ENFORCEMENT OF ENERGY ARBITRATION AWARDS AND JUDICIAL PRACTICE IN NIGERIA

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ABSTRACT

Parties to arbitration conflicts also anticipate awards at the conclusion of the proceedings. Parties should be bound by awards that are definitive and binding. Certain judicial procedures, however, prevent awards in the oil and gas sectors from being enforced in Nigeria, necessitating their transfer to other jurisdictions such as the USA of and the UK. The study compared the application of Nigerian energy arbitration awards to those of other countries, such as the United States, to see if they were in compliance with international treaties and case law.

This research was motivated by Hybrid Theory. Law reports, laws, arbitration awards, and arbitration rules from Nigeria and the USA were used in data compilation. The Arbitration and Conciliation Act LFN A18 2004, Lagos State Arbitration Law 2009, and other related arbitration laws, regulations, awards, and conventions were studied. Sheriffs and Civil Processes Act 1945, Nigerian National Petroleum Corporation Act 1977, Federal Arbitration Act 1925, New York Convention 1958, International Centre for Investment Disputes Convention 1975, Reciprocal Enforcement and Judgment Act 1990, Uniform Arbitration Act 1995, UN Commission on International Trade Law, Model Arbitration Law 1985, United States Arbitration Act 1985, UN Commission on International Trade Law, Model Arbitration Law 1985, United States of America Arbitration Act 1985, United States of America Arbitration Act Cases that were relevant were also examined. Structured interviews with chartered arbitrators in Nigeria and the United States of America, officials of the Lagos Court of Arbitration, the American Arbitration Association, and the Chartered Institute of Arbitrators branches in Nigeria, New York, and North America were used in collecting qualitative data. Content review was employed in examining the information gathered.

As a result of frivolous lawsuits for award recognition, Nigerian judicial arbitration procedure dampens the implementation of energy awards. Because of the size of its oil and gas investments, Nigeria has a lot of interest in energy arbitration. Because of compliance with international conventions such as the International Centre for the Settlement of Investment Disputes Convention and the New York Convention, the USA, produced tremendous revenue from arbitration. Due to the availability of infrastructural facilities for arbitration and favourable judicial procedure, the United States of America had a high degree of exposure to arbitration. In Nigeria, the judicial practise of arbitration is discouraging and inconvenient because lawyers regard it as though it were an appealable decision. They always take a dispute to court on any imaginable question. As a result, the interviewees expressed dissatisfaction with the Nigerian judicial system due to time waste and various technicalities such as operation and response to court procedures.

Due to the difficulties encountered in enforcing awards, energy arbitration is not always pursued in Nigeria. For a successful arbitration outcome in Nigeria, structural changes including the consolidation of arbitration laws should be implemented. Arbitration should be added to the exclusive list of rights in the constitution, and delocalization of arbitration would improve the effectiveness of Nigerian arbitration.

Keywords: Energy arbitration, Judicial practice and enforcement, Arbitral awards

CERTIFICATION

I certify that this thesis was conducted by **Adesina Temitayo, BELLO** with Matric No. 77312 in the Centre for Petroleum, Energy, Economics and Law (CPEEL), University of Ibadan, Ibadan, Nigeria.

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DEDICATION

This thesis is dedicated to Almighty God

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LIST OF ABBREVIATION

AAA	American Arbitration Association
ACA	Arbitration and Conciliation Act
ADR	Alternative Dispute Resolution
BIT	*Bilateral Investment Treaty*
ECT	Energy Charter Treaty
FAA	Federal Arbitration Act
FHC	Federal High Court
FJREA	The Foreign Judgments (Reciprocal Enforcement) Act
FSIA	Foreign Sovereignty Immunity Act
ICC	International Chambers of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
IPCO	International Petroleum Corporation
IPIC	International Petroleum Investment Company
LOF	Lloyd's Open Form
LPG	Liquefied Petroleum Gas
LSAL	Lagos State Arbitration Law
LSARC	Lagos State Arbitration Reform Committee
NNPC	Nigerian National Petroleum Corporation
OOO	Obshchestvo s ogranichennoy otvetstvennost'yu
PCA	Permanent Court of Arbitration
PSC	Petroleum Sharing Contract
REJA	Reciprocal Enforcement of Judgments Act
RUAA	Revised Uniform Arbitration Act
UAA	Uniform Arbitration Act
UNCITRAL	United Nations Commission on International Trade Law

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

In several commercial transactions, disagreements are inevitable. Disputes are unavoidable situations in many commercial transactions. Diverse lawful prospects, commercial structures, political complications, approaches to cultural background and circumstances surrounding geography are foundations for disputes between contracting parties.[1] Industry is not exempted from disputes. The international and multifaceted nature of oil and gas sector exposes it to greater risk of commercial disputes. There have been various alternatives to litigation developed over time for ease of dispute settlement. One of the most commonly used is arbitration. As a result, arbitration is described as "a practice that permits parties to resolve disputes which may occur, between them in a legal relationship through arbitrators consented, rather than through governmental adjudication."[2] The process ensures rapid, transparent and effective dispute settlement.

International arbitration is a voluntary arbitration agreement between parties to resolve conflicts by decision-making procedures in which each party has the chance to table their case. Arbitrators have adjudicatory powers in the first place and may make a final, binding, and enforceable decision in an adjudicatory process. It gets its adjudicatory power from the parties' agreement. Arbitrators are appointed in a personal capacity by the parties on their behalf.

[1] Faculty of Law, Feb. 3, 2017. Arbitration as a dispute settlement mechanism. Retrieved Feb. 3, 2017, from www.lsu.edu/toddbruno/Vis/Chapter%201.
[2] ibid.

It is sufficient to claim that the adjudicatory authority precludes state court jurisdiction over the conflict. State courts, on the other hand, can perform restricted supervisory and supporting functions, such as enforcing arbitration contracts and setting aside arbitral awards on legal or public policy grounds, among other things. There are no merits appeals from an arbitration ruling that is final, binding, and enforceable. An award's analysis is usually limited to procedural fairness, public policy, and jurisdictional concerns. An award may be applied against a party's will or with the help of public officials. Arbitrators must be neutral and autonomous. Since it is the responsibility of the parties to determine whether to enter into an arrangement to arbitrate as expressed in an arbitration agreement, the Arbitral Tribunal derives its authority from the parties' will. The parties also determine how the arbitration will be performed. International arbitration has a number of advantages, including cost savings, enforceability, speed, confidentiality, centralised dispute settlement, and party autonomy. The enforceability of awards, the avoidance of complex legal structures and national courts, flexibility, the choice of parties to appoint arbitrators, integrity and anonymity, autonomy, inevitability, and pace are the most important features of transnational arbitration. The New York Convention, which acts as an international legal standard for the acceptance and implementation of arbitration agreements and arbitral awards, is one such international arbitration convention. It is enforced by national legislation, making compliance simple and low-cost for the implementing team. It respects the autonomy of the parties in deciding arbitral procedures and the law that governs the agreement.

Generally, the energy sector involves technical, capital-intensive and compound transactions. Often times using litigation to resolve disputes arising from this sector makes the resolution process more complicated. For this reason, arbitration is now a more suitable and acceptable alternative means of settling disputes. This indigence has made arbitration a more suitable and acceptable settlement mechanism in the energy sector.

According to the Halsbury's Law of England[3] arbitration has to do with the recommendation of a dispute to a third party, separate from a court of law. This

[3] Halsbury, H.S.G., and Hailsham, Q.H. 1980. *Halsbury's law of England.* 4th ed. London: Butterworth 256.

was reaffirmed in ***Awonusi v. Awonusi***[4] there **Awala JCA** defined an arbitration as "a legally operative adjudication of a disagreement else than by an ordinary procedure of the regular courts. The above definition resonates with the very essence of international arbitration in disputes involving oil and gas or energy. Clearly, how effective the procedure is, comes from the attributes of the procedure:

a) Ability for disputing parties to choose the presiding arbitrators, a process that is uncommon to the courts.
b) The maintenance of the concealment and the privacy of parties, during the proceedings.
c) The flexibility of the procedure made to fit the requirements of the parties which of certainly is not available to parties undergoing litigation.
d) Easy enforcement of arbitral awards.
e) Venue convenience.

International trade in the energy industry has expanded significantly over the past decades.[5] It has become impossible to eradicate conflicts or stop disputes from arising. Contextually, international arbitration explains arbitration, as "one of the more common methods, employed by multi-national investors, to ensure equal, effective and rapid dispute settlement relating to their investments"[6] Litigating energy disputes has led to loss of commercial relationships which are meant to still be of benefit to the parties in future transactions. In the energy sector of today there is the need to settle disputes at a faster pace and ensure there is quick dispensation of energy disputes. This will save time and cost spent in settling disputes in the sector.

1.2 Problem Statement

[4] Awonusi v. Awonusi, 1642 ALL FWLR. 1661, 2007.
[5] Oscar, N. 2014. Do not litigate: the significance and role of alternative dispute resolution (ADR) in the oil and gas industry. *Dispute Resolution Journal* 1:79.
[6] Energy ADR Forum, Oct. 2006.

Arbitration process is a hybrid of Alternative Dispute Resolution (ADR) that has faced significant difficulties, particularly when it pertains to implementing arbitration awards. Enforcing such award is problematic in Nigeria because lawyers and judges would tend to regard the award as not final or having a binding effect on the parties. As a result of this, challenges follow the award which tends to turn it into an appeal by negating the award as not being final and binding. If care is not taken this may wreck the growth and development of arbitration. The issue is how judicial practice in the United States of America positively leads to or promotes award compliance, and how this can alleviate Nigeria's award enforcement problems, thus paving the way for global standard practice.

The judicial practice in any jurisdictions matters a lot, it determines the direction of the courts. This is very important in enforcing the arbitral award requiring leave of court. The present trend of elongated procedures for enforcement of awards in Nigeria as compared to other jurisdiction like the United States of America is worrisome.

1.3 Research Questions

The thesis looks to address the following;

a) What are the characteristics of energy arbitration?
b) Are there significant differences in domesticating the NYC in Nigeria and other jurisdictions such as the (the United States of America)?
c) Are there national case law that would significantly affect the result of enforcing energy awards in Nigeria and other jurisdictions such as the United States of America (U.S.A)?
d) Are there differences in outcomes of enforcing energy awards under the International Centre for Settlement of Investment Disputes (ICSID) in Nigeria and other jurisdictions such as the U.S.A?
e) How can this trend be reversed?

1.4 Research Objectives

General Objective

This research seeks to examine the basis for the preference of contracting parties in Nigeria to have recourse to enforcing arbitration award in other jurisdiction like (the United States of America).

The Specific Objectives are to;

a) examine the characteristics of energy arbitration;
b) investigate whether there are significant difference in domesticating the New York Convention in Nigeria and other jurisdiction like the U.S.A;
c) explore the availability of national laws (of statutory and case origin) that significantly affect the outcome of enforcing energy awards under NYC;

d) examine the outcome of awards under ICSID in Nigeria and other jurisdictions like the USA.

e) determine how this trend can be reversed

1.5 Justification for the Study

The arbitration procedure as a means of settling disputes, should be well protected as a result of its numerous advantages. This study intends to reveal a gap in the Nigerian judicial practice and procedural rules in arbitration and suggests necessary reforms of arbitration laws for its growth and development. It is apparent that if proper measures are not established of judicial influence will potentially wreck arbitration. Therefore it is the overall interest of scholars, the judiciary, legal practitioners and the public to provide ample and viable solutions to the existing problems arising from inter-relationships between the courts and the arbitration institutions.

Foreign investors have ways of surrendering to Nigerian arbitration. A majority of international disputes involving Nigerian entities are being referred to foreign jurisdiction. It is necessary that this practice be reversed. The chances that there would be in future, more Liquefied Natural Gas (LNG) and energy contracts involving colossal sum of money in Nigeria is high. It is a painful fact that disputes arising from these contracts may most likely be referred to foreign seats. Although Nigeria is a developing nation, it is in the nation's interest if commercial investment and disputes are resolved by the arbitration medium. Majority of disputes of commercial nature in the United States of America were resolved by arbitral tribunal's sitting in the USA and granted awards for enforcement. Nigeria cannot be an exception if we are to grow and develop commercially and economically. In ***IPCO (Nig.) Ltd. v. NNPC*** it was held that:

> *"the English Court of Appeal consents to enforcement of an arbitration award where there is excessive delay in the court proceedings challenging the award at the seat of arbitration"*

The rationale for choosing Nigeria and the USA include the followings: they both practice;

- Capitalism: Both Nigeria and the USA operate an economic and political system in which trade and industry is controlled majorly by private owners for profits.
- Federal Constitution: The nature of the Nigeria and the United States of America constitution is such that powers are shared between the three arms of government namely, the Judiciary, Legislative, and Executive.
- Bi-camera Legislature: This is a legislation that has legislators in two separate assemblies, chambers or houses. The Nigerian and United States legislature are both made up of the House of Senate (The Upper House) and the House of Representatives (The Lower House).
- Developed and Developing Nations: The United States of America is acclaimed globally as a developed nation characterised with advance technological infrastructure and high level of general standard of living. On the other hand Nigeria is known to be a developing country as it is still in the process of industrialisation.
- Both have Quantum reserves in Energy industry particularly in Oil and Gas: The countries are active players in the international energy industry with energy reserves in billions of tonnes.

To this end, the study will provide a remedy to this problem particularly in its comparative analysis.

1.6 The Scope and Delimitation of the Study

The research focused on enforcing arbitral awards and the power of the judiciary on enforcing arbitral awards and how judicial practice affects its enforcement in two jurisdictions (and not on the entire arbitration practice, procedure and judicial intervention on the entire system). This work is however limited to the effect and functionality of judicial practice on the enforcement of awards.

The study centers on two jurisdictions of Nigeria and the United States of America with attention being paid to various templates of judicial practices and depth of arbitral awards in the two countries. The research field is limited to Nigeria and the United States of America, although considerations will be given to the experiences of other jurisdictions like the United Kingdom and Canada in other to have an acceptable research that will contribute to knowledge.

CHAPTER TWO

LITERATURE REVIEW

Several materials are available on practice and procedures of arbitration, with in-depth analysis of the system in various jurisdictions including Nigeria. However, a number these literature are devoted to enforcing arbitral awards and judicial practice. The major challenge encountered is the availability of materials which directly discuss the enforcement of arbitral awards and judicial practice. This challenge has its advantage and disadvantage to the research. The body of this situation is that it makes this work innovative and unique, while adding value to knowledge in the field of arbitration. The research goal is to ultimately explore how judicial practice can affect the enforcement of arbitral awards which very few literatures had dealt with. Several writers discuss arbitral proceedings, agreements and judicial intervention, but rarely the enforcement of award. Clearly, this research gives the template of the subject a novel approach.

For coherence and convenience, this chapter is split into six areas with the first discussing arbitration as a subject, vis-à-vis its relevance to energy disputes. The second section appraises the legal framework of arbitration in Nigeria. The third section assesses the practice of arbitration in the country. The fourth section focused on the topic in the U.S, while the fifth section compared the application of arbitral awards in energy disputes with the theoretical context.

2.1 Agreement as Centre Point of Arbitration

An arbitral award does not determine the culmination of a dispute, it is the enforcement of the award that does.[7] Despite the United States being a party to numerous international conventions supporting international arbitration, it is still difficult to enforce foreign arbitral awards against a sovereign state. This is a result of the state laying claim to infringement of their sovereign immunity if such awards are enforced.[8]

The features that determine effective and enforceable laws for arbitration[9] include; the Arbitration Agreement or Clause, Arbitration Conventions and Investment Treaties, Arbitration Procedural Rules, National Laws and The National Court.

2.2 Relevance of Arbitration to Energy Disputes

The energy sector is such that risk management is a key factor due to the increasing complexity of the growth of investments in the sector which is characterized with large scale projects, cross-border trades and transactions. Thus the use of arbitration in the sector encourages investor confidence in the energy sector through establishing regulatory certainty and balanced contractual terms by providing the strategy for resolving both existing and future disputes. What is more, the internationality of the industry which pools in assets all over the world, not to mention the value of claims demanded by oil and gas companies spanning into millions, makes litigation time consuming and international arbitration a worthwhile approach in terms of global enforceability and finality of the proceedings[10].

[7] Strong, S. I. 2006. Enforcement of arbitral awards against foreign states or state agencies. *Northwestern Journal of International Law & Business* 26.2: 335.
[8] ibid.
[9] ibid
[10] White & Case. Oct. 6, 2015. Oil and gas industry favours international arbitration for dispute resolution. Retrieved Nov. 5, 2018, from https://www.whitecase.com/news/oil-and-gas-industry-favours-international-arbitration-dispute-resolution.

There are certain issues that may warrant the use of arbitration in energy dispute. They include the following[11]:

(a) Technicalities associated with the industry which requires expert knowledge in the process.
(b) High degree of sophisticated contracts which anticipate inevitable disputes and the resolution mechanisms to be initiated.
(c) The international nature of processes in multinational oil companies, and the cross-border nature of their transactions ensure that they favour arbitration as a mode of settling disagreements.
(d) The intersection amid commercial interests and contractual relationships are at stake between oil and gas companies, ensuring a process that fosters relationships rather than tears.

2.3 Legal Framework for Arbitration in Nigeria

For Nigeria, the law and procedure of arbitration are regulated by a combination of enactments and laws that can be decided upon by the parties. There are several arbitral institutions across the country which facilitate and promote arbitration by providing a pool of skilled and qualified arbitrators and arbitral services. These institutions undertake the continuous training of arbitrators to enhance capacity in attending to the requirements of commerce where the need for arbitration may arise. They also facilitate and provide the necessary infrastructure for the arbitration process.

2.3.1 Arbitral Laws

i. The Arbitration and Conciliation Act

The Act of 1988 (ACA) 1988[12] remains the main law for Arbitration in Nigeria. It was legislated to provide an amalgamated legal outline for the impartial and proper resolution of commercial disagreements through

[11] Akinjide-Balogun, J. Mar. 28, 2000. Nigeria: oil and gas arbitration: international commercial arbitration in the African sub-region:
[12]Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2010 (ACA).

arbitration and conciliation.[13] Except that the parties consent to a different law, the ACA relates to all arbitral proceedings held in Nigeria. The ACA is based on the 1985 Model Arbitration Law of the United Nations Commission on International Trade Law (UNCITRAL). It includes a wide range of provisions for both local and international arbitration. The provisions governing the structure and purpose of an arbitration agreement are particularly important,[14] the powers of the court to stay proceedings,[15] appointing arbitrators processes and the mode of challenging such appointments,[16] jurisdiction of an arbitral panel and its competence to rule on same,[17] provisions relating to interim measures during arbitration, conduct of proceedings;[18] the power to render an award by an arbitrator, recognizing and enforcing the award and its setting aside, upon a challenge that is successful,[19] with the basis for the rebuttal of acknowledgement to an award and the extent to which the court can intervene in the proceeding. The third part of the Act is designed to accommodate International Commercial Arbitration, which are under the Articles 6-8 of the UNCITRAL Model Law. Notably, the ACA also ensures that the NYC is applicable in Nigerian Arbitration.[20]

In ensuring that the party-oriented nature is maintained, the ACA gives parties the latitude to decide upon crucial issues relating to appointment, number of arbitrators, extent and scope of dispute submitted to arbitration, and so on. These party-oriented provisions of the ACA are supported by the court interventions, to encourage the arbitration process. Ordinarily, many courts would affirm in contract, the arbitration clauses and even rule in favor of the provision by granting a stay of proceedings awaiting arbitration's decision. For instance, in **SA & Ind. Company Ltd. v. Ministry of Finance Incorp (2014)**

[13] ibid Preamble.
[14] ibid.
[15] ibid
[16] Ibid.
[17] ibid.
[18] ibid.
[19] Ibid.
[20] ibid s 54.

10 NWLR (Pt. 1416) 515, a dispute of monetary subject arose in respect of an agricultural products supply contract, consequent to which the respondent instituted a claim in court without first complying with the contractually agreed dispute resolution mechanism which was stipulated to be arbitration. The Court of Appeal in Nigeria, enforced the provisions of S. 5 of the ACA, which sought to compel either parties to settle the disputes by arbitration in line with the agreement of parties. The court was of the opinion that if one party to a contract disregards the arbitration agreement or clause and goes straight to court, the other party has the right to file an appeal to stay or otherwise prohibit further proceedings in order to compel arbitration. The power then possessed by the court to halt proceeding is however premised on a timely application by the respondent/defendant before any action or step is taken in the proceeding. Furthermore, where the respondent takes any step, such as delivering pleadings in answer to the claims, he would be deemed to waive his right to have his case heard by an arbitral panel.[21]

ii. The Arbitration Law of Lagos State

It has been seriously contended that regulation of arbitration in Nigeria is not subjected to the exclusive legislative competence of the Nigerian National Assembly.[22] As such, states also claim empowerment to enact laws to regulate arbitration and arbitral proceedings within their geographical territories. Against this background, the government of Lagos State (as well as other states like Kano State in Northern Nigeria) formulated their own laws on arbitration. The Lagos law is known as, the Lagos State Arbitration Law, 2009, which is practically necessary due to the huge volume commercial activities in the state, and its relevance as the economic and commercial nerve of Nigeria.

In 2007, the Government of Lagos State set up the Lagos State Arbitration Reform Committee (LSARC) to review the ACA, which was then applicable in

[21] Fawehinmi Const. Co. Ltd v. O.A.U, part 553, 6 NWLR 171, 1998.
[22] See The Constitution of the Federal Republic of Nigeria 1999 (as amended) (The Constitution) s 4(7).

Lagos State, and propose a new arbitration law for Lagos to be passed into law within the shortest possible time.[23] The work of the LSARC culminated the passage of the Lagos State Arbitration Law, 2009 (LSAL). This law is applicable to every arbitral proceeding in Lagos, with an exception of parties making an explicit statement on the application of another arbitration law.[24] The Law incorporated a significant number of provisions into the ACA, but introduced some new innovations hitherto not contained in the ACA. Some of the innovations in the law include:

a) In contrast to the ACA, which has a default composition of three arbitrators, if the arbitration agreement does not stipulate the number of arbitrators, the known number of arbitrators in an Arbitral Tribunal is one (a single arbitrator).[25] The reduction in the default number of Arbitrators under the LSAL is very commendable for many reasons, including the cost implications for parties. Experience has shown that loose or pathological arbitration clauses are usually contained in contracts entered into by less sophisticated parties who usually do not anticipate and can hardly afford the high cost of three arbitrators.
b) It allows for the unification of arbitral proceedings and parallel trials, also known as multi-party arbitration, as well as the joining of parties in an arbitral process.[26]
c) Application of limitation laws to arbitral proceedings.[27]
d) An arbitral tribunal is given further authority to issue provisional orders or temporary steps to protect the arbitration's subject matter.[28]
e) The rule provides further the recognition and grant of enforcement through the High Court of interim measures which are issued by the panel.[29]

[23] Candide-Johnson, C.A. and Shasore, O. 2012. *Commercial arbitration law and international practice in Nigeria* New York: LexisNexis Publishers.
[24] See Lagos State Arbitration Law (LSAL), s 2.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] ibid.

f) The tribunal is also empowered to refuse the delivery of an award as a lien on unpaid fees for the arbitrator.[30]

The arbitral tribunal's powers under Section 13 of the ACA and Article 26 of the arbitral rules are not specified explicitly, as they are limited to an "interim degree of protection"; this only gives the tribunal the power to issue short-term processes necessary to shield the arbitration's subject matter. However, under LSAL, the power of arbitrators are expanded and bifurcated into the power to grant *interim measures* and to *make preliminary orders*. These powers are similar in nature to injunctive reliefs granted by regular courts, including ***Mareva*** and ***Anton Piller*** Orders.

Preliminary orders under the LSAL are granted ***ex parte*** and ought to be requested along with the application for *interim measures*. It must be pointed out that the tribunal derives the power to allow preliminary orders from the agreement by the parties. Hence, where the agreement between the parties does not contemplate the grant of preliminary orders, the arbitral tribunal will lack the power to grant it.[31] Upon the grant of a preliminary order, the tribunal is mandated to divulge to all parties the making of the application, grant of the same, the request for interim measures, as well as all other communication written and oral, which takes place amongst parties and the tribunal, which relate to the matter.[32] Under Section 25 of the LSAL, the Tribunal has the authority to spread, change, suspend or out rightly terminate any interim measure or preliminary order. In addition, the LSAL introduced the Arbitration Application Rules, 2009, which governs the mode and manner in which applications may be made to the regular courts, where such intervention is required. The rules provide that for applications to the court shall be by *originating motion.* It also governs service of processes in an arbitral proceeding where same is required outside the territory of Lagos, and that same

[30] ibid.
[31] ibid.
[32] Ibid.

must comply with the law in Nigeria on service of processes across the territory of states within Nigeria; that is, the Sheriffs and Civil Processes Act.

Clearly, the LSAL is a qualitative statutory support to enhance, and also ease, dispute resolution by arbitration.

2.4 Effect of Current Legislation in Arbitration Practice

Arbitration practice in Nigeria has invariably raised issues which have remained on the front burner, some of these are not dissimilar from issues in other jurisdictions. An example is the determination and limits of the role of the courts in arbitral proceeding. In this connection, it must be noted that the arbitral process, though, that albeit backed by statutory enactments (as highlighted in the preceding parts of this work), the process remains driven by the parties. Hence, it thrives better on mutual cooperation of the parties. This is so albeit, the intervention of the regular courts may be constantly sought to further enhance the process. Clearly, the coercive powers of the court, emanating from the authority of the state is brought to bear on the arbitral proceeding so as to enhance the arbitral dispute resolution procedure. It is very key to know that the intervention by the court is to the level allowed by the ACA, hence the s 34 of the ACA (see also s 59(1) of LSAL) which suggests that:

"the court will not interfere in any issue ruled by this Act,
bar where so permitted under this Act"

Consequently, court intervention in its various forms is clearly spelt out in the laws that regulate the procedure. For instance, under Sections 4 & 5 of the Act, the court is empowered to halt proceedings commenced in court and direct parties to make a reference to arbitration. Section 7 of the ACA suggests that if the parties disagree on the nomination of such arbitrator, the court has the authority to appoint an arbitrator for the parties if one of them requests it. Section 23 further vests the court with the authority to order and compel the

witnesses to appear at an arbitral proceeding by the issue of subpoenas. Sections 31 and 51 of the Act allows the courts the authority to recognize, impose arbitral awards and, in deserving cases, to set the same aside. The Rule 1 of the Arbitration Application Rules of the LSAL also contains an exhaustive list of areas of intervention by the court under the LSAL which are substantially the same as the ACA. Again, the courts have also been required to delimit the scope of arbitral tribunal jurisdiction, through the pronunciation of the nature of disputes of arbitral nature, and the precise definition of 'dispute' within the context of arbitral proceedings. Going by Order 3 of the Rule 11 of the High Court of Lagos (Civil Procedure) Rules 2012, upon the filing of a claim before the court, the Registry is mandated to conduct a case intake screening in order to determine the suitability of the claims for intervention by arbitration or other ADR methods.

Using case law as guides, some of the practical effects of intervention by the court in some of the areas mentioned above will be considered.

2.4.1 The Scope of Arbitral Disputes

It is clear, that not all disputes in Nigeria can be submitted to arbitration under the laws of Nigeria. There is s general consensus on the eligibility of criminal acts under the Penal Code. Section 35 (a) of the ACA submits and recognizes that other laws may prevent or foreclose arbitration in certain disputes. It states that the act shall have no effect on laws that specifies that some of their disputes may not fall under arbitration.

Furthermore, it is inferred from the long title to the ACA, of "*an Act to make available a concerted legal framework for reasonable and competent settlement of commercial differences*", that arbitration under the ACA only contemplates commercial disputes.[33] It must be pointed out that from the preliminary parts of the LSAL, the law seems to extend beyond the scope of

[33] Akinokus. Sept. 22, 2012. Wallpapers calagos. Retrieved Oct. 23, 2000, from http://www.rcicalagos.org/status.html.

commercial disputes under the ACA. The LSAL makes general references to ***'resolution of disputes'***[34] and ***'settlement of any dispute'***.[35]

Thus, generally, a suit cannot be a subject of arbitration if it:

1. Indicts an offence of a public nature;
2. Entails disputes from a void or illegal contract; or
3. Is a proceeding for divorce, which leads to a change in status

In ***Statoil Ltd v. Federal Inland Revenue Service & Ors***[36] the opening for the court to expand the range of disputes that can be referred to arbitration. In the case, the Federal Inland Revenue Service, an organization responsible for the collection of taxes and revenue that could be added to the Government of Nigeria, approached the Federal High Court challenging the legality and constitutionality of the subject matter of an arbitral agreement, this was subjected to arbitration and the eventual decision which if enforced by the arbitral tribunal, would impede and impinge on its duty under the law to collect, assess and account for federal taxes. The Court of Appeal, while recognising the ACA's applicability in section 34, maintained the test court's ruling, which had challenged such arbitration agreement and the arbitral tribunal's jurisdiction on the grounds that an arbitral agreement involving taxes and revenue owed to the federal government had no binding power in the first place. As a result of the Appeal Court's ruling, a dispute involving taxes and revenue owed to the government will not be appropriate for settlement by arbitration.

Clearly, Arbitration in Nigeria has incorporated the ascertainment of an arbitrable dispute. An example is where a party admits to a debt or liability, with a refusal to pay,[37] the claim will not be arbitrable. As a result, a case that can be submitted to arbitration must also be one that can be tried as a civil

[34] LSAL op. cit. p.11, s 1.
[35] LSAL op. cit. p.11, s 1(c).
[36] Statoil Ltd v. Federal Inland Revenue Service & Ors, LPELR-23144 (C.A) 2014.
[37] See UWL Limited v. MTS Limited, Part 568, 10 NWLR 106, 1998.

claim. By implication, if the conflict cannot be resolved in a fair or genuine manner in the normal courts, it may not be appropriate for arbitration. This position can be commended, knowing that it prevents parties from deploying the arbitral dispute resolution model where no real and/or substantial issue exists between the parties.

2.4.2 Recognition, Implementation and Setting Aside of Arbitral Awards

An arbitral award, which considers the parties' submissions in light of their claims and includes the arbitral decision of a tribunal based on the records and facts presented to it, is the final step in the arbitration process. To justify an arbitral award as obligatory on the parties to the arbitral reference, it must be accepted and enforced. Putting aside an arbitral award is the same as declaring it void. As a consequence, recognition and enforcement are highly critical in arbitral award judgments.

i. Recognition and Enforcement

The acknowledgement and implementation of arbitral awards are relevant elements to resolving a dispute through arbitration. The relative ease of realizing an award is a paramount consideration when parties contemplate the venue of arbitration.

These elements are governed by Section 31 of the ACA and Section 56 of the LSAL (addition to the provisions of the New York Convention with respect to foreign arbitral awards). The mode of enforcement ensures an application to court, either by a motion on notice or an originating motion. The arbitration agreement, a copy of the award, a interpretation of the award to English (where

the award is in a foreign language) is to accompany the application. By virtue of Sections 32 & 52 of the ACA and 57 of the LSAL, an application for recognition may be refused if applied for by a party on a variety of grounds which include: partiality on the part of the arbitrator, incapacity of any of the parties, lack of proper notice for the arbitration, not giving room for fair hearing and so on.

ii. Setting aside

An award is normally binding and final. No appeal can lie with respect to the award. However, within three months of obtaining an award, a party may through an application to the High court, challenge the award and consequently seek to set it aside. It is however important to note that challenging the award is not an appeal against it. A High Court to which an application has been made to nullify an award is without jurisdiction to inquire into the merit of an award or sit on appeal over same. In ***Mutual Life & Gen. Insurance Ltd. v. Iheme***[38], in maintaining the arbitral award and discharging the appeal, the Court of Appeal concluded that parties who submit their issues to arbitration must be deemed to have placed their fate in the hands of the arbitrators, for better or worse, and are therefore bound by the tribunal's decision.

Evident from the foregoing, is the fact that Nigerian courts are loathe to interfere with the award rendered by an arbitral panel. In ***Baker Marine v. Chevron Nig. Limited***[39]**,** the Appeal Court expressed further, an unwillingness of the courts to refuse arbitral awards.

Both the ACA and LSAL contain exhaustive grounds to found the application for the setting aside of an award.[40] The justifications are of the same ilk as the grounds for the acknowledgment of an arbitral award. Furthermore, section 30 of the ACA provides that ***'misconduct by an arbitrator or the improper***

[38] Mutual Life & Gen. Insurance Ltd. v. Iheme, part 1389, 1 NWLR 670, 2014.
[39] Baker Marine v. Chevron Nig. Limited, part 681, 12 NWLR 393, 2000.
[40] See ACA, s 48 and 55. It must be noted that Section 48 of the ACA.

procurement of the arbitral award would also constitute grounds for setting aside'. A *'misconduct'* is not however defined by the Act**,** but the Supreme court' position in ***Taylor Woodrow Ltd. v. SE GMBH***[41]**,** is a guide on the meaning and instances where an arbitrator may be rightly said to have misconducted himself so as to warrant setting aside of an award.

