature of the claim and an indication of the amount involved, if any;
> (f) the relief or remedy sought
> (g) a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon
> 4. The notice of arbitration may also include:
> (a) the proposals for the appointment of a sole arbitrator
> (b) the notification of the appointment of an arbitrator referred to in Article 7;
> (c) the statement of claim referred to Article 18.

However, given that an enforcing party is required under the Arbitration Rules to stipulate certain information in the notice of arbitration, the question that then arises is whether insufficient or otherwise improper notice of arbitration is capable of nullifying an award. It seems fairly settled that notice must be given according to the parties' agreement and where there is no such agreement, according to the provisions of the ACA. In *Compaigne Général de Geophysique v. Dr Jackson Etuk,*[64] the appellant refused to participate in the appointment of a sole arbitrator as agreed by the parties, the respondent unilaterally appointed a sole arbitrator without an application to the court for such appointment as stipulated under section 7(2)(b) of the ACA. The arbitrator proceeded to hear the respondent's case without the appellant. An award was rendered in favour of the respondent. The High Court recognised the award and ordered enforcement. On appeal, the Court of Appeal

63. The Arbitration Rules attached to the ACA is a re-enactment of the UNCITRAL Arbitral Rules 1976.
64. [2004] 1 N.W.L.R. (Part 853) 20 at p.52.

reserved the trial court's decision and held *inter alia* that the appointment of the sole arbitrator by the respondent was void having been done in breach of the provisions of section 7(2)(b) of the ACA. The Court of Appeal further reasoned that the award was void having been vitiated by failure to put the appellant on notice of the proceedings of the arbitrator thus, a breach of the appellant's right to fair hearing which rendered the arbitral proceedings a nullity.

Clearly, article 3(3) of the Arbitration Rules stipulates mandatory information which must be contained in a valid notice of arbitration. By expressly stipulating the contents of a proper notice of arbitration the ACA, like the UNCITRAL Arbitration Rules, ensures that the respondent will receive information "sufficient to apprise the respondent of the general context of the claim asserted against him". Such information will enable the responding party to decide on its future course of action.[65] In this regard, improper notice is capable of preventing a party from presenting its case. This arguably constitutes a clear breach of due process, and a failure to protect the parties' rights to equality and procedural fairness.[66]

6.1.3.3. Inability of a party to present its case

According to di Pietro and Platte the text "unable to present his case" of article V (I) (b) of the NYC covers any serious irregularity in the arbitration proceedings that may lead a party to miss an opportunity to present its case.[67] For Born, the NYC "also suggests that the exception may extend to cases in which extra-ordinary circumstances, akin to force majeure, prevented a party from presenting its case".[68] In *Generica Ltd v Pharmaceuticals Basics Inc*.,[69] a United States of America Court of Appeal considered the phrase and thus stated that:

> The defence basically corresponds to the due process defence that a party was not given the opportunity to be heard at a meaningful time and in a meaningful manner … Therefore, an arbitral award should be

65. Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, UNCITRAL, 8th Session, UN DOC A/CN.9/97 (1974); Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, UNCITRAL 9th Session, Addendum 1 (Commentary) UN DOC A/CN.9/122/Add. 1 (1975).
66. Caron, D. D. & Caplan, L. M. (ed.) (2013) The UNCITRAL Arbitration Rules: A Commentary, 2nd edn., Oxford University Press, Oxford, pp. 363 – 365.
67. Di Pietro, D. and Platte, M. (2001) at p. 15.
68. Born, G. B. (2001) International Commercial Arbitration: Commentary and Materials, 2nd edn., Kluwer Law International, The Hague, p. 832.
69. (1998) XXIII YBCA 1076.

> denied or vacated if the party challenging the award proves that the due process jurisprudence defines it … It is clear that an arbitrator must provide a fundamental fair hearing … A fundamental fair hearing is one that meets the minimal requirements of fairness – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.[70]

Article 24(3) of the UNCITRAL Model Law also shed light on when a party is considered "unable to present its case". Generally speaking, it demonstrates that equality of information between the parties is vital as any other procedural requirement.[71] Karrer asserts that equal treatment of the parties may be ensured through guaranteeing parties' right to be heard.[72] Therefore, where one party is given the right to put forward its case and another denied the right to defend itself, then the arbitral award becomes a product of injustice.

In *Kanoria v Guinness*[73] allegations of fraud and dishonesty were made against the respondent. The respondent was not notified of the allegations, and could not attend hearing in India, apparently because of matters outside his control (serious illness). The arbitrators based their decision on the allegations without affording the respondent an opportunity to defend himself. The English Court of Appeal upheld the lower courts' decision and refused enforcement. The court held that the respondent had not been afforded the chance to present his case when allegations of fraud and dishonesty were made against him by the claimant at the hearing. The court reasoned that such denial of the right to be heard and the unequal treatment melted against the respondent amounted to "… an extreme case of potential injustice".[74]

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70. *Generica Ltd* (1988) at pp. 1078 – 1079.
71. Article 24(3) of UNCITRAL Model Law on International Arbitration provides:
    > "All statements documents or other informational supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties."
72. Karrer, P. A. (2005) "Must an Arbitral Tribunal Really Ensure that its Award is Enforceable?" in Aksen, G., *et al* (ed.) Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner, ICC Publishing, London, pp. 429 – 435.
73. *Kanoria v Guinness* [2006].
74. *Kanoria v Guinness* [2006]; In *OGH* (2005) YCA XXXXI, pp. 583 – 585, Australian Supreme Court held that a defendant's arguments that the arbitrators did not accept certain evidence brought forward by the defendant did not amount to a violation of due process; however, if the

Thus, it is argued in this thesis that in England and Nigeria, a party will be considered unable to present its case where it is shown that the arbitrator was biased, or a measure was taken of which one or both parties were unaware, or the unsuccessful party was not accorded an opportunity to contest facts and evidence put forward by the successful party which the arbitrator considered as the reason(s) for the award.[75]

6.1.3.4. Default of the unsuccessful party to present its case

The defence of "unable to present its case" cannot result from the unsuccessful party's own conduct.[76] Consequently, where the unsuccessful party declines to appear, or neglects to respond to the evidence before the arbitral tribunal after being accorded a fair opportunity to do so, it cannot subsequently plead that it was unable to present its case. In such situation, courts will be unsympathetic to allegations of breach of due process. Thus, a party alleging lack of opportunity to present its case, as a ground to resist enforcement of an award, must show that such lack of opportunity did not result from its own conduct.[77]

In England, this view is illustrated in the case of *Minmetals Germany GmbH v Ferco Steel Ltd.*[78]In *Minmetals*, an award rendered in China was on the application of the defendants remitted by the Beijing Court to the arbitrators for a resumed hearing. The reason for the court's order of resumed hearing was that the arbitrators had rendered their award on the basis of evidence not put to them by the parties. The relevant arbitration rule allowed the arbitrators to make reference to materials not put to them by the parties. But in relying on such evidence, the arbitrators were required to disclose to both parties the evidence from which they reached their conclusion. At the resumed hearing, the defendants proceeded on the basis that the evidence relied upon by the arbitrators in rendering their initial award was no longer relevant and submission were made on other grounds. The arbitrators nevertheless took the view that the defendants had said nothing to alter their earlier factual conclusions, and thus

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arbitrators had based their decision on facts and evidence that the defendant had no opportunity to challenge, such omission would have been a violation of due process.

75. *Kanoria v Guinness* [2006]; *Irvani v Irvani* [2000].
76. Joseph, D. (2010) Jurisdiction and Arbitration Agreements and their Enforcement, 2nd edn., Sweet and Maxwell, p. 440.
77. Garnett, R., *et al,* (2000) A Practical Guide to International Committee Arbitration, Oceana Publications, New York, p. 105.
78. [1999] CLC 647.

affirmed their award. Colman, J held that the award was enforceable by the claimant and thus stated that:

> …the inability to present a case to arbitrators within s. 103(2) (c) contemplates at least that the enforcer has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcer has, due to matters within his control, not provided himself with means of taking advantage of an opportunity to present his case, he does not … bring himself within that exception to enforcement under the Convention.[79]

The court in arriving at its decision reasoned that the defendant was eventually accorded a fair opportunity to request for the disclosure, but declined to utilise it. It is observed that the court's interpretation of the text "otherwise unable to present his case" is restrictive. It precludes circumstances where the resisting party fails to take advantage of any opportunity to present or defend its case.

In Nigeria, Article 28 of the First Schedule to the ACA provides:

> 1. If within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.
> 2. If one of the parties, duly notified under the Rules, fails to appear at a hearing, without showing sufficient cause for failure, the arbitral tribunal may proceed with the arbitration.
> 3. If one the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral

79. *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] at pp. 658 – 659.

> tribunal may make the award on the evidence before it.

Consequently, it seems that if the resisting party declines to appear before the arbitral tribunal after being correctly served with the notice of arbitration, or fails to produce its defence on a date fixed for hearing, any award rendered against it cannot be denied enforcement on grounds of inability to present its case.[80]

6.1.3.5. The impact of due process violation on an award

According to Gaillard and Savage, breach of due process without the need to show that it caused actual injury to the resisting party, justifies non-enforcement of an arbitral award.[81] Gaillard and Savage argued that their proposition is premised on the NYC which disapproves a breach of due process, without making refusal of enforcement subject to the resisting party establishing injury suffered as a result of the violation. They further submitted that any other interpretation would be considered to add a gloss to the article V (I) (b) of the NYC, and detract from its intended dissuasive effect.[82]

Conversely, van den Berg and other authors have argued that a violation of due process might not result in a refusal of enforcement, provided the alleged violation of due process has no effect on the arbitral award.[83] In effect, where the violation of due process is insignificant, enforcement of the arbitral award will not be denied.[84] This view seems more representative of the intentions of the NYC, especially, where the outcome of the arbitration will not be different regardless of the breach of due process.[85]

In England, the court will not refuse enforcement of the arbitral award where violation of due process has no severe effect on the award. In *Ominium de Traitement*

80. This rule is also stipulated under article 25 of the UNCITRAL Model Law and article 21 of the ICC Rules.
81. Gaillard, E. and Savage, J. (eds.) (1999) at para. 1699. This view is also evident in *Rice Trading Ltd. v Nidera Handelscompagnie BV* (1998) XXIII YBCA 731 (Gerechtshof Court of Appeal).
82. Gaillard, E. and Savage, J. (eds.) (1999), para. 1699.
83. van den Berg, A. J. (1981) at pp. 301 – 302; Kroll, S. M. (2002) "Recognition and Enforcement of Foreign Arbitral Awards in Germany" *International Arbitration Law Review*, Vol. 5, No. 5, pp. 160 – 169; Tweeddale, A. and Tweeddale, K. (2010) at p. 145.
84. Merkin, R. and Flannery, L. (2014) at p. 399.
85. Yu, H-L. (1999) "Minmetals Germany GmbH v Ferco Steel Ltd.: A Step Further than Localisation", *International Arbitration Review*, Vol. 2, No. 3, pp. 83 – 89.

et de Valorisation SA v Hilmarton Ltd.[86] The applicant argued *inter alia*, that it was unable to present its case within the meaning of section 103 (2) (c) of the AA 1996. The applicant based its argument on two facts: that the second arbitrator who took over following the resignation of the initial arbitrator decided not to hear the oral evidence of parties and, that the second arbitrator held only a short hearing to take closing submissions before rendering the award. The court found that there was nothing in the applicant's argument to hold that section 103 (2) (c) of the AA 1996 applied or was violated. Thus, the applicant's submission that it was unable to present its case was rejected. The court reasoned that the initial arbitrator heard all the witnesses and took notes of the evidence. Secondly, neither the applicant nor the respondent requested to supplement its evidence. Thirdly, neither the applicant not the respondent alleged new facts after the appointment of the second arbitrator. Lastly, the second arbitrator premised his decisions on the need for procedural economy and efficiency rule that characterises arbitral process. The court observed that with defence of this kind, "a careful reading of the award itself" would suggest whether a breach of due process affected the arbitral award.[87]

Thus, looking at the arbitrator's reasoning for the arbitral award, the court will determine if either fact or law supported the award. If the award is supported by either fact or law, it is unlikely that a court will hold that one of the parties was otherwise unable to present its case. Therefore, when a party alleges that it could not present its case, it seems that the English and the Nigerian courts will examine if the exception impacted on the award.[88]

6.1.4. The arbitrator acted *ultra vires*

An enforcing court may refuse the enforcement of an award if it is satisfied that the award was rendered beyond the arbitrator's authority. This ground of refusal is stipulated under article V (1) (c) of the NYC, section 103 (2) (d) of the AA 1996 and article V (I) (c) of the Second Schedule to the ACA.

In a consensual arbitration parties' agreement to submit or refer their dispute to arbitration is pivotal to the jurisdiction of the arbitrator. According to Park, the

86. [1999] 2 Lloyd's Rep. 222.
87. *Ominium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] at p. 225.
88. Though there is no Nigerian decided case on this point however, it can be said that the authority can be cited or relied upon as a persuasive precedent.

arbitration agreement stands as a primary source of the arbitrator's authority to resolve the dispute submitted or referred to it by the parties.[89] The arbitration agreement not only gives content and sets limits to the arbitrator's authority, it also defines the essence of the power been deployed. Thus, a valid arbitration agreement is the standard upon which the jurisdiction of the arbitrator is determined. Lord Hope of Craighead in *Fiona Trust* considered this as firmly embedded in "the law of international commerce."[90]

There are two ways the arbitrator may exceed its jurisdiction. Under article V (1) (c) of the NYC, the first instance is where the arbitrator renders an award that deals with a matter not contemplated by or not falling within the terms of the arbitration agreement. The second is where the arbitrator renders an award on matters beyond the scope of the arbitration agreement.[91] Merkin and Flannery observe that it is not easy to distinguish any material difference between the two instances, and thus stated:

> If the award 'deals' with a difference, it usually implies that it 'contains decisions on matters; and (leaving aside any difference in the expressions 'terms of the submission' and 'scope of the submission') something that does not fall within the scope must be beyond it.[92]

However, it can be argued that a difference exist between the two circumstances. In the first situation, the arbitrator acts *extra petita* by dealing with matters not contemplated by or not falling within the ambit of the parties' agreement.[93] It also replicates cases where the arbitrator awards remedies not contained in the contract between the parties.[94] The second instance is where the arbitrator acts *ultra petita* by rendering an award on matters beyond the scope of the reference or submission to

89. Park, W. W. (2006) "The Arbitrator's Jurisdiction to Determine Jurisdiction" in van den Berg, A. J. (eds.) International Arbitration 2006: Back to Basics? ICCA International Arbitration Congress, Vol. 13, Series 55, pp. 1 – 156.
90. *Fiona Trust and Holding Corp. v Privalov* [2007] 4 All ER 951 at 963.
91. Section 103 (2) (d) of AA 1996, and Section 52 (2) (iv) (v) and article V (1) (c) of the Second Schedule to the ACA.
92. Merkin, R. and Flannery, L. (2014) at p. 399.
93. The first limb of Article V (I) (c) of the NYC indicates that an arbitrator may exceed its jurisdiction if "the award deals with a difference not contemplated by, or not falling within the terms of the submission to arbitration."
94. Mistelis, L. A. and Di Pietro, D. (2010) "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC), 1958" in Mistelis, L. A. (ed.), Concise International Arbitration, Kluwer Law International, The Netherland, pp. 1 – 32.