Furthermore, the Supreme Court in ***Taylor Woodrow Ltd. v. SE GMBH* (*supra*)**, provided some illumination on the duty of a court evaluating motion for refusal of an arbitral award stating that, such must be clearly seen to be erroneous.

"so as to have a ground for setting aside an award, a discrepancy in law on the face of the award must be such that a legal notion that is the basis of the award and is incorrect could be included in award, or in a document actually incorporated with it. If a precise question of law is given to the arbitrator for his decision, the fact that the decision is incorrect does not render the award void on its face, allowing it to be set aside; and when the question referred for arbitration is a question of construction, which is, in general, a question of law, the arbitrator's decision cannot be set aside only because the decision is incorrect. The court, on the other hand, has no authority to interfere with the arbitrator's evidence-based determinations, and must agree to the decision at face value."

The court is not giving the power to investigate if the findings are correct or not, nor can it put itself in the shoes of the arbitral tribunal. In ***Baker Marine v. Chevron Nig. Limited*** (supra), the Court of Appeal held that the lower court is not serving as a court of appeal as regards the arbitral awards and so has no power to determine if the findings of the arbitrators are correct or not.

These definitive pronouncements leave no-one in doubt on the stance of Nigerian courts as being pro-arbitration. Being that though there exists the

[41] Taylor Woodrow (Nig.) Ltd. v. S.E. GMBH (1993) 4 NWLR (Pt. 286) 127 CORAM.

avenue to challenge and jettison an arbitral award, the Nigerian courts in jettisoning an arbitral award are being guided by the acceptable principles that connotes that award cannot be appealed. This enhances the confidence of parties in the arbitral process and further confirms Nigeria as a suitable seat for settling varying commercial disputes. As a means of further improving the ease with which arbitral awards are enforced, it has been suggested that the space of time taken to enforce an award in court should be shortened.[42] This may be done by making arbitral awards enforceable under the pronouncement of the Supreme Court, the highest court in the country thus eliminating appeals in respect of applications to jettison arbitral awards. This is the practice in respect of awards given with reference to the International Convention for the Settlement of Investment Disputes. By Article 54(1) of ICSID, to which Nigeria is a state party, arbitral awards are registrable as judgments of the Supreme Court. This provision, which has been domesticated through the ICSID (Enforcement of Awards) Act, is a further statutory intervention to reduce the time between when an award is rendered and when its benefits are realized.

The statutory framework and institutional setup for arbitration in Nigeria are positive testaments to the capacity of Nigeria to adequately accommodate effective resolution of various complex commercial disputes that arise locally, as well as international arbitration.

[42] Ufot, D.U. Aug. 2015, Arbitration practice area review. Retrieved Oct. 23, 2018.

2.5 Arbitrability in the United States of America Laws

In recent times, arbitration is now seen as a good alternative to litigation. It is used for settlement of various disputes, ranging from commercial to consumer transaction to employment disputes.[43] Historically, under global international arbitration, arbitration in the United States cannot be overlooked, it has contributed greatly to the advancement in international arbitration. Majorly, in the history of arbitration in the U.S, the doctrine of "freedom of contract" letting parties make choices.[44] This section of this work would thus look to x-ray the process of international commercial arbitration in the USA.

2.5.1 Review of Arbitration Legislations

Sources of arbitration laws in the United States are explained below:

i. Federal Arbitration Act ("FAA")

The law which deals with enforcement of arbitration in the U.S is the Federal Arbitration Act (FAA). The FAA was passed in 1925, with section 2 of the Act providing that only grounds for invalidation of contractual transactions can be applicable in determining invalidation of arbitration.[45]

The FAA provides that should any party to a contract, with an arbitration clause proceed to court, the other party can apply for stay[46] and ensure that the arbitration clause is strictly complied with.[47]However, before staying the court proceedings the courts should decide the arbitrability of the subject matter. [48]

The Act further makes provision for the following; allows arbitrators to call for and compel appearance of witnesses and hold them guilty of contempt if they

[43] Simpson, W.S. and Kesikli, Ö. 2006. The contours of arbitration discovery. *Alabama Lawyer* 67: 280.
[44] Nolan-Haley, J.M. 2013. *Alternative dispute resolution in a nutshell.* 4th ed. United States: West Academic Publishing.
[45] Federal Arbitration Act (FAA) s 2.
[46] ibid.
[47] ibid.
[48] Ibid.

disobey such order;[49] provision as to enforcement of arbitral award,[50] vacation of arbitral award.[51] Worthy of note is the provision of the FAA that allows enforceability of foreign arbitral awards in US courts.[52] In *Southland Corp. v. Keating*[53] the Act was held to be constitutional and that it deals with commercial disputes basically. The Act provides that an ward must be confirmed within one year of the grant of the award being given by the arbitral tribunal and anyone who wants to challenge an award can do so within three months of rendering the award.

ii. New York Convention – 1958

The Convention came to force in June, 1958[54] and was ratified by the United States in 1970. The convention is applicable to all overseas arbitration contracts, nonetheless the subject matter. The convention notes that reciprocity refers to the seat of the arbitration and not the nationality of parties to the dispute. The convention ensures the enforcement of an award in another state party to the convention is enforceable by another state party.

Albeit, regarded as a successful tool for the advancement of transnational trade, the convention has a limited scope. Its requirements are limited to the recognition and enforcement of decisions rather than the arbitral process itself. It leaves that to the states to determine how it should go, thereby not encouraging uniformity of process.

iii. Panama Convention

The convention, approved in 1990 by the United State, its scope is that of dealing with the harmonization of the arbitral process and the enforcement procedure in the U.S and regionally, in other Latin American states. The

[49] Ibid.
[50] ibid s 9.
[51] ibid s 10 (a) (1)-(4).
[52] ibid s 15.
[53] Southland Corp. v. Keating, 465 US 1, 1984.
[54] Ashurst. June 21, 2019. Introduction to international arbitration. Retrieved Oct. 10, 2018,

convention differs from the NYC due to its regional application and does not only deal with enforcement procedures, it deals with the uniformity of the arbitral process, including where the parties disagree on the arbitral process.[55] Unlike the convention in the New York, it has no provision on reciprocity and applies solely to commercial transaction.[56]

iv States Laws and FAA's Preemption

Applying state arbitration laws is not exempted under the FAA, except where such a state law has inconsistency with the Act, the arbitration can be easily ruled by the state law. The Supreme Court emphasized this: ***Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 477 (1988)***,

Following the provisions of 2nd Section of the FAA, courts have formed significant mechanism for deciding if the FAA can supersede state laws in a specific situation. Elements to consider include:

1) the nature of the agreement(writing);

2) the boundary of the transaction (involving inter-sate commerce), and

3) can the transaction endure scrutiny of the traditional defenses to contracts[57].

v. AAA – Commercial Arbitration Rules & International Dispute Resolution Rules

The American Arbitration Association (AAA) is a non-profit, public service body contributing a wide variety of dispute resolution services[58]. The AAA rules have been used widely in arbitration in the United States. Parties may choose the AAA as the body to handle their arbitration and also include that the

[55] Stromberg, W. 2007. Avoiding the full force of the law: International Commercial Arbitration and Various Worldwide Mechanisms for Resolving Disputes. *Loyola of Los Angeles Law Review* 40: 1347.
[56] ibid.
[57] ibid.
[58] American Arbitration Association. ADR.ORG. Retrieved Nov. 23, 2018, from http://www.adr.org/about_aaa.

AAA rules be the law to rule the arbitration. It is a result of this that the AAA rules can be said to be a cradle of arbitration law in the U.S.

With this clause in contracts, the parties can conveniently allow for arbitration of impending disagreements:

"Any disagreement or accusation arising from or connected to this contract, or its breach, shall be handled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgement on the arbitrator(s) award may be filed in any court with jurisdiction."[59]

Describing jurisdiction by AAA Commercial Arbitration Rule R-7:

"(a) The arbitrator holds such right to deliberate on his/her own jurisdiction, alongside allegations against the nature, extent, or legitimacy of the arbitration agreement.

(b) The arbitrator holds the authority of deciding on the nature of a contract containing an arbitration clause. The arbitration clause would be thought-out as a distinct arrangement compared to the rest of the contract. The arbitrator's ruling that the contract is invalid would not automatically make such arbitration clause void.

(c) A party must file an objection to the arbitrator's jurisdiction or the arbitrability of a right or counterclaim no later than the filing of the opposing claim or counterclaim's answering argument. Such objections can be decided by the arbitrator as an introductory issue or as part of the concluding award."

Note that the AAA International Dispute Resolution Measures affords virtually the similar provision.

vi. Uniform Arbitration Act ("UAA") and Revised Uniform Arbitration Act ("RUAA")

The Uniform Arbitration Act (UAA); was enacted to be a uniform provision on procedural arbitration law. Although the Act was enacted in 1955 it has been

[59] American Arbitration Association. Commercial arbitration rules and mediation procedures. Retrieved July 23, 2018,fromhttps://www.adr.org/sites/default/files/Commercial%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Jun.%2001%2C%202009%20Fee%20schedule%20Jun.%201%2C%202010.pdf.

revised.[60] The revised version is wider in scope than the former it deals in a modern way with processes of arbitration. However the revised edition does not make provision for international arbitration.

[60] Uniform Law Commission. The national conference of commissioners on uniform state laws: why states should adopt RUAA. Retrieved from Oct. 23, 2018, from http://www.nccusl.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UAA.

vii. UNCITRAL Model Arbitration Law

The United Nations Convention on International Trade Law (UNCITRAL) was created on December 17, 1966, through the agreement of fifty-eight states[61]. A major basis for the creation of the law was to create a uniform international arbitration law such that international arbitration can be free from any national law.[62] The scope of the law covered parties with business sited in diverse states, place of performance sited separately from the parties' home country, instances where the parties have decided to make the arbitration an international one.[63] The UNCITRAL also called the model law has enough provision to govern arbitration, it is wider in scope than the Federal Arbitration Act and the Revised Uniform Arbitration Act and by extension most national and regional laws governing arbitration. It makes adequate provision for the lapses that may exist in an arbitration agreement that was not properly couched.[64]

2.5.2 Analysis of Arbitration Agreement in the United States of America

The most relevant stage for parties to exercise their right in arbitration is by enlisting their arbitration agreement efficiently without leaving out any relevant

[61] Kolkey, D.M. 1998. It's time to adopt the UNCITRAL Model Law on international commercial arbitration. *Transnational Law & Contemporary Problems* 8.2: 199-276. See also Besson, S. 2000. The utility of state laws regulating international commercial arbitration and their compatibility with the FAA. *The American Review of International Arbitration* 11: 211.

62 J.H. Samuels and J. Kleinheisterkamp, Jan. 2009. Report on commercial arbitration in the United States: The Impact of Uniform Law on National Law: Limits and Possibilities Retrieved on January 20, 2019. from https://ssrn.com/abstract=1394223.

[63] Park, W. 2002. Amending the federal arbitration act. *The American Review of International Arbitration* 13: 1-78.

[64] Graves, J.M. 2011. Contract arbitration: The need for a full, comprehensive set of legislative default rules. *William & Mary Business Law Review* 2: 248.

information. Arbitration is highly consensual and nothing can be done against the express provisions of the intent of the parties.[65]

i. Substantive Federal Law on Validity & Enforceability of Arbitration Agreement

The Federal Arbitration Act in its first chapter and section 2 makes provision that ***"An arrangement to resolve a dispute by arbitration shall be obligatory, irreversible, and enforceable, except if it exists at law or in equity for contract revocation."*** Therefore an agreement for arbitration is binding once the subject matter is arbitrable and the parties agree expressly to its final and binding nature.

The New York Convention is a relevant law that governs arbitration agreements' validity. It provides the necessary content of a valid arbitration agreement. Alongside the Panama Convention it lists the content of an enforceable arbitration agreement. The two conventions have requirements that are related. The requirements are: the agreement must be in writing, must be in respect of a present or future happening, there must exist a legal relationship from which the dispute arose and lastly must be in a respect of an arbitrable subject matter.

ii. Law Applicable to Validity of Arbitration Agreement

Generally, party autonomy in arbitration allows party to decide how they want the arbitration to go. Where they choose the law to be followed during the arbitration, whatever law they choose shall be used. The United States encourages party autonomy.[66] Where the parties do make a decision on the law, the arbitrators seem to have been granted the right to choose the law following

[65] ibid.
[66] Buys, C. 2005 In commercial arbitration, the arbitrators must honour the parties' choice of rule. The Law Review of St. John's 79: 59.
[66] Corrie, C. 2007. Challenges in international arbitration. The arbitrators' duty to respect the parties' decision of law in commercial arbitration. *St John's Law Review* 79: 59.

various decisions of the Supreme Court of the United States to that effect. Going by ***Buckeye Check Cashing, Inc. v. Cardegnsa 546 U.S. 440 (2006)***, the court held that arbitrators can decide the applicable law to the arbitration perhaps the parties decide against making a choice in their agreement.

Also the United States Courts have upheld an attitude of splitting the arbitration clause from the main contract. In the more recent case of ***Prima Paint Corp v. Flood & Conklin Mfg Co***, there was an argument on the validity of the contract containing the arbitration agreement. The Supreme Court stated some principles that should be known for any arbitration to be successful. That the arbitration agreement is not same as the contract it is separate from the remaining parts of the contract; that the challenge has to be in respect of the arbitration clause itself for it to bring about a question of validity of the arbitration clause and that the Federal Arbitration Act governs both state and federal arbitrations. The rule of separability was upheld in this case and the challenge failed.

iii. Obligatory Effect of the Arbitration Agreement over Non-Signatories[67]

In general, because arbitration is consensual parties that have are yet to agree to arbitrate cannot be held by an arbitration agreement. However in certain instances under the agency and contract law principles this may be possible.[68] Where a corporation that is an alter ego to another subsidiary company has its subsidiary corporation as a party to arbitration, the arbitration clause is also binding on the corporation that is the alter ego. A party who is not a signatory to arbitration who acts as party to arbitration can also have the arbitration binding on them. An agent who refuses to reveal he is acting as one would be bound by any arbitration agreement signed while doing so. Those who are third

[67] Corrie, C. 2007. Challenges in international arbitration for non-signatories. *Comparative Law Yearbook of International Business* 29: 45-74.
[68] Park, W. 2008. International Contracts and Non-signatories: An Arbitrator's Conundrum. *Dispute Resolution International* 2: 84.

party beneficiaries of the subject matter of the arbitration are also bound by the arbitration.

2.5.3 The USA Arbitration and Arbitrability Concept

i. Substantive arbitrability;

"This refers to a case in which an the subject matter itself is not arbitrable, even though the arbitration agreement itself is legitimate."[69]

In addition it is stated in New York Convention Article V(2)(a) Substantive arbitrability;

"The court where the recognition and compliance is sought may refuse recognizing and enforcing the arbitral judgements if it judges that "the subject matter of the difference is not capable of resolution by arbitration under the legislation of that nation."

[69] Hwang, S.C.M and Lee, S. 2008. Survey of South East Asian nations on the application of the New York convention. *Journal of International Arbitration* 25.6: 873.

Substantive arbitrability occurs while the arbitration arrangement is binding; the arbitration's issue is not arbitrable.[70] This is also referred to as subject matter inarbitrability. It is provided for in the NYC.[71]Substantive arbitrability usually comes up because the subject matter is sensitive and touches on public policy.[72] Initially, disputes relating to intellectual property, employment, competition law, securities and so on were not arbitrable.[73] However in recent times this view has been rejected by the U.S. through the Highest Court in plethora of cases. Antitrust, securities, and competition law questions are now arbitrable in the United States, according to **Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,** 473 U.S. 614, 632 (1985).[74] So arbitration is becoming more applicable to matters provided the parties agree to its usage. In ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 632 (1985)** it was held;

> *"It is a legislative policy expressed in the Federal Arbitration Act that allows courts to liberally interpret the scope of arbitration agreements covered by that Act, just as it is the legislative intent represented in certain other statutes on which agreements to arbitrate would be maintained unenforceable. A party that agrees to arbitrate a statutory claim relinquish not the substantive rights granted by the statute; rather, it submits them to resolution in an arbitral, instead of judicial, forum. It trades the courtroom's procedures and opportunity for scrutiny for arbitration's ease, informality, and pace. We must presume that if Congress intended for a statute's substantive security to include protection against waiver of the right to a judicial forum, the intent would be discernible from the text or statutory background. Except if Congress expressly states that a renunciation of judicial remedies for the statutory rights at issue is not permitted, the group should be held to its agreement to arbitrate. In the meantime, nothing prohibits a party from removing legislative claims from the reach of a binding arbitration agreement."*

[70] ibid.
[71] NYC, Art V (2) (a).
[72] Carbonneau, T.E. 2009. *Arbitration in a nutshell.* 2nd ed. United State: West Publishing.
[73] Bishop, R.D. A Practical guide for drafting international arbitration clauses. Retrieved Dec. 21, 2018, from http://hoghooghi.nioc.ir/article/pdf/Practical%20Guide.pdf.
[74] ibid.

ii. Are parties allowed the choice of law to use on arbitrability issues?

Notwithstanding that arbitration can be done without recourse to litigation at any stage whatsoever, issues relating to arbitrability is usually solved using litigation. Parties go to court to determine not minding if the dispute is arbitrable or not.[75]arbitrability comes up either before the arbitration commences or after an award has been given. Sometimes, even though arbitration is international the domestic law comes to play during enforcement because what is arbitrable in a particular country may not be in another country. However the rule of the arbitration should be given great consideration in determining arbitrability. If the issue is arbitrable considering the rule of arbitration chosen by parties then its arbitrability should be upheld.

Even though parties in the United States have the freedom to select any of the fifty jurisdictions for arbitration, when it comes to arbitrability there is conflict on if the law preferred by the parties will be respected or the general provision on arbitration in the U.S. In most samples the Federal provision has been chosen above the laws picked by the parties on matters of arbitrability.[76] However, this view is changing with time. When evaluating arbitrability, the New York Convention, under Article II, gives preference to the parties' arbitration agreements, unless the agreement is invalid; in that case, the law chosen by the party would decide arbitrability pursuant to the New York Convention.

In tandem with federal legislation parties' options, the United States Courts settled questions of arbitrability under the New York Convention.

[75] Simpson, W.S. and Kesikli, Ö. 2006. The contours of arbitration discovery. *Alabama Lawyer* 67: 280.
[76] Thrope, J. 1999. A question of intent: choice of law and the international arbitration agreement. *Dispute Resolution Journal* 54: 16.

In ***BeckerAutoradio U.S.A. Inc. v. Becker Autoradiowerk***[77] where the 3rd Circuit held that the decision on arbitrability of a subject matter would be based on the Federal Law provision and not on a foreign or state law.

[77] BeckerAutoradio U.S-A. Inc. v. Becker Autoradiowerk, 3d Cir, GmbH 585 F.2d 39. 1978

The ***Volt Information Sciences Inc. v. Leland Stanford Junior University***[78] was the leading case where the United States established that the choice of law by the parties should be given cognizance over every other law in existence as that would give room for actualization of the intention of the parties. In ***Mastrobuono v. Shearson Lehman Hutton***[79] the Supreme Court followed the decision in the volt case that the choice of law by the parties shall prevail over every other legal provision on question of arbitrability of subject matter. Which state further;

> *"Other areas of arbitration law, such as arbitration arrangements which parties agree being regulated by state law, are not preempted by the FAA or decided by the federal courts in the deficiency of explicit federal legislation spelled out in the FAA or decided by the federal courts. First, the Supreme Court has stated that it is up to each state's basic contract law rules to determine whether a specific contractual agreement to arbitrate is valid. The Court's assertion that the enforceability of arbitration agreements must be determined using same principles as are employed to establish the enforceability of a contract is the only restraint on state law in this regard."*[80]

2.6 The Relevance of Energy Matters in Arbitration

The international energy market, characterised by expansion, partnerships, and various types of cross-border investment as a result of increased market liberalisation, reduced trade barriers, and increased technology, results in and encompasses complex cross-border disputes, necessitating the development of effective and efficient dispute resolution mechanisms. Hence, arbitration clearly indicates being the most effective way in resolving their disagreements.

The 2016 ICSID caseload statistical report showed that cases relating to energy disputes were about 26 per cent.[81] In 2014 as well energy disputes settled at

[78] Volt Information Sciences Inc. v. Leland Stanford Junior University, 489 U.S. 468, 1989.
[79] Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 1995.
[80] Pirsig, M. 1956. Uniform arbitration act. *The Business Lawyer* 11: 44.
[81] International Centre for Settlement of Investment Disputes. January 2016. The ICSID caseload statistics (Issue 2016-1). Retrieved July 20, 2018,.

ICSID made up about 18.6 per cent of the caseloads.[82] One-quarter of the disputes settled at ICSID over the years are energy disputes and this is not coincidental, it is because of the nature of business transactions in the energy sector which gives rise to several international commercial disputes. The energy sector requires a lot of capital input by the investors and the need to have agreement with the owners of the land where the investments would be actualized. Often times the investors are prone to be at the mercy of the owners of the resources, in most cases the state. The prices of product in the energy sector are susceptible to frequent changes and as such the profit rate cannot be easily predetermined. Therefore the negotiation terms are often times not fixed; the effect of this is that a party can choose to take advantage of the other as a result of the possibility of changing the terms of the agreement frequently. As a result of the time consciousness of the energy business litigation has been discouraging for settling such disputes.[83]

[82] International Chamber of Commerce (ICC). Arbitration of oil and gas disputes. Retrieved July 20, 2018, from www.iccwbo.org/Training-and-Events/All-events/Events/2015/Arbitration-of-oil-and-gas-disputes/.

[83] *Murphy Exploration & Production Company International v. Republic of Ecuador* PCA Case No. 2012-16 (formerly AA434). Retrieved July 20, 2018

Evolution of price on important natural resource prices (crude oil brent)[84]

Average Annual Amount	
Year	**Brent Crude Oil (US$ per barrel)**
1990	23.76
1991	20.04
1992	19.32
1993	17.01
1994	15.86
1995	17.02
1996	20.64
1997	19.11
1998	12.76
1999	17.90
2000	28.66
2001	24.46
2002	24.99
2003	28.85
2004	38.26
2005	54.57
2006	65.16
2007	72.44
2008	96.94
2009	61.74
2010	79.61
2011	111.26
2012	111.57
2013	108.56
2014	98.97
2015	52.32
2016	40.69
2017	50.00
2018	65.73
2019	55.01

[84] US Energy Information Administration. Europe brent spot price FOB. Retrieved Jan. 10, 2019, from www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=rbrte&f=D.

The table above shows the volatility and the price evolution of crude oil brent. For example the average price of brent crude oil per barrel varies from $383.73 to $20.04 in 1991 to $15.86 in 1994 and $111.26 in 2011, $111.57 in 2012, to $55.01 in 2019. The zig-zag variations in the prices does not create a global price stability in the crude oil market. This is the reason why disputes are rampant in the energy sector.

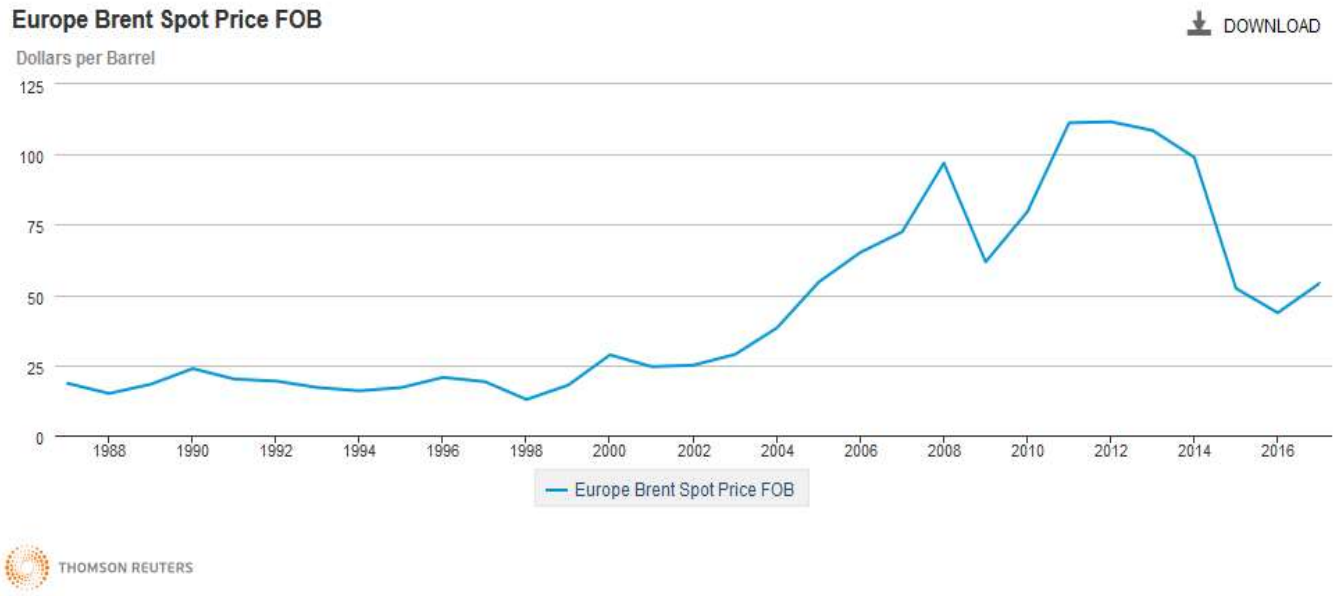


Fig 1: Europe Brent Spot Price FOB[85]

[85] ibid. p.29.

The graphical trend in Europe Brent Spot Price FOB choose the variance and swing in relation to the prices and the years. That is the price range between $25 to $125 and the years range between 1988, to 2015. The lowest peak was 1988 below $25 and the highest peak is 2012 above $110

2.7 Theoretical Framework

The non-availability of a clear court arbitration theory has long been taken note by scholars in contra distinction with major emphasis on judicial practice and enforcement of awards. There are now evolving various theories developed to explain the concept and practice of arbitration. Considering the various literature consulted in this research, the paramount theories are:

i. The contractual;
ii. Jurisdictional;
iii. Hybrid (or means theory);
iv. Autonomous ;

i. The Contractual Theory provides that preference be paid to the agreement of parties and as such, the laws applicable in the process, should be those which the parties choose to be governed with. This theory is believed to encourage delocalization.

ii. The Jurisdictional Theory pays attention to the venue of the procedure and the existent laws in place. The supervisory power of the states which makes the state want to ensure that any arbitration taking place within it be it domestic or international must adhere to the laws available in the state. The jurisdiction theory does not give room for delocalization at all[86] "it provides that the arbitrator derives powers via available law at the seat of arbitration"[87] and "it is totally in contrast with the contractual theory."[88]

[86] Hong-Lin, Y. 2004. Explore the void: an evaluation of arbitration theories. *International Arbitration Law Review* 1: 180-190.
[87] Mehren, A.T.V. 1986. International commercial arbitration: the contribution of French jurisprudence. *Louisiana Law Review* 46.5: 1046-1059.
[88] Isele, T. 2010. The Principle *iura novit curia* in international commercial arbitration. *International Arbitration Law Review* 13:57.

iii. The Hybrid Theory seems to create a proportional approach to the jurisdictional and contractual theories. Maintaining a middle position between the two theories and ensure that while giving respect to the decision of parties, hence, selected policies of the seat of arbitration is adhered to.

iv. The Autonomous theory more importantly, gives room for delocalization the most. It drifts from the traditional approach of arbitration which considers the seat of arbitration more importantly. It recognizes that international arbitration should enjoy autonomy and have its own system of laws and as such should not be subject to any state laws.[89] It provides further that courts should have nothing to do with the arbitral process starting from commencement to enforcement.[90]

The above theories constitute the fundamental theories of arbitration. Writers on these theories include Mann[91], Moultuslky[92], Niboyet[93], Laine[94], Merlin[95], Foelix[96], Balladore[97], Bernard[98], Surville[99]. All the theories are important, but

[89] Hong-lin, Y. 2004. Explore the void: an evaluation of arbitration theories. *International Arbitration Law Review* 7: 180.

[90] Sauzier, E. and Hong-lin Y. 2000. From arbitrator's immunity to the fifth theory of international commercial arbitration. *International Arbitration Law Review* 3.3: 114-121.

[91] Mann, F. 1986. Lex facit arbitrum. *Arbitration International* 2:241-260. See also Mustill, M.J. 1984. Transnational arbitration in English Law. *Current Legal Problems* 37.1: 133-152.

[92] See also J.H. Samuels and J. Kleinheisterkamp, Jan. 2009. Report on commercial arbitration in the United States: The Impact of Uniform Law on National Law: Limits and Possibilities Retrieved on January 20, 2019. from https://ssrn.com/abstract=1394223.

[93] Niboyet, J.P., 1950. *Traité* de droit international privé français. Paris: Recueil Sirey.

[94] Laine, A. 1899. *De l'éxécution en france des sentences arbitrales étrangeres.* French ed. Montana : Kessinger Publishing. See also J.H. Samuels and J. Kleinheisterkamp, Jan. 2009. Report on commercial arbitration in the United States: The Impact of Uniform Law on National Law: Limits and Possibilities Retrieved on January 20, 2019 from https://ssrn.com/abstract=1394223.

[95], J.H. Samuels and J. Kleinheisterkamp, Jan. 2009. Report on commercial arbitration in the United States: The Impact of Uniform Law on National Law: Limits and Possibilities Retrieved on January 20, 2019. from https://ssrn.com/abstract=1394223.

[96] Foelix, J.J.G. and Demangeat, C. 1856. *Traite du droit international prive: ou, du conflit des lois de differentes nations en matiere de droit prive*. Paris : Joubert. See also J.H. Samuels and J. Kleinheisterkamp, Jan. 2009. Report on commercial arbitration in the United States: The Impact of Uniform Law on National Law: Limits and Possibilities Retrieved on January 20, 2019.from https://ssrn.com/abstract=1394223.

[97] Pallieri, G.B. 1935. L'arbitrage privé dans les rapports internationaux. *Recueil Des Cour* 51: 287. See also Frédéric-Edouard, K. 1958. Autonomie de la volonté et arbitrage. *Revue Critique de droit International Prive* 47: 255. See generally J.H. Samuels and J. Kleinheisterkamp, Jan. 2009. Report on commercial arbitration in the United States: The Impact of Uniform Law on National Law: Limits and Possibilities Retrieved on January 20, 2019. from https://ssrn.com/abstract=1394223.

[98] Samuels, J.H. and Kleinheisterkamp op. cit. p.32.

not all directly cover the entire arbitral process and judicial practices of various jurisdictions. In effect, the most relevant of them which gives coverage and articulate the judicial practice coupled with arbitral process is the hybrid theory.

This research will therefore, be based on the Hybrid theory, which combines the Jurisdictional and Contractual theories.

There is a link between the hybrid theory and arbitrations of international commercial nature, and this is very important to this work. This is because, the parties are granted the freedom to determine to have an arbitration agreement, through which, they can make a choice relating to the place of arbitration, the arbitrators, and the rules to govern the process and so on**.** Albeit, the basis and legitimacy of the arbitral proceeding and agreement would be subject to the compulsory rules and public policy of *lex fori* is jurisdictional in nature, hence the enforcement of the award and judicial practice in arbitration will be better suited with hybrid theory because of its wider coverage and proper leverage of the lacuna created by other theories.

2.7.1 The Hybrid Theory

Formulated by Surville[101] with a further development by Sauser-Hall, who maintained thus

> *"Belief that arbitration owns its roots in a private contract, in which parties hold such right of selecting the arbitrators and guidelines regulating the arbitration process and substantive matters, reflects a contractual aspect in arbitration. On the other hand, he agreed with the jurisdictional principle that arbitration must be performed within national legal systems in order to assess the parties' powers, the arbitration agreement's validity, and the awards' enforceability."****[100]***

[99] See G. Sauser-Hall, L'arbitrage en droit international privé, 1952. International Law Institute's Annual Report 44: 469. See also Lew, J. 1978. *International commercial arbitration: A study of Commercial Arbitration Awards.* New York: Oceana Publication.
[100] ibid.

Clearly, the jurisdictional and contractual theory both enjoy support at the opposite ends of arbitration, although some jurists recognize that the jurisdictional nor contractual theory do not logically satisfy or provide accurate framework for modern International Commercial Arbitration [101] It is pointed out by Lew, that there is no surprise that there is a development of a compromise theory, with a mix[102]. Developers of the hybrid theory are convinced that the existence of international commercial arbitration rests on jurisdictional and contractual features; and clearly, the mixed theory comprises of either theories.[103]

Therefore, arbitration is "a mixture of juridical institution, sui generis, with its root being the [parties'] agreement and takes its jurisdictional effects from the civil law."[104] It is further described as being based on jurisdiction, this is as a result of applying the procedural rules, while deriving effectiveness via the arbitration agreement[105]. Argument by the author Sauser-Hall as justified by Messrs Redfern and Hunter opines that:

> *International Commercial Arbitration is a hybrid type of dispute resolution. It all starts with a private agreement between two people. It proceeds in the form of private litigation, in which the parties' wishes are paramount. Nonetheless, it concludes with an award that has legal force and influence, and that most countries' courts would be willing to accept and implement if those requirements are met. The private process has a public impact, thanks to the cooperation of each state's public authorities, as articulated in national laws.*[106]

[101] Hong-lin, Y. 2008. A theoretical overview of the foundations of international commercial arbitration. *Contemporary Asia Arbitration Journal* 1.2:255.
[102] See also Lew, J. 1978. *Applicable law in international commercial arbitration: a study in commercial arbitration awards*. New York: Oceana Publication.
[103] ibid.
[104] See G. Sauser-Hall, L'arbitrage en droit international privé, 1952. International Law Institute's Annual Report 44: 469. See also Lew, J. 1978. *Applicable law in international commercial arbitration: a study in commercial arbitration awards*. New York: Oceana Publication.
[105] See G. Sauser-Hall, L'arbitrage en droit international privé, 1952. International Law Institute's Annual Report 44: 469.
[106] Redfern, A., and Hunter, M., 2004. *Law and practice of international commercial arbitration*. 4th ed. London: Sweet & Maxwell.

Clearly, the essential dual nature of the arbitration procedure was reasserted by Ancel.[107]

Jean Robert who also perceives the dual nature of the procedure elicits a relationship between arbitration and the forum employed for the procedure. He clarifies that

> *"The parties' agreement governs the structure of arbitration and the authority of the arbitrator, while the validity of the agreement and the implementation of awards must be determined in accordance with public policy or mandatory rules of the applicable legislation, such as the lex fori and the law of the country where enforcement is sought."*[108]

Sanders is of the opinion that the hybrid theory the most preferred and complete. He notes that, the hybrid theory is most popular, well accepted and frequently applied because of its insightful and well-articulated postulation on the general practice and procedure of arbitration. It has been able to fill the lacuna left by jurisdictional, contractual and autonomous theories.

2.7.2 Synopsis of Hybrid Theory

The Hybrid theory generates some models, as much as ones for position of arbitrators and selection of the proper rule. It can be thought of as a middle ground between jurisdictional and contractual theories. It argues that international commercial arbitration possesses contractual and a jurisdictional component, and that as a result, the parties should have complete control over how the arbitration is performed.[111]

i. The Status of Arbitrators

The hybrid theory postulates that there exists, a relationship of contractual nature between the arbitrator and parties. Such agreement spells out rules of the contract. Therefore the arbitrator derives their powers most importantly from

[107] Ancel, J.P. 1993. Judicial Attitudes in France. *Arbitration International* 9.2: 121.
[108] Samuels, J.H. and Kleinheisterkamp op. cit. p.32.

the agreement. However unlike the contractual theory, the hybrid theory gives room for consideration of jurisdictional laws and as such both the rules of the parties agreement and the place of arbitration, govern the proceeding and the authority possessed by arbitrators.[112]

ii. The Proper Law Choice

Hybrid theory, like the jurisdictional theory, pays close attention to the applicable jurisdictional rules in effect at arbitration seat and the location of implementation. It states that the parties are bound by these laws unless they agree otherwise. The arbitrators are obligated to apply the law selected by the parties, and if the parties have not chosen a law, the arbitral tribunal may accept the most appropriate law in the arbitration's place.[113]

CHAPTER THREE

LEGAL RESEARCH METHODOLOGY

3.1 This study examines and analyses the enforcement of arbitration awards emanating from Nigerian energy disputes in comparison with those of other jurisdictions such as the U.S. and whether such enforcements comply with the provisions of international conventions (the New York Convention on the Enforcement of Foreign Awards) and case law. The research does not limit its scope of legal research and application to a single type of legal research but adopts varying types of legal research methodologies where necessary.

This research adopts the doctrinal research methodology with the international and comparative research methodology.

The basis for adopting a mix of research methodology is founded on the focal point of the research work which aims not only to examine arbitration laws, statutes and case judgements as it relates to energy arbitration in Nigeria exclusively but also to examine these laws and statutes as compared to other jurisdictions.

3.2. Doctrinal Research Methodology

This research analysis employs the traditional legal method of research, which has a focus on laws, and the language by which statutes are formed for easy understanding by non-legally trained individuals. Doctrinal analysis uses particular techniques to render the law internally consistent that is, is there a thread of precedent into which judgment fits or are externally consistent? That is, does this statute align with that statute or does it align with the relevant principles?

The doctrinal research methodology, examines arbitration laws, statutes and case judgments as it relates to energy arbitration. It examines the various rules governing the procedure, conduct and practice of energy arbitration and a number of court judgments in matters relating to energy arbitration and the enforcement of its resultant award. The study also examines international institutional frameworks on the procedure, conduct and practice of energy arbitration in view of the provisions of int'l conventions and case law.

Applicability of Doctrinal Research methodology were used to analyse cases, statues, arbitral awards, authoritative texts and journals for this research.

3.3 International and Comparative Research Methodology

This research approach integrates public and private international law alongside local law, European law, and the comparative method, breaking down conventional legal categories. Its aim is to make international law and legal structures easier to understand, as well as their effect on the formulation of foreign policy in an age of global interdependence.

The international and comparative research methodology, focused on comparing what is attainable in the United States of America (USA) vis a vis Nigeria, international arbitral organizations in these jurisdictions as it relates to energy arbitration and judicial practice in light of the provisions of international conventions (New York Convention on the Enforcement of Arbitral Awards) and case laws. It compares their legal frameworks in relation to the enforcements of Energy arbitration awards and their judicial practice.

Basically this method was used to compare the legal framework of the U.S and Nigeria, the workings of the International Centre for Settlement of Investment Dispute (ICSID) and the Energy Charter Treaty (ECT) coupled with other international commercial disputes.

3.4. Data Collection

A number of authoritative texts (court judgments and statutes) surrounding the scope of this research has been examined. Pre-existing data published by the International Centre for Settlement if Investment Disputes (ICSID) and the Energy Charter Treaty (ECT) between the period commencing from the year 2000 to 2018 on energy linked disagreements brought to arbitration has been considered.

CHAPTER FOUR

FINDINGS AND DISCUSSIONS

4.1 Types of Arbitration Conducted in the Energy Sector

4.1.1 Arbitration relating to States or Parties Linked to State

Oil and gas have strategic, security, and geopolitical importance for many countries. The state is the legitimate owner of most resources in most countries. As a result, states with such resource are important to the industry, as they could gain an economic interest in specific, venture or contract, or exercise monitoring duties over it. In many ways, states may become involved in a venture or contract;

- may take part in a complex project related to oil and gas or an entity dedicated to an oil and gas endeavor;
- Participation may also be achieved by working via a domestically related corporation;
- Could also be governed by policies concerning hydrocarbons, such as regulations, that expand hydrocarbon use.[109]

  Clearly, transaction and dispute relating to Oil and Gas, which employ arbitration are frequently between states or state-linked parties. Commercially mediated arbitrations can include private agreements between companies and states, as well as disputes under investment treaties.

4.1.2 Commercial Arbitration

[109] ibid.

Typically, states and their national oil companies sign lease agreements that benefit private oil and gas exploration and production companies. It can take one of several forms, such as a concession, a license, production agreement, or service agreement.[110] Grants, fellowships, trusts, and scholarships can take different forms: Because it combines characteristics of all three forms of grant agreements, this is commonly referred to as a mixed funding agreement. The industry has been transitioning from "grants over resources" agreements to "production sharing agreements" since the 1970s. The most common sort of agreement for venture operations is a production sharing agreement, although these agreements require taking production risks. The investor obtains an entitlement to share in profits once operations become profitable, but bears costs for exploration and any losses that occur. Indonesia, in fact, set up the first production sharing agreements in the 1960s.[111] While the worldwide application of production sharing agreements is still growing, they are now found in Bangladesh, China, Myanmar, the Philippines, and Vietnam as well.[112] The following are some of the differences that may develop as a result of agreements over production sharing:

• Differences over agreement's cost recovery and accounting procedures;

- failure to pay invoices or royalties;
- reductions in the sale of goods
- Distractions, infractions, or diversions.

These conflicts and difficulties differ from project to project to project, from issue to issue, and from country to country.

Most arbitration in the region have resulted from production sharing and other grants, like grants or under-invoicing. An estimated 22.5 out of India's 310 production sharing agreements have been in Arbitration. A few of the arbitrations are symbolic of the wide variety of problems that may arise. Niko Resources, a joint-venture company between British Petroleum and India's

[110] Omorogbe,Y. 2001. *Oil and gas law in Nigeria simplified*. 1st ed. Ikeja: Malthouse Press Limited.
[111] ibid.
[112] ibid.

Reliance Industries Limited filed a notice of arbitration against the government and the companies operating the KG-DG offshore gas block in the Bay of Bengal, November 2011, claiming it should be reimbursed for the cost recovery of production. BP and Niko Resources joined with the plaintiff in a suit in 2014 arguing that the Indian government had failed to implement an amount increase in natural gas.[113] This was later withdrawn. [114] The same agreement was signed in November 2016 when India levied a fine on Reliance Industries (US$1.55 billion) and their partners over extraction certain gas from neighboring regions belonging to Oil and Natural Gas Company that had moved to the KG-D6 block (ONGC).[115]

[113] ICSID. Oct. 1, 2016, ICSID caseload – statistics. Retrieved Sept. 12, 2018,.
[114] Thomson, D. Sept. 1, 2016. Pakistan defeats treaty claims over gas terminal. Retrieved Sept. 11, 2018,
[115] Hepburn, J. Feb. 12, 2018. English court orders security for costs against claimants in set-aside proceedings funded by burford capital, but declines security over still-unpaid adverse costs order in underlying arbitration. Retrieved July 20, 2018,

4.1.3 Investment Treaty Arbitration

Oil and gas disputes are the subject of a large sum of investment treaty arbitrations concerning countries in the Asia-Pacific areas. A significant sum of ICSID arbitrations include parties from the area who are involved with oil and gas companies. As of October 2016, the oil, gas, and mining industry was involved in 45 percent of the 46 ICSID issues involving a state from South and East Asia and the Pacific. Given the complexities and diversity of safety and political surroundings where a number of oil and gas companies work, an arbitrary investment treaty can cause a slew of problems. Expropriations claims from different descriptions – be they legally or illegally, directly or indirectly – are no strange in the oil and gas sector, for example. Two treaty claims taken against Pakistan against Progas Holdings, the Mauritian company and their shareholder British Iraq for alleged LPG terminal expropriation in Port Qasim, Karakhi, have been dismissed by a UNCITRAL Court in 2016. A petition to rescind the awards submitted by investors is challenged before the English Court.[116]

Retrospective taxes and regulatory enforcement have become quite common in recent times. In March 2015, an oil company from Scotland, commenced UNCITRAL arbitration against India, claiming that its subsidiary in India and India's demands for back taxes to the tune of US$1.6 billion are in addition to India's reported denial of its remaining 10% stake in Cairn.[117] When Hanocal and IPIC Dutch subsidiaries launched the ICS claims in respect of tax, they laid claim to the Korean petrochemical firm's leading stake in November of €21 million in Hyundai Oilbank in May of that year, with an ask for compensation for tax paid retroactively from previous years'[118] In July 2016, Royal Dutch Shell has filed a claim with the ICSID against the Philippines for US$1.1 billion in back taxes levied by the Philippine Auditing Commission on gas

[116] Yong, L. May 22, 2015. New ICSID claim against South Korea. Retrieved Sept. 11, 2018,
[117] Yong, L. July 22, 2016. Shell takes on Philippines over back taxes. Retrieved Sept. 11, 2018,
[118] Jones, T. Jan. 22, 2018. Samsung and oman settle ICSID dispute. Retrieved Sept. 12, 2018,

produced from the country's first natural gas well, Malampaya.[119] In 2015, Samsung issued an ICSID claims against Oman, in relation to a public procurement that was going on for a new project development at the Sohar refinery in northern Oman. The case has already been resolved.[120]

There has also been recent criticism of investment treaty arbitration, leading some countries to rescind their bilateral investment treaties. By March 2017, India had sent notification to almost half of Europe and the Americas' trading partners of its plan to abolish the bilateral investment treaties (BITs).[121] At the beginning of 2015, India said it was working on a new version of the framework agreement for trade and investment, called the Indian model BIT, which it first proposed in 2012.[122] The new five-year statute of limitations period on disputes in India's Supreme Court-arbitration model treaty has been negatively reviewed so far this year.[123]

The president of Indonesia officially announced in late 2014 that he would start to eliminate the BITs, and has since completed this in accordance with that decision.[124] It has been stated that Indonesia is intent on renegotiating new agreements, though no agreements have been signed yet. You should grant a ‘sunset' or ‘survival' period for investments prior to termination or implementation of a treaty, with protection for at least 15 years. The Oleo Consortium, a subsidiary of an Australian energy firm, began proceedings under the Singapore-Indonesia bilateral investment treaty with regard to an oil palm-based project in Sumatra in August of 2016. There was past its expiration

[119] Peacock, N. and Joseph, Nihal. Mar. 16, 2017. Mixed message to investors as India quietly terminates bilateral investment treaties with 58 countries. Retrieved Sept. 18, 2018,
[120] Singh, K. and Ilge, B. July 15, 2016. India overhauls its investment treaty regime. Retrieved Sept. 18, 2018,
[121] Ibid.
[122] See Crockett, A. 2015. Indonesia’s bilateral investment treaties: between generations? *ICSID Review* 30: 437.
[123] ibid.
[124] Hepburn, J. Aug. 11, 2016. Palm oil company sees BIT claim registered against Indonesia at ICSID. Retrieved Dec. 20, 2018,

date in June of 2016, however, the necessary treaty encompasses a clause which mandates investment a minimum of 10 years after its expiration.[125]

4.2 Prospects and Challenges of Energy Arbitration

As in other international commercial sectors, the mechanism for settling disputes in the energy sector through arbitration though being increasingly accepted as the preferred means for settling disputes, faces its own share of challenges.

[125] King, R. April 2015. Disputes arising from oil price decline. Retrieved Sept. 18, 2018,

4.2.1 Prospects of Energy Arbitration

Despite the difficulties that arbitration faces in the energy sector, there are many advantages of using arbitration to resolve disputes in the oil and gas industry. One of such prospects is the designation of Lagos State as seat of Arbitration in international commercial arbitration for West Africa. By this the difficulty that parties in oil and gas dispute might be thinking of as regards ***Locus Arbitri*** will no longer be present. The designation of Lagos as center of Arbitration for West Africa by the International community was an effort to make available to Nigerians (and citizens of Ecowas generally) affordable and expedient access and equitable terms for negotiation

Also the ratification and domestication of ICSID Convention is a welcome development in enforcement of ICSID award. Many countries, USA with Nigeria inclusive, approved the ICSID Convention since August 23, 1965. Energy dispute is covered by the ICSID Convention as most disputes in oil and gas are purely investment dispute. This will enable parties in oil and gas to seek enforcement of arbitral award made in oil and gas industry directly from the Supreme Court

Notably, arbitration tends to offer oil companies, of international acclaim, a platform to settle disputes experienced with local and host communities, this is without injuring the existing cordial relationship between them. Clearly, the procedure is not costly, quick to the parties in the Oil and Gas Industry, and it eliminates the likelihood of justice based in technical elements.

4.2.2 Challenges of Energy Arbitration

There are some challenges integral to arbitration in the energy sector. Sometimes, the obstacles that lie ahead prevent both parties from using arbitration as a mechanism for settling disagreements about energy matters. Some of these challenges are highlighted below.

A. **Absence of power of Enforcement of Award**. There is usually no problem when the parties to the arbitration want to abide by the decisions in the award given by the tribunal. However, there may be a problem if the party against whom the award was made failed to co-operate. This would force the victorious party to seek court's assistance to apply the award, albeit the other party, making an attempt to impinge the award, with gross misconduct or improper procurement, the arbitrator will rule against you. This is likely to lead to protracted litigation, when this happens, the saving of time and money enjoyed by the use of arbitration will be lost, with ICSID as an exception.

B. **The Effect of Limitation Laws:** The limitation laws in some countries have the effect of rendering nugatory a right of action which earlier existed. This is because they require a prospective litigant to commence action against the offender within a stipulated time[126]. Arbitration certainly keeps the parties out in an effort to settle dispute amicably. A situation where a disagreement occurs and the aggrieved party submits to arbitration and the arbitral proceedings was against a public office or officer like the workers in the controlling body in the energy sector of a state e.g. NNPC, Petroleum Ministry, if the suit lasts over 3 months, it will be caught up by the provisions of the public officers Protection Act and will be disable to be dismissed. This is because the cause of action is already dead. This is also because period of amicable negotiation does not suffice as a defence to statutes of limitation laws.

C. **Venue Problem in Arbitration**: the issue of venue in arbitration is beginning to course delay in the arbitration process frequently.[127] The choice of a venue in domestic arbitration is left to the parties; however, the choice of a venue in international arbitration is provided for by the Act international arbitration, and the choice of venue is a decision of law as well.[128]. In international energy arbitration, sometimes parties disagree over the venue of the arbitration especially if it is outside their home country, so they often time ask the court to

[126] Limitation Act, Public Officers Protection Act, Cap 41 Law of the Federation of Nigeria 2004.
[127] ibid.
[128] ibid.

determine the venue of the arbitration and this in turn causes delay during energy arbitration.[129]

D. **Impeachment of Arbitral Award:** In certain nations, such as Nigeria, an arbitral award rendered under the country's Arbitration and Conciliation Act could be overturned by an aggrieved party.[130] As decided by the court in Triana Ltd v U.T.B Plc, the court upheld that Section 30(1) of the Arbitration and Conciliation Act, 1988 (now 2004), requires the court to separate an award if the arbitrator is accused of wrongdoing.[131]. A party in arbitration in the energy sector in Nigeria and some other countries with similar rules may be applicable in refusing an award under the s. 30 of ACA.[132] Extricating an award then lead to prolonged litigation and render the deployment of arbitration ineffective.

E. **Arbitrability of the Subject Matter:** Arbitration is not sufficient in all cases. Many conflicts concerning crimes and unethical business practises are not subject to arbitration. The procedures used by oil companies' host communities may often result in the committing of crimes, which are not subject to arbitration. Vandalism of oil pipelines, sea piracy, and abduction of expatriates are examples of illegal activities not subject to arbitration.

F. **The Effect Anti-Arbitration Injunctive Orders:** Some parties not interested in resolving their disagreements may seek an injunction from a regular court to prevent arbitration from taking place. This might make it difficult to successfully enforce energy arbitration.

4.3 Characteristics of Energy Arbitration

In 2017, the energy sector witnessed a thriving number of international arbitrations. According to ICSID's caseload-statistics, the end of 2016 reported that 42% of cases controlled by ICSID were energy disputes and greater than that of any other sector, this was also the case in 2017. Currently, with the introduction of the Treaty of Energy Charter, the application of arbitration in

[129] ibid.
[130] ibid.
[131] Taylor Woodrow Nigeria Ltd v. SEGMBH Ltd, part 286, 4 NWLR, 127, 1993.
[132] ibid.

the energy sector has substantially increased.[133] Disputes on the subject of energy often times involve complex and controversial issues which relate to sovereignty, security and the welfare of the public. Most energy disputes are international form of investment disputes between the home country and the international organizations working in the energy sector. Usually, these entities intending to work together would enter into a contract before commencement of the business and in the business contract there usually is a dispute resolution agreement. In the modern world, by virtue of the International Centre on Settlement of Investment Disputes (ICSID), although the use of arbitration as a dispute settlement procedure is occasionally employed in investment negotiations, this is fairly uncommon between states and foreigners. Given that energy disputes come under international investment disputes, it is safe to assume that most energy disputes, like all other investment disputes, will be resolved through arbitration. Therefore the convention will apply to energy disputes and also be relevant in understanding energy arbitration and it will not be out of place to give a brief overview of ICSID convention and its connection with energy treaty of arbitration and the Energy Charter.

4.3.1 The International Centre for Settlement of Industrial Disputes Convention

The multilateral treaty which created ICSID was signed in 1965. This bank group, with its headquarters in Washington, signed the Treaty of Washington in 1966. As part of an increasing number of concession contracts, the center was created. It also takes the process one step further and creates an independent investment forum. As stated in the preamble, the ICSID's mission is to support business development by enticing foreign investment and facilitating the resolution of investment disputes. Its organization is governed by an executive council. which consists of one delegate from each contracting state, with the role of appointing an arbitrators if both parties fail to fill that role. If parties want to go to the ICSID process, a tribunal must be created for each claim.

[133] Lew, J. 1978. *op*. cit. p.33

Arbitrators may be members of the ICSID arbitrator list, but individuals not listed may be appointed as well.

The picture below depicts a geographical representation of ICSID membership (Fig. 2).

Fig 2: ICSID Membership chart across the World[134]

Figure 2 above depicts the contracting state to ICSID convention is represented by blue colour, which covers various continents like: Europe, Africa, North America, Australia, and South America. While the yellow colour shows the signatory states to ICSID convention, which are mostly Canada and some little parts in Africa.

Fig. 3 and 4 highlights the special features of the International Centre for Settlement of Investment Disputes (ICSID).

[134] ICSID. Nov. 15, 2012. An overview of ICSID. Retrieved Jan. 21, 2019, from https://uba.ua/documents/doc/meg_kinnear_2.pdf.

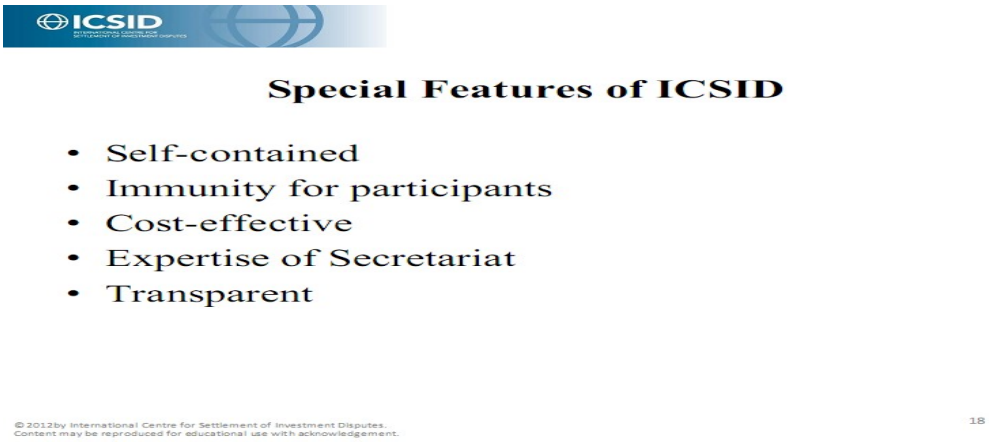


Fig 3: Special Features of ICSID[135].

[135] ibid.

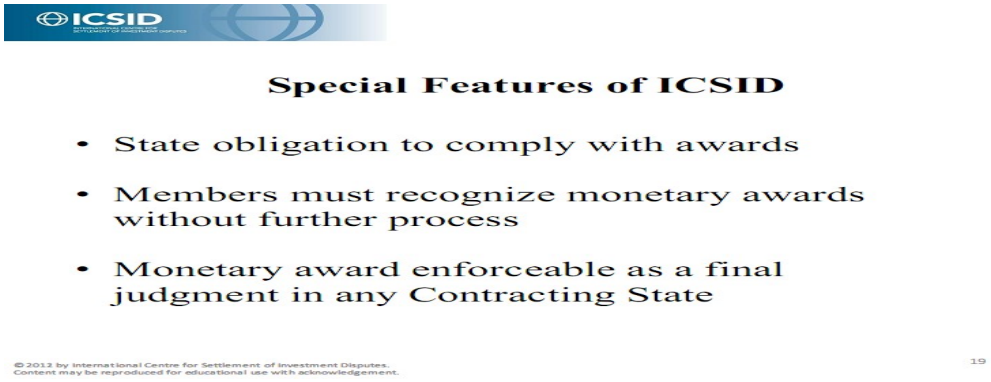


Fig 4: Special Features of ICSID[136].

First, in order to refer the conflict to the ICSID, the arbitration rules to be used for the process are automatically incorporated. One may not hold arbitration under the ICSID rules. Secondly, only disputes between investors and investors that are created by a signed contract and submitted to the ICSID are permitted to be submitted to the tribunal.[137] This means that ICSID's jurisdiction is confined to investment disputes. Investment-friendly disputes, for example, cannot be brought to ICSID. In recent years it was defined by many courts using what has already been called **Salini criteria** named after the award of the tribunal in the **Salini v. Morocco** case, despite the Convention's failure to define investment.[138] The jurisdiction of ICSID also only extends to mixed disputes, i.e. interstate, national, diplomatic or interstate, controversy. The Convention must have been ratified by both states. To date, ICSID has registered 597 cases, most of them from the early 2000s.[139]

[136] ibid.
[137] ibid art1.
[138] ICSID. Arbitration under the ICSID convention investment arbitration. Retrieved Sept. 13, 2018, from http://www.coursera.org/lecture/arbitration-international-disputes/arbitration-under-the-ICSID-onvention-2kgTv.
[139] ibid.

4.4 The Procedure for Arbitration at the ICSID Centre

Investment arbitration clause, ICSID's jurisdictional requirements, written consent to investment arbitration, and ICSID facility rules are central to the focus of these ICSID jurisdictional issues. By virtue of written consent to ICSID Arbitration, both parties must consent in writing to arbitration under ICSID, general consent to arbitrate is insufficient. It means both parties must submit to the centre. The burden is on investor to produce written consent to arbitrate that is binding on the host state and the investor. A state consent to ICSID arbitration is contained in the relevant BIT or other treaty.

Furthermore a disagreement must be amid a contracting state and a national of another contracting state. The nationality of a party is determined by individual citizenship, company's place of incorporation or principal place of business. ICSID convention excludes dual nationals, even if one of those nationalities is that of the host state. There is a split in cases involving foreign-incorporated companies owned by investors who are national of the host state. Finally ICSID additional facility rule was adopted in 1978, it permit ICSID to administer arbitrations that do not satisfy ICSID Convention jurisdictional requirement. The proceedings pursuant to the Additional Facility Rules are not governed by the ICSID convention. It is overseen by an administrative head, the Secretary-General, who manages the center's daily operations.

Fig. 5 gives a tabular description of the International Centre for Settlement of Investment Disputes (ICSID) Governance Structure. Highlighting the functions of the Administrative Council and the Secretariat.

Fig 5: ICSID Governance Structure[140].

Figure 5 includes the administrative council which has the functions of annual budget and report, determination of condition of service and adopt ICSID rule on arbitration and conciliation proceedings. The secretariat has the functions of technical assistance, publications and support hearing process.

Investing members are expected to notify the Secretary General when a dispute arises and are assured of subsequent registration. The requirement is that the request should be submitted with the requisite payment. The Secretary-General must accept receipt of the document as well as the filing date to the group seeking ICSID arbitration. The Secretary General will investigate and review the document to establish whether the centre has jurisdiction, if the parties are

[140] ICSID. op. cit. p.47

the appropriate to bring forth such dispute to ICSID, and perhaps the parties have decided to bring up their dispute to ICSID. Before he can register the dispute and notify the other side, the Secretary General must satisfy himself that there is a legal issue involving investment, that the parties agreed to ICSID, and that the issue is between a state-member of the convention.[141] He is empowered to refuse registration if any of these three criteria is missing. When uncertainty arises, the Secretary-General may request additional information. His decisions on the matter are absolutely final in all cases in which the Secretary-General refuses to register a request. The rejection of the request precludes the party from using the ICSID. the Secretary-General has formally requested the dispute to be considered, but any of the parties or all parties may contest jurisdiction when the tribunal is formed[142] When the Secretary-General receives notification of registration, the parties are directed to proceed to chapter 10 of the statute under section 2 of the convention.

[141] ICSID Convention, art 25.
[142] Klockner Industrie Anlagen GmbH v. United Republic of Cameroun, CLUNET 409, 1984.

Fig. 6 is a tabular representation of the ICSID proceedings.

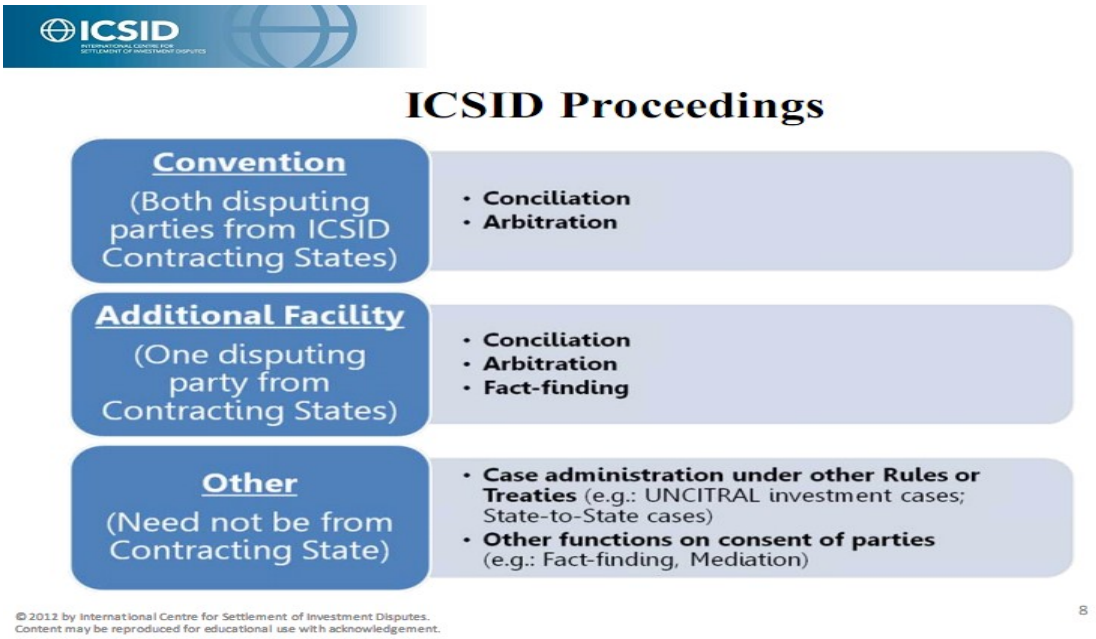


Fig 6: ICSID Proceedings[143].

This covers the convention, additional facility and contracting state.

[143] ICSID. op. cit. p.47.

Except as specified in the application, the parties must notify the Secretary General on time, any agreement they have reached on the number of arbitrators and the mechanism for appointing them.," according to Rule 1 (2). No person may be named as a member of the tribunal if they have previously served as an arbitrator in any proceeding for the resolution of a dispute." The parties were given the ability to choose their own arbitrators in the Agreement, and there were generous provisions for doing so.[144] However, the convention does make provision for specific conditions which must be observed regardless of the agreement between the parties, which include; a) the arbitrators' number mustn't be even[145] b) At least half of the panel members should not be party nationals of one of the nations taking part in the arbitration must come from states other than the states involved in the dispute in order to qualify.[146] c) It is the preeminent obligation of the outside arbitrators to also serve on the panel of arbitrators. If the parties can settle the appointment of an arbitrator quickly, then a sole appointee may be used. Arbitrators may be appointed by the groups, or the delegates may be able to assign the job to another who may be designated as the Administrative council or devolve it to their representatives.[147]

From the forgoing, it is clear that the parties to a dispute enjoy absolute freedom to choose the arbitrators. The parties don't have to limit their list of arbitrators to those who are named by the ICSID. upon the appointment of the arbitrators, parties must make every attempt to inform the secretary-general of that appointment. Once the decision is made, the Secretary General will look for assent. A new employee is given 15 days to accept his or her position. It is not necessarily the case that one will be accepted by an appointee. In some cases, it is crucial to inform the person that one has been chosen as an arbitrator of your expectations before his or her terms are set, lest he or she refuse to

[144] ICSID, rule 1 (3). See also rules 2(1)(a)(b) (c) (2)(3) & rule 3.
[145] ICSID, Art 37.
[146] ICSID, Art 39.
[147] ICSID, Art 40(2).

serve. An arbitrator who refuses to serve may design another who will designate one who is empowered to act in their place.

The arbitral tribunal is considered to be established where the Secretary-General informs the parties of the arbitrators which have been approved their appointments. The tribunal must convene within 60 days of its formation or any agreement between the parties. If no president is chosen, the Secretary-general will determine when the first session will be held, and the arbitrators will select a president based on their agreement. Prior to the conference, the president is expected to speak with the main stagers and participants. It will take place at the arbitration venue, as stated in Article 63 of the treaty. If the president sets a date for a hearing and then fails to show up, Article 45 and Rule 42 of Procedure will be invoked.

The president of the tribunal is to hold the hearing and oversee deliberations at the meeting; and lest the parties agree otherwise, a bulk of the tribunal members must be present.[148] As deliberation is meant to be done away from the eyes of all members of the court, deliberation proceedings in the tribunal must be private and confidential. The Tribunal has the right to admit witnesses who could have the kind of role he/she needs to play, depending on the circumstances.