arbitration.[95] It also reflects instances where the arbitrator issued an award containing broader relief than specifically requested by a party.[96]

Opinion varies as to whether enforcement of an award should be refused if arbitrators exceed their authority by awarding more than or something different from, what a party claimed. For example, Gaillard and Savage argue that so long as an arbitrator acts within the purview of its authority, article V (1) (c) precludes courts from refusing enforcement even if it is established that the arbitrator acted *extra petita* or *ultra petita*.[97] On the other hand, van den Berg contends that unlike article V (1) (a), article V (1) (c) is not intended to refer to arbitration agreement in general. It refers to the arbitrator's mandate as may be expressly or impliedly deduced from the parties' submission to arbitration.[98] This thesis agrees with van den Berg's position and further argue that article V (1) (c) gives an enforcing court the power to refuse enforcement if the resisting party alleges and proves that the arbitrator acted *extra petita* or *ultra petita*. However, in the absence of any proof, it should be taken that the arbitrator acted within the limit of its mandate.[99]

In England, refusal of enforcement under section 103 (2) (d) of the AA 1996 relates to lack of substantive jurisdiction of the arbitrator. The determination of whether an arbitrator lacked substantive jurisdiction is provided for under section 66 (3) of the AA 1996:

> Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award …[100]

95. The second limb of Article V (I) (c) of the NYC indicates that an arbitrator exceeds its jurisdiction if the award "contains decisions on matters beyond the scope of the submission to arbitration."
96. da Silveira, M. A. and Levy, L. (2008) "Transgression of the Arbitrator's Authority: Article V (I) (c) of the NYC", in Gaillard, E. and Di Pietro, D. (eds.), Enforcement of Arbitration Agreements and International Arbitral Awards: The NYC in Practice, Cameron May, pp. 639 – 678.
97. Gaillard, E. and Savage, J. (eds.) (1999) at p. 988.
98. van den Berg, A. J. (1996) "The NYC: Summary of Court Decisions" in Blessing, M. (ed.), The NYC of 1958, ASA Special Services 9, Swiss Arbitration Association, Basel, pp. 85 – 86; van den Berg, A.J. (1981) at pp. 312 – 315.
99. Lew, J. D. M., *et al*, (2003) at pp. 713 – 714.
100. Provided the resisting party has not lost the right to raise such an objection. Where an arbitrator is acting *extra petita* or *ultra petita*, and a party nonetheless participates in the proceedings without objection, in circumstances where the party is or ought to be aware of the jurisdictional defect, the combined effect of sections 31 and 73 of the AA 1996 is that the party has waived the jurisdictional defect; Merkin, R. and Flannery, L. (2014) at p. 288.

The text "lack of substantive jurisdiction" can be said to cover instances where an arbitrator has acted *extra petita* and *ultra petita*. In effect, section 66 (3) applies where the resisting party alleges and proves that the arbitrator either determined matters outside the arbitration agreement (*extra petita*), or the award contained broader relief than was asked for by a party (*ultra petita*). In *Minmetals Germany GmbH v Ferco Steel Ltd*, the court stated *inter alia* that:

> The function of this exception [section 103 (2) (d)] is to exclude from enforcement awards made on issues falling outside those which were referred for decision to the arbitrators.[101]

With respect to Nigeria, 'the lack of arbitrator's jurisdiction' ground is stipulated under article V (1) (c) of the Second Schedule to the ACA. Though, there is no reported case regarding this ground, other common law countries have considered the applicability of this ground and Nigerian courts may rely on such precedence as persuasive authority.[102]

This thesis argues that article V (1) (c) of the Second Schedule to the ACA should be interpreted narrowly to align with the pro-enforcement bias of the NYC.[103] A narrow interpretation means, firstly, that the arbitrator's jurisdiction should be interpreted broadly to comport with the enforcement facilitating thrust of the NYC and the policy favouring arbitration.[104] And secondly, the ground 'the arbitrator has exceeded its jurisdiction' should only be accepted in obvious cases.[105] In this regard, if parties in their arbitration agreement assert that 'any dispute arising' out of their

101. *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] at pp. 658 – 659.
102. In Canada for example, the jurisdiction of the arbitrator is determined by the text or wording of each arbitration agreement. This point is illustrated in *Dunhill Personal System Inc. v Dunhill Temps Edmonton Ltd*. [13 Alta LR (2d) 241, 144 AR 272 (1993)] In *Dunhill*, a franchisor who obtained a New York arbitration award in its favour sought enforcement against the franchisee in Canada. The franchisee argued, *inter alia*, that the arbitrators had gone beyond the scope of the submission to arbitration in awarding damages for trademark infringement and passing off. The court held that the scope of the arbitrators' jurisdiction is to be determined by the wording of the arbitration agreement. The court reasoned that where an arbitration agreement stipulates that disputes between parties are to be determined by arbitration, such provision is broad enough to include claims not expressly mentioned in the agreement.
103. Ezejiofor, G. (1997) The Law of Arbitration in Nigeria, Longman Nigeria Plc., Lagos, pp. 180 – 181; Idornigie, P. O. (2015) Commercial Arbitration Law and Practice in Nigeria, LawLords Publications, Abuja, pp. 301 – 308.
104. de Silveira, M. A. and Levy, L. (2008) at pp. 641 – 642.
105. van den Berg, A. J. (1981), p. 208.

contract will be resolved by arbitration, it is only fair to construe such text broadly and give effect to the arbitrator's jurisdiction.[106]

6.1.4.1. The possibility of partial enforcement

The proviso to article V (1) (c) of the NYC relates to the possibility of enforcing an award if the arbitrator's decision is *ultra petita*. This possibility exists only when part of the arbitral award exceeds the arbitrator's authority. Article V (1) (c) provides that the award may be recognised and enforced in part:

> …provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced…

From the text of article V (1) (c) partial enforcement of an award is permissive on the condition that decisions on issues agreed to be arbitrated are separated from those not agreed. According to Redfern *et al*, "if the partial excess of authority is proved, that part of the award that concerns matters submitted to arbitration may be saved and enforcement ordered."[107] However, what remains to be determined is how enforcing courts' discretions are exercised. van den Berg drawing from the *travaux preparatories* to the NYC suggests a guideline on how the court's power can be exercised, thus:

> Partial enforcement may be granted if the matter in excess of arbitrator's authority is of a very incidental nature and the refusal of enforcement would lead to unjustified hardship for the party seeking enforcement.[108]

However, it is argued in thesis that the text of article V (1) (c) of the NYC does not stipulate such limitation regarding partial enforcement of arbitral awards.[109] Rather, article V (1) (c) strikes a balance between the interests of the parties. On the one hand, it protects the unsuccessful party's right to resist the enforcement of an award where the arbitrator exceeds its authority, whether incidental or not; and on the other

106. van den Berg, A. J. (1981), p. 319.
107. Redfern, A. and Hunter, M. (2004) Law and Practice of International Commercial Arbitration, 4th edn., Sweet and Maxwell, pp. 450 – 451.
108. van den Berg, A. J. (1981) at p. 319.
109. de Silveira, M. A. and Levy, L. (2008) at p. 676.

hand, it ensures that the successful party reaps the benefits of the arbitration within the scope of the arbitration agreement.[110] An example of a partial enforcement of arbitral award under article V (I) (c) can be seen in the Turkish Court of Cassation ruling;

> …As a rule, there is no legal obstacle to partial enforcement of arbitral awards. Hence, in the decision of our chamber dated 3.6.2012 and numbered 9357/4209, it is decided that in case the arbitral award is made based on a matter not included in the arbitration agreement or clause or goes beyond the scope of the arbitration agreement or clause, the court may reject the enforcement (concerning this part of the award) and therefore, the partial enforcement is possible.[111]

In England, the possibility of partial enforcement is clearly provided for under section 103 (4) of the AA 1996. The section refers to award on issues beyond the scope of the arbitration agreement which can be separated from those within its scope. It sets out in terms that an enforcing court may grant partial enforcement of a NYC award untouched by any other part, in which awards on issues not submitted to arbitration are made. In *IPCO (Nig.) Ltd. v NNPC*[112] the court questioned whether this express stipulation for partial enforcement of award regarding the arbitrator's excess jurisdiction could be construed as meaning that the intention was to preclude it in other cases. The court was referred to a decision of the Austrian Supreme Court where partial enforcement of a NYC award was enforced in terms other than under article V (1) (c).[113] According to Merkin and Flannery, section 103 (4) of the AA

110. King, M. and Meredith, I. (2010) "Partial Enforcement of International Arbitration Awards", *Arbitration International*, Vol. 26, No. 3, pp. 381 – 390.
111. Decision of the 19th Civil Chamber of the Court of Cassation dated 18/12/2003 and numbered 2003/7270 E., 2003/1288K. Another example of partial enforcement can be seen in an old Italian case of General Organisation of Commerce and Industrialization of Cereals of the *Arab Republic of Syria v S. p. A. SIMMER*, (1983) Y. B. Comm. Arb., VIII, pp. 386-388. In that case, the court found that an award rendered in Syria had exceeded the arbitrator's authority by covering both non-technical issues. The arbitration agreement provided for arbitration in Syria concerning "non-technical" issues and arbitration according to the ICC Rules in regard to "technical" issues. The court separated the arbitrators' decisions on the "technical" issues and thus granted partial enforcement of the "non-technical" issue.
112. [2008] 2 Lloyd's Rep 59.
113. *Buyer (Austria) v Seller (Serbia and Wontenegro)* (2005) Yearbook of Commercial Arbitration, Vol. XXX, p. 421. The Austrian Supreme Court decision is reported anonymously under. The decision concerned enforcement of partial award, with the award of interest being overturned.

1996 is a strong reference to the likelihood of partial enforcement of an award though only where the separation has been initiated by jurisdictional issues.[114]

In relation to Nigeria, the ACA provides for such partial enforcement. Under article V (1) (c) of the Second Schedule to the ACA, the court may grant partial enforcement of an award if the decision on matters submitted to arbitration can be separated from those not submitted.[115]

It is not clear whether partial enforcement can be on other grounds in England and Nigeria. Though the AA 1996 and the ACA make no other provision for partial enforcement, the court can resort to the principle in accordance with the analogy of section 103 (4) of the AA 1996 ad section 52 (2) (v) of the ACA. Furthermore, the court can also rely on the pro-enforcement bias of the NYC as implemented by the AA 1996 and the ACA. This proposal is made pursuant to the pro-enforcement views of the Austrian Supreme Court.

For example, under the NYC, the Austrian Supreme Court denied enforcement of parts of an award on public policy ground, and enforced the other parts not contrary to its public policy. In *Buyer (Austria) v Seller (Serbia and Wontenegro)*[116] parties concluded a supply contract which contained an arbitration clause. When dispute arose between the parties, the seller commenced arbitration at the Foreign Trade Arbitration at the Chamber of Commerce and Industry of Serbia. The arbitral tribunal rendered an award with interest in favour of the seller. The seller sought enforcement of the award in Austria and the buyer objected. The ground of objection was that the award violated public policy of Austria because the award was *inter alia* based on a false statement by the sole witness and the rate of interest was excessive. The court held that though the interest violated Austrian international public policy, it was possible to separate the award on the main sum which was enforceable from the award on interest, which was not enforceable.[117]

114. Merkin, R. and Flannery, L. (2014) at p. 409.
115. Section 52 (2) (v) of the ACA is applicable to non-NYC awards.
116. *Buyer (Austria) v Seller (Serbia and Wontenegro)* (2005) at pp. 435 – 436.
117. This view was adopted in an earlier case of *J. J. Agro Industries Ltd v Texuna International Ltd* (1993) Yearbook Commercial Arbitration, Vol. VXIII, pp. 396-402 (Hong Kong High Court 1992).

6.1.5. Improper appointment of the arbitrator or incorrect arbitral procedure

Under the NYC, enforcement of arbitral award may be denied if the unsuccessful party satisfies the court that:

> …the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place.[118]

The threshold for determining improper appointment of the arbitrator or incorrectness of the arbitral procedure is parties' agreement. It is only in the absence of such agreement that the law of the country where the arbitration took place will be considered.[119] A significant point to note about article V (1) (d) is the priority given to party autonomy over the law of the seat of arbitration.[120] It is irrelevant if such agreed rules are contrary to the rules of the seat of arbitration, this of course depends on whether such rule is mandatory or not.[121]

Equally, aside that article V (1) (d) promotes the supremacy of the parties' agreement, the requirements of due process under article V (1) (b) ought to be considered. Failing which, enforcement of the award may be denied pursuant to article V (1) (b) or article V (2) (b).[122] This point demonstrates the interface between article V (1) (b) and article V (1) (d), as both articles relate to alleged procedural irregularities in the arbitration proceedings.[123] Nevertheless, this thesis question whether every violation of the agreed procedure is capable of justifying a denial to enforce an award.

118. Article V (I) (d) of the NYC.
119. Nikiforov, I. (2008) "Interpretation of Article V of the NYC by Russian Courts', *Journal of International Arbitration,* Vol. 25, No. 6, pp. 787 – 808.
120. Platte, M. (2008) "Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation", in Gaillard, E. and di Pietro, D. (eds.) Enforcement of Arbitration Agreements and International Arbitral Awards, Cameron May, London, pp. 491 – 495.
121. Davidson, F. (2012); In an old Italian case of *Rederi Aktiebolaget Sally v S. r. l. Termarea*, decided 13/04/1978, the Court of Appeal of Florence held refused enforcement of an award on the basis of article V (1) (d), holding that the parties' agreement prevailed over the law of the seat of arbitration.
122. Maurer, A. G. (2013) The Public Policy Exception under the NYC: History, Interpretation and Application, JurisNet LLC, New York, pp. 67 – 69.
123. van den Berg, A. J. (1981) at p. 301.