While the proceedings are being held, any party can have an agent, counselor, friend, or advocate present who has been designated by that party, and any member of that party may be hurling abuse or participating in defense.[149] Both parties are supposed to submit their evidence and a few days hence. According to Rule 29, the Secretary General, each member should receive a copy of all documents and communications which support the request that was issued by the tribunal, as well as a copy of the request that the proceeding was started, and all documents and communications which were used in support of it. Inclusive also, the written procedure is to consist of the pleadings, which is to

[148] ICSID, Art 3(2).
[149] ICSID, Rule 6(2).

be filed within the stipulated time, set by the Tribunal. Among other things, the pleas, the party seeking the procedure should submit a memorial, along with a rejoinder and a reply by the opposing party. The monument shall encompass a statement of relevant facts, statements of laws, and any party that desires to state their position on the matter To further the argument, there is an answer and a rejoinder that counter memorializes the previous pleadings, which admit and deny facts, which were made in response to the first. Subsequent statements and testimonies will cover these aspects of the dispute as well. Where expertise is required, independent experts are brought in.[150]

It occurs when the Tribunal is in session. The Tribunal has the burden of proof to find the facts and of fact and evidence supporting the admissibility. Letters, emails, and other documents pertaining to the case must be made available for the court to view. the evidence and witnesses and experts are to be called before the tribunal to make a solemn oath before offering their testimony.[151] Once the presentation is finished, the meeting is officially closed. Nevertheless, however, provided the new evidence is put forward, this argument has to be re-addressed before award at the conclusion of its deliberations; the tribunal shall deliver a decision and present an award that is supported by a majority of its members.

4.5 The Award

The tribunal is to have finished determining the award within the time allowed (i.e., after 60 days) or extended time period (i.e., by the court's decision) the tribunal must issue its decision on all the issues when a majority of members are voting in favor. It is especially critical to point out that the award should not be completed prior to the hearing, as it can't be accepted in court.[152] But if decisions were made by means of ballots or through correspondence, each member of the tribunal who cast a vote should register their vote.[153] A

[150] ICSID, Rule 14(2) & (3).
[151] ICSID, Rule 18(1).
[152] ICSID, Rules 28, 29, 30 & 31.
[153] ICSID, Rule 34.

signature must be obtained and the signature must be completed in thirty (30) days, with an extra thirty (60) days to give the paper time period.

The award is to be in writing and must include the following:

a) An exact designation of the parties
b) A description of the procedure for setting up the tribunal with a statement regarding its competence under the UN Convention The details and names of the members of the tribunal, with an identification of the appointing authority of each of the members
c) Names and descriptions of the parties' advocates and agents
d) Dates and locations of sitting
e) A brief summary of the proceedings will appear here shortly
f) A conclusion supported by facts arrived at by the Tribunal
g) The submission made by parties
h) The Tribunal' decision on every question brought before it, including reasons on which the stance is reached
i) The costs incurred in the Tribunal shall be decided by the Council. [154]

Once the award has been signed by the final arbitrator, the Secretariat shall promptly make an authenticated copy and send it to each party. When certified copies are issued, the award will be presented on the date specified in the award notification. As a final condition, the Secretary-General may then has the option to provide copies of the documents, which he certifies, that is to be published with the parties' permission. In arbitration, arbitration decisions are non-public by nature, and must be approved by the parties before being announced. The Court may elect to issue an additional decision(s) or make a supplementary ruling on the facts and make corrections to the initial ruling. If supplemental or corrective decision is needed, the requester shall file the request and the fee within 45 days of the award. This request is to contain all necessary facts which are provided for under Rule 49 of ICSID, these are:

a) the contents of the request, specifically

[154] ICSID, Art 48 (1) and ICSID, Rule 16(1).

b) It must show the date of the request
c) For the requesting party, any un-elucidated question has to be filled in before the award is granted.
d) Additionally, it must also state the error and accompanying charge if discovered during the course of making the request, this is according to the administrative and financial regulations (2)

When a request to a party or member of the Tribunal is registered with the Secretariat, a Secretary-General notifies the relevant parties and panel and members of the Tribunal. Once it has been agreed upon, the President will set a deadline, and no longer, for all parties to provide their observations on the proposal to the Tribunal. This would set in motion further. The decision and rectification shall be in tandem with the requirements of Rule 46 – 48 of ICC. Supplanting the additional decision and rectification, one party can request an injunction of the award to be stayed.[155]

[155] ICSID, Rule 54.

The graphical representations below relates to cases enlisted under ICSID conventions and Additional facility Rules (Fig. 7) and tries to produce a categorization of the said cases as it relates to establish ICSID Jurisdiction (Fig. 8), distribution of cases by economic sector (Fig. 9), Geographic distribution and State party involvement (Fig. 10) amongst others.

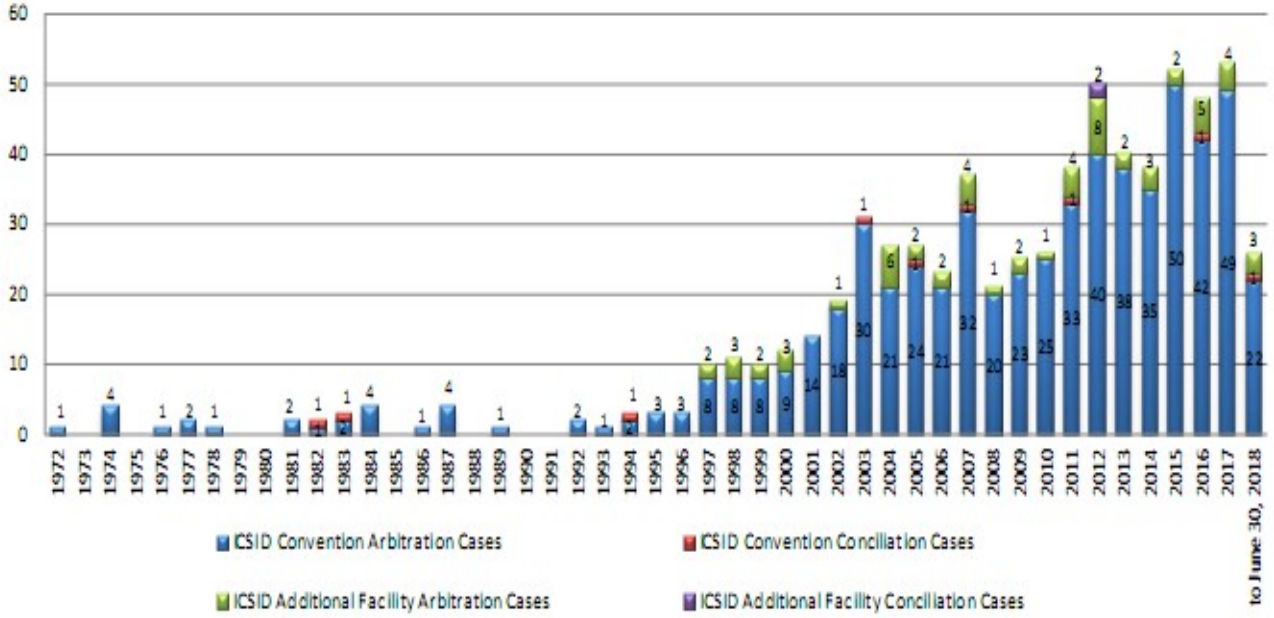
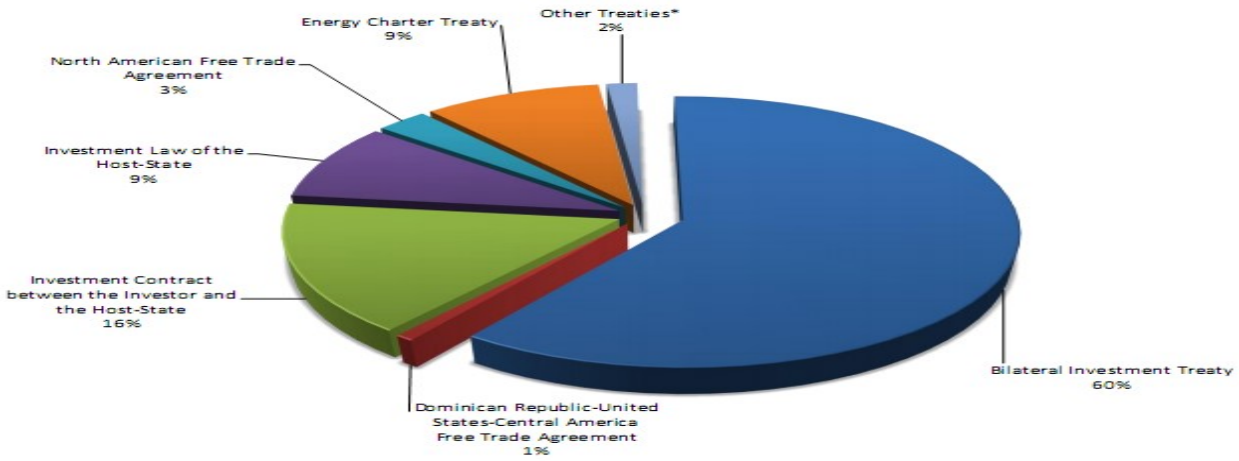


Fig 7: Cases Registered under the ICSID Convention.

Figure 7 shows cases enlisted per year with ICSID convention. Between 2011, 2012, 2015, 2016, and 2017, the number of cases increased, while the lowest numbers were registered in 1972, 1973, 1976, 1978, 1986, 1989, and 1991.



* "Other Treaties" refers to the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference; ASEAN Agreement for the Promotion and Protection of Investments; Canada-Colombia Free Trade Agreement; Canada-Peru Free Trade Agreement; Central America-Panama Free Trade Agreement; Chile-Colombia Free Trade Agreement; Colombia-Mexico Free Trade Agreement; U.S.-Panama Trade Promotion Agreement; Oman-U.S. Free Trade Agreement; U.S.-Colombia Trade Promotion Agreement; Treaty on the Eurasian Economic Union; and the Agreement on Promotion and Reciprocal Protection of Investments in the Member States of the Eurasian Economic Community.

Fig 8: Basis of Consent Invoked to Establish ICSID Jurisdiction in Cases Registered under the ICSID Convention and Additional Facility Rules[156].

[156] ICSID. February 2018. Caseload.

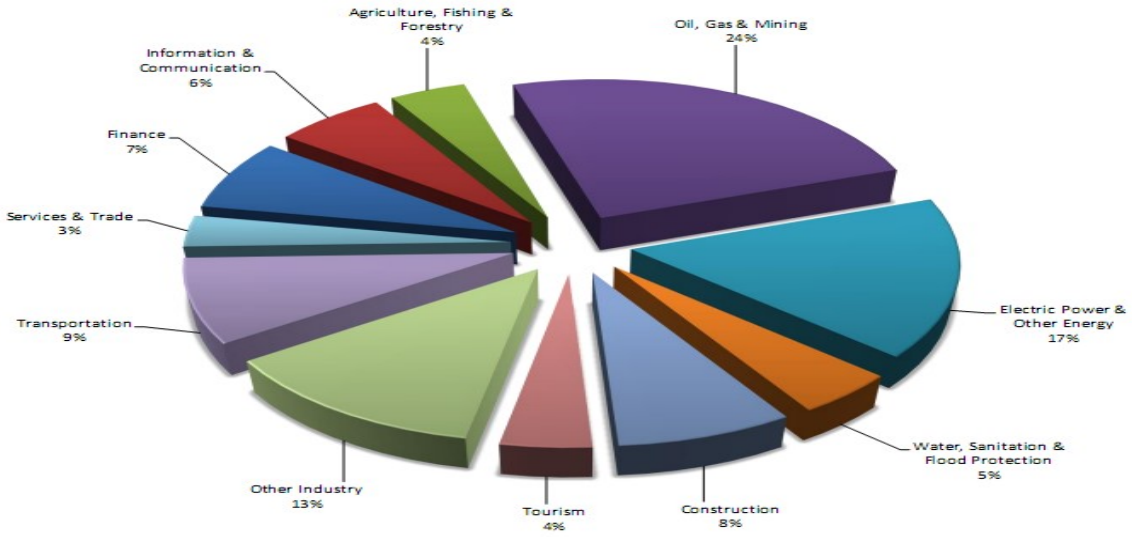


Fig 9: Distribution of All Cases Registered under the ICSID Convention and Addition Facility Rules, by Economic Sector.[157]

[157] ICSID. Feb. 2010.Sector classification world bank report. Retrieved Jan. 21, 2019,

Figure 9 shows Oil, Gas & Mining at the highest with 24%, followed by Electric power & other Energy having 17%. At the least is the Service & Trade with 3%. In matters registered under the ICSID Convention and Additional Facility Rules, basic consent is required to create ICSID jurisdiction. Oil, gas & Mining have 24%, while Electric power & other Energy has 17%. Other industry has 13%, while transportation has 9%.construction has 8%, while information and communication has 6%. At lowest is service and Trade which stands at 3%.

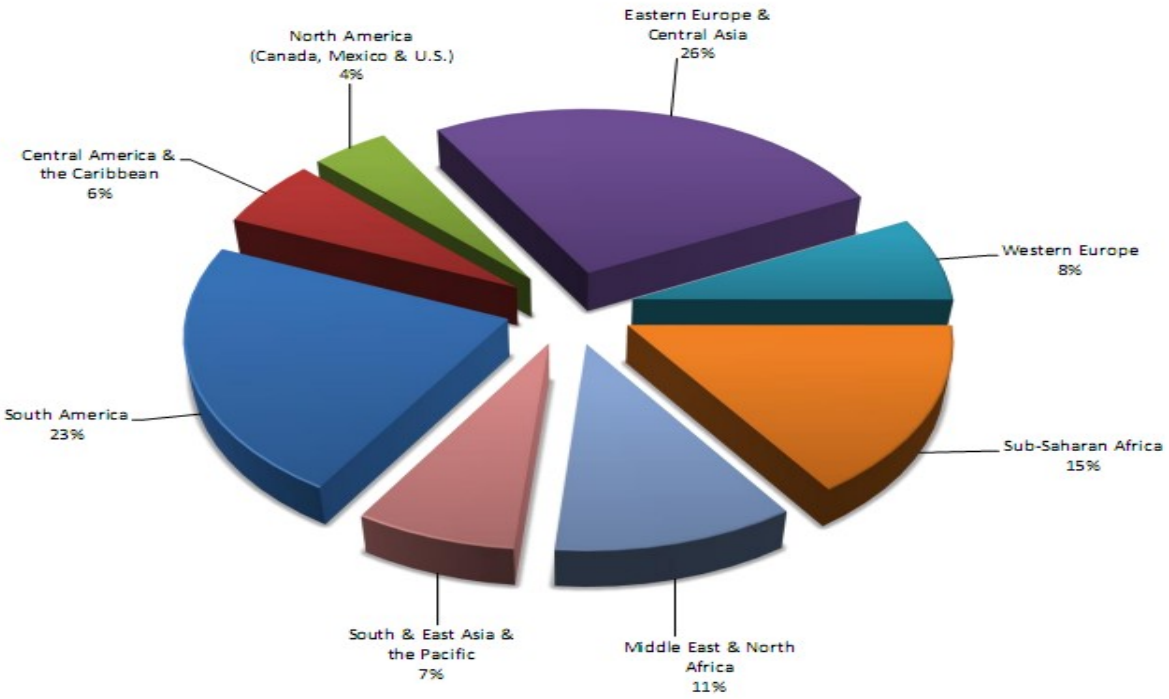


Fig 10: Geographic Cases Registered under the ICSID Convention[158]

[158] Geographic Cases Registered under the ICSID Convention.

Figure 10 shows Eastern Europe & Central Asia having the highest percentage being 26%, followed by South Africa with 23%, and Sub-Saharan Africa with 15%. At the very least is North America (Canada, Mexico & US) with a total of 4%. Geographic distribution of all cases registered under the ICSID convention, an additional facility rules by state parties involved. Eastern Europe and Central Asia have highest percentage of 26%, followed by South America having 23%. At the least is North America (Canada, Mexico & US) with 4%.

4.6. The Energy Charter Treaty

In December 1994, the Energy Charter Treaty was created and in April 1998 it came into force. There are 53 Signatories and Contracting Parties to this Treaty which includes the United States of America.[159]The ECT is a legally binding international charter which deals with all commercial spheres of energy sector.[160] The need to bring the Soviet Union's and Eastern Europe's energy sectors together led to the enactment of this treaty. One of its objectives is to create openness in international energy markets and eradicate discrimination of any manner in the energy sector. Breaking the provision of the ECT attracts grave penalty which even get up to hundreds of millions of dollars. Disputes arising from violation of the ECT are settled using arbitration; following the provisions of the treaty, the Yukos case which was a ten year old case was settled.[161]

4.6.1 The Economic Community of West African States (ECOWAS) Energy Protocol (EEP)

Inspired by the Energy Charter Treaty (ECT) some African regional organizations possess sector-specific regional agreements for the energy sector. These include the Economic Community of West African States (ECOWAS) Energy Protocol (EEP) A/P4/1/03 signed by members of ECOWAS in 2003 (the "Energy Protocol"). The Energy Protocol forms part of a suite of measures approved by the region to attract power sector investment.[162] It aims at providing a regional legal framework for energy sector development in the West African sub-region. The ECOWAS parties explained that they utilized so much of the ECT verbatim, since it "represent[s] the leading internationally accepted basis for the promotion, cooperation, integration and development of energy investment projects and energy trade among sovereign nations.[163]

4.6.2 The ECT and the EEP

[159] ibid.
[160] ibid.
[161] Yukos Universal Limited (Isle of Man) v The Russian Federation accessed 13 September 2018.
[162] Protecting Energy Sector Investors in West Africa accessed 11 March 2021
[163] J. Chalker; "Article 17 (1) of the ECOWAS Energy Protocol" OGEL 3 (2008), accessed 11 March 2021

The EPP can be regarded as a "carbon copy" of the ECT. Not only are the objectives substantially similar, most of the provisions of the EEP are statutory adoption of equivalent provisions of the ECT.[164] Both are multilateral legal agreements; the ECT governing the international energy markets in the world whilst the EEP binding only members of the ECOWAS sub-region. The ECT and the EEP also seek to build an investment environment that is transparent, consistent, and non-discriminatory.[165] Coupled with these rules for permanent energy resources and adherence to the established international principle of public availability, the book is a clear validation of a broader concept - the recognition of non-dispersive and publicly available private property in the exploration, development, acquisition, and supply of energy resources. The two instruments recognize the crucial need for environmental sustainability in energy and both instruments provide comprehensive systems for the settlement of disputes.[166]

Since the establishment of ECT, about 114 investment arbitration cases were invoked. Due to the confidentiality of arbitration it may be higher than the figure.

[164] Nigerian Energy Resources Law and Practice, Oil and Gas Law (Practice, Cases, and Theories), Yemi Oke, 2019 p.592.
[165] ibid
[166] ibid

The diagram (Fig. 11) below represents the number of investment disputes registered under the Energy Charter Treaty

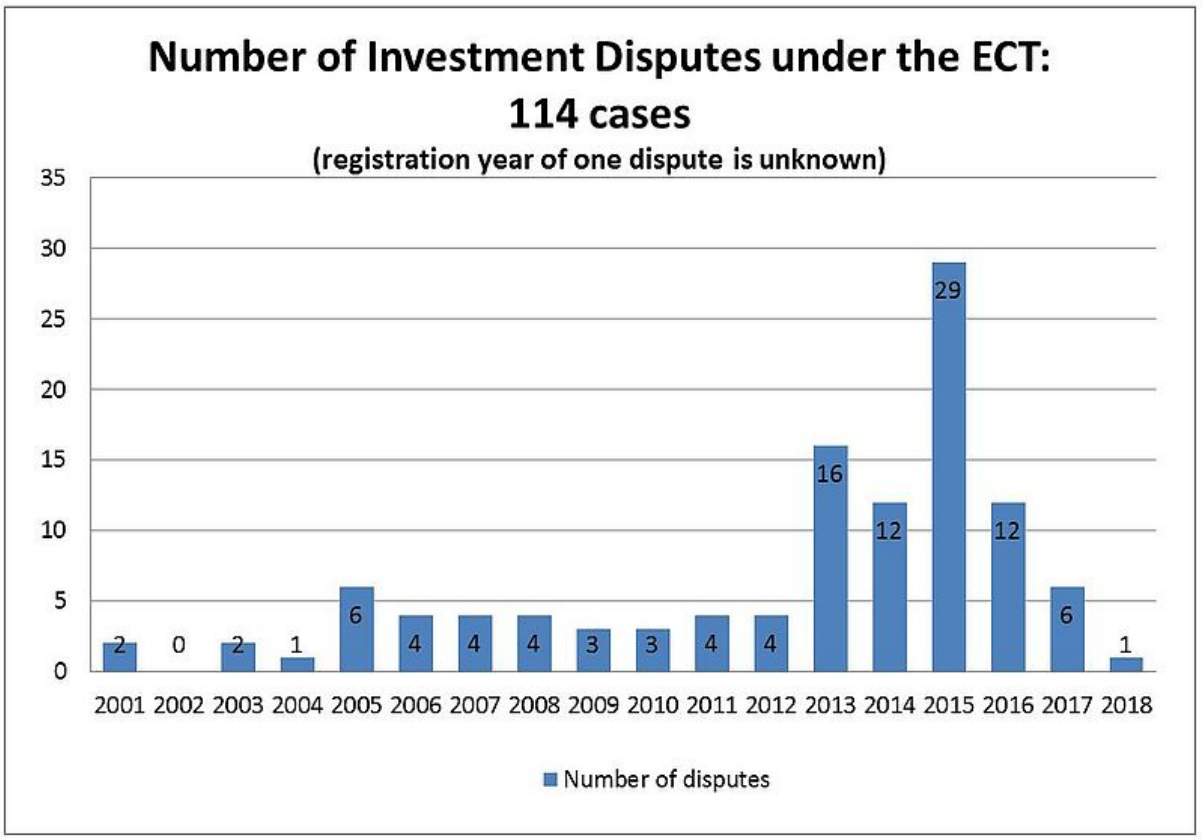


Fig 11: Number of Investment Disputes under the ECT[167].

[167] International Energy Charter. op. cit. p.63

Figure 11 shows the number of the investment dispute under Energy Charter Treaty is about 114 cases between 2001 and 2018. The lowest case occurred between 2004 and 2018 while 0 case was recorded 2002. However there is upward movement between 2013, 2014 and the highest peak of 29 cases in 2015.

Figure 12. is a graphical representation of Intra-EU and Disputes with Third Countries.

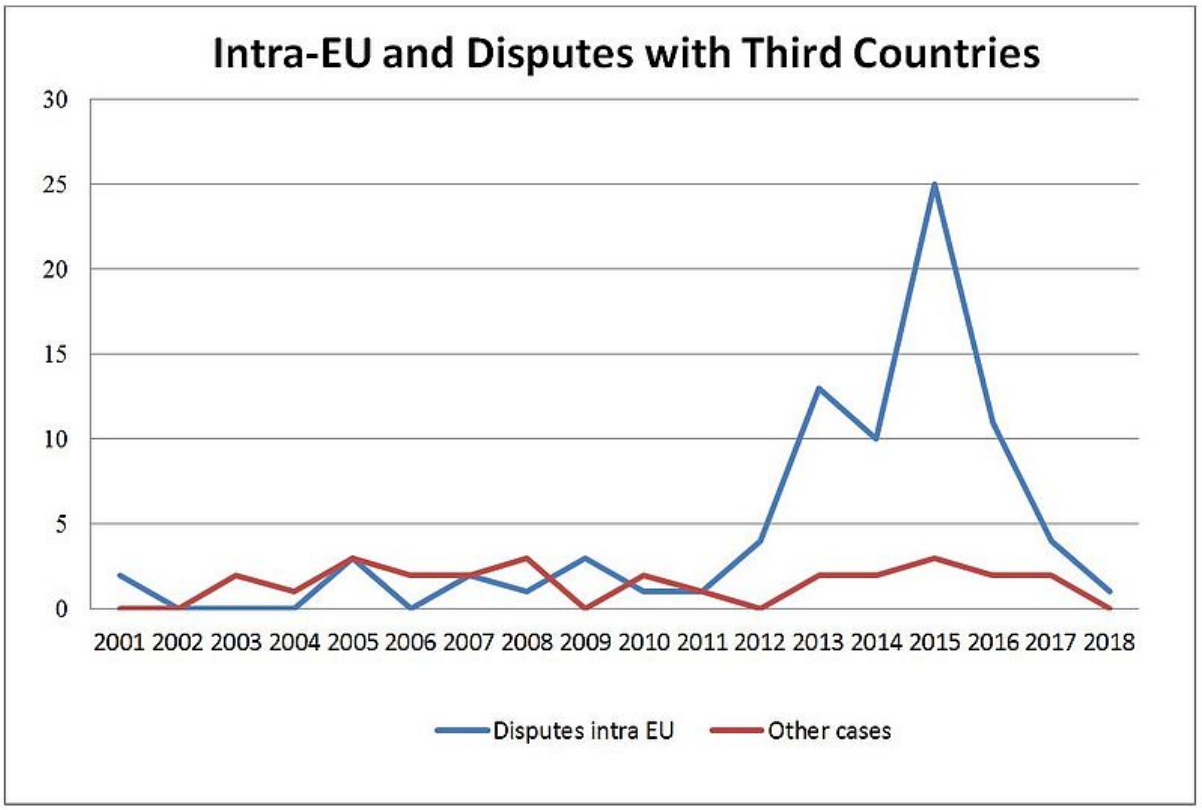


Fig 12: Intra-EU and Disputes with Third Countries[168].

[168] ibid.

Figure 12: The blue line is showing the dispute intra within EU while the red line shows other cases the intra-EU is at lowest level in 2002 with less than 4 cases and its at the highest level in 2015 with 25 cases while other cases swing marginally from 2001 and highest peak in 2015. It should stated that other fell to 0 level in 2018.

The graph below (Fig. 13) is a representation of the Respondents states of the 114 cases that were registered under the Energy Charter Treaty.

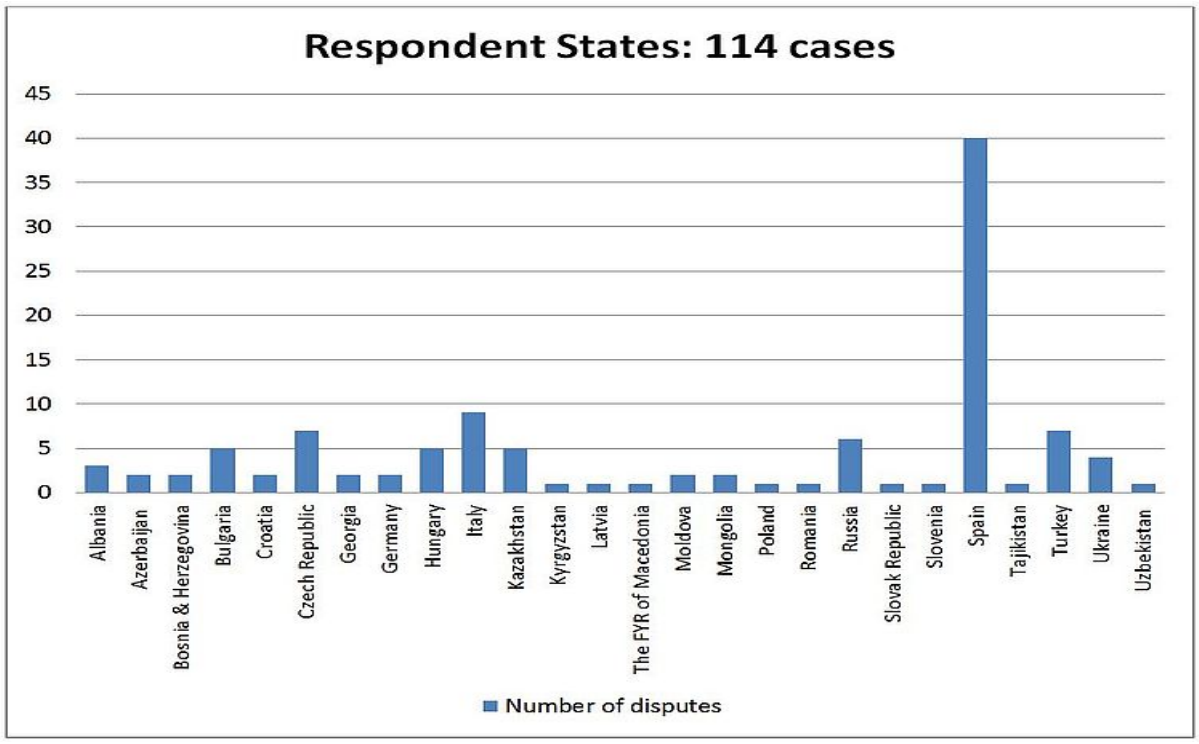


Fig 13: Respondent States[169].

[169] ibid.

Figure 13 shows that Kyrgyzstan, Latvia, The FYR of Macedonia, Poland, Romania, Slovak Republic, Slovenia, Tajikstan and Uzbekistan has lowest case rate, while Bulgaria, Czech Republic, Hungary, Italy, Kazakhstan, Russia, Turkey have 5 and above cases, the highest among the countries is Spain with 40 cases.

Fig 14. Depicts the different procedural rules that were applied in the 114 cases registered under the Energy Charter Treaty.

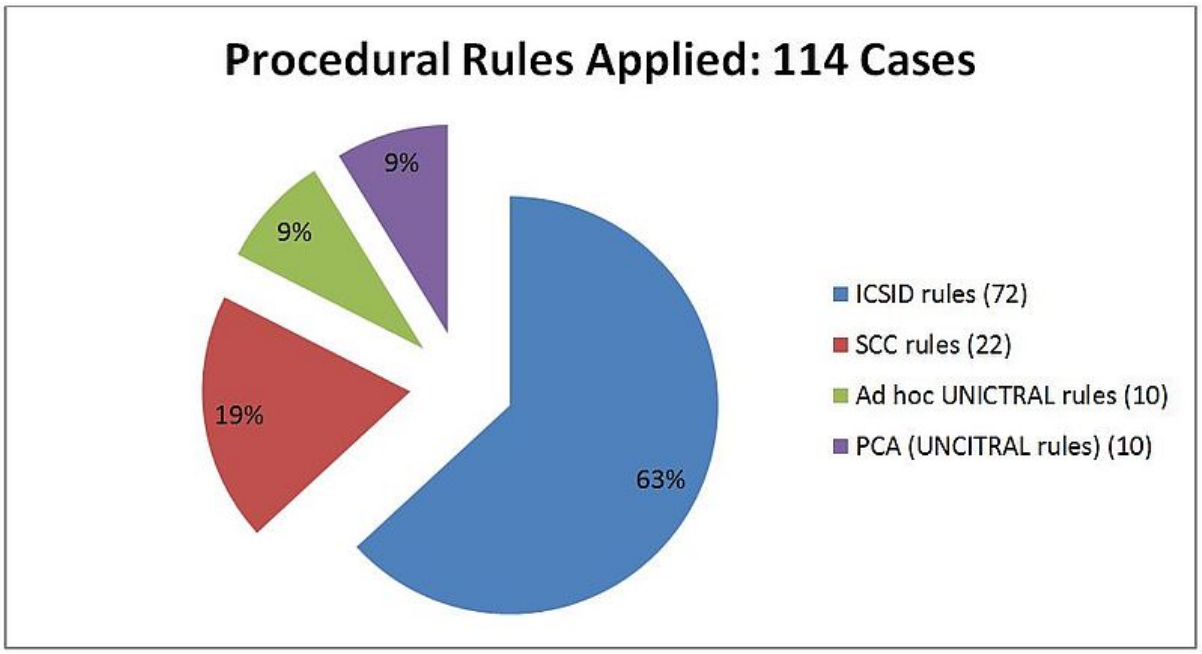


Fig. 14: Procedural Rules Applied[170].

[170] ibid.

Figure 14 shows that among the cases, 72 brought before **ICSID**, 22 before the **Stockholm Chamber of Commerce** (SCC), 10 before ad hoc arbitration tribunals under the Arbitration Rules of **UNCITRAL** tribunals and 10 before the **Permanent Court of Arbitration (PCA)** (applying UNCITRAL rules).

The Status of the investment disputes of the 144 cases registered under the Energy Charter Treaty is depicted bow in Fig. 15

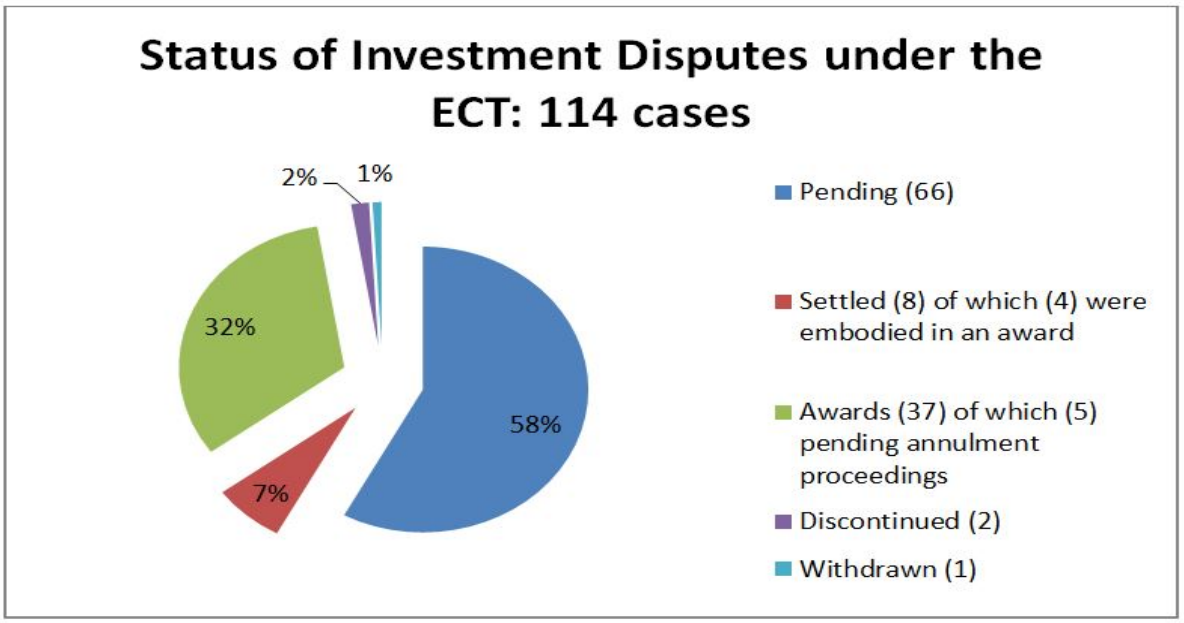


Fig 15: Status of Investment Disputes under the ECT[171].