Where article V (1) (d) is proved, such proof may result in denial of enforcement, however courts rarely grants an objection based thereto.[124] Nacimiento explains this point thus:

> In practice, Article V (1) (d) has rarely been raised successfully in enforcement court because parties are generally in agreement over the composition of the arbitral tribunal and because the tribunal usually enjoys wide discretion regarding the arbitration procedure.[125]

Additionally, most parties, arbitration rules and law usually allow arbitrators wide powers regarding the conduct of the arbitral procedure and proceedings, thus, making it difficult for the resisting party to successfully establish this ground of refusal.[126] Aside from the above explanations other reasons are advanced. These explanations include but are not limited to instances where the court views a contravention of the parties' agreement as minor, or applies the doctrine of estoppel, or considers that the unsuccessful party have tacitly consented to the composition of the arbitral tribunal.[127]

Generally, an enforcing court may disregard minor contraventions in the appointment of the arbitrator or in the arbitral procedure and still enforce an award. The question that may arise is: what constitutes minor contravention? The test under this question is, whether the award would have been substantially different if not for

124. Di Pietro, D. and Platte, M. (2001) Enforcement of International Arbitration Awards: The NYC of 1958, 1st edn., Cameron, London,p. 491; Lew, J D. M., *et al* (2003) at paras. 26 – 28.
125. Nacimiento,P. (2010) "Article V (I) (d)" in Kronke, H., et al, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the NYC, Kluwer Law International, The Netherlands, pp. 281 – 300.
126. Bocjstiegel, K., Kroll, S., and Nacimiento, P. (2008) Arbitration in Germany: The Model Law in Practice, Kluwer Law International, The Netherlands, pp. 547 – 548.
127. In *Minmetals Germany GmbH v Ferco Steel Ltd.* [1999] CLC 647, the defendant argued that the arbitral awards were rendered via a procedure that was not in accordance with parties' agreement. The defendant brought its application inter alia under section 103 (2) (e) of the AA 1996. The defendant moved the court to set aside the leave to enforce two awards obtained by the claimant, the court refused the application and stated at pp. 659 – 660:

> There can be no doubt that Ferco's representatives were fully aware of the arbitrator's failure to act in accordance with the rules when they embarked upon their application to the court to revoke the award and when they participated in the resumed hearing. However, they proceeded without explicitly raising with the arbitrators their objection as to the non-compliance …they therefore waived their rights to object to the continuing omission of the arbitrators to disclose the award. Indeed, it is difficult to envisage a more glaringly obvious waiver of procedural irregularity than that found in this case…

the minor procedural violation. According to Born, enforcement of an award should be refused under article V (1) (d), provided that the violation mentioned under the article occasioned substantial prejudice to the resisting party.[128] This position is illustrated in *Shenzhen Nan Da Industrial & Trade United Co. Ltd. v FM International Ltd*.[129] The unsuccessful party contended that the arbitral tribunal which rendered the award was not the tribunal mentioned in the parties' agreement. Thus, enforcement should be refused under article V (1) (d) of the NYC. The court rejected the argument and granted enforcement. The court reasoned that the change of name of the tribunal from FETAC to CIETAC was a minor departure from what was stipulated in the parties' agreement. It was further stated that both tribunals were legally the same entity and the agreed tribunal would not have decided the dispute differently.

In England, a breach of section 103 (2) (e) of the AA1996 may be disregarded if it is considered trivial by the enforcing court. This is evidenced in *Tongyuan International Trading Group v Uni-Clan Ltd.*[130] Parties' contract contained an arbitration clause for settlement of any dispute arising out of their contract. It was agreed that the arbitration will take place at the Shenzhen or the Shanghai office of CCPIT. When dispute arose, the claimant initiated arbitration. Although the defendant was informed of the proceedings, it did not take part in the arbitration, except on one occasion when it sought to contact the arbitrator appointed on its behalf. The arbitrators conducted the arbitral proceedings in Beijing and rendered its award in favour of the claimant. The claimant sought to enforce the award in England against the defendant. Leave was granted. The defendant thus, sought to set aside the order granting enforcement of the award. The defendant argued that the award was a nullity because the arbitral proceeding was conducted in Beijing rather than Shenzhen or Shanghai. The defendant particularly relied on section 103 (2) (e) of the AA 1999.[131] The court rejected the defendant's argument and held that the change in the venue was not critical to the validity of the award. Thus, the court *inter alia* stated:

128. Born, G. B. (2014) at pp. 3564 – 3565.
129. (1993) Yearbook Commercial Arbitration, Vol. XVIII, pp. 377 at 379.
130. [2001] Yearbook Commercial Arbitration, Vol. XXVI, p. 886.
131. Section 103 (2) (e) which is materially same with article V (1) (d) stipulates that the court may refuse enforcement or recognition of a NYC award, if the procedure adopted in the arbitration was not in accordance with the parties' agreement.

> …the importance of a term of this kind can only be assessed by reference to the true construction of the contract. It may be that, in many cases, the parties will be sufficiently concerned about the place at which the arbitration is to be conducted as to make it clear by their agreement that it is a matter of fundamental importance. In other cases, a different picture may emerge. The contract in the present case does not … point to the conclusion that to hold the proceedings in Shenzhen or Shanghai was necessarily critical in all cases … those locations may well have been chosen for the convenience of the two parties… The extent to which the failure to hold the proceedings at one of the chosen locations could have a very great, or an entirely insignificant, effect on the parties and their ability to deal with the proceedings, depending on the particular circumstances of the case. It hardly needs to be said that to conduct the proceedings in a country outside that stipulated by the parties could have the most serious effects because it might well result in subjecting the proceedings to an entirely different crucial law. In the absence of any language which makes it clear that … parties regarded the venue for the arbitration as a matter of critical importance in all cases,… the right construction of this arbitration clause is that it was an intermediate term, … the effect of a failure to comply with it must be viewed in the light of the nature and gravity of the particular breach.[132]

The court thus reasoned that the gravity of a breach of parties' agreed place of arbitration cannot simply be assessed in geographical terms. Thus, removing the proceedings from Shenzhen or Shanghai to Beijing had no effect on the arbitral awards.

6.1.6. Award not binding, or has been set aside or suspended

An enforcing court may refuse enforcement of an award if the party resisting enforcement proves that the award has not yet become binding on the parties, or has been set aside or suspended by a competent court at the seat of arbitration.[133] In England and Nigeria, this ground of refusal is stipulated under section 103 (2) (f) of the AA 1996, and article V (1) (e) of the Second Schedule to the ACA. According to Goode, article V (1) (e) ground of refusal concerns the extent the decision of a court

132. *Tongyuan International Trading* [2001] at pp. 887 – 888.
133. Article V (I) (e) of the NYC.

at the seat of arbitration setting aside or suspending an award is applicable to the enforcing courts.[134]

The article V (1) (e) of the NYC sets forth three alternative grounds that may allow an enforcing court to refuse enforcement of an arbitral award: an award that has not yet become binding on the parties (6.1.6.1), an award set aside at the seat of arbitration (6.1.6.2), and an award suspended at the place of arbitration by a competent court on enforcement (6.1.6.3). This section will then discuss the enforcing court's discretionary power to stay enforcement proceedings pending the outcome of the challenge application (6.1.6.4).

6.1.6.1. Award not yet binding on parties

To succeed under this ground, the resisting party must prove that the arbitral award has not yet become binding on the parties.[135] Although, the aim of the term "binding" under article V (I) (e) of the NYC is to eliminate the problem of "*double exequatur*", it is unclear what the term means and the precise point in time when an award becomes binding on the parties.[136] The NYC itself does not provide any definition of the term or stipulate any guidance. The ambiguity in the use of the term "binding" has generated different interpretation by national courts and commentators. Hence, the question which arises is, when will an award become binding on the parties? Conversely, whether an award *can* only be considered "binding" if it is binding under the law of the seat of arbitration? To answer this question, two concepts have emerged, namely, the law applicable to the arbitral award (i) and the autonomous concepts (ii).

(i) The law applicable to the arbitral award concept

This concept contends that the binding element of an award should be determined by the law of the place where the award was rendered.[137] This view is based on the structure of article V (1) (e) of the NYC, to the effect that setting aside or suspension

134. Goode, R. (2001) "The Role of the Lex Loci Arbitri in International Commercial Arbitration", *Arbitration International*, Vol. 17, No. 1, pp. 19 – 28.
135. Nazzini, R. (2002) "The Law Applicable to the Arbitral Award", *International Arbitration Law Review*, Vol. 5, No. 6, pp. 179 - 192; Merkin, R. (2004) at paras. 19 – 26.
136. Darwazeh, N. (2010) "Article V (I) (e)" in Kronke, H., *et al*, (eds.) Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the NYC, Wotters Kluwer, The Netherlands, pp. 301 – 344.
137. Gaillard, E. and Savage, J. (eds.) (1999) at para. 1682.

of arbitral award is subject to the law of the place where the award was rendered. According to Darwazeh, since the text 'binding' in article V (1) (e) is associated to setting aside and suspension of the award, it may also be argued that same applies when an award becomes binding on the parties.[138] Similarly, Gaillard and Savage argue, firstly, that if the same interpretation is not followed in determining the issue of whether an award has become binding, it will result in inconsistency where an award becomes binding under a certain law, but enforcement refused because it was set aside under another law. Secondly, the binding element of an award cannot exist in isolation, not even under the NYC itself, "but must stem from a legal system which recognises that binding quality."[139] Also, in support of this view, Paulsson observed that when the NYC was drafted the role of the seat of arbitration was more substantial. Thus, difficult to imagine that the NYC intended the arbitral award to be binding in a delocalised manner independent from the law applicable to the arbitration.[140] This view has also been adopted by some national courts.[141]

(ii) The autonomous concept

This concept considers the binding character of an award under the article V (1) (e) of the NYC is independent of the law applicable to the award. In support of this interpretation, Lew, Mistelis and Kroll and other commentators have argued that the phrase, "…the country in which, or under the law of which, that award was made," refers only to the setting aside and suspension of the award.[142] This is because, to interpret the text of article V (1) (e) as suggested by the previous concept will lead to 'double exequatur', a mischief the NYC sought to expressly avoid by using the term 'binding' instead of 'final'.[143] Under this interpretation, an award that is unenforceable in the country where it was rendered can still be binding for the

138. Darwazeh, N. (2010) at pp. 313 – 314.
139. Gaillard, E. and Savage, J. (eds.) (1999) at paras. 1678 – 1682.
140. Paulsson, J. (1980) "Arbitre et Juge En Suede deitalicize-Expose General et reflexions sur la delocalisation des sentences arbitrles", *Rev. Arb*., pp. 441 – 468.
141. *Seller v Buyer* (2007) Yearbook Commercial Arbitration, Vol. XXXII, pp. 322 – 325, (Germany Court of Appeal, decided 06/10/2005; *Antilles Cement Corporation v Transfican* (2006) Yearbook Commercial Arbitration, Vol. XXXI, pp. 846 – 551, (Spain Supreme Court, decide 20/02/2004).
142. Lew, J. D. M., *et al*, (2003) at paras 26-101; van den Berg, A. J. (2003) at p. 660; Nazzini, R. (2002) at p. 186; Di Pietro, D. and Platte, M. (2001) at p. 166; David, R. (1985) Arbitration in International Trade, Kluwer Law Taxation, Deventer, p. 400; Redfern, A. and Hunter, M. (2004) at p. 468.
143. Nazzini, R. (2002) at pp. 184 – 186.

purposes of enforcement under the NYC.[144] Therefore, an award should only be considered not binding if the arbitral proceedings stipulate that, or the arbitral award itself provides that the award is not binding on the parties.[145]

Furthermore, the autonomous approach suggests that the phase "the award has not yet become binding on the parties" does not entail that leave must first be granted to enforce an award in a manner depicting double exequatur or other similar means in the country of origin.[146] Rather, it entails that an award will not become binding on the parties until steps required by the arbitration agreement, or proceedings or the award itself have been taken. Except and until such condition is met, the award will not yet become binding and an enforcing court ought not to enforce such award.[147] An example of such condition is illustrated in *Rosseel NV v Oriental Commercial Shipping Co. (UK) Ltd & Ors.*[148] The defendant in *Rosseel NV* contended that the arbitral award has not yet become binding. The defendant based its argument on an oral agreement between the parties, where the plaintiff agreed not to seek enforcement of the award abroad until after the award has been confirmed by a United States' court. Although, the court rejected the defendant's argument appointing out that such agreement is inconsistent with the fact that the NYC had done away with the concept of 'double exequatur.

However, it is submitted in this thesis that if such condition formed part of the arbitration agreement, an enforcing court ought to give effect to the parties' agreement. Nonetheless, if such requirement was agreed upon after the award has been rendered, an enforcing court may give effect to it, as such post arbitration agreement or award condition is at best voidable.[149] Accordingly, the autonomous approach considers an award binding on the parties immediately upon delivery or publication, regardless of possible or pending judicial, institutional or other review.[150] In essence, such award may continue to bind the parties even after the

144. Darwazeh, N. (2010) at pp. 312 – 313.
145. David, R. (1985) at p. 468.
146. Mustill, M. J. and Boyd, S.C. (2001) Commercial Arbitration: 2001 Companion Volume to the 2nd edn., Butterworths, London, p. 213.
147. Sutton, D. S. J. and Gill, J. (eds.) (2003) Russell on Arbitration, 22nd edn., Sweet and Maxwell, London, pp. 375 – 376.
148. [1991] 2 Lloyd's Rep 625.
149. Section 58 of AA 1996.
150. Born, G. B. (2014) at pp. 3610 – 3611; Tupman, W. M. (1987) "Staying Enforcement of Arbitral Awards Under the NYC" *Arbitration International*, Vol. 3, pp. 209 – 224.

award has been set aside or suspended by a court of competent authority at the country of origin.[151] This is because the issue of whether such binding effect is valid and capable of supporting non-enforcement of an award is at the discretion of the enforcing court to decide.

In England, this ground of refusal is stipulated under section 103 (2) (f) of the AA 1996. The section is almost taken verbatim from article V (1) (e) of the NYC. On the first part of the section which relates to the time on which the award becomes binding on the parties, the court have held that an award becomes binding on the parties immediately upon its publication and remains so except set aside or suspended by the country of origin.[152]

Regarding the binding character of an award, the English court will consider the issue on the basis of whether or not it is in a position to recognise and enforce the award. The issue will not be determined on the basis of whether or not a court at the seat will consider the award as binding or not binding on the parties. This position is evidenced in *Dowans Holding SA v Tanzania Electric Supply Co. Ltd.*[153] The question that arose for determination *inter alia*, was whether a Tanzanian award had become 'final and binding' despite the existence of proceedings in Tanzania to set the award aside. Burton J held that whether an award had become 'binding on parties' was a matter for the English Court to decide. This the court will do on the basis of whether it was in a position to enforce a NYC award, rather than a matter of evaluating whether the court at the seat would consider that the award was binding.

In Nigeria, the defence is provided for under article V (1) (e) of the Second Schedule to the ACA.[154] Courts in Nigeria has not so far dealt with the interpretation of the phrase "… has not yet become binding on the parties". However, given the fact that English cases are persuasive authorities in Nigeria, it is submitted in this thesis that an enforcing court in Nigeria may rely on the *Dowans Holding SA*[155] to determine the binding element of a NYC award.

151. Merkin, R. and Flannery, L. (2014) at p. 400.
152. *Rosseel NV v Oriental Commercial Shipping Co. (UK) Ltd & ors* [1991] 2 Lloyd's Rep 625
153. [2011] 2 Lloyd's Rep 475.
154. Section 52 (2) (viii) of the ACA will apply if the award is not a NYC award.
155. *Dowans Holding SA* [2011].

6.1.6.2. The arbitral award has been set aside

Article V (1) (e) of the NYC further provides that an enforcing court may refuse enforcement of an award if the party against whom the award is invoked proves that the award has been set aside by a competent court in the country where or under the law of which, the award was made. Arguably, article V (1) (e) establishes a link between the review of the award by a competent court at the seat and its enforcement abroad. Nevertheless, the NYC provides no standard by which the enforcing court will adhere to, and also no limitation to the grounds upon which an award may be annulled at the seat.[156] Thus, the grounds for annulment of an award are entirely regulated by the law of the place where the award was rendered. This creates a problem in the application of the NYC concerning the extent an annulled award can influence refusal of enforcement at the enforcing state. Therefore, the question, whether an annulled award has a binding effect on enforcement application is considered below.

Three approaches have been advanced. The first view holds that an annulled award ceases to exist and is unenforceable in any other jurisdiction. This traditional approach, which reflects the jurisdictional theory of arbitration discussed in chapter three 3.3.1, emphasis the territoriality of the state and in support, van den Berg argues that:

> …the fact that the award has been annulled implies that the award was legally rooted in the arbitration law of the country of the origin. How then is it possible that other country can consider the same as still valid? Perhaps some theories of legal philosophy may provide an answer to this question, but for a legal practitioner this phenomenon is inexplicable. It seems that only an international treaty can give a special status to an award notwithstanding its annulment in the country of origin.[157]

156. van den Berg, A. J. (2007) "NYC of 1958: Refusals of Enforcement" *ICC International Court of Arbitration Bulletin*, Vol. 18, No. 2, pp. 1 – 35.
157. van den Berg, A. J. (1994) "Annulment of Awards in International Arbitration, in Lillich, R. B. and Brower, C. N. (eds.), International Arbitration in the 21st Century: Towards "Judicialisation and Uniformity?, Transnational Publishers, New York, p. 161. This view has also been upheld in Supplier v State Enterprise [2008] Yearbook Commercial Arbitration, Vl. XXXIII, p. 510 (Germany Court of Appeal, decided on 31/01/2007).

One of the advantages of this approach is that it discourages endless forum shopping for the enforcement of an annulled award.[158] On the contrary, the second approach presupposes that an enforcing court is at liberty to enforce an award notwithstanding that the award has been annulled at the seat.[159] This approach is based on the delocalisation of international arbitration, which reflects the autonomous theory of arbitration discussed in chapter three 3.3.4, and is justified on grounds that international arbitration "cannot be deemed a manifestation of the state."[160] Moreover, it is also a fact that the language of article V (1) of the NYC is permissive and not mandatory.[161] Thus, enforcement of an annulled NYC award is at the discretion of an enforcing court. Arguably also, enforcement of an annulled award can be based on the provision of article VII (1) which permits an interested party in an arbitration to rely on a more favourable enforcement regime than the NYC itself.[162] And so, if the enforcing court decides to enforce a set aside award because its law permits it, such enforcement decision is favoured under the NYC.

Nonetheless, it remains unclear as to the test an enforcing court may apply in order to enforce an annulled award. Thus, the third approach syntheses the territorial and delocalisation approaches to establish its criteria. This approach holds that an enforcing court should only refuse enforcement of an annulled award if the reason for the annulment is based on 'international standards.'[163] Conversely, where an award is annulled on the basis of local standards, an enforcing court may choose to

158. UNCITRAL Explanatory Note on the Model Law on International Commercial Arbitration, UN DOC.A/40/17 (1994) at 7 (b) (24).
159. de Cossio, F. G. (2015) "Enforcement of Annulled Awards: Towards a Better Analytical Approach", *Arbitration International*, http://www.arbitration.oxfordjournals.org/content/early/2015/12/16/arbint.aiv071 [accessed on 27/09/2016].
160. Paulsson, J. (1998) "Enforcing Arbitral Awards Notwithstanding Local Standard Annulments" *Asia Pacific Law Review*, Vol. 6, No. 2, pp. 1 – 34.
161. Article V (I) of the NYC provides *inter alia*:
> "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought."
162. In *Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV)* (1994) Yearbook Commercial Arbitration, vol. XIX, p. 655, (France Supreme Court, decided 1994), the court held an award annulled in Switzerland to be enforceable in France under article VII (I) of the NYC. Similarly, in *Chromallory Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996), a US Court relied on article VII (I) of the NYC to enforce an award rendered and annulled in Egypt.
163. Paulsson, J. (1998), pp. 20 – 28; Lew, J. D. M., *et al*, (2003) at pp. 719 – 720.

enforce such award.[164] Therefore, according to Paulsson, an international standard annulment has to reflect any of the grounds set out under article V (1) (a) to (d) of the NYC.[165] However, this approach is not flawless. Notably, it makes redundant article V (1) (e) of the NYC. Arguably, the intention of the NYC is that article V (1) (e) should provide a separate ground for the unsuccessful party to resist enforcement of an award that has been annulled.[166] Given the Paulsson's international standard this separate ground is elusive or at best in abeyance.

The English court's approach on enforcement of annulled awards has been pragmatic. Though, in principle, English law does not recognise the idea of delocalised arbitration, English courts have applied a test to determine whether annulled awards should or should not be enforced.[167] In applying the test, the English court may have to decide whether the decision of the annulling court offended basic principles of honesty, natural justice and English public policy. In effect, the English court have interpreted the text "recognition and enforcement of the award may be refused" literally.

In *Yukos Capital SARL v OJSC Rosneft Oil Company*,[168] the defendants failed to honour the arbitral award despite the decision of the Court of Appeal in Amsterdam. Thus, the claimants commenced legal proceedings in England to enforce the award. The preliminary question before the court was whether the common law precludes enforcement of awards that have been annulled at the place of origin. The court held that the answer was to be found in a "test" asking whether the court can in the circumstances treat the award as having legal effect. Thus, Simon J stated:

> In applying this test it would be both unsatisfactory and contrary to principle if the court were bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy.[169]

164. Paulsson, J. (1996) "The Case for Disregarding Local Standard Annulment (LSA) Under the NYC", *American Journal of International Arbitration*, pp. 99 – 114.
165. Paulsson, J. (1998), p. 29; the same grounds are also set out in article 34 (2) (a) of the UNCITRAL Model Law.
166. Koch, C. (2009) "The Enforcement of Awards Annulled in their Place of Origin: The French and U.S. Experience", *Journal of International Arbitration*, Vol. 26, No. 2, pp. 267 – 292.
167. Tweeddale, A. and Tweeddale, K. (2005) at pp. 444 – 445.
168. [2014] EWHC 2188 (Comm).
169. *Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] at para. 20.

Similarly, in *Dowans and another v Tanzania Electric Supply Co. Ltd*[170] the court held that there was no question of an automatic refusal to enforce the award simply because one of the grounds for setting the award aside has been satisfied. The court further stated that "English Courts still retain the discretion to enforce the award, though that jurisdiction will be exercised sparingly." Similarly also, the recent case of *IPCO (Nig.) Ltd v NNPC*[171] is consistent with this pragmatic test. This is because the court stated in *IPCO* that, there was no doubt that section 103 of the AA 1996 is pre-disposed to the enforcement of the NYC awards. Thus, even when a ground for denying enforcement is established, the court still retains its power to enforce the award. The court then went on to consider how the discretion would be exercised. The court referred to Lord Mance's ditum in *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan,*[172] paraphrasing the court's decision, Gross J. held that, the enforcing court could if necessary consider the circumstances in which the original award was rendered and the circumstances in which it was later annulled. Also, the enforcing court would not be precluded from forming its own views on whether the foreign entities involved had complied with the appropriate legal rules.

It can be argued that the above cases demonstrate that English courts will not consider that an arbitral award stands or falls with the decision of the court at the place where the award was made. The courts have shown that an annulled award may survive and be enforced in England if the enforcing party can be shown that the annulling court offended basic principles of honesty, natural justice and English public policy.[173]

In Nigeria, there is no reported case law on international commercial arbitration dealing with the issue. However, it is arguable that the English jurisprudence in *Dowan, IPCO (Nigeria) Ltd.* and *Yukos Capital SARL* may be followed as persuasive authorities. This submission is based on the fact that English case laws are persuasive authorities in Nigeria. However, it remains to be seen when and on what premise the Nigerian courts will or will not permit the enforcement of an annulled award.

170.[2011] EWHC 1957 (Comm).
171.[2014] EWHC 576 (Comm).
172.[2010] UKSC 46 at pp. 67 – 68.
173.Tweeddale, A. and Tweeddale, K (2005), pp. 425 – 429.

6.1.6.3. The arbitral award has been suspended

Article V (1) (e) of the NYC also provides that enforcement of an award may be refused if the resisting party proves that the award has been "suspended" by a competent court in the country where, or under the law of which, the award was rendered. Furthermore, article VI of the NYC provides that an enforcing court may adjourn its decision on enforcement if the resisting party has applied for the suspension of the award at the court of the seat. Arguably, articles V (1) (e) and VI raises question as to what the drafters of the NYC meant by the suspension of an award.[174] Conversely, when is an arbitral award suspended or deemed to be suspended?

In *Apia AS v Fantazia Kereskedelmi KFT*,[175] an English Court considered the question whether an arbitral award could be suspended pursuant to article V (1) (e) of the NYC and section 103 (2) (f) of the AA 1996. It was held that an English court has power under its residual jurisdiction to suspend the enforcement abroad of an English award pending the determination of an application to annul the award. The court thus stated:

> If an award is suspended, it will be deprived of immediate effect. The article and section thus presuppose that one court has power to order that an award shall have no effect pending an application to set it aside and this may be relied upon to resist enforcement by a court in another country.[176]

The court's dictum in the above case refers presumably to suspension of the enforceability or enforcement of the award by the court of the seat until it makes a decision on an application to annul the award.[177] Furthermore, according to Gaillard and Savage, a provisional order made by the court of the seat for suspension of the award also accords with the requirement of article V (1) (e).[178] However, a mere

174. van den Berg, A. J. (2007) at pp. 17 - 18; Tweeddale, A. and Tweeddale, K. (2005) at pp. 420 – 421.
175. [2001] 1 All ER (Comm) 348.
176. *Apia AS v Fantazia Kereskedelmi KFT* [2001] at p. 352
177. van den Berg (2007) at pp. 17 – 18.
178. Gaillard, E. and Savage, J. (eds.) (1999) at para. 1690.

application to a court at the seat to suspend or set aside the award should not be held as a suspension or an annulment of the award.[179]

Another issue the defence of article V (1) (e) raises is whether an award can be suspended or annulled by operation of law at the seat? There are two instances where enforcing courts have held that automatic suspension of the award by operation of law at the seat meets the requirement of article V (1) (e).[180] However, Lord Collins, *et al* have criticised such interpretation because the NYC requires the suspension or annulment to be ordered by a court of competent jurisdiction and not by automatic suspension or annulment by operation of law of the seat.[181] It is further argued in this thesis that suspension or annulment to which reference is made in article V (1) (e) is the overt decision of a competent court at the seat and not the laws of that seat. Thus, according to van den Berg, to decide whether an award has been suspended or annulled, an enforcing court should look to what the courts of the seat have done and not to the laws of the seat of arbitration.[182]

6.1.6.4. Adjournment of enforcement proceedings pending decision on annulment

It is likely that after an award has been rendered the unsuccessful party may seek to challenge the award at the seat. Thus the question: what will the English or the Nigerian court do in a situation where after an enforcement proceedings have been commenced, the unsuccessful party objects that there is an annulment proceeding pending at the seat of the arbitration? In this regard, article VI of the NYC, which is re-enacted under section 103 (5) of the English AA 1996 and article VI of the Second Schedule to the Nigerian ACA, provides that:

179. *IPCO (Nigeria) Ltd v NNPC* [2005] 2 Lloyd's Rep 208 (CA); In *Gabon V Swiss Oil Corp.* [1989] Yearbook Commercial Arbitration, Vol. XIV, p. 621 (decided 17/07/1988) the Grand Court of the Caymen Islands held that a decision to suspend an award is a function of courts of law thus, awards are not suspended simply because a party lodged an appeal or challenged the award at the seat of the arbitration.
180. In *Continaf BV v Polycoton SA* (1987) Yearbook Commercial Arbitration, vol. XII, pp. 505 – 509, (decided on 25/04/1985). The Swiss Court of Appeal upheld a count of First Instance decision to refuse enforcement of an award rendered in France because the resisting party filed an application for annulment of the award before a French Court. The application by operation of French law automatically suspended the enforcement of the French award. Similarly, in Creighton v The Government of Qatar (1996) Yearbook Commercial Arbitration, Vol. XXI pp. 751 – 758, (decided on 22/03/1995) a US District Court relied on French law to refuse enforcement of an award pursuant to article V (1) (e) of the NYC.
181. Lord Collins of Mapesbury, *et al*, (eds.) (2012) at pp. 892 – 895.
182. van den Berg, A. J. (2007), pp. 17 – 18.

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V paragraph (1) (e), the authority before which award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Apparently, article VI gives an enforcing court discretionary power to adjourn its enforcement decision pending a determination of an annulment proceeding in the country where the award was rendered. In addition and to protect the rights of the enforcing party, the court may on the application of the enforcing party require the resisting party to provide suitable security for the duration of the stayed enforcement proceedings.[183] Undoubtedly too, article VI strikes a balance between the pro-enforcement bias of the NYC and the need to protect unsuccessful parties that have genuine claim against the validity of the arbitral award.[184] In effect, article VI allows unsuccessful parties to contest the validity of the award at the seat while at the same time requiring an enforcing court to stay enforcement proceeding pending the outcome of such contest.[185] The question which then arises is the standard upon which the enforcing court may exercise its discretion. What is the threshold for the applicability of article VI of the NYC?

The NYC, the AA 1996 and the ACA does not provide a clear standard which may be followed by an enforcing court in the exercise of this discretionary power. Also, there are no internationally accepted standards to be followed by enforcing courts in deciding whether or not to stay enforcement proceedings pending annulment proceeding at the seat.[186] However, it has been suggested that enforcing courts should generally approach the issue of granting or refusing an application for adjournment pending an annulment proceeding, by considering the probable success of the annulment proceeding.[187] Yet, another view has placed substantial weight on the time frame within which the annulment proceedings will last. Arguably,

183. Port, N. C., *et al,* (2010) "Article VI" in Kronke, H., *et al* (eds.) Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the NYC, Kluwer Law International, The Netherlands, pp. 415 – 441.
184. Secomb, M. (2002) "Suspension of the Enforcement of Awards under Article VI of the NYC: Proof and LSAS" *International Arbitration Law Review,* Vol. 5, No. 1, pp. 1 – 8.
185. van den Berg, A. J. (1981) at p. 353.
186. Blackaby, N., *et al* (2015) at pp. 634 – 640.
187. Port, N. C., *et al*, (2010) at pp. 419 – 421.

nevertheless, courts will adjourn enforcement proceedings if it is likely that the decision on annulment of the award will be made without costly delay.[188]

In England, excessive delay in the determination of a challenge to the award at the seat of arbitration may be a reason for enforcement of an award. An English court will permit enforcement of an award notwithstanding that such award is been challenged at the seat and there is a likelihood of success to such challenge. In the recent case of *IPCO (Nigeria) Ltd v NNPC (No. 3)*,[189] the Court of Appeal ordered that IPCO should be entitled to enforce an award rendered against NNPC in October 2004. The Court of Appeal order was made regardless of NNPC pending challenge on the validity of the award in Nigeria the seat of the arbitration. The court reasoned that the lengthy delay in the setting aside proceedings were such that it would be inconsistent with the underlying principles of the NYC if IPCO had to wait until the outcome of those challenges in the Nigerian courts is out before being able to enforce the award.

This is the first reported English appeal case where delay alone has been held as a ground to enforce a NYC award, notwithstanding a challenge at the seat of arbitration. Although, the Court of Appeal acknowledged that issues as to the validity of an arbitral award were matters for the courts of the seat of arbitration to consider, however, the court held that it was also necessary to give due consideration to the underlying principles of the NYC. Thus, the court formed the view that the NYC "was intended to foster international trade by ensuring a relatively swift enforcement of awards and a degree of insulation from the vagaries of local legal systems."[190] Although, the Court of Appeal noted the importance of comity and respect for other courts nonetheless, the court decided that the time had come when the IPCO award should be enforced, subject to the determination of the fraud allegation in the Commercial Court.