[171] ibid.

Figure 15 shows that of the cases 66 are pending, 37 have been concluded by arbitral awards, 2 were discontinued, 1 was withdrawn and 8 more cases have been settled by the parties (including 4 consent awards, that is, arbitral awards given by an arbitral tribunal to record a settlement agreement between parties).

The outcome of the final award, including settlement agreements embodied in an award is depicted below in Fig. 16.

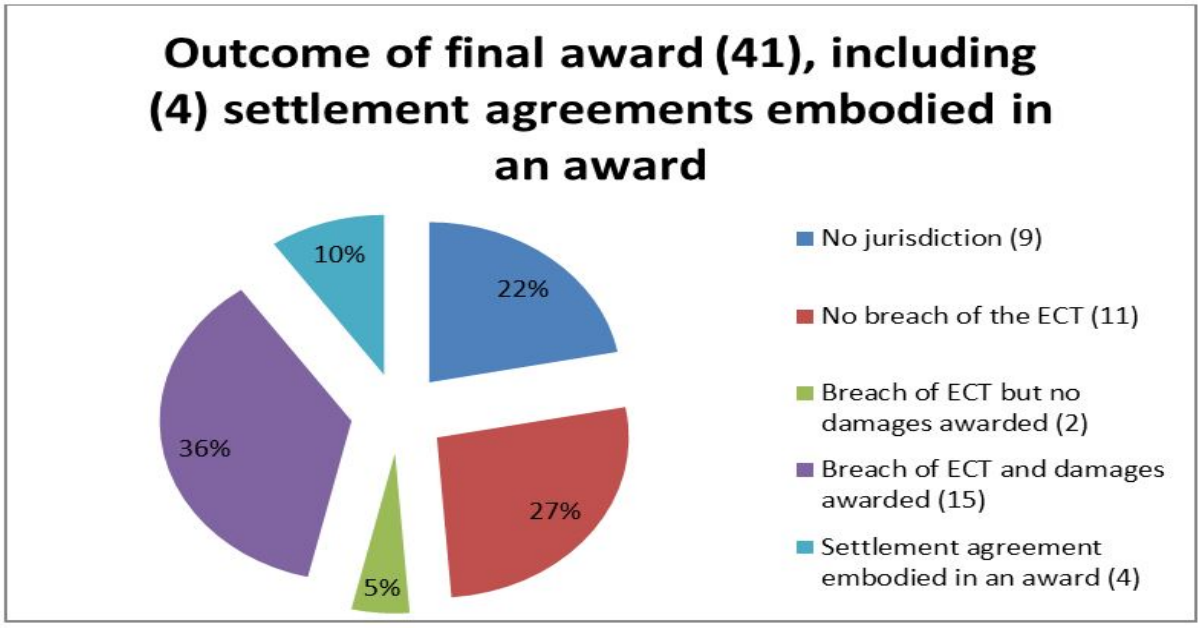


Fig 16: Outcome of final award, including settlement agreements embodied in an award[172].

[172] ibid.

Figure 16 shows that in 9 cases the tribunal has denied jurisdiction, in 11 cases no breach of the ECT obligations was found, and in 2 cases the arbitral tribunal found a breach of the ECT obligations but no damages were awarded. In 15 cases the tribunal awarded damages to the investors (though some of the awards have been set aside pending appeal). Finally, in 4 additional cases decision in an award.

Fig. 17, Represents the number of Arbitrators per Nationality

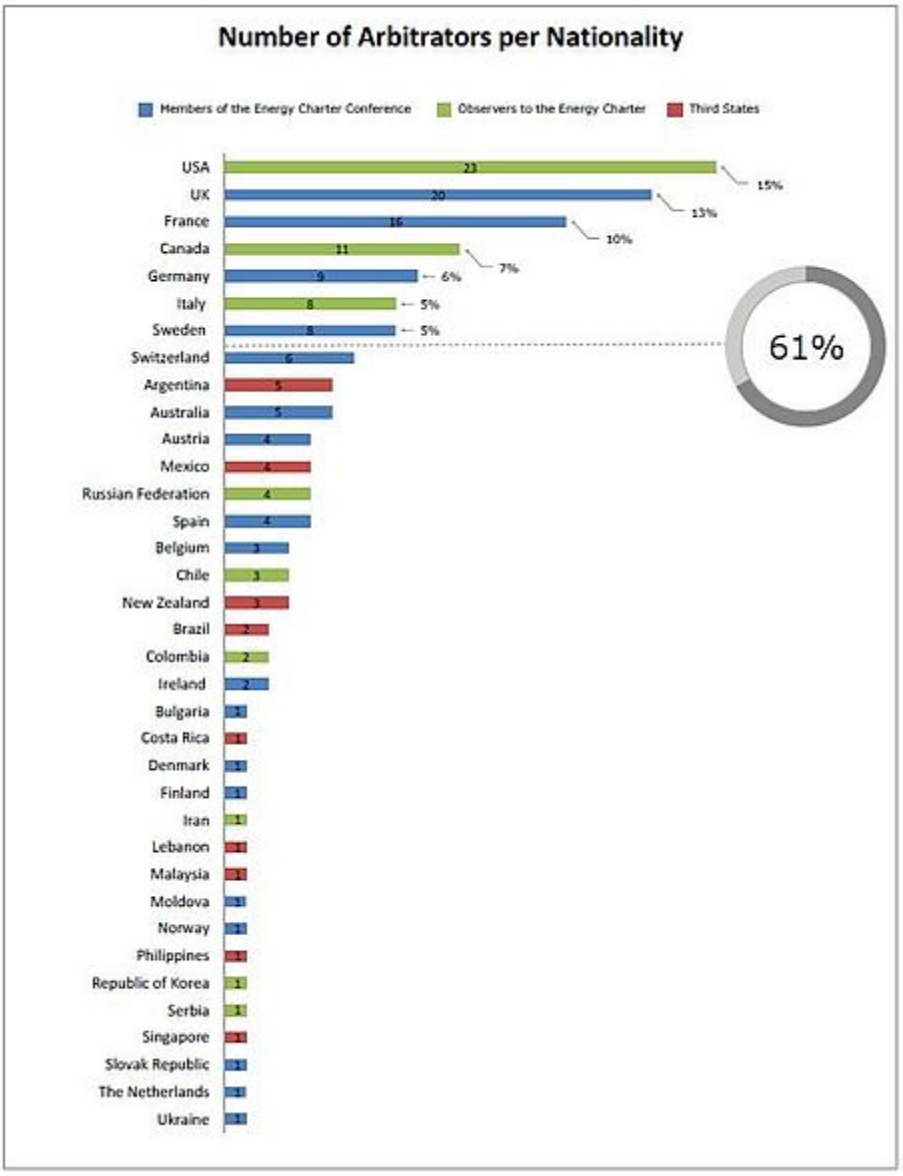


Fig 17: Number of Arbitrators per Nationality[173].

Of 114 cases, 61% is decided by the arbitrators from the USA (15%), UK (13%), France (10%), Canada (7%), Germany (6%), Italy (5%) and Sweden (5%).

[173] ibid.

Fig. 18 gives a representation of the Arbitrator's gender distribution.

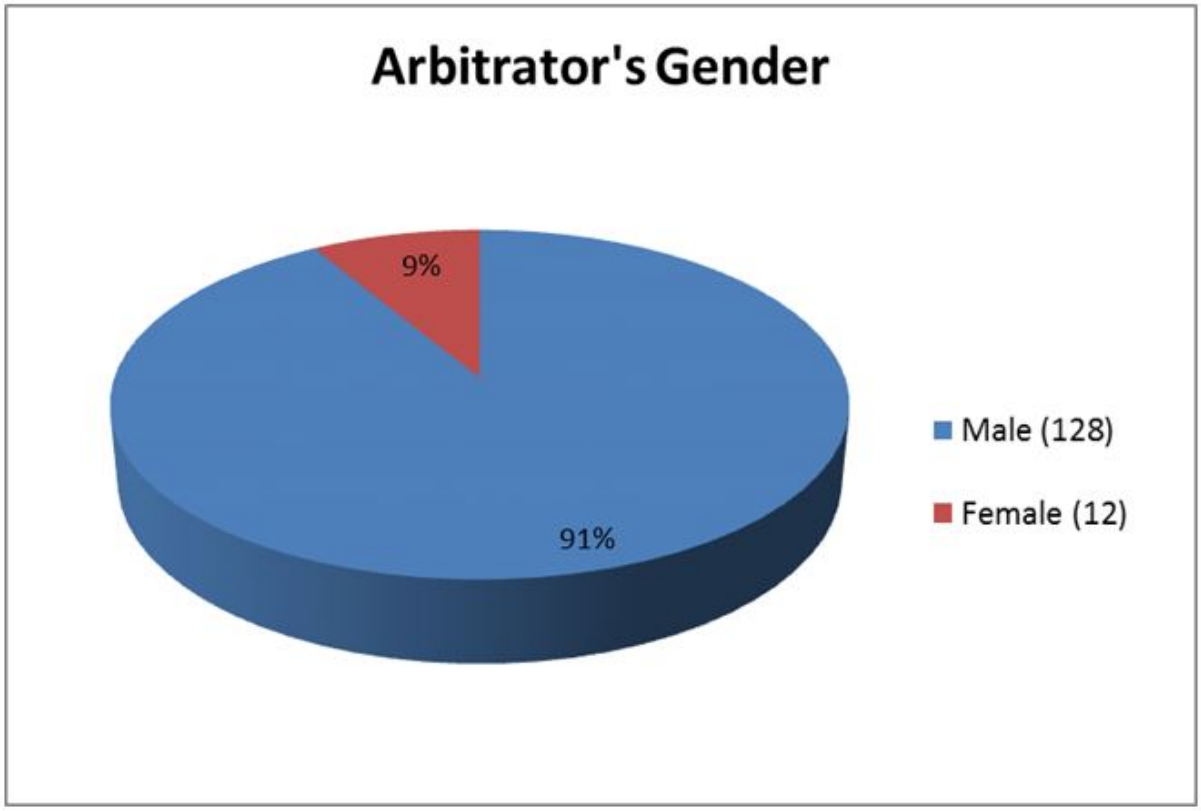


Fig 18: Arbitrator's Gender[174].

[174] ibid.

Figure 18 shows that are only twelve female arbitrators involved in the resolution of ECT cases, one of them ranks the top of arbitrators by number of appointments. However, this does not depict the efforts made by the international arbitration community in the drive to achieve gender equality in arbitration. Different international institutions have subscribed to Arbitration (ERA). As at the 5th day of March 2021 the ERA pledge has attracted a total of 4,584 signatories.

Since 2013 the Energy Charter Secretariat has stayed active in encouraging the use of good offices and mediation for taking care of investment disputes under the ECT. In 2016, ECC sanctioned a Guide on Investment Mediation (prepared in cooperation with the International Mediation Institute, SCC, PCA, ICSID, ICC and UNCITRAL) and the parties to the contract were encouraged to use mediation more voluntarily, as an option at any stage in the dispute. This is to enable cordial outcome, considering the *good office* of the Energy Charter Secretariat. At the Conference, the willingness of the parties to the contract to facilitate enforcement in their individual sections in the settlement agreement with foreign investors which would accord with the relevant domestic procedures and applicable laws. In the same year of 2016, the Secretariat established a Conflict Resolution Center to provide assistance and support in connection with good offices and mediation in relation to investment disputes or differences between the parties to the contract, relating to the understanding or the use of the Treaty.

The top 29 Arbitrators appointed by number of appointments is graphically represented in Fig. 19

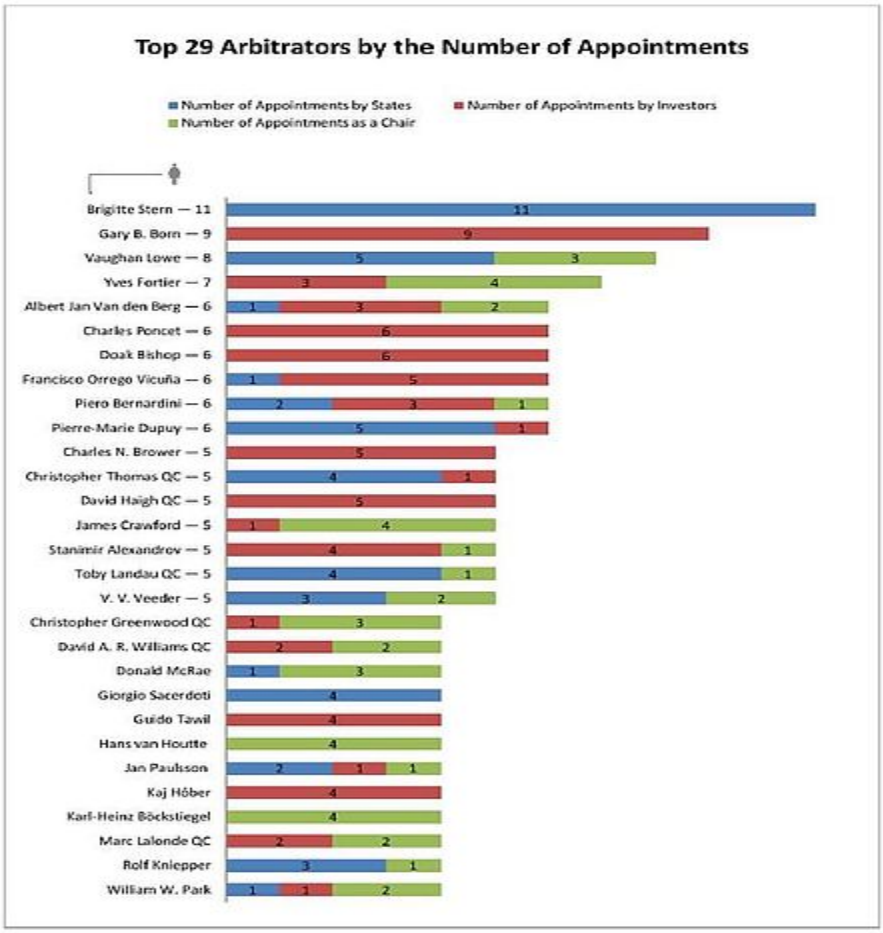


Fig. 19: Top Arbitrators by the number of appointment[175].

[175] ibid.

Figure 19 shows that the key indicators shows that blue is the number of appointment by state, red reveals the number of appointment by investors while green shows the number of appointment as a chair Brigitte Stern has the largest number of appointment by state, having been appointed 11 times Gary Born has 9 appointments by investors while Vaugan Lowe has 8 appointment with combination of 5 from state and 3 appointment as a chair. This combinations is interwoven and interrelated.

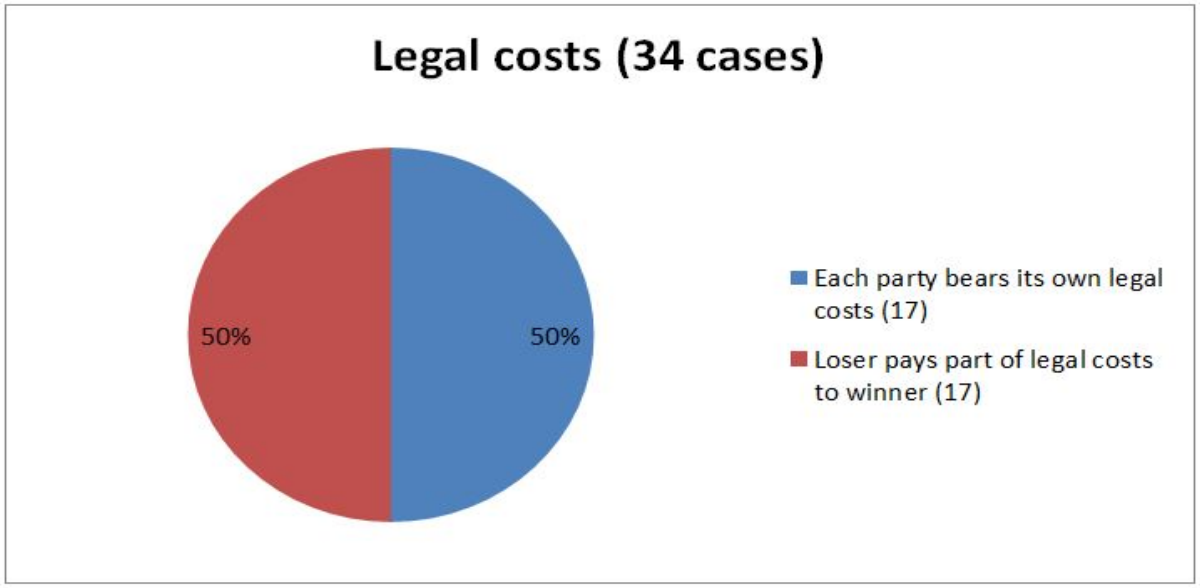


Fig 20: Legal costs[176].

[176] ibid.

Fig. 20 explains the legal costs to be borne as directed by the Arbitral Tribunal. That it is shown in colours of blue and red, that is each party bear its own legal cost at average rate of 17 while user pays part of legal cost to winner at the same average rate of 17.

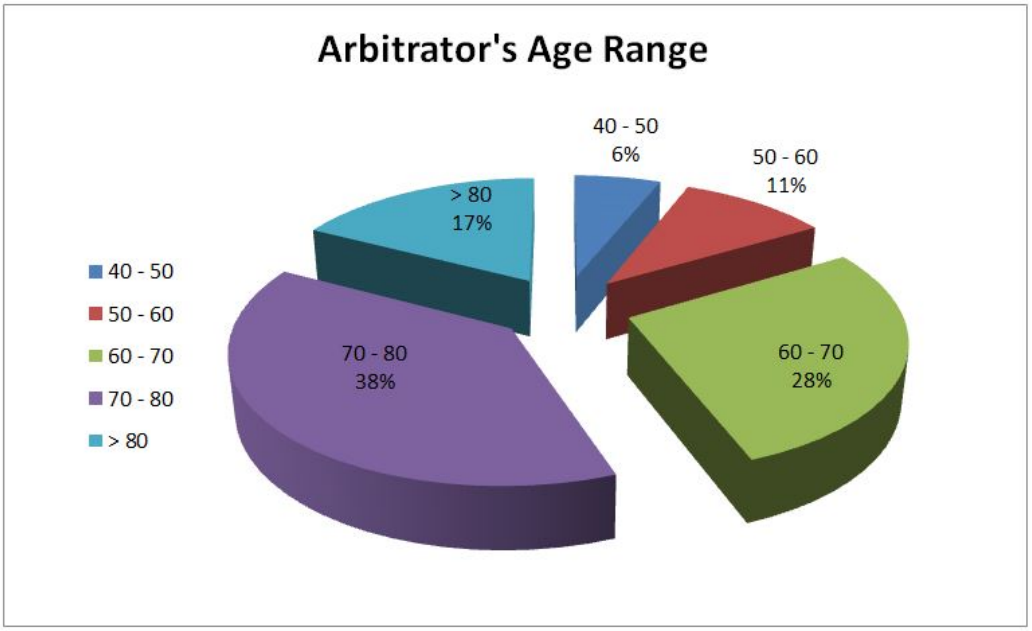


Fig 21: Arbitrator's Age Range[177].

[177] ibid.

Fig. 21 shows the age range of the arbitrators selected. Arbitrator's age rending between 40 years to less 80 years. 80 years constitute 17%, followed by 70-80 years which is 38%, 60-70years 28%, 50-60 years 11% lastly 40-50 years 6%. The statistical figure shows that majority of the arbitrator are between 60-80 years which constitute 66% of arbitrator's age range. The lowest range is between 50-60 years which constitute 17% of the total arbitrator's age range.

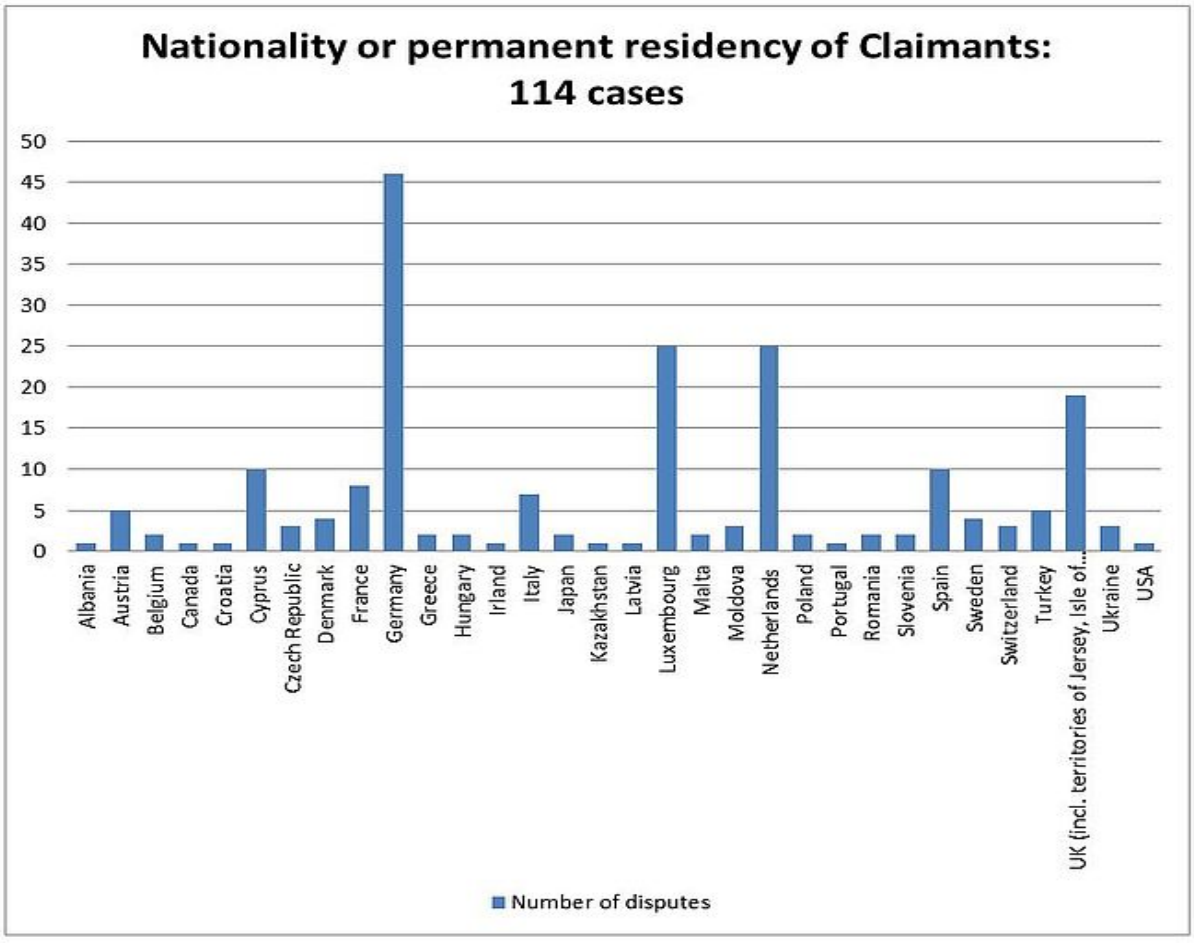


Fig 22: Nationality or permanent residency of Claimants[178].

[178] ibid.

The Nationality or permanent residency of Claimant in the 114 cases registered under the ECT was represented in Fig. 22. Out of 114 cases, Germany has above 45 Claimants in number of disputes followed by Luxembourg and Netherlands with 25 claimants in number of disputes. United Kingdom has 18 Claimants, while Albania, Belgium, Canada, Croatia, Greece, Ireland, Japan, Latvia, Malta, Poland, Portugal and USA has less than 5 claimants in the number of disputes. Spain, Cyprus have an average of 10 claimants in the number of disputes. Due to the fact that the discussion is centered on the Energy Charter Treaty makes Nigeria not to be available in the statistics.

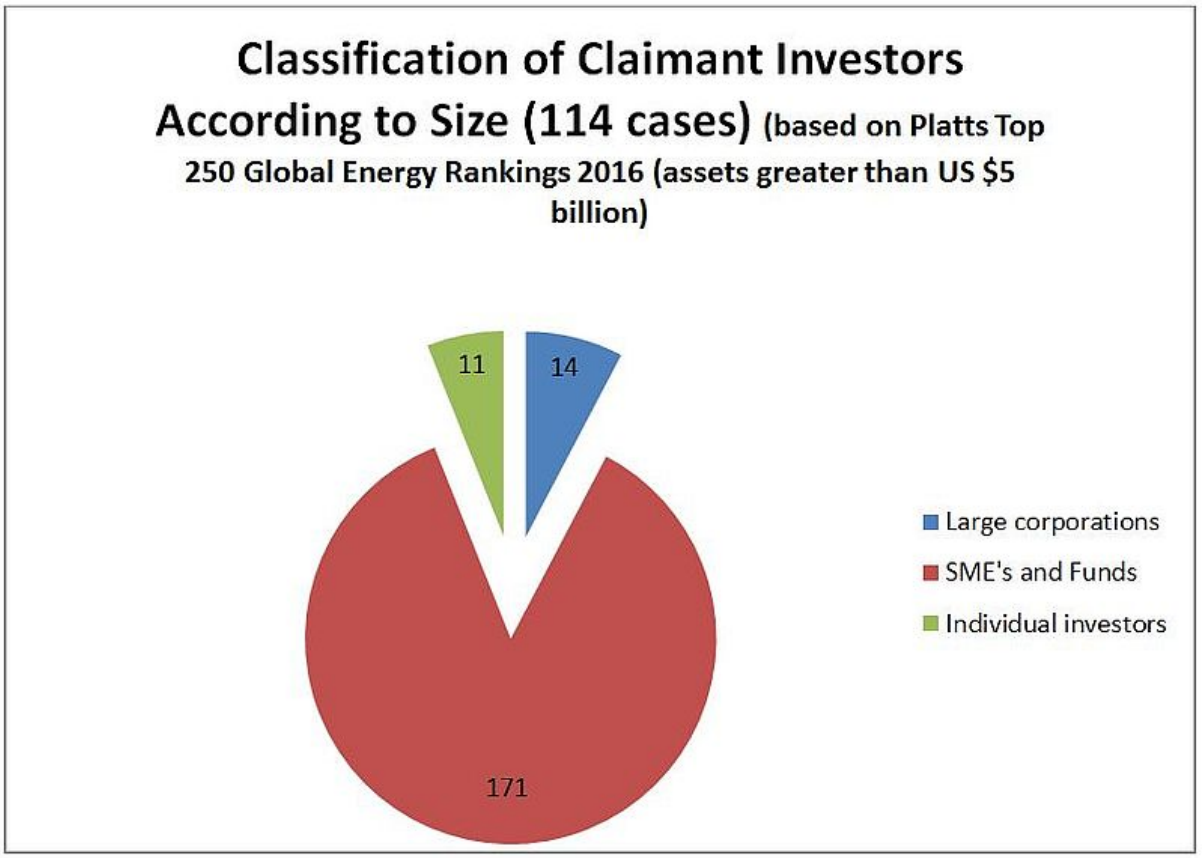


Fig 23: Classification of Claimant Investors according to Size[179].

[179] ibid.

Figure 23 depicts the Classification of Claimant Investors According to Size in respect of the 114 cases. Investors are classified with 3 different colours: red, blue and green. The investors with SME and Funds have the largest of 171, while large corporations represented with blue colours have 14, and individual investors with green colour have 11. This shows that the claimant investors are more in SME and Funds than large corporations and individual investors.

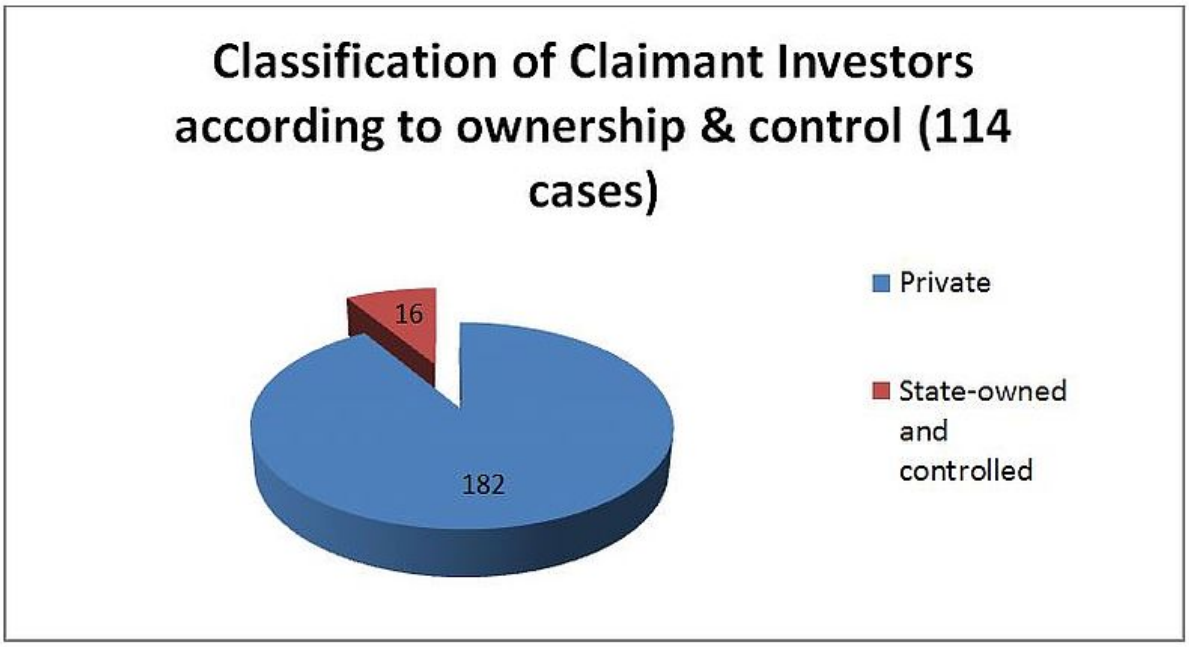


Fig 24: Classification of Claimant Investors according to Ownership and Control[180].

[180] ibid.

Figure 24 indicates the Classification of Claimant Investors according to ownership & control in the 114 cases registered under ECT. The classification of claimant investors as per ownership and control is divided into 2. That is, blue colour and red colour. The blue colour is private oriented and has the largest of 182, while state owned has 16. The variance is more of the claimants are from private investors as against the publicly controlled investors.

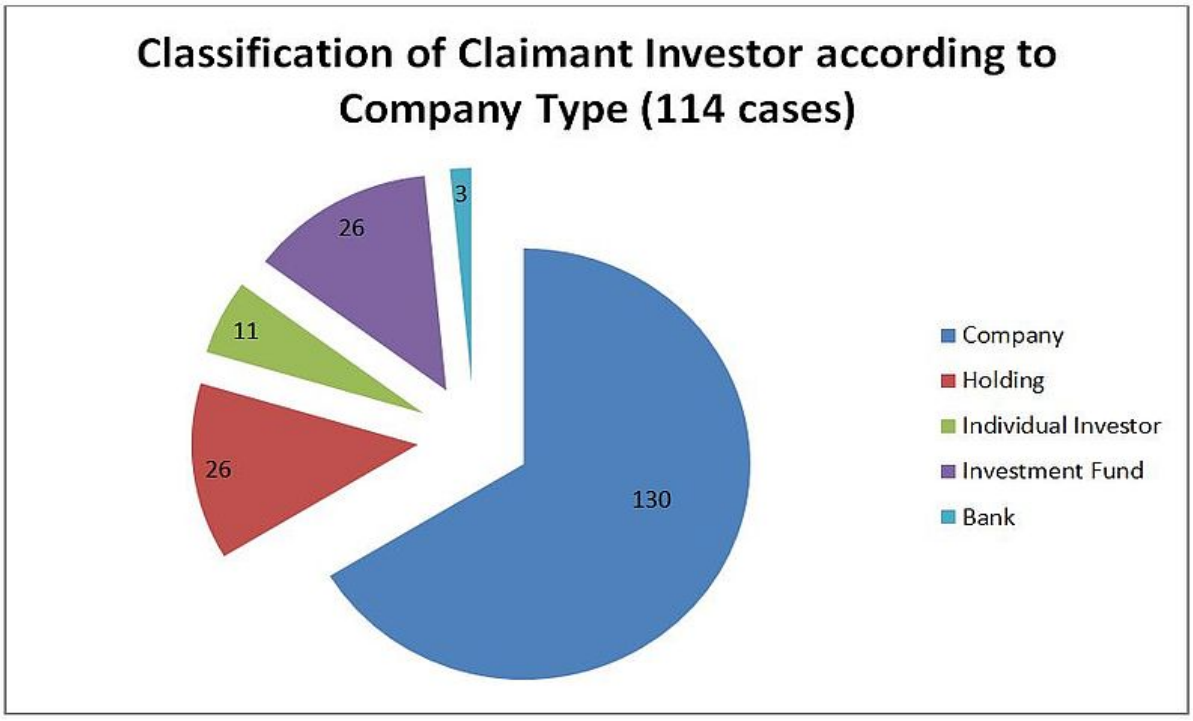


Fig 25: Classification of Claimant Investor according to Company Type[181].

[181] ibid.

Figure 25 depicts the Classification of Claimant Investor according to Company Type of the 114 cases registered under the ECT. This is represented with colours blue, red, green, purple and sky blue. The blue colour has the highest figure of 130 and is company oriented, followed by holding with red colour having 26, green which is individual investor with 11, purple which is investment fund with 26, and sky blue which is bank with 3.

Fig. 26.highlights the cases in tabular form indication the value of the Claim and Award.

	Claim	Award	Ratio
Nykomb v. Latvia (16 Dec 2003)	7.097.680 Lats + specific performance	1,600,000 Lats + Specific performance	**23%**
Petrobart v. Kyrgyzstan (29 March 2005)	4.084.652 USD	1.130.859 USD	**27,7%**
EDF International S.A. v. Hungary (4 Dec 2014)	Estimated US 100 million	Eur. 107 million	**(estim.) 100%**
Kardassopoulos v. Georgia (3 March 2010)	350 million USD	30.2 million USD	**8,63%**
Energoalliance v. Moldova (08 July 2010)	MDL 243,577,971.11+interest	195.547.212 MLD+interest	**80%**
Khan Resources v. Mongolia (10 Jan 2011)	326 million USD	80 million USD	**24,5%**
Remington v. Ukraine (28 April 2011)	36 million USD	4,5 million USD	**12,5%**
Ascom v. Kazakhstan (19 December 2013)	2,6 billion USD	497.685.101 USD	**20%**
3 Yukos Cases (18 July 2014)	114,174 billion USD	50,02 billion USD	**43,8%**
Eiser v. Spain (4 May 2017)	298 million Euro	128 million Euro	**43%**
Aktau Petrol Ticaret A.S. v. Kazakhstan (13 November 2017)	80 million USD	22.7 million USD	**28,4%**
Novenergia v. Spain (15 February 2018)	61.3 million EUR	53.3 million EUR	**86,9%**
Masdar Solar & Wind Cooperatief U.A. v. Spain (16 May 2018)	260 million EUR	64,5 million EUR	**24,8%**

Fig. 26: Award Cases[182].

[182] ibid.

Figure 26 indicates the value of the Claim and Award. The highest award with estimated claim of 100 million USD is between EDF International S.A v Hungary (100%), followed by the award of 53.3 million EUR which constitute 86.9% in Novenergia v Spain. The lowest award is 30.2 million USD which is 8.63% in Kardassopoulos v Georgia.

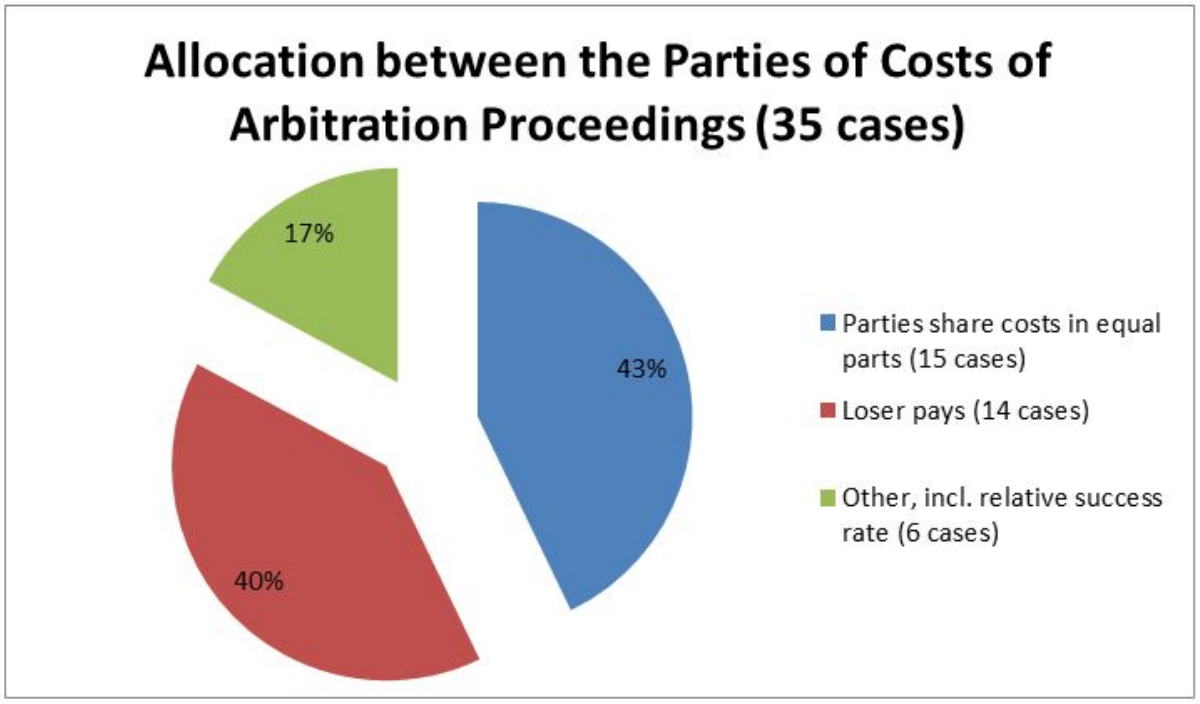


Fig. 27: Allocation of Costs Proceedings[183].

[183] ibid.

The division of costs of arbitration proceedings between the parties is depicted in Figure 27. Parties, at times, share cost equally or make losers to pay the cost. The red colour shows that losers bear 40% among 14 cases, while the blue colour shows that the parties share cost in equal parts in 15 cases. 17% in green colour shows relative success among 6 cases.

4.7 Decided Cases in Energy Arbitration

There are plethora of energy disputes that have been settled by using arbitration and talking about energy arbitration would be difficult without reference to these decided energy arbitration cases.

4.7.1. Yukos Universal Limited (Isle Mann) v. The Russian Federation[184]

The Russian government launched a lot of tax evasion criminal actions against Yukos and this caused the company to go bankrupt. In 2005, owners of Yukos filed an action at the Permanent court of arbitration in Hague, applying the ECT against the Russian government. The court of arbitration granted damages worth $50 billion as against the $100 billion compensation sought. The court gave Russian Federation ten years to pay the damages awarded or else interest accrued would become payable.

4.7.2 Global Holdings NextEra Energy B.V. and NextEra Spain Holdings B.V. v. Kingdom of Spain.[185]

This arbitration proceeding was pursuant to an international investment agreement conducted under the auspices of the ICSID convention – Arbitration Rules and the Energy Charter Treaty (ECT). The outcome of the proceedings was in favour of the Claimant in the sum of US$327,145,274 being awarded as damages. Other remedies included that the Respondent shall pay to the Claimants pre-judgment and post-judgment interest on the amount awarded at the rate of 0.234% compounded monthly. Also, it shall pay the Claimant their costs of the arbitration proceedings as well as one third of their legal expenses.

4.7.3 Process and Industrial Development Ltd v. The Federal Republic of Nigeria.[186]

[184] Yukos, op. cit. p.63
[185] ibid.
[186] ibid.

P&ID and the FRN dated 11 January 2010, were responsible for an arbitrage process resulting from a Gas Supply and Processing Agreement (GSPA).The Arbitral Tribunal delivered its final Award on the 31st day of January 2017 ruling in favour of P&ID and ordered Nigeria to pay US$6,597,000.00 being net present value of the profits. The Federal Government was also ordered to pay interest on the amount at 7% per annum from March 2013.

4.8 Distinction between Recognition and Enforcement

For arbitration to be successful process it starts with an agreement stating that parties will arbitrate and also obey the decision of the arbitrator with regards to issues submitted for settlement; When one party does not conform to the award, the non-observer may pursue the non-aider to obtain legal action against the party. Enforcement of award be it foreign or domestic is very essential to the arbitration process as it shows true determination of the issues in dispute. Therefore various national laws and treaties have existed to ensure enforcement of awards. However these laws even though made to encourage enforcement, have been seen to be discouraging enforcement as a result of some provisions made by them which will be looked into in this section.

The acknowledgement and implementation of an award may not be necessary, where the parties to the disagreement submit willingly to and bow to the terms in the award granted. However, in many cases, the party which is unsuccessful or who is at a disadvantage in the award, would refuse to abide by the requirements of the award, hence the successful party would seek the intervention of the court for enforcement. For an award to be applied by the court, it must first be recognized by the court and in many instances the unsuccessful party challenges the recognition of the award.

The term recognition is defined by Black's Law Dictionary *as "ratification, confirmation, or an acknowledgment that something done in one's name had one's authority".*[187]

Basically, recognition is when the court declares that an award is acceptable and valid and therefore enforceable.

Enforcement means,

"The act of bringing something into action, such as a law; the implementation of a law; the execution of a directive or order."[188]

The terms recognition and enforcement have been used interchangeably by people. However, they are very distinct terms. Recognition of awards usually arises when the unsuccessful part starts an action on the same issue as if an arbitration has not been conducted and a valid award already obtained. The successful party will then apply to court for the declaration of the award as final, valid and binding on all concerned by the arbitration.[189]

To bring an application for recognition, the applicant brings an application, attaches the award to it and accompanies it by an affidavit to support the application. In the event that the award covers all the issues in disputes and provides solution to them but the unsuccessful party still brings the issues to court for determination, the court would end the new proceeding and follow the rule of res judicata. If on the other hand some issues were solved while some were left unattended to at arbitration, the court would not decide on the already decided issues following the 'issue estoppel' principle. Recognition does not compel enforcement it only gives legal force to an award. However, regarding enforcement, the court sees to it that the award is obeyed. It does not only gives

[187] Black, H.C. 1991. *Black's law dictionary.* 6th ed. United State: West Group.
[188] ibid.
[189] Nwakoby, G.C. 2014. *The law and practice of commercial arbitration in Nigeria.* 2nd ed. Nigeria: Snap Press Nigeria Limited.

legal backing to the award it makes sure the terms of the award are fulfilled by the parties. However enforcement is impossible without recognition.

4.9 Sovereign Immunity and Enforcement of Arbitral Awards

Sovereign immunity has fast become a defence raised by the states and states entities to prevent the enforcement of awards which are obtained from an arbitration between the states and individuals. They simply challenge the arbitral tribunal's jurisdiction by stating that their sovereignty has been violated. This has become an issue and has made enforcement of awards against the state and its entities very difficult.

4.9.1 Enforcing International Arbitration Award against a State

The promotion of international trade has increased state party involvement in arbitration. In recent times there are states and states' entities involving in international trade contracts and these contracts have referral to arbitration should any dispute occur. One of the most important considerations for individuals who may be co-parties to states or their entities in arbitration is the location where such awards are sought to be recognized and enforced, because foreign states are immune from claims, which makes enforcing the award against the state party more difficult. While some states easily succumb to the application of arbitral awards, some do not and hence use sovereign immunity in defense.

i. Enforcement

There is debate about whether a state's obligation to succumb claims to arbitration precludes a lawsuit against them. It has been argued by arbitrators and stated in courts that submission of a matter between a state and others to arbitration constitutes waiver of the claim to sovereign immunity. While some have argued that since there is no agreement for a waiver of right in the agreement, hence such waiver should not be implied because in most instances the assets of the state is usually involved and the arbitration agreement is

believed to not be enough to allow the asset of a state to be touched. It has therefore been advised that a party who proceeds to arbitration with a state party should also ensure to have express negotiation wavering immunity as the refusal to do so may complicate enforcement procedures.

The US laws give easy provisions for enforcing international awards; provided a valid arbitration exists, that the process took place in the US or that the award is in line with a treaty to which US is one of the state parties. Although the NYC is chosen because of huge number of state parties by most parties to arbitration as the treaty to govern the award, parties are enjoined to check for bilateral or multilateral treaties that may have enforcement provisions more favourable than the provisions of the NYC. Even the NYC does not prohibit application of other treaties.[190]

ii. Execution and the Sovereign Immunities Act

The moment a court in the United States recognizes an award, such award is due for execution. However, the Foreign Sovereign Immunities Act in the US (hereinafter referred to as The Act) permits the attachment of certain properties, this is so, provided they are not in the class exempted in Sections 1610 and 1611. These provisions are examined below:

A. Section 1610(A): The "Commercial Activity" Exception

Commercial assets of a state are properties used for business purpose by a particular state. Section 1610 (a) of the Act allows attachment of properties located in the US and belong to an overseas state and which is employed for business purposes. The three conditions are as follows: the property must be owned by a foreign state, it must be located in the U.S, and lastly, they must be used for the purpose of business. What is very key is that the waiver of sovereign immunity does not override this position, and this was re-enforced in ***Connecticut Bank of Commerce v. Republic of Congo.*** [191]

[190] NYC, art VII (1). See also (1958) 9 U.S.C. § 201, 330 U.N.T.S. 38.
[191] ibid.

However distinction is made between properties owned by foreign states and used for the purpose of commercial activities, which amount to public Acts and foreign states' properties used for market participation. While the former is believed to be part of the government of the foreign state while the latter is seen as just an investment by the state and thus the protection in section 1610 (a) does not cover it.

It is important to note that the property subject must be used for commercial purposes. This was further stated in the case of ***Connecticut Bank of Commerce v. Republic of Congo.*** [192] A declaratory judgment was gotten by a creditor against Congo. The creditor sought to attach Congo's properties in the US claiming that it is being used for commercial purpose. The Fifth Circuit Court refused the attachment because the property subject was not used for commercial purposes. A similar decision was reached in ***Af-Cap Inc. v. Chevron Overseas (Congo) Limited***.[193] This provision does not cover property in the US that 'could' be used for commercial activity and not in use as a commercial subject.

Importantly, the property whether tangible or intangible must be located in the US. If it is intangible property like shares held in trust of a foreign state in a financial bank for beneficial interest, the bank must be located in the US. The shares can be sold to fulfil a judgment debt, as such intangible property is still believed to be located in the US.

Pre-judgment Attachment

S.1610 (d) (1) makes provision for prejudgment attachment and it provides that once state party has agreed to waive its immunity to pre-judgment attachment, such state party's property can be attached before judgment; however the waiver must be express and unambiguous in its construction.

[192] ibid.
[193] ibid.

B. Section 1611: Exempted Assets

Section 1611 forbids the attachment of a foreign nation's central bank or monetary authority's property, with the caveat that the property must be kept for its own account and that the state's sovereign immunity has not been waived[199]. A property owned for a foreign nation's central bank account is one that is intended to be used for central bank events rather than for the funding of a commercial operation in the United States.[200]

Courts in determining what property is held for the central bank account examine carefully the facts of each case. Even in instances where the same is shared for commercial purpose and central bank functions by that state, the court can still allow attachment once it can decipher between the two money despite being in the same account as held in the case of ***Weston Compagnie de Finance et D'Investissement***.[194] There is no waiver exemption to the provision of Section 1611.

4.10 Theoretical Analysis of the scope of Application of the New York Convention

The NYC applies to enforcing non-domestic and foreign awards; although it leaves the state parties to decide what they want to refer to as non-domestic award. It however allows every party to the convention to have a provision for reciprocity reservation and make the convention applicable to awards made in other member states to the convention.[195]

Foreign Awards vs. Non-Domestic Awards

Article I of NYC draws the difference between non-domestic and foreign awards. Foreign awards are such made in a state different from where the

[194] ibid.
[195] NYC, Art I (3).

award will be accepted and imposed. These awards are not considered domestic in the state where they will be recognized and enforced i.e. awards made locally but which is regarded as international by the parties involved and the enforcing state.

Countries like France, Italy and so on that are civil law countries did not agree to the scope of application of the NYC. According to them in considering whether an award is foreign or not the nationality of the parties involved, matter in dispute and the rule of the arbitration should be checked. Following that it is possible in civil law countries that an award made in a foreign State may neither be considered foreign, also an award made in any of the civil law countries locally may still be considered foreign if all the details listed above when considered connotes that it is foreign. As a result of this position, civil law countries made a proposal for a different scope for the NYC. This was to help civil law countries prevent the convention from applying to some awards which could have been considered foreign under the NYC because they are following their criteria and such foreign award would be considered domestic and as a result their National laws would apply.

Common law countries on the other hand did not agree to the proposal made by the civil law countries. Countries like United Kingdom, United States, Israel and so on prefer the NYC provision that determines the foreign connection of an award based on the location of the arbitration[196] It was further argued that taking the civil law countries stance would disallow the possibility of having a general provision on acknowledgement and enforcement of foreign awards and what constitutes foreign awards because every state has laid down provisions on what constitutes foreign awards already and state parties to the convention may not enjoy any special treatment when they seek enforcement of awards in another state. Finally, there was an agreement to incorporate the provisions of the civil and common law countries in the Scope of the NYC, hence the reason for the double sided provision in Article 1 of the convention.

[196] NYC, Art 34.

Rec

iprocity Reservation

There is a reservation option is Art 1 para 3 of NYC which allows recognition and enforcement of awards based on the principle of reciprocity.[197] About 134 member states while domesticating the NYC allowed the reciprocity reservation.[198]Some states believe that the reciprocity reservation only applies when enforcing awards made in another member state instead of award made in a member state where it is being sought to be recognized and enforced. This means that reciprocity reservation may not apply to non-domestic awards. However, this argument does not make sense as it defeats the purpose of ratifying the NYC. Historically, the NYC replaced the Geneva Convention on Execution of Foreign Arbitral Awards made in 1927.[199] The Geneva Convention allowed enforcement of awards made in other member states to the convention and between citizens of the member states to the convention to enjoy the reciprocity reservation.[200]NYC sought to expand the provision of the Geneva Convention; hence the reason for including reciprocity reservation, foreign awards and non-domestic awards in its scope.[201] Generally, the reason behind the reciprocity reservation provision is to encourage states to ratify NYC so that their citizens can enjoy easy enforcement of awards be it foreign or domestic. Since the basis for reciprocity reservation is easy enforcement of awards made in NYC member states or made by their citizens, then, arguing that reciprocity reservation does not relate to non-domestic awards will be implausible.

4.11 The United States of America

[197] NYC, Art 1 (3).
[198] United Nation. U.N. commission on international trade law website, status of text. Retrieved Oct. 7, 2018.
[199] United Nations, Sept. 26, 1927. Geneva convention on the execution of foreign arbitral awards. Retrieved Dec.18,2020.
[200] ibid Art 1.
[201] Rau, A.S. 1996. The New York convention in American courts. *The American Review of International Arbitration* 7: 213.

They employ various methods to enforce arbitral awards of foreign origin. However, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the New York Convention)[214] the United States of America Arbitration Act of 1976[215] are the most widely used. The basic protocol for international award compliance is to include a copy of the award, a copy of the agreement, and an official translation into English if the award is not in English within three years of the award.[216]

4.11.1 Challenges of the NYC in Enforcing Foreign Arbitral Awards in the USA

Although the Convention being regularly employed in the enforcement of arbitral awards, it occasions certain challenges namely; Limited Coverage and Defences under Article V.

In view of the limited coverage nature of the Convention, it is trite that the Convention applies to both natural and artificial persons as well as to awards that have been made in another state. However, it is been argued that the distinction between domestic and foreign cases are somewhat questionable as under the US Arbitration Act, section 9 and 207 are the provisions used and thus are applicable where an award made in the U.S in an arbitration between overseas parties[202], where an award made in the U.S in an arbitration between U.S parties[203]and where the award was made abroad[204].

Another point involving liming the scope of the convention is the foundation for reciprocity, and its -obligations towards disputes of commercial nature. Thus the convention provides for contracting states to make a reservation on reciprocity thus barring non-contracting states from enforcing their awards

[202] See AAA, s 9. Notable is the fact that where all requirements for enforcement is met, it can also be enforced under Sections 207 of the Act.
[203] See also AAA, s 9. However, where such cases are not domestic in nature, Sections 207 should be enforced.
[204] See AAA, s 9 and 207. See also McClendon, J.S. 1982. Enforcement of foreign arbitral awards in the United States. *Northwestern Journal of International Law* 4: 58.

using the convention although the United States of America Act provides for enforcement under Section 9. The Convention also makes enforceable awards arising from a commercial issue. With such a limitation, the convention or its enabling Act, the United States of America Arbitration Act, does not even define what disputes of a commercial nature entails. However, Section 202 tries to incorporate definitions as stated in Sections 1 and 2 which does not give a fitting or holistic definition[205].

Another challenge that meets the Convention are the defenses under Article V. These include procedural defects and jurisdictional defects. Procedural defects may include baselessness of arbitration agreement, absence of procedural due process, where the arbitrator exceeds authority and so on.[206]Jurisdictional defects are centered around two major issues namely- Public Policy and the fact that such disputes are not arbitrable. However, the United State of America courts lean highly towards public policy[207].

However, in the light of the above mentioned, in spite of the many defenses held by the U.S courts as regards the convention, especially its bias for public policy and an unevenness in its procedural principles, the courts have continually favoured the enforcement of arbitral awards and this represents the instance in comparison with other countries worldwide.

In view of the above, other treaties and conventions have been used to achieve the objectives of enforcement. These are the *U.S bilateral Friendship, Commerce and Navigation treaties (hereinafter FCN treaties)* which contains requirements that permit the enforcement of arbitral awards even if they are foreign. There is also the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter the ICSID Convention)*[208] which limits all disputes to be settled by the body creating the

[205] See also McClendon, J.S. 1982. Enforcement of foreign arbitral awards in the United States. *Northwestern Journal of International Law* 4: 58.
[206] ibid.
[207] Scherk v Alberto-Culver Co, 417 US 506, 519, 1974.
[208] Opened for signature, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

convention namely the International Centre for Settlement of Investment Disputes (hereinafter ICSID). It also limits application of the convention to contracting disputes of investment nature. These, of course, have been said to add to the enforcement process.

4.11.2 The U.S.A Supreme Court and the Belize on Enforcement Issues

Convincing the U.S. Supreme Court to hear any case is no easy task, and cases involving matters relevant to international arbitration seem to be particularly rare at the nation's top court. However, cases in relations to standards for enforcing foreign arbitral awards in the U.S.A are different.

Many of the awards in **Belize Social Development Ltd, Newco Ltd, and BC Holdings** have been confirmed by the D.C.C. courtAirport contractor Newco won $4.4 million resulting from a dispute of the termination of an operating agreement, while BCB won $20.5 million from a dispute of releasing an alleged secret deal in 2005 between the then Belize Prime Minister and BCB, a Belizean Financial service company which was controlled by an English billionaire.

Belize Social Development had been assigned a more than 38 million Belize dollar ($19 million) award by the LCIA that originally issued to Belize Telemedia Ltd. following a dispute over the country's alleged breach of an agreement that gave the company tax and trade benefits,

In their petitions, Belize asked the sitting to solve a circuit split on the enforcement of an action on the sacking of a decision on the ***forum conveniens*** or ***forum non conveniens*** grounds.

In the U.S. the courts can reject enforcing arbitration decisions not in accordance with the public rules. But in 2011, the Second Circuit relied on ***forum non conveniens*** to seek the sacking of a decision and affirm $21 million

issued to Figueiredo Ferraz e Engenharia de Projeto Ltd. following a dispute against a Peruvian governmental entity.

The Second Circuit's decision in Figueiredo has been heavily criticized because ***forum non conveniens*** is considered a procedural issue. Dismissing the case on the basis seems to contradict the policies underlying the NYC, requires countries to implement arbitration awards in a simple and straightforward manner. According to Christopher Ryan, a partner in the international arbitration group at Shearman & Sterling LLP.

> *"If the Supreme Court were to allow forum non convenience as a defense to enforcement, it could drastically alter the enforcement landscape in the U.S., because it opens up significant grounds for getting rid of an enforcement action that, up to this point, don't generally exist,"*[209]

4.11.3 Refusal of international arbitral awards recognition and enforcement in Nigeria

The concept of domestic or national courts being able to deny an int'l arbitral award is imperative to deliberate when discussing the enforcement of ICSID awards. Apart from the International Centre for the Settlement of Trade Investment Disputes awards, this subtopic pertains to all other foreign arbitral awards. The sitting may disallow recognizing and enforcing a decision if the aggrieved party failed to file a credible defense.[210] The issues that the aggrieved party may be required to prove are set out in Section 52 of the Nigerian Arbitration and Conciliation Act and Article V of the NYC. The following are some of the issues:

I. I. There is certain incapacity for a party to the arbitration agreement. Arbitration agreements are contracts, and they are subject to all of the legal principles that govern contracts. For minor purposes, if he is involved in the agreement, the agreement can be

[209] Opened for signature, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.
[210] ACA, s 52(1). See also NYC, Art V. See UNCITRAL Model Law, art 36.

voided, and the decision can be challenged that results in a benefit, or in what is supplied to him.

II. The Arbitration Agreement terms do not apply, neither is the award enforceable in the country in its entirety in the arbitration proceeding II. While the parties maintain the right to stipulate the law of their arbitration, the arbitral tribunal is responsible for doing so where it has not.[211] It is the law preferred by the parties, or decided by the tribunal on which the arbitration agreement is premised on Article 47 of the Act.

III. If the Party against which the arbitration was sought is not notified of the nomination of the arbitrator or the arbitral proceedings under which the award was given. Nigeria will neither recognize nor apply any arbitration award. [212] The defence of the party for which enforcement is required in this respect is that he has no just hearing. The notice of the appointment of the referee and of the inception of the arbitration proceedings is available to all of the parties to the Arbitration Agreement. Under certain conditions, they have a full hearing before the tribunal. Inviolability to hear a person fully and have a full opportunity to respond to arguments in one's own defense violates their right to a fair hearing.[213] While credible and compelling evidence is required, an arbitral proceeding can begin and be held in the absence of a party who has been informed but has chosen to remain absent.

IV. The arbitral award uncovers any type of dispute the court will refuse to recognize and enforce. (i.e., absence of or in excess of jurisdiction). A dispute between parties affects the functioning of the competence of the tribunal. The award will be saved if jurisdiction cannot be stripped from the excess; otherwise, it will be

[211] ACA, s 47(1) and (2).
[212] ACA, s 52(2)(a)(iii). NYC, Art V(1)(b).
[213] The Constitution, s 36(1). See also LSDPC v Adold Stamm International Nigeria Limited, part 358, 7 NWLR, 545, 1994.

invalid and unenforceable.[214] A jurisdictional defence may be asserted at any stage during the arbitration process, after the award has been rendered, or during a petition for recognition of the award.

V. If a party proves that the structure of the arbitral tribunal or the arbitral procedure was not in line with the parties' agreement, the recognition and application of a foreign award will be denied. The parties are allowed to pick their own arbitrators, the number of arbitrators, the method of appointment, and the procedures to be used.[215] When arbitrators are unable to specify exactly what steps must be taken, the law must specify the outcome it. Section 52(2) (a) (v) of the parties shall not identify or enforce the decision if the composition of the arbitral tribunal was not specified in the agreement. This serves as a sign that the law of the country in which the award was made plays a significant role in these matters.

VI. It will be a reason for refusal of recognition and enforcement in Nigeria if it is demonstrated that a foreign arbitral decision yet to become obligatory on the parties or has been set aside or suspended by a court of the country in which or under the legislation of which the award was made.[216] If either party files an application to challenge a decision or in any other courts outside the country of arbitration, the award is not valid yet. The ruling of the arbitrator loses its validity once it is voided by a court.

VII. Arbitral decision would not be recognised or given compliance if the reason of the dispute is not amenable to arbitration under Nigerian law. Arbitration is not available to all in Nigeria. Cases involving criminal charges or divorce, for example, cannot be referred to arbitration because the statute has determined that the courts have the requisite authority to hear them. Also, criminal cases should be heard in courts that are perceived as having high

[214] ACA, s 52(2)(a)(iv). See also NYC, Art V(1(c). See also IPCO v NNPC (2008) EWCA, CIV. 1157.
[215] See ACA, s 6 and 52(2)(a)(vi). See also NYC, Art V(1)(d).
[216] See ACA, s 52(2)(a)(viii). See also NYC, Art V(1)(e).

professional standards of competence. The Supreme Court of Nigeria in the ***K.S.U.F. v. The Fans Company*** [217]case held that jurisdictional issues like indictments, termination of contracts due to illegal betting, and alter or substitution of firm names were outside the scope of arbitration. By its recent pronouncements in **Esso Petroleum and Production Nigeria Ltd& SNEPCO vs. NNPC,** the Nigerian Court of Appeal has expanded the scope of non-arbitrability in Nigeria to include tax disputes.[218] **["Esso"] and Shell (Nig.) Exploration and Production Ltd & 3 others vs. Federal Inland Revenue Service[219] ["Shell"]**.The court found that the disputes submitted to arbitration in both cases are tax related and therefore not arbitrable in Nigeria on the basis of the exclusive jurisdiction of the Federal High Court on taxation.

VIII. Where the decision is against the general policy of Nigeria, the court will disregard and nullify it. Unfortunately, In keeping with the ACT and the New York Convention, the terms "public service" and "public benefit" did not stipulate their proper definition. The public policy, however, is defined in the black law dictionary as:
Community common conscience that every citizen feels it is his/has a moral obligation to assist others if they are in trouble, so general public policy that that he/she cannot deny it in each particular situation, it is clear, but regarding health, safety, and well-being, assistance must be universal.[220]

The phrase "public policy," in the common law, its indefinability renders it malleable, which negates a concept that can be applied uniformly in all

[217] K.S.U.D.B V. Fanz cons. Co. Ltd pt.142,4 NWLR, 1990 See also FIRS V. NNPC& Ors TLRN I 2012.
[218] ibid.
[219] ibid.
[220] Black, H.C. 1991. *Black's law dictionary.* 6th ed. United State: West Group.

situations The phrase has been used in a variety of contexts, including issues, fairness, and public interest.[221]

Under the practice of arbitration, the scope of public policy is depends on the extent to which the law enforces the award.[222] Finbery C.J. opined this in **Waterside Ocean Navigation Co. Inc v. International Navigation Ltd** when drafting the provisions of the NYC on Public Policy.[223]

> *In view of the overriding objective of the Convention; an encouragement and enforcement of commercial arbitration agreements in international contracts and the unification of the standard by which arbitration agreements are observed, it must be understood that defense of public policies needs to be interpreted in a narrow manner. It should only apply if enforcement violates our most basic concept of morality and justice.*

In this regard, national and international public policies are in place. Where a national policy is not opposed to arbitration, an international award can be recognized and enforced. On the other hand, if a prohibition exists in Nigeria, an international award regarding an alcoholic subject would not be binding because it would be recognized in the purely Islamic State. Enforcement of this prize is unlikely unless the international law was breached.

4.11.4 Time limitation for Recognition and Enforcement.

In Nigeria, statutes govern the time limits for recognition and enforcement of foreign arbitral awards. In general, a statute of limitation is a law that specifies the amount of time that an aggrieved party has to present or file his or her case to the court for review. The arrival of the English common law in Nigeria resulted in the passage of a statute of limitations (L.O. 1863). Also, the so-called English limitation Act law was replaced by the Limitation Act of 1966, which applies to everyone.

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[221] ibid
[222] ibid.
[223] Parson and Whittemore Oversea Co v. Societe Generale de L'Industrie du Papier, 2nd Cir, 508 F. 2d 979, 1974. See also Nwakoby, G.C. 2014. *The law and practice of commercial arbitration in Nigeria.* 2nd ed. Nigeria: Snap Press Nigeria Limited.

An arbitration arrangement is identical to every other contract between the parties in any respect. In section 59 of the Limitation Act, it is established what constitutes an arbitral award. The Act, as well as all other relevant laws, is extended fairly to arbitration. It's worth noting that the New York Convention Arbitration and Conciliation did not offer any time for the award to be implemented in Nigeria. The Act Cap F35 of the International Judgment stipulated a six-year period for foreign nationals to apply for their award. Since the New York Convention and the Nigerian Arbitration and Conciliation Law lack time limit clauses, the Nigerian Limitation Law and the Limit Laws of individual Nigerian States must be stressed. Limitation statute or Act is crucial in both arbitration and litigation. That every statute that is preempted by another law is a faulty right that cannot be implemented. The Period Function Import is restricted because claims that are dormant are more harmful than judicial. Where a party is permitted to file an action against the accused at any time, the action may be filed years after the accused has had believed that all the material evidence in his case has ended and may have been lost. Parties with good causes are expected to pursue them quickly and diligently.