Aside from excessive delay, English courts have considered other factors when deciding whether to grant or refuse an application for adjournment on enforcement pending an annulment action at the seat of the arbitration. For instance, in *IPCO*

188.van den Berg, A. J. (2003) at p. 670.
189.[2015] EWCA Civ 1144 and [2015] EWCA Civ 1145.
190.*IPCO (Nigeria) Ltd v NNPC (No. 3)* [2015] at para. 170.

(Nigeria) Ltd v NNPC,[191] the unsuccessful party relied on section 103 (5) of the AA 1996 to request for a stay of enforcement of the award pending the outcome of a parallel annulment proceedings in Nigeria. In deciding on the adjournment application, Gross J considered many factors as relevant to any decision to stay enforcement pending the outcome of annulment proceedings at the seat of the arbitration. Thus, these factors are:

- The likelihood that the successful party in the arbitration can repay the award if annulment at the seat were granted
- The probability ("realistic" prospect) of success of the annulment proceeding at the seat of arbitration
- The extent of the delay caused by the stay of enforcement
- Whether the annulment proceedings were brought in good faith and not used as a delay strategy, and
- The prejudice to the successful party in the arbitration if a stay of enforcement of the award were granted.

Also, in *Socadec SA v Pan Afri Impex Co. Ltd*[192] two awards were rendered against the defendant. The defendant appealed both awards. While the appeal was pending, the claimant secured an order *ex parte* to enforce the awards. The defendants sought to set aside the order granting enforcement of the awards pending the outcome of the appeals. The court held that the order to enforce the first award would not be suspended because it was not apparent on what grounds it could be challenged. The court further held that the order to enforce the second award would be suspended on terms that the defendant provides security. The court reasoned that the second award was not manifestly invalid and the chances of success on appeal appeared less than 50 per cent. Relying on the dictum of Staughton L J in *Soleh Boneh International v Government of the Republic of Uganda*,[193] Mackay J stated:

> The principle I should apply in this application to set aside or suspend the order of Morison J are helpfully

191.[2005] 2 Lloyd's Rep 208 (CA).
192.[2003] EWHC 2086.
193.[1993] 2 Lloyd's Rep 208 at p. 212.

> set out in the decision of … Staughton L J in Soleh Boneh International … there are two factors to be considered. Firstly, the strength of the argument that the award in question was invalid, which could be assessed and had to be assessed on what was called a 'brief consideration' only; certainly no mini-trial on the merits is either appropriate or possible in an application such as this. If it is plainly a valid award, then immediate enforcement should follow or at the least there should be substantial security. If it is plainly not valid, there should be no enforcement and no security would be appropriate. In the intermediate positions it is a matter for the judgement of the court. The second factor which the court has to consider is the ease or difficulty of the enforcement of the award, and, for example, whether if enforcement was withheld or delayed it could become more difficult by the movement of assets, problems of trading, the disappearance of the defendant and so forth.

In the light of the above cases, this thesis agrees in principle that the factors stated in the cases are relevant in deciding whether or not an enforcing court should grant an application for stay of enforcement. However, in applying those factors, an enforcing court should be guided by the "pro-enforcement" bias of the NYC.[194] Enforcing courts should not stay enforcement of awards when a motion for annulment is not effective at the seat or is merely pending, or if the annulment or suspension application does not accord with the terms of article VI of the NYC. This is because enforcement of an award should not be frustrated merely by the making of an application to set aside the award at the seat of arbitration.[195] Conversely, where there is an active motion to set aside an award at the seat of arbitration, the enforcing court may pursuant to section 103(5) of the AA 1996, which echoes article VI of the NYC, adjourn any decision on enforcement of an award, and/or order the party resisting enforcement to provide security for the award.

In Nigeria, there is no reported case law that deals with these issues. However, it is contended that the factors relevant to stay of enforcement discussed in this thesis

194. Merkin, R. and Flannery, L. (2014) at pp. 409 – 410.
195. *IPCO (Nigeria) Ltd v NNPC (No. 3)* EWCA Civ 1144 and [2015] EWCA Civ 1145; *IPCO (Nigeria) Ltd v NNPC* [2005] 2 Lloyd's Rep 326.

should be considered by Nigerian courts when deciding whether or not to adjourn enforcement proceedings.

6.2. Substantive grounds

The second class of defences differs from the defences already examined. The second class of exceptions are stipulated under article V (2) (a) and (b) of the NYC, section 103 (3) of the AA 1996 and article V (2) (a) and (b) of the Second Schedule to the ACA. Unlike the article V (1) defences, which only the unsuccessful party may raise and establish, either the unsuccessful party or the enforcing court on its own volition may raise either of the two article V (2) defences.[196] This sub-section examines the two grounds on which an enforcing court may refuse enforcement *suo motu* in the absence of pleadings by the resisting party. Although, an enforcing court may *ex officio* raise either of the article V (2) defences, the responsibility of establishing that such defence exists still remains with the resisting party.[197] These defences are non-arbitrability of the subject matter of arbitration (6.2.1), and violation of public policy (6.2.2).

6.2.1. Non-arbitrability

Article V (2) (a) of the NYC provides that:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country…

Apparently, this ground of refusal concerns the subject matter of the dispute not been arbitrable. Nonetheless, the NYC is silent as to matters that are arbitrable and those not arbitrable. Thus, the issues to be examined under this sub-heading are: when is a dispute considered to be non-arbitrable (6.2.1.1), and by which or what law is non-arbitrability determined in England and Nigeria (6.2.1.2)?

196. Lew, J. D. M., *et al,* (2003), p. 720.
197. Otto, D. and Elwan, O. (2010) "Article V (2)" in Kronke, H., *et al* (eds.) Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the NYC, Kluwer Law International, The Netherlands, pp. 344 – 413.

6.2.1.1 When is a dispute considered non-arbitrable?

Non-arbitrability in the sense it is used in this thesis, concerns whether a dispute may or may not be settled by arbitration. However there is no internationally agreed view as to when or what disputes are non-arbitrable.[198] Nevertheless, some disputes belong exclusively to the jurisdiction of a national court for resolution.[199] For instance, dispute relating to money laundry contract will not be arbitrable. Arguably, where parties elect to settle their dispute by arbitration, the presumption is that the arbitration agreement is valid and the subject matter arbitrable.[200] Thus, in principle, any dispute should be capable of settlement by arbitration as by litigation, or other dispute resolution mechanisms.[201]

Due to the fact that the NYC is silent on disputes that are arbitrable and those that are not, national laws and courts determine matters which are capable of resolution by arbitration in accordance with its own political, economic and social policies.[202] According to Otto and Elwan, disputes which are determined non-arbitrable usually reflect specific interest of that country, thus such disputes are to be decided by the national courts.[203] Often such disputes have an impact on the wider society or the rights of individuals which one way or the other define arbitrability on the basis of conditions connected to public policy of a country.[204]

6.2.1.2. By which or what law is non-arbitrability determined

Although, arbitration is a private proceeding, it has public consequences, at least in the enforcement of the award, therefore, some disputes belong exclusively to the jurisdiction of national courts. Hence, if issues of non-arbitrability are raised in an

198. Mistelis, L. A. (2009) "Arbitrability – International and Comparative Perspectives: Is Arbitrability a National or an International Law Issue?" in Mistelis, L. A. and Brekoulakis, S. L., (eds.), Arbitrability: International and Comparative Perspectives, Kluwer Law International, The Netherlands, pp. 1 - 17; Tweeddale, A. and Tweeddale, K. (2005) at pp. 107 – 108; Mustill, and Boyd, S. B. (2001) Commercial Arbitration: 2001 Companion Volume to the Second Edition, Butterworths, London, p. 71.
199. Brekoulakis, S. L. (2009) "On Arbitrability: Persisting Misconceptions and New Areas of Concern" in Mistelis, L. A. and Brekoulakis, S. L. (eds.), Arbitrability: International and Comparative Perspectives, Kluwer Law International, The Netherlands, pp. 19 – 45.
200. Craig, W. L., Park, W. W. and Paulsson, J. (2000) International Chamber of Commerce Arbitration, Oceana Publications, p. 62.
201. Blackaby, N., *et al* (2015), pp. 110 – 112.
202. Arfazadeh, H. (2001) "Arbitrability under the New Year Convention: The Lex Fori Revisited", *Arbitration International,* Vol. 17, No. 1, pp. 73 – 87.
203. Otto, D. and Elwan, O. (2010) at pp. 348 – 349.
204. Brekoulakis, S. L. (2009), pp. 19 – 25.

arbitration process, it becomes necessary to have regard to the relevant laws of the different countries that are or may be connected to the dispute.[205] In this sense, the relevant laws are likely to include; the personal laws of the parties, the law regulating the arbitration agreement, the law of the place of arbitration, and the law of the place of enforcement of the award.[206]

It seems straightforward to hold that under the provisions of article V (2) (a) of the NYC, enforcement of an arbitral award may be refused if the dispute is not arbitrable under the laws of the place of enforcement. However, it is questionable whether the law of the place of enforcement will always be relevant to the determination of non-arbitrability even at the enforcement stage? For Brekoulakis, to determine whether a dispute is arbitrable, courts should examine whether the arbitral award did actually breach the exclusive jurisdiction of the court.[207]To this effect, the law of the country of enforcement will be relevant for the examination of enforceability provided, the enforcing court originally had jurisdiction over the dispute determined by the arbitrator. Apart from that, there should be no reason for the enforcing court to apply its own law to refuse enforcement of a foreign arbitral award.[208]

In order to restrict enforcing courts' control of the scope of arbitrability of international commercial disputes, there is need to differentiate between domestic and international arbitrabilities. This view accords with Gaillard and Savage's submission that such distinction will enable "a dispute to be found non-arbitrable under a country's domestic law, without necessarily preventing the recognition [and enforcement] in that country of a foreign award dealing with the same subject matter."[209] Consequently, in enforcing foreign arbitral award, the court should not exercise its discretion to refuse enforcement on grounds of non-arbitrability,

205. Brekoulakis, S. L. (2009) "Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori", in Mistelis, L. A. and Brekoulakis, S. L. (eds.), Arbitrability: International and Comparative Perspectives, Kluwer Law International, The Netherlands, pp. 99 – 119.
206. Hanotiau, B. (1996) "What Law Governs the Issue of Arbitrability in General", *Arbitration International*, Vol. 12, No. 4, pp. 391 - 404; Arfazadeh, H. (2001); Bernardini, P. (2008) "The Problem of Arbitrability in General", in Gaillard, E. and di Pietro, D. (eds.), Enforcement of Arbitration Agreements and International Arbitral Awards: The NYC in Practice, Cameron May, London, pp. 503 – 522.
207. Brekoulakis, L. S. (2009) pp. 109 – 111.
208. Brekoulakis, L. S. (200) at p. 110.
209. Gaillard, E. and Savage, J. (eds.) (1999) at para. 1701.

regardless whether the dispute was non-arbitrable under the domestic law of the court or otherwise.[210]

Though, the text of article V (2) (a) is clear that the law applicable to non-arbitrability is that of the country of enforcement, there is still room for debate as to whether a different view of arbitrability should apply to domestic and international disputes. This thesis takes the view that distinguishing domestic abitrability from international arbitrability is necessary and national courts should subordinate domestic arbitrability to international policies favouring commercial arbitration.[211] Such differentiation will give effect to the pro enforcement bias of the NYC.

In England, arbitrability of dispute as a ground for refusing enforcement of a foreign arbitral award is provided for under section 103 (3) of the AA 1996. The section is taken directly from article V (2) (a) of the NYC. No concept has been adopted upon which the distinction between disputes which are arbitrable and those which are not can be drawn. Also, there is no reported case law on disputes that are capable of settlement by arbitration and those that are not capable of resolution by arbitration. According to Merkin and Flannery, the reason for such may be attributable to the fact that the concept of arbitrability was largely untouched by the drafters of the AA 1996.[212] On the other hand, Tweeddale and Tweeddale have suggested that:

> Under English law, matters which would not be capable of settlement by arbitration would include: (a) decisions affecting the legal status of the parties; (b) decision which affects the legal status or rights of non-parties; and (c) decisions reached which are not quasi-judicial (e.g. valuations, mediations and appraisements).[213]

210. This view was upheld in the US case of *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc.* (1986) Yearbook Commercial Arbitration, vol. XI, p. 555 at 556, where the court state: "… it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration". Also in *Bremen v Zapata Offshore Co.* 407 U. S. 1; 92 S.Ct. 1907; 32 LED 2d 513 (1972), the court noted that "the expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all dispute must be resolved under our laws and courts … we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts."
211. Brekoulakis, L. S. (2009) at pp. 109 – 110.
212. Merkin, R. and Flannery, L. (2014) at p. 403.
213. Tweeddale, A. and Tweeddale, K. (2005) at p. 888.

Although, Tweeddale and Tweeddale's suggestions are viable grounds for an English court to rely on when moved to refuse enforcement of an award pursuant to section 103 (3) of the AA 1996. However, it remains to be seen when and on what basis the English courts will refuse enforcement of arbitral award on grounds of non-arbitrability.

In Nigeria, lack of arbitrability is fatal to the enforcement of arbitral awards and any of the parties or even the court may raise the lack of arbitrability as a ground for refusing enforcement.[214] The texts of article V (2) (a) of the Second Schedule to the ACA is to the effect that recognition and enforcement of arbitral award may be refused if the subject-matter of the arbitration is not arbitrable. Sections 35 and 57 of the ACA regulate the scope of disputes that may be referred or submitted to arbitration under the ACA. Thus, section 35 provides that:

This Act shall not affect any other law by virtue of which certain disputes:

(a) may not be submitted to arbitration; or

(b) may be submitted to arbitration only in accordance with the provisions of that or another law.

Under section 57 (1) of the ACA, the definition of arbitration is delimited to mean a commercial arbitration whether or not administered by a permanent arbitral institution.[215] To this end, Idornigie argued that disputes arising from non-commercial transactions are not arbitrable under the ACA.[216] Although section 35 does not specify what constitutes arbitrable disputes, it is contended that the legislative intent of the section is to preclude the resolution of certain dispute under

214. Okekeifere, A. I. (1999) "Public Policy and Arbitrability under the UNCITRAL Model Law" *International Arbitration Law Review*, No. 2, pp. 70 – 77; Akanbi, M. M. (2005) "Examining the concept of Arbitrability under Nigerian Domestic Arbitration Laws", *Nigeria Bar Journal*, vol. 3, No. 1, pp. 109 – 117.