The Limitation Act has set a deadline of six years to bring an action including arbitration. Our only concern is when it comes to the time for implementation. In ***M.S.S Line v. Kano Oil Millers Ltd,***[224] with the defendant's violation of the charter party occurring less than six years ago, the plaintiff filed his action with regard to an award. The plaintiff alleged that the time had passed since the date of the award in 1966, but he argued that the time had elapsed since the 1964 violation of the Charter Party. The Supreme Court has determined that the time limit begins on the date of arbitration, i.e., when the plaintiffs first obtained an action right or a right to demand that the dispute be arbitrated.

As I previously said, I respectfully express my reservations about this Court's most recent ruling. This is due to the fact that under an arbitration arrangement, there are two main companies: the first is an arbitration undertaking when a

[224] ibid.

dispute occurs, and the second is an arbitration undertaking when a dispute arises. Each of these projects is its own contract. As a result, the time limit for referring the case to arbitration exists from the time the judgement was denied and the defendant violated it before the defendant complied, and the time limit for enforcement starts over after the defendant has complied. This is because, in K.S.U.D.B v. Fanz Construction Co. Ltd., the Supreme Court held that an award granted once creates a new cause of action for any future claims resulting from that arrangement, which claims, if acknowledged, obligate all parties to complete their contract. The highest Court ruled in City Engineering Nig. Ltd v. F.H.A. that the statute of limitations is six years and incepts when the dispute arises, even though the award has not yet been made; however, if the statute of limitations is suspended for some occasion, the duration of time begins when the dispute arises.

F.H.A. v. City Engineering Nig. Ltd. The defendant and the appellant signed a contract on December 17, 1974, for the construction of some housing units in Festac Town, Lagos, in writing dated December 17. The parties decided to apply to formal arbitration on any issues not covered by the contract. There was a misunderstanding during the execution of the contract. Rather than compromise the contract conflicts, the Respondent threatened to end them by letter with a lawsuit set to be brought on December 5, 1980. The Appellant immediately complied with the respondent's request to name an arbitrator, according to the respondent's letter dated December 10, 1980. A single arbitrator has been appointed. They began arbitrating in 1981, and in November of that year, a verdict in the sum of N3,722,188.75 was released on the applicant's behalf. The appellant won a motion on notice of non-suit after the respondent refused to pay the award. The suit was professed invalid by the court because it was submitted after the statute of limitations had expired. For the same cause, it was settled on appeal to the state's Court of Appeals and then to the Supreme Court. The Nigerian highest Court ruled, among other things, that

Arbitration agreements are not sealed or not made in accordance with any other provision of law may not exceed six years. While a decision has been made in an action before a condition precedent of arbitration was imposed, a limitation period will be started by law. The Limitation period under common law will, in an arbitration agreement begins on the date of a decision rather than the date of accrualement, where Scott v. Avery is specified (which says arbitration is required for any claim prior to suit being filed."[225]

Meanwhile, the decision of the Supreme Court in this case is perplexing since the statute does not require it. Prior to the start of the timer, an award must be given. Another explanation is that the arbitration arrangement creates two contracts: one to enter into a dispute with the employer if anything goes wrong, and another to follow the arbitrator's decision. Agbaje argued in K.S.U.D v. Fanz Const Co. Ltd that a case should be deemed an independent cause for holding an arbitration award.

On account that an action is brought against an award, the six-year time length starts on the date of the award, not the date the allegation is made, according to Tuner v. Midland Rly Co. The following are some of the opinions expressed in Halsbury's Law in England:

"All arbitration agreements must be assumed to include an explicit or implied provision that the award is final and binding on all parties to the individual making the claim, where award-specific language exists. The latter issue is absolutely and irreversibly resolved when the award is made public; however, the decision to act on the matter (following award publication) is a new agreement implied by the agreement to arbitrate."[226]

The stand in England is such founded in ***Agromet Motoimport Ltd v. Maulden Engineering Co (Beds) Ltd,***[227] Time takes off the moment the warranty is broken, not when the original obligation to pay the claim is created. In ***M.S.S***

[225] ibid.
[226] Halsbury, H.S.G. and Hailsham, Q.H. 1980. *Halsbury's law of England.* 4th ed. London: Butterworth 256.
[227] IBSSL v. Mineral Trading Corporation, 1 ALL ER, 1966.

Lines v. Kano Oil Millers[228] the supreme court based their findings on the authors' explicit authorization to substitute Arbitration on the fact that they quoted Russell's statement that

For the purposes of time limits, the duration is determined by the date the claim arose, which is the time the claimant first acquired a right to take action on the dispute or to require arbitration.[229]

In the case of Agromet, Russell's formulation of the 22nd aphorism may be of interest. Unfortunately, the Supreme Court of Nigeria upheld this status in City Engineering Nigeria Ltd v. F.H. The award has a six-year acknowledgment and compliance duration that begins on the date of the first contract violation. It is suggested that the Nigerian courts be informed of their previous guidance, which stated that the law should be rewritten to reflect the British role in the Agromet case.

The proceedings will be null and void if an unwilling party fails to follow through with its own arbitration award. The awarding of international awards is also covered under Nigeria's Federal Arbitration Act. The NYC on Investor-State Dispute Settlement and the Federation Convention on Investor-State Dispute Settlement were also adopted in 2004. In Nigeria, if an arbitral award is made within a particular time span, it is only enforceable for six years, with the time period starting from the time of the initial violation, not the date the award is decided. If an arbitrator rules favoring the complainant, the unsuccessful party gains new rights as a result of the award's terms being violated. The Agromet and Iboga cases, which have legal consequences supported by the English court system, are likely to be followed by the courts.

A. the Recognition of Enforcement of ICSID Awards

[228] ibid
[229] Walton, A., 1970. *Russell on arbitration*. 8th ed. United Kingdom: Stevens & Sons Limited.

For both parties, the ICSID's jurisdiction and area are restricted, and subject matters are limited. In ICSID proceedings, one of the parties must be a contracting state, or the other party may appoint any of its subdivisions or agencies to the Centre. The proceedings must place a strong emphasis on investment-related issues. The parties must agree to obey the protocols and rules of ICSID arbitration, and their consent must be obtained.

Art 26 of the ICSID makes consent by parties the exclusion of all remedies. Arbitration agreements indicate the parties are subject to all the procedural rules designed by the ICSID Convention, and equally, that the courts administering the rules will be protected from monitoring or influence.[230] This means that national courts in contracting States are legally prohibited from regulating ICSID in the process of making contracts. Once it becomes apparent that a case before a court within the Contracting State has to be arbitrated under an ICSID agreement, the court must direct the parties to settle it to private arbitration unless such a request is rejected by the Secretary General of ICSID, which may include if the Secretary General has refused to register the applicant, for instance. The nobility of this provision can be found in Section 62 of the Convention. This clause only applies when a contracting State or one of its subdivisions or agencies, or the national government, has a disagreement, on the one hand, and the other State, or its sub-division or agency on the other, the other hand.[231] We agree to refer the dispute to ICSID on this occasion. While the term "investment" was crucial to ICSID, neither the Convention nor the ICSID defined its definition. In order to make this Convention applicable, joint ventures, loans, and concessions were mostly granted to public entities and industrial rights deals were usually brokered, so it was required that it be stated that in an era and at a particular stage in which such deals were the norm. Profit sharing, service and management contracts, plant and turnkey contracts, as well as worldwide commercial property leasing for know-how, have all been used to raise investment capital for industrial research and development since the

[230] ICSID Convention, Art 42.
[231] ICSID Convention, Art 25 (1).

formulation of this agreement. Due to this, it is requested that parties must agree specifically if it concerns investment matters.

ICSID has a separate and independent means of enforcement for awards, thus making their award recognized as a separate type. Each contracting state only has one obligation with respect to the award. The plaintiff must submit a certified true copy of a recognized or enforced award. Supreme Court jurisdiction for ICSID awards may be designated. In accordance with the Constitution of the Federal Republic of Nigeria and Article 69 of the Convention on International Investment Agreements, the Federal Government passed the Implementation of Awards of Disputes Act, 2004.There are only two parts to the act: Section 1 provides for two parts

> *"Where the International Centre for the Settlement of Disputes decides that enforcement is required or expedient, a certified copy of the award will be accepted by the Supreme Court, and if it is registered in the Secretary General's office, it will be treated as if it were a final judgment of the court.*[232].

The provision before you makes the Nigerian government clear about their intention and their intent to honor their international arbitration agreements. the Nigerian law did not address ICSID awards directly; it only mentioned that the Chief Justice of Nigeria was to see to it that they were recognized and upheld in the country in section 1(2). Nigeria's Supreme Court of today does not have any rules or guidelines for enforcing ICSID awards, unfortunately. By registering ICSID at the Supreme Court, the award would rank as the same as the final judgment issued by the Supreme Court of Nigeria, which supports Section 54(1) of the Constitution, of the ICSID says.

> *Because each contracting State must accept liability and respond in accordance with an award made under this Convention, which has the effect of a final judgement in its jurisdiction." A contracting state's member may choose to enforce the contract in federal court and stipulate that the court must apply a constituent state's award.*[233]

[232] ICSID (Enforcement of Awards) Act CAP I20 LFN 2004 s. 1
[233] ICSID Convention, Art 54 (1)

Under Article 54 of the ICSID Convention, each of the contracting states is required to carry out the awarded damages without hindrance, but this can be an issue when executing an award. When an ICSID (International Court of Security in Enforcements of Justice) application is made, the national or domestic court should only ensure that the award is executed and this task is entirely subsumed by that is done at the second stage of the exercise.[234] Although a signatory to the ICSID arbitration agreement is permitted to reduce its state immunity in order to demonstrate good faith, it is a legal obstacle in accordance with Article 55 of the treaty.[235]

4.11.5 The United States of America Recognition and Enforcement of Annulled Foreign Arbitral Awards

Parties who thought in the aftermath of Chromalloy,[236] that they had found in the U.S., as in France, a refuge for enforcing foreign arbitral awards may be wrong having regard to two recent decisions of the US court.[237] Although Chromalloy cannot be fully reconciled with these two recent cases – Baker Marine and Spier – these three cases and a fourth – Yusuf Ahmed Alghanim[238] - together give a clearer picture showing how the foreign awards in the US are enforced.

Although these cases do not define any hard-and-fast rules and pose as many questions as they address, they do reveal some common themes. The most prominent trend is that a ready-made grant would not be made to implement a non-cancelled award. More specifically, the court ruled that the contract was not enforceable in the United States because it made no reference to US law. This should come as good news to those who believe the Chromalloy decision sets a bad precedent. A second theme, which follows from the reasoning

[234] ibid
[235] ibid
[236] In the Mater of Chromalloy Aero services and the Arab Republic of Egypt, 939 F Supp. DDC 907, 1996.
[237] Baker Marine (Nigeria) Limited v. Chevron (Nigeria) Limited, 191 F.3d 194, 2d Cir, 1999. See also Spier v. Calzaturificio Tervica S.p.A, 71 E.Supp.2d 279. S.D.N.Y 1999.
[238] Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, 126 F.3d 15. 2d Cir. 1997.

underlying the Baker Marine and Spier decisions, which is that the terms in the arbitration agreement may be vital to the outcome of this enforcement issue. Most important would be for the agreement to provide that US arbitration law shall govern the arbitration proceedings and awards.

controversy about the abolition of annulled rewards centers on Articles V(1)(e) and VII of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[239]

4.11.6 Application of the New York Convention in the U.S.A Courts

A. The Convention Act and the Convention

Since the 1970s, the US have ratified the new Kyoto treaty. Although the Convention has been domesticated in Britain as the Convention Act, it is disregarded in the United States,[240] which is the one that is directly applied in the US. The boundaries of the Convention Act go beyond NY law. Its application is to commercial arbitration, and awards with exception to those without any foreign nature. This is a contract between citizens of the US, as opposed to the territorial and non-domestic criterion of the NYC.[241] The convention Act is applied by US Courts to; 1. Foreign arbitral awards not within the reciprocity reservation. 2. Awards made in the US that do not lack foreign features. Prosecution of claims in the second subsection is frequently a matter of debate.[242]

One of such debate is the debate that Article II of the Convention only makes provision, as a condition to enforce awards, and to ensure the existence of an agreement in written form, which is between states, this is to ensure the applicability of the convention Act. There is no provision that it must have foreign elements as opposed to the provision in S. 202 of the Act which

[239] NYC on the recognition and enforcement of foreign arbitral awards. Retrieved Dec. 21, 2018,
[240] 9 U.S.C. § 201 (the Convention Act became Part II of the FAA, SS 201-208).
[241] NYC, art I.
[242] Jones v. Sea Tow Services, 30 F.3d 360, 2d Cir. 1994.

prohibits application of the Act to arbitration awards from US citizens which do not have foreign connection.[243]

Some of the Cases where the scope of the Convention Act has been dealt with are examined below:

1. ***Bergesen v. Joseph Muller Corp[244]***

In the Bergesen's case, there was a disagreement amid Bergesen who was a Norwegian ship owner and Joseph Muller Corporation which was a Swiss company, as a result of failure of Joseph Muller's non-performance on some conditions set forth in the agreement. It was as it had been included in the contract; the dispute was arbitrated in New York. An award was given in Bergesen's favour. Bergesen applied to the Southern District court of New York for enforcement of the award. The award was enforced and the Court stated its reason to be the fact that the award even though obtained in the US had foreign interest and the convention was applicable. On appeal by Joseph Muller Corporation, Reciprocity may be a problem in this case, as he suggests the appeal court defining non-domestic award as that not within the US legal framework[245]upheld the decision of the lower court[246] And furthermore, the section in the Convention Act, or part of it, was applicable to the case.[247]

The main advantage of the decision is that the convention can be cited as an independent basis of enforcement of awards by the parties. The Federal Arbitration Act or any other Act with similar features cannot be used to challenge its application.

2. Lander Co. v. MMP Investments[248]

Although not the first, Launder Co. v. MMP Investments defined non-domestic

[243] See 9 U.S.C. § 203.
[244] *Bergesen v. Joseph Muller Corp*, 710 F.2d 928, 2d Cir, 1978.
[245] *ibid*.
[246] *ibid*.
[247] *ibid*.
[248] *Lander Co. v. MMP Investments,* 927 F. Supp. 1078, N.D 111, 1996.

awards in the US court. In contrast to the Bergesen case the appeal Court in Lander's case gave a finality to the question does reciprocity reservation have an influence on non-domestic award?, when it gave a decision in Lander's favour. a New Jersey company, Lander Company, and an Illinois investment firm, formed a joint venture in Poland and contracted for the distribution of some Lander Company products. According to their arbitration agreement, their disputes must be settled in New York and the rules to be utilized shall be the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC).[249]An award was given and it favoured Lander Co.

They held in the District Court of Appeals that it would not be enforced. on appeal by Lander Co. the appellate court while reversing the districts court's decision elaborated on several enforcement issues that have not been addressed earlier with regards to the interpretation of the Convention Act.[250] They are

A. Reciprocity Reservation: although in Bergesen's case, the court did not state whether the reciprocity reservation limited non-domestic awards' recognition,[251]in Lander the Court held that the reciprocity reservation is a territorial limitation to non-domestic awards.[252]it further stated that the intention was to restrict the application of the convention by US Courts to awards made in other signatories to the convention and thus not being beneficial to non-signatories to the convention.[253]

B. The Nexus between the Convention and the Convention Act: it was established in Lander's case that Section 202 of the Convention Act gives a wider coverage for foreign award's enforcement in the US than the NYC.[254] This allows for an easy enforcement of awards of foreign origin.[255] In

[249] *ibid*.
[250] *ibid*.
[251] *ibid*.
[252] *ibid*.
[253] Trans Chem. Ltd. v China Nat'l Mach. Import & Export Corp, 978 F. Supp. 266, SD, 1997.
[254] ibid.
[255] ibid.

explaining this, the court gave three main scope of the convention Act: 1. to bring more arbitration to the US. 2. to allow American businesses to benefit from judicial enforcement of awards using the reciprocity reservation in the country where such awards would be enforced. 3. To make procedures in charge of activities of foreign nature in American firms easy irrespective of the parties' nationalities.[256]Furthermore it was held that the neither the NYC nor the Convention Act is exclusive, hence parties can choose to use either or both of them as the rule to govern the enforcement of their award.

4.12 Nigeria

ACA in section 54 permits for it to be enforceable in Nigeria under the New York arbitration agreement. Hence Awards made in the Convention member states are applicable in other member states.[257]

[256] ibid.
[257] Taylor Woodrow Nigeria Ltd v. SEGMBH Ltd, part 286, 4 NWLR, 127, 1993.

4.13 Enforcement of Foreign Arbitral Awards in Nigeria

With the growth of arbitration in Nigeria still at its infancy, the practice of enforcement of arbitral awards in commercial disputes, energy disputes inclusive, is still under way. To achieve this objective, Nigeria has adopted the following enforcement methods[258]:

A. By court action.
B. Reciprocal Enforcement of Judgment Act 1990
C. ACA, 2004
D. NYC 1958
E. ICSID Convention

A. By Court Action

As a result of the doctrine of obligation, once a court of competent jurisdiction sits on a matter and gives a decision on same it becomes enforceable in any other court of competent jurisdiction even if that enforcing court is a foreign one; this is why foreign arbitral awards can be enforced in Nigeria. In order to obtain enforcement, however, the party asking for enforcement must show the court that a valid arbitration agreement existed, that the arbitration was properly conducted in the foreign state and that the award is valid and enforceable.

This principle was properly established in the leading case of **Topher Inc** of ***New York v Edokpolor (Trading as John Edokpolor & Sons)*** [259] in New York where the plaintiff tried to enforce a New York award. The trial court did not allow the enforcement on the basis that New York did not have a reciprocal treatment to decisions made in Nigeria. However on appeal, the Supreme Court held that an arbitral award can be enforced in Nigeria once the enforcing party

[258] Abiloye, O. and Akolade, J. Jan. 19-21, 2016. Challenges in the recognition and enforcement of foreign Arbitral awards in Nigeria. Retrieved Jan. 10, 2019, from http://www.acas-law.com/assets/challenges-in-the-recognition-and-enforcement-of-foreign-arbitral-awards-in-nigeria.pdf.
[259] Topher Inc of New York v Edokpolor (Trading as John Edokpolor & Sons), All NLR 307, 1965.

sues upon the award in the absence of reciprocation elsewhere. Process has been said to be difficult and time consuming as it may take up to a year, thus defeating the purpose of the arbitration process[260].

B. Reciprocal Enforcement Of Judgment Act 1990

By virtue of the enactment of the Foreign Judgment (Reciprocal Enforcement) Act 1990 [266], a foreign judgement or award is enforceable in Nigeria, within six years of which the award is obtained[261]

The foreign judgement or award must be definitive and binding, and all that remains is for the foreign judgement or award to be registered in a Nigerian court if the following conditions are met:[267]

1. There was strict compliance with the Act
2. The original court where the judgment or award was obtained possessed the competent jurisdiction to adjudicate on the matter at the time.
3. The foreign judgment or award does not conflict with any public policy in place in Nigeria.
4. The judgment or award was not fraudulently obtained.
5. The judgment or award is not affected by the doctrine of res judicata.
6. The Act is extended to the country where the award has been obtained from.

C. ACA Section 51 and 52, 2004

The Arbitration and Conciliation Act[262] remains the most effective judicial enforcement regarding arbitration. The Act in section 51 makes provision for the automatic enforcement of foreign arbitral awards, albeit subject to the provisions of section 32 of the Act. This section mirrors the UNCITRAL Model Law, Conventionis known to have broader applicability than the rest of

[260] Abiloye, O. and Akolade, J. Jan. 19-21, 2016. Challenges in the recognition and enforcement of foreign arbitral awards in Nigeria. Retrieved Jan. 10, 2019, from http://www.acas-law.com/assets/challenges-in-the-recognition-and-enforcement-of-foreign-arbitral-awards-in-nigeria.pdf.
[261] ibid s 4(1).
[262] ACA.

the world although it has been submitted that this section has no extra-territorial application which the New York Convention does.[263]

D. Enforcement Under (ICSID) Convention

Nigeria was agreed to the ICSID on August 23, 1965, in the conference that we just mentioned. It was further domesticated as the ICSID (Enforcement of Awards) Act, Cap 19, Laws of the Federation of Nigeria 1990. The Act made provision for ICSID awards to be regarded with the same authority as a Supreme Court Judgment. Such awards shall be certified by the Center Secretary General and must be filed with the Supreme Court by the party seeking enforcement. With this in place, there is minimal window for an objection to such award as is given and it is the fastest mode to enforce any award of foreign origin in Nigeria. The intention is therefore to clearly treat the award as a conclusive decision, with no room for appeal on challenges.

4.14 Challenges of Enforcement of Arbitral Awards in Nigeria

The principle on enforcing awards under arbitration cuts across all fields, energy law inclusive. In the same vain, the challenges emanating thereof are the same as well. Some of the typical challenges are:

A. Statutory Limitations: most Nigerian statutes make limitation provision that is, a time range within which action can be brought on a particular subject matter. In Lagos[264], to secure enforcement of an arbitral awards, court action must be taken within 6 years of the award being rendered. The limitation provisions limit the enforcement of awards because at times as a result of various issues raised after an award has been obtained it may take time before the award can be brought to jurisdiction for enforcement. So as a result of the

[263] Orojo, J.O. and Ajomo, M.A. 1999. *Nigerian Arbitration and Conciliation Laws and Practices* Nigeria: Mbeyi and Associates (Nigeria) Limited.
[264] Limitation Law of Lagos State (Limitation Law), s 8(1)(d).

limitation provision, the award becomes unenforceable because the time within which to bring the action has lapsed.

In ***City Engineering Nig. Ltd v. F.H.A.,***[265] the Highest Court held that the time frozen, which is the timeframe between the beginning of the action and the receiving of the award, must be included in determining the term to which the award recognition and compliance could be applied. The only exception being if the arbitration meets the criteria under the ***Scott v. Avery*** provision, that allows for a right of action till the award is delivered. In ***Sifax Nigeria Limited v. Migfo Nig. Ltd,***[266] the court of Appeal drifted from the decision in ***City Engineering Nig. Ltd v. F.H.A.*** when it held that the frozen time should not be included while calculating the limitation period. On appeal to the Supreme Court, the court aligned itself with and upheld the stance of the Court of Appeal. In explaining its position, the court noted that including frozen time while calculating limitation period means punishing the parties for an occurrence they are not in control of. Unfortunately, the Supreme Court did not officially overturn its decision in ***City Engineering Nig. Ltd v. F.H.A.***

The Lagos State Arbitration Law governs arbitration in Lagos except the parties agree to be governed by another legislation. The law also makes provision for a six year limitation period. However the law makes provision, that the period from commencing arbitration law provides that the period from commencement of arbitration to the time of obtaining an award would not be included when calculating the limitation period.[267] The limitation period is six years and its application is to all arbitration sessions within Lagos state, with the exception of the parties' agreement. The limitation law of Lagos state's provision on limitation does not clash with the Lagos State arbitration Law because the limitation law provides that the law will not apply where another enactment provides for a limitation period for matters within its application.[268]

[265] City Engineering Nig. Ltd v. F.H.A., part 520, NWLR, 224, 1997.
[266] Sifax Nigeria Limited v. Migfo Nig. Ltd, LPELR 24655 (CA), 2015.
[267] Lagos State Arbitration Law s 8(1) (a).
[268] Limitation Law, s 4(a).

B. **Jurisdiction of the Court**: This poses a problem in Nigeria as in considering the foreign awards' enforcement in Nigerian Courts, jurisdiction is a major factor for its enforcement. This is because of legislation, which enforces arbitral awards, uses the term "High Court". [269].

C. **Obsolete Arbitration Legislations:** it is an obvious situation that the Nigerian Laws on arbitration need to be revisited and amended to suit the modern day international positions on arbitration. If these amendments are done, it is believed that provisions that will give room for easy enforcement of awards would be included.

D. **Unrestricted appeals against orders enforcing arbitral awards:** another problem that enforcement of award faces in Nigeria is the ability to appeal against the decision of the court allowing its enforcement. This allows incessant appeals and also frustrates the enforcement process.

Nigeria has a lot of work in terms of enforcement of arbitral awards and therefore requires laws that will aid direct enforcement of arbitration award.

4.14.1 Possible Solutions to the Statutory Limitation Problem

i. Instituting a preservative action

Where a party senses that enforcement of award is going to be affected by the limitation period because the frozen time will be calculated, especially if the arbitration is not under seal, not governed by ACA or the Lagos State Arbitration Law; the party can start an action in court and make an application to stay the proceedings pending arbitration. This may seem like abuse of Court process especially if the action is filed by the applicant not the defendant, but ACA does not state that any of the parties is prohibited from applying for stay of proceeding pending arbitration; it allows any of the parties to do so.[270]

[269] ACA, s 57. See also Reciprocal Enforcement of Judgments Ordinance 1922, s 3(1).
[270] ACA, s 5.

By virtue of ACA the period of limitation is not applicable and will not constitute abuse or lack of cause of action as stipulated in the act.

ii. Commencing *enforcement* within 12 months after award

According to the Foreign Judgment (Reciprocal Enforcement) Act (FJREA) 1990 within 12 months after publication of an unsealed foreign arbitral award, such awards may then be registered as a judgment of domestic authority. For common wealth countries, awards made by them are enforceable in Nigeria even if there is no reciprocity reservation in existence but other countries must have the reciprocity reservation and ensure the domestication of the award in Nigeria is done within 12 months of obtaining the award.

iii. Applying for recognition first in another jurisdiction

Where a party figures that an award may not be recognized in Nigeria because it is statute barred, such party may take the award to another jurisdiction for recognition. After which such a person will come with the judgement to Nigeria recognizing the award for its registration and subsequent in the country. This process is deemed as a contradiction to public policy, with questions on the possibility for a recognition and enforcement of the award in two jurisdictions. Hence, without an answer being offered officially, it is then assumed to be possible.

4.15. Venue for Recognition and Enforcement of Foreign Awards

Court in the definition session of ACA means Courts..[271] In Nigeria, the location of the court where the application is submitted is recognized as the venue for the recognition and enforcement of the award. The application should be taken to where the High Court with the original jurisdiction over the dispute had it been that the parties did not arbitrate is located.[272] It is advised that where attachment of property is involved the venue for the recognition and enforcement of the award must be where such party against whom execution is sought has properties. The successful party is expected to consider the existing

[271] ACA, s 57(2).
[272] Afcon Nigeria Ltd. V. Registered Trustees of Ikoyi Club, FHCLR 371, 1996.

public policy of the venue, this is to certify that such an award will not be considered to be without value, due to its contradiction with the public policy at the venue.

Previously, aliens had no right or legal capacity under international law. Most disputes were handled through diplomatic protection, and a gunboat diplomacy. However in the modern template protection of aliens' rights to travel and trade becomes enormous. Investor protections in treaties emerged as alternative to diplomatic protection. Treaties concluded between two or more states were signed to attract foreign investment in host state. This provides protection on investments in the event of a dispute and alternative to local law or courts. Specifically treaties define investment to include any kind of properties. Investment means "every item directly or indirectly owned or controlled by an investor that has the features of an investment, comprising the commitment of funds or other resources, the anticipation of increase or return, or the assumption of risk. Investment may take these forms:

- An enterprise;
- Intellectual property rights;
- Bonds, debentures, other debt instruments, and loans;
- Licenses, authorizations, permits, and similar rights conferred pursuant to domestic law
- Shares and stocks
- Futures, options, and other derivatives

The mode of enforcement of investment arbitration awards may be different, The award in question is rendered thanks to the nature of the mechanism. These rules and procedures can be particularly apparent in international investment dispute settlement proceedings where the ICSID was active. This was under the obligations arising out of the convention. ICSID Convention establishes the International Centre for Settlement of Investment Disputes ("ICSID") and constitutes a stand-alone, self-contained regime entirely

different from national regimes. All contracting member of ICSID are mandated to recognize and enforce ICSID Arbitral Awards. In this chapter, these awards are thoroughly enforced. For enforcement and recognition, the main concerns are related to ICS. Due to the fact that disputes involving sovereign states could be mediated, state and private investment used to resolve such issues, earlier investment disputes had a competitive advantage. This lack of neutrality led to the choice of an international rather than national forum International arbitration became a more popular because it is viewed as fair and fast. In most cases, one of the main pulls of arbitration is the dearth of ambiguity in the final decision resulting from the process. Unlike administrative tribunal decisions, arbitration awards have finality and binding authority; that is, once the panel has reached a decision, the award is final. Despite having the advantage of finality, arbitration awards still have to go through the court system.

The International Commission on the Settlement is multinational company, and a member of the World Bank Group, formed in 1962, who acts as an intermediary between two contracting states, or states with foreign investors.[273] ICSID arbitration that is denominated according to the ICSID rules. With regard to ICSID, an agreement implies that both parties have agreed to the rules under ICSID, and that they are not bound by any other rules or laws. ICSID procedures are limited to those involving members of the ICS. ICSID jurisdiction means that a party must be a Contracting State Member of the ICSID Convention. Most importantly, they must allow the submission of their investment dispute to the ICSID. An award is deemed to have been delivered after hearing and determination of the parties are bound by it. and all the parties need to seek is the recognition and enforcement of such award in the jurisdictions where the disputes arose.

[273] The negotiations between states covered by the convention on the resolution of investment disputes signed on March 18, 1965.

4.16 The Enforcement of ICSID Arbitral Awards

Recognizing and enforcing award by the ICSID is provided for under by Articles 53, 54 of the Convention. Any party who seeks to enforce an ICSID award may do so in a member state, with the same requirement and the action may be simultaneously carried out in another state.[274] A decision on the enforcement will ultimately depend on available assets and the domestic law and the enforcement of judgements.

Article 53 of the Convention provides that an ICSID award is final and binding in its nature. It notes that the award is not subject to judicial review, except otherwise stated. The conditions for a judicial review under the preceding section 52 serve as defences which are employed by states which are on the losing end to an award raised in their argument. A resistance to enforcement and the non-implementation of an arbitral award violates international obligation. Seeking recognition and enforcement in a domestic court, the authority of the court will be restricted to a verification of the validity of the award.[275]

Article 54 of the convention states that contracting states are to recognize an award by the ICSID as binding. The state is also to execute every pecuniary obligations which is contained in it, as a final domestic judgement of the local court in the state. This is to be understood as a final judgement of the highest court of that state and in other instances, one where there is no remedy available.[276] The article further provides that the execution of the award is to be guided by a domestic law which relates to the execution of judgement in every state where the enforcement is desired.

[274] Dolzer, R. and Schreuer, C. 2012. *Principles of international investment law.* 2nd ed. United Kingdom: Oxford University Press.
[275] ibid.
[276] Schreuer, C.H., Malintoppi, L., and Reinisch A. 2009. *The ICSID convention: a commentary.* 2nd ed. England: Cambridge University Press.

Furthermore, Article 55 of the convention provides that laws which relate to sovereign immunity, seeking to restrict execution are applicable. The ratification of the convention is not a waiver of sovereign immunity. Sovereign immunity as a defence to execution is regulated by customary international law, albeit there exist legislations which outline rules; notably, this varies with the jurisdiction a joint state and property immunity treaty, outlined in 2004 is although not binding, but contains regulations for the implementation of rulings and decisions against the properties of states.[277]

Generally, party states do not employ the defence of the theory of complete sovereign immunity to avoid implementation of the decision, the theory, on its relationship to the execution of judgement, is permitted for the seizure of state assets. More importantly, as earlier noted, the execution is granted on commercial assets of the state or those which are employed for commercial purposes, the seizure of assets of public nature and use or governmental purposes is prohibited.[278] It is clear that a dispute will exist on whether the purpose of an asset determines its viability as a subject of execution, this is because the categorization of assets may be somewhat problematic, and this is with the knowledge that many times, the state would mix commercial funds with assets of public use. The assets which are used for government purposes include diplomatic property, such as embassy offices, accounts and accounts for the Central Banks' Diplomatic property which includes embassy account and a few other usually immune from execution.[279] Additionally, execution on states, is permitted where the state, either explicitly waive their immunity or nominate properties to satisfy the specific claim.[280] Furthermore, Article 27 of the Convention notes that "where a state seeks to contempt an award by the ICSID, the party seeking the enforcement of the award will benefit from the diplomatic protection of its home state, who can also bring an international

[277] United Nation. Dec. 2, 2004. United Nation conventions on jurisdictional immunities of states and their property. Retrieved Sept. 26, 2018, from https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf.
[278] See ibid article 19(c).
[279] Dolzer, R. and Schreuer, op. cit. p.115
[280] Blackaby, N., Partasides, C., Redfern, A., and Hunter, M. 2009. *International arbitration, Redfern and Hunter.* 5th ed. United Kingdom: Oxford University Press. See also UN Convention, art 19(a) and (b).

claim". Clearly, the submission of a state with an award of the ICSID, which is rendered against them is increased.[281] States are then tasked with a risk to their reputation, a pressure from the World Bank, diplomatic and political force for the payment of the award.[282]

4.17 The Enforcement of ICSID Arbitral Awards and National Courts

4.17.1 Nigeria

The convention created a treaty-based framework to conduct arbitration, entirely independent and removed from the court system. The arbitration proceedings included in this ICSID decisions, such as the determination of awards, are not subject to national laws and judicial oversight. ICSID. We have a binding enforcement scheme in place that ICSID has created.[283] Furthermore, with respect to acknowledgment and execution of ICSID awards, provisions of Articles 53-54 are applicable.