215. Under ACA, the word 'commercial' is defined as,
"… all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or service, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or pasengers by air, sea, rail, or road…

216. Idornigie, P. (2004) "The Principle of Arbitrability in Nigeria Revisited", *Journal of International Arbitration*, Vol. 21, No, 3, pp. 279 – 288; Idornigie, P. (2005) "Nigerian Telecommunications Plc v Pentascope International BV Private Lad: Separability Circumscribed by Arbitrability", *Arbitration*, Vol. 71, No. 4, pp. 372 – 377.

the ACA.[217] Though, the text of sections 35 and 57 appear seemingly simple and clear, yet the interpretation and scope of its application has generated considerable debates. For example, Okekeifere argues that intellectual property disputes are not arbitrable under the ACA but triable by the Federal High Court only.[218] On the other hand, Asouzu submitted that:

> …as it pertains to section 35 (a) of the Act, under the Constitution and certain other statutes in Nigeria, civil jurisdiction with respect to certain subjects is vested in the Federal High Court 'to the exclusion of any other court', for example, trademark matters, patents and designs, and copyrights. The import of such provisions may be that with respect to those matters and the courts (i.e. as between courts), the Federal High Court has exclusive jurisdiction; not necessarily that, in appropriate cases, the relevant subject matters are incapable of being submitted to arbitration unless the Arbitration and Conciliation Act is expressly excluded.[219]

However, Nigerian courts have adopted a pragmatic approach to determine whether a dispute is arbitrable or not. The test applied is whether the dispute between the parties involves a reasonable matter triable civilly. In *United World Ltd. Inc. v M. T. S. Ltd*[220] the court held that for a dispute to be arbitrable, "it must consist of a justifiable issue triable civilly." The court went on to state that such dispute must be capable of being compromised lawfully by way of accord and satisfaction. Nevertheless, in *Kano State Urban Development Board v Fanz Constitution Ltd.,*[221] the Nigerian Supreme Court listed matters which are not arbitrable in Nigeria. Thus, disputes relating to, indictment for an offence of a public nature, illegal contract, gaming and wagering, change of status such as divorce petition, bankruptcy

217. Akanbi, M. M. (2005), p. 112.
218. Okekeifere, A. I. (1999), pp. 70 – 77; Okekeifere's contention is based on the fact that section 38 of the Copyright Act confers exclusive competence on the Federal High Court for the trial of offences and resolution of intellectual property disputes under the Copyright Act.
219. Asouzu, A. A. (2001) International Commercial Arbitration and African States: Practice, Participation and Institutional Development. Cambridge University Press, Cambridge, p. 155.
220. [1998] 10 NWLR (Pt. 568) 116.
221. [1990] 4 NWLR (Pt. 142) 32.

proceedings, winding up a company, and any agreement that permits the arbitral tribunal to give a decision in *rem* are not arbitrable in Nigeria.[222]

This thesis argues that under article V (2) (a) of the Second Schedule to the ACA, an enforcing court in Nigeria is obliged to consider the arbitrability of dispute in accordance with the laws of Nigeria.[223] In *SNEP & 3 ors. v FIRS & anor*.[224] and *EEPN & anor. v NNPC,*[225] respectively, the Court of Appeal held that disputes arising under the Petroleum Tax Act are not arbitrable. The court reasoned that disputes relating to the revenue of the Government of Nigeria or its organ and matters pertaining to taxation of companies and other bodies carrying on business in Nigeria are not arbitrable.

6.2.2. Public Policy

The fact that an award offends against English and Nigerian public policy is a ground for an enforcing court in England and Nigeria to refuse enforcement under the AA 1996 and the ACA, as the case may be. This ground for refusal in England is stipulated in the second paragraph of section 103 (3) of the AA 1996. In Nigeria, it is provided for under article V (2) (b) of the Second Schedule to the ACA. Both the English and the Nigerian public policy grounds of refusal are taken from article V (2) (b) of the NYC which provides that:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (b) The recognition and enforcement of the award would be contrary to the public policy of that country

This sub-section examines the concept of public policy (6.2.2.1), the applicable law to public policy (6.2.2.2) and, the standard of public policy defence (6.2.2.3) under the NYC, the AA 1996 and, the ACA.

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222. *Kano State Urban Development Board v Fanz Constitution Ltd.*, [1990] at p. 33.
223. Ufot, D. (2008) "The Influence of the NYC on the Development of International Arbitration in Nigeria", *Journal of International Arbitration*, Vol. 25, No. 6, pp. 821 – 836.
224. [2016], Appeal No. CA/A/208/2012, delivered on 31/08/2016.
225. [2016] Appeal No. CA/A/507/2012, delivered on 22/07/2016.

6.2.2.1The concept of public policy under the New York, AA 1996 and ACA

Although enforcing courts in England and Nigeria will refuse to enforce an international arbitral award which violates English and Nigerian public policy, as the case may be, the scope of public policies in both jurisdictions differs. This is because the issue of public policy is controversial, and no concept has been adopted to determine its scope.[226] Different countries have different meanings attach to public policy. The basis is that each country has its own fundamental interest within which it has to decide whether or not to enforce a foreign arbitral award on an objection premised on public policy.[227] Hence, enforcement of an award may be refused because of public policy considerations in country A, and the same award enforced in country B where such public policy considerations do not apply. Principles which are determined fundamentally important to one country's legal, social, economic, political or religious order may be considered less essential in other countries. Therefore domestic laws may differ significantly in this regard.

The controversy surrounding the scope of public policy sometimes finds its way even within the territory of a country. For instance, an enforcing court may refuse to enforce an award because of public policy elements in one case, and in another case, the same court or another court may enforce another award which involves the same circumstances. Arguably, considerations of what constitutes public policy are based on a case-by-case policy. In England, this controversial approach is manifest in a number of cases in which the same court gave different judgements on different awards, even though the circumstances were the same.[228] This is understandable as

226. Mistelis, L. (2000) "Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards", *International Law Forum du droit international*, Vol. 2, No. 4, pp. 248 - 253; Okekeifere, A. I. (1999), pp. 70 – 77.
227. Lord Goldsmith, (Peter) (2015) "An Introduction to International Public Policy", in Bray, D. and Bray, H. L., eds., International Arbitration and Public Policy, JurisNet, LLC, New York, pp. 3 – 8.
228. The case of *Soleimany v Soleimany* [1998] 3 WLR 811, the court of Appeal overturned the judgement of the lower court in [1999] QB 785 (CA); *Westacre Investmen Inc. v Jugoimport-SDPR Holding Co. Ltd* [1999] QB 740, the Court of Appeal upheld the lower court's decision in [2000] QB 288 (CA); *Omnium de Traitement el de Valorisation SA v Hilmarton Ltd.* [1999] 2 Lloyd's Rep 222, will be examined to illustrate the controversial nature of public policy even within the same country.

what is considered public policy in one case is not sacrosanct even within the same country.[229]

To state a precise definition, whether statutory or otherwise, of the concept of public policy may be difficult, more so, in the context of enforcement of foreign arbitral awards under the NYC, the AA 1996 and the ACA. This is because, the above legal regimes offer no definition of the concept, nor do they provide guidance as to how public policy elements should be applied as a defence for refusing enforcement.[230] On the other hand, public policy is relative. It concerns many areas of law in many ways, and its content and scope varies from country to country and from time to time.[231] To this end, different commentators have defined public policy according to their perception of the concept. For instance, according to van den Berg and Enterria respectively, the term public policy concerns the fundamental moral and convictional policies of the forum place.[232] For Tweeddale, public policy is "open-textured and encompasses a broad spectrum of different acts."[233] However, Chukwuemerie remarked that:

> Public policy like 'national interest' to which it is inseparably related is a nebulous concept hardly capable of precise definition or explanation at any one point in time. It is a fluid concept the contents of

229. In *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 at 674, the Court of Appeal New Zealand, reasoned thus;

> Even within any given common law country the courts cannot by the doctrine of precedent stereotype public policy; what was once the rule need not be accepted as required by current conditions … 'Since public policy reflects the mores and fundamental assumptions of the community, the content of the rules should vary from country to country and from era to era'. This does not mean that prior decisions based on public policy as judicially conceived at the time as lightly to be abandoned and the issue automatically assume that past public policy is sacrosanct.

230. Lew, J. D. M., *et al*, (2003) at paras 26 – 115; Shaleva, V. (2003) "The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of Central and East European States and Russia", *Arbitration International*, Vol. 19, No. 1, pp. 67 – 93.

231. Tweeddale, A. G. (2000) "Enforcing Arbitration Awards Contrary to Public Policy in England", *The International Construction Law Review*, pp. 159 – 174; Sher, J. and Kazaz, N. (2014) "When Even Fraud is not Nearly Enough Recourse Against Arbitral Awards and Public Policy Considerations: An Anglo-Australian Perspectives" *Arbitration*, Vol. 80, No. 2, pp. 124 – 135; Sheppard, A. (2004) "Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?", *Transnational Dispute Management*, Vol. 1, No. 1, pp. 1 – 8.

232. van den Berg, A. J. (1981) at p. 376; Enterria, J. G. D. (1990) "The Role of Public Policy in International Commercial Arbitration", *Law and Policy in International Business*, Vol. 21, pp. 389 – 402.

233. Tweeddale, A. G. (2000) at p. 159.

> which are determined by the changing mood of society.[234]

Further to the various attempts to define and describe public policy, the International Commercial Arbitration Committee of the International Law Association (ILA) published a report and resolution on public policy as a ground for refusing enforcement of foreign awards. The report and resolution identified various aspects of public policy with examples, but did not provide a definition of the concept.[235] Two main levels of public policy were identified, namely, domestic and international public policies. The third, transnational public policy was merely mentioned in the report and resolution. These levels of public policy are briefly examined later on in this sub section. Nevertheless, public policy definitions and descriptions from plethora of commentators reflect the protection of fundamental economic, legal, moral, political, religious and social values of every country or extra-national community.[236] There is equally no definition of the concept of public policy offered by case law in England and Nigeria. However, it has been described as "a very unruly horse, and when you get astride it you never know where it will carry you."[237] Consequently, the concept of public policy is easier to identify or exemplify than it is to define.

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234. Chukwuemerie, A. I. (2002) Studies and Materials in International Commercial Arbitration, Lawhouse Books, Pot Harcourt, p. 203.
235. Interntational Law Association, New Delhi Conference (2002), Committee on International Commercial Arbitration, Final Report on Public Policy Aa a Bar To Enforcement of International Arbitral Awards; Resolution 2/2002 International Commercial Arbitration, The 70th Conference of the International Law Association held in New Delhi, India, 2-6 April 2002, at http://www.ila-hg.org/en/committees/index.cfm/cid/19 [accessed on 27/09/2016]
236. Lew, J. D. M. (1978) Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Award, Oceana Publication, Inc., New York, p. 532; Blessing, M. (1997) "Mandatory Rules of Law versus Party Autonomy in International Arbitration", *Journal of International Arbitration*, Vol. 14, No. 2, pp. 23 – 40; Liebscher, C. (2000) "European Public Policy – A Black Box?", *Journal of International Arbitration*, Vol. 17, No. 3, pp. 73 – 88.
237. *Richardson v Melliah* (1824) 2 Bing 229 at 252; In *Egerton v Brownlow* (1853) 4 HLC1, the English House of Lords described public policy as "that principle of law which holds that no subject can lawfully do that which has the tendency to be injurious to the public, or against public good." In the context of enforcement of an arbitral award, the English Court of Appeal (as per Sir John Donaldson MR) in *D. S. T. v Ras Al Khaiimah National Oil Company* [1987] 2 Lloyd's Rep 246 at 254, stated;

> Consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution … it has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good, or possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.

According to Merkin and Flannery the most important aspects of public policy defence in England have been identified in circumstances where:

(a) The award has been obtained by perjury or fraud

(b) The losing party is at risk of having to make payment in some other jurisdiction as well as in England

(c) The award is tainted by illegality

(d) The award was obtained in breach of the rules of natural justice. This is a limited defence, for the losing party will normally have a right to seek to have the award overturned by the courts of the jurisdiction in which the award was given, and if losing party sough but failed to obtain relief from the curial courts, or has unreasonably not invoked the jurisdiction of the curial courts, the award will generally be enforced by the English courts; and

(e) The award is so unclear as to the obligations imposed on the losing side as to be incapable of enforcement.[238]

In Nigeria, the Supreme Court in the case of *Taylor Wordrow (Nig.) Ltd. v Suddentolalie Etna-Werlk GMBH*[239] identified some acts that will constitute violation of the public policy of Nigeria, paraphrasing the court, such acts are where:

(a) the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement

(b) the arbitrator has been bribed or corrupted

(c) technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement of reference. This however, does not mean that every irregularity of procedure amounts to misconduct.

(d) the arbitrator fails to decide all the matters which were referred to him.

238.Merkin, R. and Flannery, L. (2014) at p. 403.
239.[1993] 4 NWLR (Pt) 127.

(e) the arbitrator has breached the rules of natural justice. It is against public policy in Nigeria to enforce an award which results from arbitral proceeding held in breach of the sacred constitutional principle of natural justice.[240]

In addition, it can be argued that enforcement of an award will be against public policy in Nigeria, if the subject matter of the arbitration is not arbitrable under Nigerian law. In this sense, there is a nexus between arbitrability and public policy considerations. Disputes which are non-arbitrable are based on public policy considerations.[241] In effect, Nigerian courts may on grounds of public policy refuse enforcement of an arbitral award which subject matter under Nigerian law is not capable of settlement by arbitration.[242]

6.2.2.2. The law applicable to breach of public policy

This sub-section poses the question: when will the English and the Nigerian courts regard an award as contrary to English and Nigerian public policy? According to Lew *et al*, the public policy defence set out in article V (2) (b) of the NYC is an acknowledgment of the right of a country and its court to exercise control over enforcement proceedings of a foreign award.[243] As part of this control, an enforcing court may refuse to enforce an award where such enforcement will violate the enforcing country's most basic notions of morality and justice.[244] This is irrespective of whether the award is a domestic award,[245] a NYC award,[246] a non- NYC award,[247] or foreign award which might otherwise be enforced at common law.[248] Consequently, the law applicable to violation of public policy under the NYC, the

240. Chukwuemerie, A. I. (2002) at p. 204.
241. Okekeifere, A. I. (1999), pp. 70 – 77.
242. K*ano State Urban Development Board v Fanz Construction Ltd* [1990] 4 N.W.L.R. (Part 142) 1
243. Lew, J. D. M., *et al* (2003) at pp. 720 – 722; International Law Association, New Delhi Conference (2002).
244. Hwang, M. and Chan, A. (2001) "Enforcement and Setting Aside of International Arbitral Awards: The Perspective of Common Law Countries," in van den Berg, A. J. (ed.), ICCA Congress Series No. 10 (New Delhi 2000), Kluwer Law International pp. 145 – 164; Scherer, M. (2013) "Effects of Foreign Judgement Relating to International Arbitral Awards: Is the Judgment Route the Wrong Road?", *Journal of International Dispute Settlement*, Vol. 4, No. 3, pp. 587 – 628; Silberman, L. J. and Scherer, M. (2013) "Forum Shopping and Post-Award Judgments," *New York University Public Law and Legal Theory Working Papers*, Paper 447, pp. 313 – 345.
245. Section 68 (2) of the AA 1996; section 52 of the ACA.
246. Section 103 (3) of the AA 1996; article V (2) (b) of the Second Schedule to the ACA.
247. Section 99 of AA 1996, section 37 of the Arbitration Act 1950 and, section 52 of the ACA (as the case may be).
248. *Dalmia Dairy Industries Ltd. v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223

AA 1996 and the ACA is the law of the enforcing court.[249] In this case, it is the English and Nigerian law.[250] In *Soleimany v Soleimany,*[251] Lord Justice Waller stated this position *inter alia*:

> An English court exercises control over the enforcement of arbitral awards as part of the *lex fori*, whatever the proper law of the arbitration agreement or the place where the arbitration is conducted. If a claimant wishes to invoke the executive power in this country to enforce an award in his favour, he can only do so subject to our law… (It is now expressly provided in section 68 (2) of the Arbitration Act 1996 that an award may be challenged on the ground that it is contrary to public policy; and section 2 (2) (b) of that Act in effect provides that the enforcement of awards shall be governed by English law even if that is not otherwise the law applicable to the arbitration.) It follows that an award, whether domestic or foreign, will not be enforced by an English court if enforcement would be contrary to the public policy of this country.[252]

Flowing from Lord Justice Waller dictum, the question that then arises is: whether the English and the Nigerian courts should apply the same standard of public policy to both domestic and foreign arbitral awards?

6.2.2.3. The standards of application of public policy defence

The NYC, AA 1996 and ACA provide for the application of public policy of the enforcing country without stipulating whether courts should apply the same public policy standards they apply in domestic awards to foreign awards. However, some countries have attempted to set out a more universally oriented standard (transnational public policy) with a view to achieving greater legal certainty, at least in the area of international arbitral awards.[253]

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249. Derains, Y. (1987)"Public Policy and the Law Applicable to the Dispute in International Arbitration," in Sanders, P. (ed.) ICCA Congress Series No. 3, (New York 1986), Kluwer Law International, pp. 227 – 256.
250. Article V (2) (b) of the NYC; section 103 (3) of the AA 1996 and, section 52 (2) (a) and article V (2) (b) of the Second Schedule to the ACA.
251. [1999] Q B 785 (CA).
252. *Soleimany v Soleimany* [1999] at pp. 798 – 799.
253. The Swiss Federal Tribunal in *W v F & V* (1995) Bull 217 specifically held in favour of a "universal conception of public policy, under which an award will be incompatible with public policy if it is contrary to the fundamental moral or legal principles recognised in all civilized countries". Also, the French Court of Appeal in *European Gas Turbines SA v West Man International Ltd* [1994] Rev. Arb. 359, held that bribery was not only contrary to French Public Policy but contravened the ethics and ethos of international trade; Hober, K. (2011) International Commercial Arbitration in Sweden, Oxford University Press, Oxford, pp. 370 - 371; Bantekas, I.

This sub-section examines, three main components of public policy that have been suggested by commentators, namely; domestic-international (i), regional (ii) and, transnational public policies (iii).[254] To sum up this sub-section, the English and the Nigerian courts approach are examined (iv).

(i) Domestic- International public policy

Domestic-international public policy comprises both internal and external public policies of a country. Whereas, internal public policy regulates domestic awards, external public policy provides for the application of certain rules of national interest of the enforcing country to international awards.[255] According to Lew, domestic public policy consists of both national policies recognised in customary law and legislations enacted to regulate certain circumstances which cannot be by-passed by the parties.[256] Nonetheless, these policies, principles and laws are only relevant where domestic laws are applicable, or deemed applicable. They are irrelevant to international situations.[257]

For Lalive, the external public policy of a country may be tied to the fundamental rules and interests of that country and retains a relative or selfish element concerning international cases.[258] Similarly, the ILA described international public policy as that part of the public policy of a country which, if breached, would excuse a party from relying on foreign law or foreign judgment or foreign arbitral award.[259] Other commentators have either defined or described international public policy in similar terms.[260]

(2015) An Introduction to International Arbitration, Cambridge University Press, Cambridge, pp. 242 – 246.

254. Lew, J. D. M. (1978) at pp. 531 – 565; Hunter, M. and Conde e Silva, G. (2003) "Transnational Public Policy and its Application in Investment Arbitrations", *Journal of World Investment*, Vol. 4, No. 3, pp. 367 – 378; Pryles, M. (2007) "Reflections on Transnational Public Policy" *Journal of International Arbitration*, Vol. 24, No. 1, pp. 1 – 8; Cairns, D. (2009) "Transnational Public Policy and Internal Law of State Parties", *Transnational Dispute Management*, Vol. 6, No. 1, pp. 27 – 42.
255. Hunter, M. and Conde e Silva, G. (2003), p. 371.
256. Lew, J. D. M. (1978), pp. 531 – 565.
257. Liebscher, C. (2000), p. 80.
258. Lalive, P. (1987) "Transnational (or Truly International) Public Policy and International Arbitration", in Sanders, P. (ed.) ICC Congress Series No. 3, (New York 1986), Kluwer Law International, pp. 257 – 320.
259. International Law Association, New Delhi Conference (2002).
260. Bocksteigel, K-H. (1987) "Public Policy and Arbitrability" in Sanders, P. (ed.), ICCA Congress Series No. 3, (New York 1986), Kluwer Law International, pp. 177 – 204; Lew, J. D. M. (1978) at pp. 534 – 535; Tweeddale, A. and Tweeddale, K. (2005) at pp. 426 – 428; Derains, Y. (1987);

National courts have struggled to give a precise definition or description of international public policy. For example, the French Court of Appeal described international public policy as "an assemblage of rules and values which the French legal order cannot disregard, even in situations of an international character."[261] Likewise, the Supreme Court of Luxembourg remarked that, international public policy is only applicable where the arbitral award substantially violates, "at the time of application before the court, that court's fundamental convictions as the law applicable to international relationships."[262]

The various attempts at distinguishing between domestic public policy which the enforcing court applies to domestic award from those applicable to international award, appears to be academic, a distinction without a difference. Thus, the question is posed: there is any difference between domestic (internal) public policy and international (external) public policy.

(a) Domestic public policy and international public policy any difference?

It seems difficult, if not impossible to distinguish between international public policy and domestic public policy. The fundamental moral and convictional policies invoke as a bar to enforcement of domestic awards are the same as those apply to international awards.[263] Nonetheless, it seems that what distinguishes both levels of public policy is the test the enforcing court applies in cases concerning international awards and those regarding domestic awards. This raises the issue of whether a narrower concept of public policy as applicable to public international law, or a broader concept of public policy as applicable to domestic law, should be applied by national courts.[264]

Fei, L. (2010) "Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach", *Arbitration*, Vol. 26, No. 2, pp. 301 – 312; Blackaby, N., *et al* (2015) at pp. 641 – 647.

261. France, Cour d' appeal de Paris, 27 October 1994, LTDC v Sce Reynolds, 4 Rev Arb. 709 - 713 (1994) at 709. The original French text reads, "l' ensemble des regles et des valeurs don't l'ordre juridique francais ne peut souffrir la meconnaissance, meme dans des situations a caractere international.
262. *Kersa Holding Co. Luxembourg v Infancourtage and Famajuk Investment and Isy* (1996) Yearbook Commercial Arbitration, Vol. XXI, p. 617 at 625.
263. Tweeddale, A and Tweeddale, K. (2005) at pp. 428 – 429.
264. Blackaby, N., *et al* (2015) at pp. 641 – 647.

In *Hebei Import and Export Corp. v Polytek Engineering Co. Ltd*.,[265] the Court of Final Appeal of the Hong Kong Special Administrative Region stated that public policy defence under article V (2) (b) of the NYC should be interpreted narrowly. Firstly, the court considered whether the phrase 'international public policy' was subject to some level common to all civilised countries. The court then reasoned that it would be wrong to attempt to define such a level. Thus, the court held that the test should be: whether the issue of public policy violated the country's own principles which were 'fundamental to its notion of justice.'[266]

(ii) Regional or community public policy

Another level of public policy is what some commentators refer to as regional or community public policy.[267] This standard of public policy holds the essential rules of a political or an economic community.[268] Arguably, majority of these rules relevant to arbitration whether domestic or international arbitration, are extracted from inter-country agreements establishing the regional or community entity.[269] Instances of these levels of public policy can be found in the EU, OHADA, NAFTA, Islamic theory of Siyasa and Merlosur agreements or treaties.[270] According to van Houtte and other commentators, the rules of the EU serve as a paradigm of this

265. (1999) Yearbook Commercial Arbitration, Vol. XXIV, pp. 652 – 677.
266. Similarly, in *Renusagar Power Co. Ltd. (India) v General Electric Co. (US)* (1995) Yearbook Commercial Arbitration, Vol. XX, pp. 681 – 738 at 702, the Supreme Court of India posed the test whether the narrower concept of public policy as applicable in the field of public international concept of public policy s applicable in the field of municipal law. They thus held that the narrower concept should prevail and that enforcement would be refused on public policy ground if such enforcement would be contrary to (i) fundamental policy of India; or (ii) the interests of India; or (iii) justice or morality.
267. Lew, J. D. M. (1978) at p. 534; Schlosser, P. (1997) L'Arbitrage et le Droit European, (translated as 'Arbitration and European Public Policy'), Bruylant, Brussels, p. 85; Brulard, Y. and Quintin, Y. (2001) "European Community Law and Arbitration: National Versus Community Public Policy", *Journal of International Arbitration*, Vol. 18, No. 5, pp. 533 – 548; Lew, J. D. M., *et al*, (2003), p. 422.
268. Gillard, E. (1995) "Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules", *ICSID Review*, Vol. 10, pp. 208 – 231.
269. Hunter, M. and Conde e Silva, G. (2003), p. 367.
270. Onyema, E. (2014) "Regional Arbitration Institution for ECOWAS: Lessons from OHADA Common Court of Justice and Arbitration", *International Arbitration Law Review*, Vol. 17, No. 5, pp. 99 – 111; Lew, J. D. M. (1978), p. 534; Dossou, R. (1996) "OHADA Arbitration: Historic Background and Objectives" XI International Conference of Bar Associations, Ouagadougou, pp. 9 – 14; van Ee, J. (2001) "Mercour Agreement: A New Regime" *International Arbitration Law Review*, Vol. 4, No. 2, pp. 55 – 65; Haddad, H. (1990) "The AMMAN Convention of 1987 on Commercial Arbitration", *American Review of International Arbitration*, Vol. 1, No. 1, pp. 132 – 138; Brulard, Y and Quintin, Y (2001), p. 533.

standard of public policy.[271] Laws on human rights, competition rules, and free movement of people, capital, goods, establishment and services have been identified as part of European Public Policy.[272]

According to Lew, supra-national source of community public policy has a regulatory function towards the laws of all member state thus, integrated within the concept of transnational public policy[273]. To this end, an evaluation of the usefulness or otherwise of community and domestic public policies to international commerce may reveal whether transnational public policy rules have emerged under article V (2) (b) of the NYC or not.

(iii) Transnational public policy

According to Bantekas, the concept of 'transnational public policy' or 'truly international public policy' relates to a standard that is common among many countries.[274] Comparatively, transnational public policy is of even more curtailed scope, but of universal application than domestic-international public policy.[275] While domestic-international public policy of a country is part of the law or legal system of that country, transnational public policy is not necessarily part of any legal system. However, both domestic-international public policy and transnational public policy transcend nationalities and national frontiers. Accordingly, Gaillard and Savage clarify that:

> … not every breach of a mandatory rule of a host country could justify refusing recognition and enforcement of a foreign award. Such refusal is only

271. van Houtte, H. (2002) "From a National to an European Public Policy", in Nafziger, J. A. R. and Symeonides, S. C. (eds.) Law and Justice in a Multi-State World: Essays in Honour of Arthur T. von Mehren, Transnational Publishers, Ardsley, p. 841.
272. Moitry, J. (1989) "Right to a Fair Trial and the European Convention on Human Rights: Some Remarks on Republique de Guinee Case" *Journal of International Arbitration*, Vol. 6, No. 2, pp. 115 – 122; Liebscher, C. (1999) "European Public Policy after Eco Swiss", *American Review of International Arbitration*, Vol. 10, No. 1, pp. 81 - 94; Liebscher, C. (2000) "European Public Policy and the Austrian Supreme Court", *Arbitration International*, Vol. 16, No. 3, pp. 357 – 366. In *Kajo-Erzeugnisse Essenzen GMbH v DO Zdravilisce Radenska* (1999) Yearbook Commercial Arbitration, Vol. XXIV, pp. 919 – 927, the Austrian Supreme Court held inter alia that articles 81 and 82 of the European Union Treaty are pillars of the rules and fundamental principles of the EU common market. Thus, they are given the principle of supremacy of EC law which is part of the public policy of every EU member State.
273. Lew, J. D. M (1978) at pp. 534 and 538 – 539.
274. Bantekas, I. (2015) at pp. 242 – 246.
275. Lalive, P. (1987); Rogers, A. and Kaley, M. (1999) "The Impact of Public Policy in International Commercial Arbitration", *Arbitration*, Vol. 65, No. 4, pp. 326 – 332.

> justified where the award contravenes the principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value.[276]

In the context of the NYC, national courts may rely on transnational public policy where one party commences litigation in violation of an arbitration agreement or where enforcement of an award will breach the fundamental interests of the international community.[277] To determine those fundamental interests, an enforcing court will have to reference a widely held view amongst members of the international community. Those fundamental interests may be either substantive or procedural transnational public policies.[278] Examples of violation of substantive transnational public policy and procedural transnational public policy include but not restricted to bribery, fraud, impartiality of the arbitrator, lack of due process. These examples and many more are copiously discussed by Otto and Elvan and other commentators.[279] By applying these transnational public policies, national courts directly or indirectly endorses those rules of public policy as to which a broad consensus has emerged in the international community.[280]

(iv) English and Nigerian Courts approach

As regard English and Nigerian courts approach, two Court of Appeal cases are examined in thesis namely; *Soleimany v Soleimany* and *Westcare Investment Inc. v Jugoimport-SDPR Holding Co. Ltd*.

276. Gaillard, E. and Savage, J. (eds.) (1999) at para 1711.
277. International Law Association, London Conference (2000), Committee on International Commercial Arbitration, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, pp. 6 – 7.
278. Kreindler, R. H. (2015) "Standards of Procedural International Public Policy", in Bray, D. and Bray, H. L. (eds.), International Arbitration and Public Policy, JurisNet, LLC, New York, pp. 9 – 22; Jagusch, S. (2015) "Issues of Substantive Transnational Public Policy", in Bray, D. and Bray, H. L. (eds.) International Arbitration and Public Policy, JurisNet, LLC, New York, pp. 23 – 48; Scherer, M. (2005) "The Recognition of Transnational Substantive Rules by Courts in Arbitral Matters", in Gaillard, E., Schlaepfer, A. V., Pinsolle, P. and Degos, L. (eds.), Towards a Uniform International Arbitration Law?, Juris Publishing, New York, pp. 91 – 121.
279. Otto, D. and Elwan, O. (2010), pp. 344 – 413; Kreindler, R. H. (2015), pp. 9 – 22; Jagusch, S. (2015), pp. 23 – 48; Kurkela, M. S. and Turunen, S. (2010) Due Process in International Commercial Arbitration, 2nd edn., Oxford University Press, Oxford, pp. 15 – 42; International Law Association, London Conference (2000) at pp. 22 – 34.
280. Harris, T. L. (2007) "The 'Public Policy' Exception to Enforcement of International Arbitration Awards under the NYC", *Journal of International Arbitration*, Vol. 24, No. 1, pp. 9 – 24.

In Soleimany v Soleimany father and son were involved in an illegal contact and when dispute arose, the matter was referred to arbitration in England. An award was rendered in favour of the son. The son applied to the High Court to enforce the award as a judgement of the court. Leave to enforce the award was granted. The father resisted the enforcement of the award on the grounds that the award was based on an illegal contract. The father argued that enforcement of the award would be contrary to English public policy. The trial court dismissed the father's application on the basis that a contract which is unenforceable for illegality becomes enforceable if the procedural law of the arbitration attaches no importance to the illegality.

Dissatisfied, the father appealed the High Court decision. The Court of Appeal overturning the judgment at first instance held that, an award whether domestic or foreign will not be enforced in England if enforcement would contravene English public policy. The Court of Appeal reasoned that since the principal contract was based on an illegal contract, enforcement of the award would be contrary to English public policy. Although, the arbitrator determined the illegality to be insignificant under the law of the principal contract (Jewish law), nonetheless, enforcement was refused pursuant to section 103 (3) of the AA 1996.

In *Westacre Investment Inc. v Jugoimprt-SDPR Holding Co. Ltd*, parties entered into a consultancy contract governed by Swiss law. The first defendant appointed the claimants as consultants for the procurement of contracts for the sale of military equipment to Kuwait. The claimants were to receive a substantial percentage of the value of the contracts in return for its services. Dispute arose and the claimants commenced arbitration in Geneva. The defendant urged the arbitrators to dismiss the claimants' claim because the principal contract was tainted with illegality (fraud and bribery) or illicit personal influence of other kinds. The arbitrators found in favour of the claimant and award was rendered against the defendant.

The defendant challenged the award and sought the annulment of the award before the Swiss Federal Court. The Swiss Federal Court upheld the arbitrators' award and dismissed the defendant's application for annulment of the award. Consequently, the claimants sought to enforce the award in England and leave was granted. The defendants moved to set aside the leave for enforcement on grounds of public policy in accordance with section 103 (3) of AA 1996. The trial court held that a foreign

award which was both legal under the proper law of the contract and the procedural law of the arbitration (*lex arbitri*) but illegal in the country of enforcement could still be enforced. The court clarified that on the facts of the case the public policy of finality of arbitral awards outweighed the public policy of discouraging international commercial corruption. Enforcement of the award was granted. On appeal, the Court of Appeal agreed with the views of the judge at first instance. Instructively, the Court of Appeal referring to *Lemenda*[281] stated *inter alia* that:

> It was difficult to see why outside the field of such universally condemned activities such as terrorism, drug trafficking, prostitution, paedophilia, anything short of corruption or fraud in international commerce should invite the attention of English public policy in relation to contracts which are not performed within the jurisdiction of the English courts … It is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its crucial law, even if English domestic public policy might have taken a different view … [282]

In *Soleimany*, the claimant sought to enforce an English award (domestic award), while in *Westacre* case, the claimants sought to enforce a Swiss award (foreign award). However, in both cases, the defendants contended that since the principal contracts were based on illegality, the court should refuse enforcement of the awards pursuant to English public policy. Nevertheless, the Court of Appeal in *Soleimany* refused enforcement of the award and in *Westacre*, enforcement of the award was allowed.

The difference between the two cases is that, in *Soleimany*, the arbitrator found the principal contract illegal under the law of the place of performance (Iran). Also, it was apparent on the face of the award that the principal contract was illegal under Iranian law. Thus, the Court of Appeal had no difficulty in denying enforcement of the award on grounds that enforcement will violate English public policy. Conversely, in *Westacre*, the court decided to enforce the award and not the principal

281.*Lemenda Trading Co. Ltd v African Middle East Petroleum Co.* [1988] 1 QB 448.
282.*Westcare Investment Inc. v Jugoimport-SDPR Holding Co. Ltd.* [2000] at pp. 300 – 305.

contract, because the arbitrators had found the issue of illegality of the principal contract unmeritorious under the law of the place of arbitration (Swiss law).

Although, the facts of both cases were not same however, a common element to both cases remains the illegality of the principal contract. Thus, the different conclusions reached by the Court of Appeal in both cases have been applauded at the same time criticised.[283] Nevertheless, this thesis argues that each of the cases had its own merits according to which the Court of Appeal decided differently. The decision of the Court of Appeal in *Soleimany* is clear that English courts will excuse enforcement of an award "whether domestic or foreign" if the illegality of the principal contract is "palpable and indisputable".[284] Furthermore, in *Westacre* the Court of Appeal categorised illegality of the principal contract into two. Firstly, illegality which contravenes rules of public policy based on considerations which are universally condemned. For example, an illegality involving conducts such as terrorism and armed robbery. Secondly, illegalities which breach rules of public policy based purely on domestic considerations.

Flowing from the above categorisation, it seems English Courts will refuse enforcement of an award if the principal contract contains illegality falling into the first category. The fact that the principal contract is enforceable under the proper law or the law of the place of performance is irrelevant.[285] However, where the illegality relates to the second category and provided the principal contract is enforceable under the proper law or crucial law, English courts may enforce the award. Under the second category, English courts may still enforce an award even though it is apparent from the face of the award that the principal contract is illegal, English public policy notwithstanding.[286]

283. Enonchong, N. (2000) "The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts", *Lloyd's Maritime and Commercial Law Quarterly*, pp. 495 – 521.
284. *Soleimany* [1999] per Waller LJ; Colman J in *Westacre* [2000] at p. 740 – 767.
285. Sheppard, A. (1999) "Whether Enforcement of a Foreign Award should be Refused as contrary to English Public Policy, on the ground that the Underlying Agreement was Illegal Under the Law of the Place of Performance" *International Arbitration Law Review*, Vol. 2, No. 4, p. N46; Enonchong, N. (2000), p. 503.
286. Sheppard, A. (1999) "Whether Enforcement of Foreign Award should be Refused as Being Contrary to English Public Policy, on the ground that the Underlying Agreement Concerned the Procurement of Personal Influence", *International Arbitration Law Review*, Vol. 2, No. 4, p. N47.

This thesis argues that on the strength of *Westacre* that a foreign arbitral award can be enforced in England though the principal contract violates English public policy. Provided the illegality of the principal contract is not universally condemned. Accordingly, it appears the English court applies transnational public policy with respect to refusal of enforcement of foreign arbitral award under section 103 (3) of the AA 1996. In the absence of direct authority in Nigeria, it is suggested that enforcement of a foreign award should not be refused in Nigeria on grounds of illegality if such illegality is not internationally condemned.

6.3. Summary

This chapter examined the grounds of challenge of awards and discussed the attitude of the courts of England and Nigeria where enforcement of the award is resisted or actively challenged.

Chapter seven

Conclusion

This thesis set out to answer the following research questions:

i) Legal justification for enforcement of arbitral awards: Whether the same standards are applied in determining the validity of the enforcement of transnational commercial arbitral awards by the English and Nigerian courts.

ii) Jurisprudential theories of arbitration: Whether the juridical theory of arbitration the law and attitude of the national courts of England and Nigeria reflect in enforcing transnational commercial arbitral awards are the same.

iii) Judicial attitudes to evidential requirements towards the enforcement of awards rendered purely on transnational legal principles: Whether arbitral awards based purely on transnational rules are enforceable in England and Nigeria; and whether the procedures for the enforcement of such arbitral awards in England and Nigeria are effective.

iv) Judicial attitudes to annulment of awards: Whether the English and Nigerian courts apply the same conditions in setting aside transnational commercial arbitral awards.

v) Judicial attitudes towards resisting enforcement of awards: Whether the English and Nigerian courts apply the same conditions in refusing enforcement of transnational commercial arbitral awards; and whether the conditions for the refusal of such awards in England and Nigeria are effective.

Throughout this thesis, five areas have been examined in five substantive chapters with the aim of addressing the research and other incidental questions.

The first area concerned the legitimacy of the enforcement of transnational commercial arbitral awards. Chapters two of this thesis addressed the issue from a historical perspective. The chapter examined the historical development of the legal instruments that regulates the enforcement of arbitral awards in England and Nigeria.

It was found that in England, arbitration as a non-state dispute settlement evolved out of the customs, usages and practices of traders who travelled from fair to fair. The Royal courts which were vested with the state's judicial power lacked jurisdiction to adjudicate cross-border commercial disputes. These courts were also ill-equipped to resolve cross-border commercial disputes which were not injurious to the King's reign. Thus, courts of the fairs and markets, akin to modern day arbitral tribunals, were developed by cross-border traders to resolve their trade disputes. This was private and non-litigious. Submission of such disputes was voluntary and the parties were bound by the courts' decision. Perceiving that arbitration will weaken their jurisdiction, the common law courts provoked parliament to statutorily regulate arbitration. These statutes preserved the principle of party autonomy.

As it relates to Nigeria, it was found that arbitration as a private dispute mechanism is as old as the indigenous communities that make up the entity known as Nigeria. Before the indigenous peoples were overpowered and forced into colonial rule by Great Britain, customary arbitration was, and is still, prominently used in the resolution of various disputes. The Chiefs-in-Council, traditional rulers, elders and other trusted third parties arbitrated between disputing parties. Submission to customary arbitration is voluntary and the decision of the arbitrator is final and binding, provided the parties agreed to be bound by such arbitrator's decision. The chapter also indicates that during the colonial rule, customary legal systems of various ethnic nationalities of Nigeria became influenced by the English legal system though, customary arbitration and English styled arbitration operated side by side. English styled arbitration was only applicable where local jurisdiction and circumstances allowed. After independence in 1960, the English Arbitration Act 1889 continued to be in force in Nigeria as Arbitration Act 1958. Though, the ACA 1988 impliedly repealed the Arbitration Act 1958, it preserves the spirit and letter of the principle of party autonomy.

Consequently, this thesis argued in chapter two that the historical progress of arbitration in both countries demonstrates that arbitration emerged as an essential dispute resolution mechanism, and is based on the principle of party autonomy in both jurisdictions.

The thesis then examined the features and jurisprudential theories of arbitration in chapter three. The chapter also established the policy underpinning of the laws and attitude of the English and Nigerian courts towards the enforcement of arbitral award. The thesis argued in this chapter that the efficacy of international commercial arbitration depends ultimately on the positive attitude of courts towards giving effect to the principle of party autonomy. Following an analysis of the decisions of English and Nigerian courts, this thesis concludes that the courts in both jurisdictions in apposite cases will enforce transnational commercial arbitral awards, primarily because of their desire to protect and respect party autonomy to contract. These courts are minded of the fact that if they refuse to enforce arbitral awards, such refusal may subvert parties' freedom to contract and thwart their legitimate expectations. In determining whether to enforce arbitral awards, the courts consider whether parties freely intended to arbitrate the disputes. Parties' consent to arbitrate their dispute is construed from their arbitration agreement independent of the principal contract, which is required to be in writing under the New York Convention, AA 1996 and the ACA.

It was further argued that the arbitration process is not an extension of the state adjudicatory system, but a private dispute resolution mechanism that requires the support of the courts. Thus, the validity of the award is not subject to conversion into a court judgement. The award's validity lies in the contract between the parties to resolve their dispute by arbitration and to accept the award as final and binding on them. Whether the award is enforceable or not is at the discretion of the enforcing court after taking into account the exhaustive grounds for refusal under the New York Convention as implemented by the AA 1996 and ACA respectively.

Chapter three therefore concluded that the reason why the English and Nigerian courts are prepared in applicable cases to enforce a transnational commercial arbitral award is because of the parties' consent to submit their dispute to arbitration. This reason accounts for the pro-enforcement approaches of these courts.

This conclusion led to an examination in chapter four of the judicial attitudes in England and Nigeria towards the evidential requirements for the enforcement of transnational arbitral awards rendered. The thesis also examined whether the procedures for enforcement in both jurisdictions are effective. It was finds that a

successful party in an international commercial arbitration has different enforcement methods under the English and Nigerian regimes, it can adopt. In England, a New York Convention award can be enforced either by an action on the award at common law or by summary procedures at the High court or County court. In Nigeria, a New York Convention award can be enforced by a common law action on the award, or by summary procedures, or by registration before a High Court. For the award to be enforced in both jurisdictions, the enforcing party must supply the court with the evidential documents of: a duly authenticated original or a duly certified copy of the award, the original or duly certified copy of the arbitration agreement and if the award or agreement is in a language other than that of the court, a translation of it.

The chapter also examined the question whether an award can be enforced against an unsuccessful party in the two jurisdictions. It was concluded in chapter four that both the English and Nigerian courts are willing, in appropriate cases, to enforce arbitral awards based purely on transnational legal principles and that the enforcement procedures in both countries are effective. There are two principal regimes for enforcing commercial arbitral awards in England and Nigeria, namely under the common law and under statute. The statutory regime can be further divided into New York Convention and non-Convention arbitral awards.

Chapter five continued this enquiry into the attitudes of courts in the two jurisdictions. It examined the judicial attitudes towards a challenge to the enforcement of arbitral awards where either of the two jurisdictions is the seat of arbitration. It was argued in the chapter that both English and Nigerian courts show sensitivity in upholding arbitral awards. This it was argued is because the arbitration agreement demonstrates the parties' intention to comply with the decision of the arbitrator as final and binding on them.

To this end, the AA 1996 envisages three grounds for challenging an award namely, want of jurisdiction, serious irregularity and error of the law. The Act allows parties to contract out of the right to appeal the award for errors of law. However, the AA 1996 does not allow parties to opt out of the provisions on the challenge of arbitration awards rendered on the procedural defects of want of jurisdiction and serious irregularity. Under the ACA on the other hand, the grounds for setting aside arbitral award in Nigeria are misconduct relating to the arbitrator and improper

procurement of the arbitral proceeding or award. Other grounds range from incapacity of a party to the arbitration agreement to, the award being against the public policy of Nigeria. Although, the Nigerian courts have wide discretion to set aside arbitral awards, the chapter contended that, the courts have shown support to uphold arbitral awards where prima facie, the award is good on its face.

This theme of judicial attitudes towards arbitration was continued in chapter six with an examination of judicial attitudes towards refusing enforcement of arbitral awards in England and Nigeria. This chapter examined whether the grounds for refusal of enforcement of arbitral awards in both countries are effective. This thesis found that the grounds on which English and Nigerian courts will refuse enforcement are the same. These grounds range from incapacity of a party to the arbitration agreement to the award being contrary to the public policy of both countries. The chapter argued that the grounds of refusal stipulated under the AA 1996 and the ACA are exhaustive and that the courts in both jurisdictions interpret them narrowly.

This narrow interpretation by the courts effectively strikes a balance between the finality of awards and the legitimacy of the enforcement of awards. This, it was argued is because both the English and Nigerian courts, will not generally refuse the enforcement of an award annulled at the seat of arbitration. Both courts will need to be satisfied that the award or arbitration offended their own principles of natural justice and basic rules of honesty.

Finally, this thesis argues that the policy considerations of the laws and the judicial attitudes of both English and Nigerian courts favour the enforcement of transnational commercial arbitral awards. It further argues that this shows their compatibility, similarities and differences. In any case, in the absence of a uniform law for the enforcement of transnational arbitral awards, this thesis suggests new ideas and legal perspectives to both countries that will provide greater efficiency. This thesis also provides a useful guide for the process of the enforcement of foreign arbitral awards in England and Nigeria.

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