Article 53 of the convention opines: 1) "The decision is requisite on the parties and is not down to appeal or any remedies other than those specified in this agreement. Each party shall conform with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this convention".

2) "This section covers awards section includes the chapters 50, 51, and 52.
Finally, Article 54 of the Convention contains the following stipulation:
1) "Contracting state shall accept and implement the pecuniary obligations imposed by an award made pursuant to this convention within its territories as if it were a final judgment of a court of that state. A contracting state with a federal Constitution may impose such award in or through its federal courts, and such courts may decide that the award be treated like a final decision of a constituent state's courts."

[281] Filipiuk, A. Apr. 15, 2016. Enforcement of arbitration awards and sovereign immunity. Retrieved Jan. 15, 2019, from http://www.etd.ceu.hu/2016/filipiuk_anastasiia.pdf.
[282] ibid.
[283] ICSID, Art 53 – 54.

2) “A party pursuing recognition or compliance in the terrains of a contracting state shall send a copy of the award approved by the Secretary General to a component court or other authority that such state has appointed for this reason. Each contracting state must inform the Secretary-General of the competent court or other authority it has designated for this function, as well as any subsequent changes to that designation.”

3) “The award will be carried out in line with the laws governing the execution of judgments in effect in the state whose territory the execution is sought.”[284]

The Article 55 of the convention impliedly sets the limit of the obligation granted to state parties in the previous Article, that stipulates nothing in Article 54 shall be said to be against the law in any state contracted in as regards the invulnerability of the state or of the other states from execution.[312] Article 53 of the Convention, conventional awards are binding upon the parties, which means no remedies are available other than the ICSID provides. in more significantly, the award made by the ICSID is immune from challenge in other national sitting. According to others, Abby Cohen claims that[313] “Article 53 generates an disparity between the parties to the conflict since in ICSID arbitration, the parties will often be a state on one side and an investor, which is normally a private party on the other.” This means then that, the final judgment which may be made against any foreign state and its assets. In explaining this further, a report by the World Bank describing Article 53 to 55 of the ICSID stated that: “The parties shall adhere by and comply with the award, pursuant to any stay of enforcement granted by the Convention, and Article 54 compels any contracting state to treat the award as enforceable, as if it were a final judgement of a local court.” Article 54 does not recommend any specific procedure to be followed in its domestic application, but allows each contracting state to meet the requirements of the Article in accordance with its

[284] ICSID, Art 53-54.

own legal framework, due to the differences in legal techniques used in common law and civil law jurisdictions, as well as the differences in judicial systems found in unitary and federal or other non-unitary states. [314].

Hence, sovereign immunity prevents a forceful action on a foreign soil. As earlier note, Article 54 of the convention, requires that a state equates the award rendered based on the convention, be considered as final in the area This does not require the state to order a forced execution of awards which are rendered under the terms of the Convention. On a clearer note, Article 55 notes that Article 54 is to be construed as a derogation from any law on the subject, the state statute governing immunity from execution.[285]

The Nigerian system has the Supreme Court designated to recognize, enforce and register awards. According to Article 69 of the ICSID, which refers to the Convention, the law requires the ruling to be validly made by the highest court in the nation. The ICSID Act (Cap 120) Laws of the Federation of Nigeria 2004 as stated earlier on in this work is the governing law on the subject in Nigeria. Section 1 states that where, for any reason or reason, a copy of the award, duly certified, filed by the Supreme Court by the party pursuing recognition for implementation in Nigeria, by the Secretary General of the center mentioned above, dispute resolution is a legal requirement or merely a politically desirable in Nigeria as if for all purposes a copy was effective as if it were filed by the Supreme Court. Section 1(2) of the Act provides that the chief justice has the power to establish and enforce the court's rules.

This may however not be the case in the country at the time, as questions surround the fact that, if the award is not a verdict of the court, why should it be recognized as such? It is clear that the “spirit” and intended meaning is to bolster the investor's confidence, and to promote investor equal treatment,

[285] ICSID. Apr. 2006. ICSID convention, regulations and rules. Retrieved Dec. 20, 2018, from https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf. See also Smutny, A.C., Smith, A. and Pitt, M. 2016. Enforcement of ICSID, convention arbitral awards. *Pepperdline Law Review* 43: 652.

respectively. Hence, a seeming method by which investors in the country would be assured of fair treatment is that provision, which protects them by the order from the apex court of the land.[286]

Furthermore, an application for registration of the award must include a sworn statement signed by the Secretary-General. The limitation period also applies to the ICSID award. The provisions of Article 54 of the ICSID supports the registration of the award as a judgment of the Apex Court, where it was stated that: "Each contracting state shall accept and implement the pecuniary duty imposed by an award made pursuant to this convention within its territories as if it were a final judgment of a court in that state." Though the contracting state legislation requires recognition and enforcement of an award, the problem may then be that the contracting state faces difficulty in fulfilling that duty. If the award is made in the federal district court where the applicant is filing, it only has a role in confirming the fact of it. As far as we know, the government is concerned, only the legislature can seek relief from the sovereign state immunity doctrine at the second stage.

These issues were mostly campaigned for in ***BB v The Government of the People's Republic of Congo***[287] where a request has been granted to the applicant for the execution of the award for preliminary consent of the Court to the protection and enforcement of government and public property immunity. The applicant submitted that the court should extend the order after the second stage, beyond the terms of Article 54 of the ICSID Treaty. As the case was heard, the court dismissed the claim on the grounds that it was impossible to identify which asset or fund was immune from seizure. The party on the 26th of June, 1981, appealed on the issue of legitimacy but may have been referring to either getting an exequatur or to the actual process of putting in effect.

[286] Asouzu, A. 1994. Developing and using commercial arbitration and conciliation in Nigeria. *Lawyers' Biannual* 1: 2. Nwakoby, G.C. 2014. *The law and practice of commercial arbitration in Nigeria.* 2nd ed. Nigeria: Snap Press Nigeria Limited.

[287] BB v The Government of the People's Republic of Congo, ICSID Rep 368, 1993. See also Nwakoby, G.C. 2014. *The law and practice of commercial arbitration in Nigeria.* 2nd ed. Nigeria: Snap Press Nigeria Limited.

The appellate court was then advised by the applicant to extricate the part of the order on the plea of Sovereign immunity. Accordingly, the Court heard the appeal and amended the earlier decision.[288] The Court in its ruling, maintained that: "Article 54 provided a streamlined method for getting an execution for an award made under the convention's framework, limiting municipal courts' responsibility to ascertaining that the document in front of them was a copy of an award validly approved by the ICSID Secretary General. Article 55 states that nothing in Article 54 should be construed as limiting the immunity from execution. However, an order granting exequatur from an arbitral award did not constitute a measure of execution, but rather a preparatory measure; the judge in the first instance had thus exceeded his competence under Article 54 by taking part in examining the question of a foreign state's immunity from execution, which was only important at the second stage, during acquittal.[289].

The Court of Appeal's decision in **BB v. GPRC** was justified, because it came to the right inference on the outcome and intent of the statute and Articles 54 and 55. With that said, **Senegal v. SOABI**[290] the President of the Paris Tribunal de Grande, As per Article 54 of the International Chamber of Commerce the tribunal ruled on the enforcement of SOABI's award. The Paris Court of Appeal overturned the first instance judgment, finding that recognition and enforcement of the award would conflict with the claim of sovereign immunity. The Board's decision goes against the terms of the ICSID conventions. It is at the first stage of conviction and punishment that the courts' jurisdiction and ability to decide if or not to exercise immunity are applicable. The court must at first rule on the authenticity of the award and then on whether or not to enforce it.

4.17.2 The United States of America

[288] Nwakoby, G.C. 2014. *The law and practice of commercial arbitration in Nigeria.* 2nd ed. Nigeria: Snap Press Nigeria Limited.
[289] ibid.
[290] Senegal v. SOABI, 2 ICSID Rep 164, 1994.

The U.S Legislature has provided in the convention of ICSID by the enactment of 22 U.S.C § 1650 a, on ICSID awards, this section of the law importantly that *a* decision of a tribunal shall create a right arising under a US treaty. The duties levied shall be enforced and shall be permitted the same rating as if it were a final judgment of a court with the jurisdiction to *do so*[291]

Eminent domain court decisions, however, have established that the above paragraph does not account for land confiscation cases, whether there is a dispute on a subject, relating to jurisdiction (this means, whether a state is immune to the intervention by a court in the U.S They maintain that the part of the law only clarifies that questions on whether such a jurisdiction exists, is exclusive to the federal courts in the U.S, in comparison to the current legal system[292]

Notably, issues on subject matter jurisdiction relating to the enforcement of an ICSID award are operable under the FSIA.[293] A good number of sittings have seen that the enforcement of ICSID awards is encapsulated ensured in the [extensive] invulnerability allowance [294], which is provided for under the 28 U.S.C § 1605 (a) (6) (b) which provides that, a foreign state will be under U.S. jurisdiction if the arbitration agreement is guided by a treaty that calls for recognition and enforcement of decisions.

A further question is the enforcement of an arbitral award against the Regime of the United States or its agencies, where being an award-debtor. In response to this, where there is the absence of statutory consent, the United States and its agencies are immune from suit seeking for damages of monetary value.[295] However, where statutory consent has been granted, such as "**Tucker act**", under

[291] 22 USC s 1650 a(a)
[292] See for example the case of Continental Casualty Co. v. The Argentine Republic, 893 F. Supp. 2d 747, E.D. Va. 2012.
[293] ibid.
[294] See for instance Blue Ridge Investments v. Republic of Argentina, 735 F.3d 72, 2d Cir. 2013.
[295] See for instance F.D.I.C. v. Meyer, 510 US 471, 1994.

which the court may grant a judgment against the United States or any of its agencies, and any contract with Congress or by the Tucker Act, as well as implied contracts with the federal government, may award damages in non-based claims."[296]

The Tucker Act, in particular, clearly, creates a remedy but fails to regulate rights (these are rights provided for under the Constitution, the Acts of Congress, Executive regulations and in contracts),which are the procedural media to obtain damages of monetary value for rights which are provided for under federal laws.[297] Notably, the steps for the implementation of arbitral awards against the U.S, while largely not being put to test, it seems relatively straightforward, with the authorization under the 22 U.S.C § 1650 of ICSID awards. Moreover, it is further argued that with this provision, International awards can be enforced under the 1958 New York Convention, which enables both of them to do so; thus, the legislation can be regarded as a free and voluntary consent." to a suit, and where the United States refuses to abide by an arbitral award, the other party can enforce it under a law suit pursuant to the Tucker Act, wherein the party would seek for money judgment.

The ICSID Convention is of important relevance in the international arbitration, in the broad sense it pertains only to the domestic or investor companies within the member states and deals only with investment-related issues. ICSID is a contract exemption will be necessary for the matter to apply in any instance, which means any other arbitration law must be excluded in order for the parties to be bound by it. Designated for the ICS secretariat by the Contracting State, the courts may recognize and enforce ICSID arbitral awards, and are authorized to administer Foreign Sovereign immunity Clause 55. Foreign Sovereign Immunity will be the only thing that can be placed in the

[296] 28 U.S.C. § 1491.
[297] Here, the claimant would follow the laid down procedures in the Tucker Act to prosecute a claim against an agency of the United States, as if such were the United States itself.

way of ICSID arbitral awards being enforced by the one party who agreed to them. Civility and equity demand that a foreign lawyer draft an agreement in order to safeguard that all sovereign immunity be waived so that fairness and justice are upheld. This chapter looks into the effects of courts interventions on arbitration process, ranging from the appointment stage to the recognition and enforcement of award stage. The chapter further looks into how the courts have intervened in the arbitration system of the Nigeria and the USA. Also, it navigates into the concept of delocalization and how it affects the International Commercial Arbitration.

4.18 Judicial Intervention in the USA Arbitration System

In the United States there is no clear difference between international and domestic arbitration. International arbitration can be handled at the state or federal levels as arbitration is properly guided at both levels in the USA. FAA works better than the NY Convention.[298] However, the FAA does not prohibit the applicability of state laws and as such conflict of laws cannot be avoided.

Applicable Law: Federal Law v. State Law

Prior to 1925[299] when the enactment of the FAA occurred, state laws governed arbitration cases both at the federal and state levels.[300] The Act, endorsed under the authority of the Interstate Commerce Clause, then brought about the existence of a federal law to guide arbitration and the possibility of federal and state laws to have concurrent guidance over arbitration.[301] Hence, federal courts are not bound to abide by state laws or state public policies in order to determine arbitral cases which arise from the FAA.[302]

In ***Allied-Bruce Terminix Cos. v. Dobson, Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*** the Supreme Court of the United States on the

[298] 9 U.S.C. §§ 201-208.
[299] See Sauser-Hall, G. 1952. L'arbitrage en droit international privé. *Annuaire de I'Institut de droit International* 44: 469.
[300] Besson, S. 2000. op. cit. p.124
[301] Moses H Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 1983. See also Allied-Bruce Terminix Cos. V. Dobson 513 U.S. 265, 1995.
[302] Robert Lawrence Co. v. Devonshire Fabrics Inc., 271 F.2d 402, 2d Cir. 1959.

assumption that the FAA will be applied in diverse cases in federal courts."[303] The intent of the congress was that the FAA should pre-empt state laws in some areas, this is because the supremacy clause of the constitution provides that federal laws supersede state laws that conflict with them.[304]

However, three things are considered in deciding the applicability of the FAA or state laws to an arbitral dispute in a specific jurisdiction:[305]

(1) How valid is the arbitration agreement
(2) Is the dispute arbitrable?
(3) Any other aspect of the arbitral process

4.18.1 The Federal Arbitration Act

The law relates to the enforcement of arbitration in the U.S. it was passed in 1925, with section 2 of the Act providing that only grounds for invalidation of contractual transactions can be applicable in determining invalidation of arbitration.[306]

The FAA provides that, should a party to a contractual agreement having an arbitral clause proceed to court, the other party can apply for a stay of proceeding[307] and ensure that the arbitration clause is strictly complied with.[308] However, before the court proceeding is stayed, the court is to determine if the subject matter is arbitrable. [309]

The FAA makes a provision for the following; allows arbitrators to call for and compel appearance of witnesses and hold them guilty of contempt if they disobey such order;[310] provision as to enforcement of arbitral award,[311]

[303] Prima Paint Corp. v. Flood & Conklin Mfg. Co, 388 U.S. 395, 1967.
[304] Besson, S. 2000. op. cit. p.124.
[305] Besson, S. 2000. op. cit. p.124..
[306] FAA, s 2.
[307] FAA, s 3.
[308] FAA, s 4.
[309] FAA, s 3.
[310] FAA, s 7.
[311] FAA, s 9.

vacation of arbitral award.[312] Worthy of note is the provision of the FAA that allows enforceability of foreign arbitral awards in US courts.[313] In *Southland Corp. v. Keating*[314] the FAA was held to be constitutional and that it deals with commercial disputes basically. The FAA makes provision that an award be compulsorily confirmed within one year of the award being given by the arbitral tribunal and anyone who wants to challenge an award can do so within three months of rendering the award.

4.19 Judicial Intervention in the Nigerian Arbitration Process

4.19.1 The Role of the Court in the Commencement of the Arbitral Proceedings

The role of the court at the commencement of arbitration many times, mirrors issues which relate to the control of the presence and validity of arbitration. An arbitration agreement is irrevocable, except such is otherwise by the parties.[315] This means that a court possesses the authority to revoke an agreement by the grant of a leave to any of the parties for such. Arbitration is arguably the most significant, because the parties cannot voluntarily surrender their right to be part of the court. Hence, an arbitral clause which ousts the jurisdiction of the court becomes invalid for being contrary to public policy.[316] The parties may albeit have an agreement restricting the right of action with respect to differences arising in the contract, except such dispute has been adjudicated upon through arbitration[317]. This clause is referred to as the **Scott v. Avery,** the clause usually formulates as:

"After such a dispute has first been heard by, and resolved by, the Arbitrator(s), neither party herein, nor any individual submitting claims under either of them, will bring any action or legal action in relation to the other, and

[312] FAA, s 10 (a) (1)-(4).
[313] FAA, s 15.
[314] FAA, s 15.
[315] ACA, s 2.
[316] See Compagnie Miniereet Metallurigioue v. Hereon, MSNLR 169, 1970.
[317] Amucheazi, O. 2004. Enforcing arbitration agreements in Nigeria. *Unizik Law Journal* 4: 99.

award from the Arbitrators shall become a condition of the right to which either side is entitled."

Despite such clauses sometimes, many times, parties to a dispute approach the court early in the dispute, if they are not interested in the arbitral process. The court helps to ensure that arbitration agreement are legally upright and not oppressive in any manner.[318] Only agreements that are validly made are enforced by the court.[319] Hence, the court is urged to stay proceeding and refer the parties to arbitration, where a valid arbitration exists. In the case of ***Obembe v. Wemaboard Ltd.***[320], an agreement containing a clause that stated that:

> *"Any disagreement or difference emerging from an agreement shall be addressed to arbitration by a person mutually agreed upon or, if there is no agreement, by a person selected by the President of the Institute of Consulting Engineers for the time being."*

To confirm a claim, the court employed the rule of Separability. This doctrine is protected in s 12(2) of the *ACA* which provides that arbitration clauses are treated separately from the other contract agreement.

This means that the presence of an arbitration agreement represents a separate agreement that the dispute will be settled by a tribunal chosen by the parties.[321]

Furthermore, another way in which the courts in Nigeria have intervened in the arbitration process is by upholding Agreements for Arbitration as done in the case of ***Imoukhuede v. Mekwunye & 2 Ors.***[322] Where an agreement to arbitrate a tenancy issue was upheld by the court, regardless of the challenge to the award which was made as a result of the arbitration.

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[318] Underhill, Mayer, Brown, Rowe & Maw. Do state courts really have a useful role to play in international arbitration? Retrieved Jan. 15, 2019, from http://www.mayerbrownrowe.com/.

[319] Markham, B. 2006. The Indispensable Judge: The Judiciary's position in a National and International Commercial Arbitration system. *Arbitration International* 22: 73.

[320] Obembe v. Wemaboard Ltd., 5 S.C. 129, 1977.

[321] Rean v. Benthworth Fin., 1 ACLC, 419.

[322] Imoukhuede v. Mekwunye & 2 Ors, 1 CLRN 305, 2015.

4.19.2 Third-Parties intervention in Arbitral Proceedings.

In the celebrated case of ***Statoil Nigeria Limited v. Federal Inland Revenue Service***[323] a disagreement ensued between the parties on the meaning and the performance of the PSC by NNPC which resulted in the arbitration, which was demanded by Statoil. The FIRS commenced a proceeding against the parties to the arbitration. The suit was to ascertain if the Tribunal had the jurisdiction to hear the matter, which was a subject of arbitration. The claim was on the basis that disputes relating to tax could not be referred to arbitration, as it related to a statutory obligation under the FIRS ctA. The Court in hearing the claim decided that although the FIRS was not a party to the agreement for arbitration, the agency could intervene in the proceeding. The court held then that, would a person be precluded from obtaining declaratory relief or starting summons if the arbitral tribunal's jurisdiction can be questioned, or if a party's reservations constitute an infringement of some elements of the Constitution or the laws of the land, or if they obstruct her constitutional and statutory tasks or powers? ” No, I don't believe that is true. There must be a remedy for a proved wrong.

The court then decided the third party did not have to wait for an decision, to then demand the setting aside of the award, however, the party could pursue an independent challenge to the proceeding. In re-asserting this position, the court held that the respondent need not finalize the tribunal proceedings since jurisdiction and other forms of illegality have been identified.

Further from this decision, it may be said that a party who was not a party to an agreement for arbitration, can ignore or challenge the award, which was made in instances where the jurisdiction of the court was questioned and where the powers which are provided for under the constitution or any other legislation are contravened, need no further interpretation. The Court's decision in this case therefore portrays the need for review and restraint, such as the provision of section 34 of the ACA and the desire of the court to enforce their role as

[323] Statoil Nigeria Limited v. Federal Inland Revenue Service, LPELR-23144 (CA) 8, 2014.

provided under the constitution as the ultimate interpreters of the law and arbiters of disputes.

4.20 The Role of Court in the Appointment of Arbitrators

Choosing an arbitrator becomes important when a dispute is referred to arbitration. When deciding on an arbitrator, the parties must consider the argument and decide whether it is primarily a legal issue or whether specialised knowledge is needed to rapidly and reasonably assess evidence. This is mostly done by parties to ascertain that their differences get settled by "judges of their own choosing."[324]

The court lacks inherent jurisdiction to appoint an arbitrator; however, if both parties fail to meet the Tribunal's needs, we can convene a roundtable discussion; if both parties fail to agree on one arbitrator and there is no applicable institution or other rules, the court will then assist them with the appointment, with section 7 of the Act requiring intervention by the co-arbitrator.

4.21 The Role of Court in the Challenge of Arbitrator's Authority

Despite the arbitrator possessing the right to rule in its jurisdiction without being challenged, the court has the authority to decide matters involving the arbitrator's authority to make such decisions. Arbitration agreements specify the location of the arbitration; but, if the parties fail to specify the location of the arbitration in their agreement, the arbitral tribunal will resolve any differences of opinion. Despite this explicit clause, courts will continue to hear and decide on cases in which parties challenge the arbitrator's jurisdiction to assess the arbitration's location. The parties in Nigerian National Petroleum Corporation v. Lutin Investment Limited did not specify a venue for arbitration in their agreement. The arbitrator relocated the arbitration to London, England,

[324] This expression comes from the Hague Convention of 1907.

and the appellant filed a civil summons in the Federal High Court, alleging, among other things, that the arbitrator acted outside of his jurisdiction and the reach of the parties' agreement. The suit sought to remove the arbitrator. The high court dismissed the claims and the orders sought were not granted on further appeals to the court of Appeal and the Supreme Court, the decision at the Federal High Court was upheld. Hence the court helped to assert the arbitrator's authority even though it can be said that it was not really in favour of the parties. The parties' autonomy was encroached on by the Court.

4.22 The Role of Courts; Stay of Proceedings pending Arbitration

The *ACA* in sections 4 and 5, grants the court the power to grant a stay of proceedings in respect of matters which are brought before it which are a subject of arbitration agreement.

Section 5 makes provision for a party who applies for a stay to do so any time after entering appearance, albeit before any pleading is made or any other step is made in that proceeding[325]. It also imports the element of discretion on the courts. Orojo and Ajomo in discussing the two sections, which they described as incompatible, U.N.N.CITRAL has produced a model code section in an effort to establish uniform commercial arbitration regulations, according to which section 4 while section 5 was taken from the previous ***Arbitration Act of 1914*** which sought to regulate domestic and international arbitration.[326] It has been argued that section 4 is wider than section 5 and could be used in all cases envisaged by section 5 and that section 4 can be used for both domestic and international arbitration.[327] It has also been argued that another reason why section 4 is preferred is that the grant of stay under section 5 is not automatic as the grant is set forth, which is discretionary.[328] It is however advised that

[325] Section 5 (1) of the *ACA.*
[326] Orojo, J.O. and Ajomo, M.A. 1999. *op. cit. p.110*
[327] Yakubu, J. 2006. The interplay of adjudicatory function: The arbitral tribunals against the courts with respect to arbitration proceedings. *Contemporary Issues in Nigerian Law, Essays in Honour of Hon. Justice, Umaru Faruk Abdullahi.* S. Kanam and A. Madki. Eds. Nigeria: ABU.
[328] Nwakoby, G. 2004. The courts and the arbitral process in Nigeria. *Unizik Law Journal* 4: 20.

sections 4 and 5 should be read together in all cases pending the amendment of the Act.[329]

In the Case of ***Enyelike v. Ogoloma***[330] regardless of the existence of an agreement for arbitration between the appellant and respondent, the respondent went ahead to institute an action against the appellant at the High Court. The appellant filed a conditional appearance in the action, as well as a motion for a continuance to file a defence and a statement of defence and counter-claim. Following that, the appellant filed a notice of preliminary objection, requesting that the suit be dismissed on the grounds that the respondents failed to meet the condition precedent to the institution of an action, which is the use of arbitration. The preliminary objection was dismissed by the court since the appellant took other actions. On appeal to the Court of Appeal, which while dismissing the appeal, held that for a stay of proceedings to be granted, the applicant must not take any action during the litigation. The Court also stated that where a party decides on a step outside the official appearance, such party would be deemed to have waived the right to employ arbitration and by implication waived his right to challenge the competence or jurisdiction of the court[331]. The Court of Appeal earlier in ***Confidence Assurance Ltd. v. The Trustees of the Ondo State College of Education Staff Pension***,[332] had emphasized that the right to evoke the arbitration provision must be asserted before a party takes any other steps in the proceedings. If, as was the case in the instant, the appellant naivetly raised the need to use and exhaust the provision of arbitration in the trust act without applying to the courts in particular to stay the proceedings, that would amount to taking action in the proceeding.

[329] ibid.
[330] Enyelike v. Ogoloma, part 1107, 14 NWLR, 2008. See also Kano State Urban Development Board v. Fanz Construction Co. Ltd., part 142, 4 NWLR 1, 1990.
[331] Enyelike v. Ogoloma, part 1107, 14 NWLR, 2008. See also Kano State Urban Development Board v. Fanz Construction Co. Ltd., part 142, 4 NWLR 1, 1990. See also Kurbo v. Zach-Motison (Nigeria) Limited, part 239, 5 NWLR 102, 1992.
[332] Confidence Assurance Ltd. v. The Trustees of the Ondo State College of Education Staff Pension, part 59, 2 NWLR 373, 1999.

4.23 Role of Courts during the Arbitral Proceedings

At the beginning of an arbitral proceeding, the court's role in supporting the process or hindering it is vast.[333] This is so, albeit that the arbitral tribunals possess the freedom to determine issues which are brought before them. The court however possesses the power to interfere in the following situations:

4.23.1 Power of the Court to Order Attendance of Witness

Even if an arbitral tribunal collects and hears testimony without adhering to specific evidence laws, it does have the authority to force a witness to appear and testify before it. This authority includes the ability to issue a writ of habeas corpus requesting the production of a detainee for investigation. By virtue of section 23 of the ACA, the court has this authority. A witness may either choose to testify in an arbitral award or be forced to do so. A court of law can only force a witness to testify if it issues a subpoena to that effect.

4.23.2 Power of Court to Order Removal of Arbitrator

In several judicial climes, parties are granted the freedom to determine the circumstances by which the appointment of an arbitrator may be revoked. On a default, this is the case, either where (i) the parties to the dispute jointly remove the arbitrator (ii) the other members of the tribunal remove the arbitrator (iii) the court removes the arbitrator. Various legal systems reserve the power for the removal of the arbitrator who are deemed unfit and unable to act, or partial[334]. In Nigeria, the parties to an arbitration who deem an arbitrator of a misconduct, may apply to the court for the removal of that arbitrator.[335]

For real or obvious bias, an arbitrator may be disqualified. An arbitrator refusing to allow one side to present its case is an example of such conduct[371]. Potential arbitrators' appointment to major international bodies is often scrutinised in order to reduce the impact of bias on their decisions. The ACA requires "anyone aware of any situations likely to cause any justifiable doubts

[333] Ahdab, A.H.E. Role of courts in arbitration in the Arab countries. Retrieved Sept. 12, 2018,
[334] Wikipedia. Arbitral tribunal. Retrieved Sept. 23, 2018, from http://en.wikipedia.org/wiki/Arbitral_tribunal.
[335] ACA, s 30 (2).

as to an arbitrator's impartiality or independence to report such situations to the parties as soon as possible."[370]

4.23.3 Power of Court to issue Interim Measures

The ACA does not grant the court, but the arbitral tribunal, the power for the issuance of an interim measure; this is provided for in section 13. In ***Econet Wireless Limited v. Econet Wireless Nigeria Limited***[336] the parties had a dispute over the operations of a particular shareholder's agreement. The was referred to arbitration, with one of the parties instituting an action in court for the protection of some subjects in the dispute, the court in hearing the application, held that it lacked jurisdiction to grant the relief sought in the injunction because there was no existing action before the court on the said dispute, hence only the arbitral tribunal has jurisdiction to grant such reliefs.

Interim measures exist in arbitration to give room for flexibility and ensure that awards are enforceable. Hence the existence of the properties that will aid the enforceability of the award given is often times secured by the tribunal making interim orders protecting the res in question before the final determination of the dispute. If the property sought to be protected is not in protection of any of the parties, the help of the court will be required to grant interim injunctions to protect such properties.

4.23.4 Supporting the Arbitral Process

A well-known case of Statoil (Nig) Ltd & Anor v. NNPC & Others[343], the question before the arbitral tribunal was unresolvable because it was unarbitrable under Nigerian law, and hence NNPC confronted the arbitral tribunal's jurisdiction and filed an application to have the arbitral proceedings terminated. NNPC cited FIRS v. NNPC & 4 Ors[344] in support of its case. It was decided that tax-related problems in Nigeria are not arbitrable. The trial court granted the injunction, Stat Oil appealed, and the Court of Appeal ruled that

[336] Suit No: FHC/L/CS/832/2003 10.

courts do not possess the power to interfere in arbitral proceedings unless otherwise specified by ACA.[345]

The decision was followed in ***Nigerian Agip Exploration Limited v. Nigerian National Petroleum Corporation.***[337]

4.24 The Role of the Courts After the Issuance of the Arbitral Award

Arbitration for years has had the backing of the law; therefore, a legitimate arbitral award is binding on all parties in disputes.[338] Every award by an arbitration tribunal has a ***res judicata*** effect, this means that the onus is on the court to enforce or set aside the award.

4.24.1 Enforcement of Domestic Arbitral Awards

Only when the winning party has the ability to implement the reward against the losing party would it be worthwhile. When attempting to enforce an award, however, such relevant facts must be established, such as the submission for compliance or the presence of a contract with an arbitration clause. Unless set aside, the arbitrators' ruling is binding on the parties and unimpeachable in the same way as a court of law's judgments are. In Arbico Nigeria Ltd v. Nigerian Machine Tools Ltd, the Court stated that any properly made arbitral award must be accepted and binding on the parties. Although Section 31(1) accepts the award as binding, it can only be implemented "upon submission in writing to the court." If we remember Nikki Tobi, JSC's terms, "an arbitral award lacks compliance or enforceability...., and is toothless until a court of law gives it teeth," we may conclude that "an arbitral award does not have enforcement or enforceability..." According to the Act, "such submission shall be accompanied by the properly authenticated original award (or certified true copy) and the original arbitration agreement (or duly certified copy)." "The applicant must

[337] Nigerian Agip Exploration Limited v. Nigerian National Petroleum Corporation, 6 CLRN 150, 2014.
[338] See The Supreme Court decision in Raz Pal Gozi Cons. V. FCDA, part 722, 10 NWLR 559, 2001, *w*here the Court held that an unsuccessful challenge of the arbitral award meant that the award remained binding and enforceable.

also make full disclosure of any matters which he knows can affect the granting of the leave to implement the award," Russell continues.

The parties to an arbitral proceeding are allowed under ACA in Section 32 allows the court to refuse recognition and enforcement of an award by filing an ex-parte motion with the court.[339] Although the Act does not make provision for grounds or the grant of such application when brought in respect of domestic arbitration, but this provision for refusal of recognition and enforcement has been applied sparingly. Refusal to recognize and enforce award by the court may frustrate the arbitral process and render it a waste of time however, refusal to recognize an award does not affect validity of that award.[340]

Arbitration commences as a private agreement between the parties and persists by way of private proceedings, with the parties having a great say about the way the process should go. The final decision of the arbitrator will be final and binding on all the parties. It is the intendment of the ***ACA*** as well as other international conventions on arbitration to limit court interference as much as possible in order to give arbitration its desired autonomy and velocity and not to clog the normal court dockets with spillovers from arbitration. Though it is desirable for arbitration to be completely independent of the courts, it nevertheless requires the support of the courts that have the compelling force, backed up by state powers to assist the arbitral process. The court's task is to ascertain whether or to order an arbitration agreement be nullified, and/ On those occasions where a party is negligent or reluctant to submit and demand evidence, the party and the arbitrator would be treated with contempt by going to court. The courts are also intended to make sure the award is obeyed, as well as to protect the rights of the parties, and to aid in enforcing and confirming the results of the award. If a party is aggrieved about the award, the court will be the final arbiter.

[339] KSO & Allied Products Ltd. V. Kofa Trading Co. Ltd., 3 NWLR 244, 1996.
[340] ACA, s 52(3).

Arbitrators should be well-seasoned and carry out their duties with utmost conscientiousness because their actions have a big impact on whether the courts intervene, particularly when it comes to setting aside an award. They must prevent actions that may result in the award being revoked. They also have a responsibility to ensure that they do not arbitrate cases for which they are not eligible, that they do not go outside the reach of the matters that have been submitted to arbitration, and that they do not make awards that are contrary to public policy. When the courts intervene, they should keep in mind that arbitration proceedings are supposed to be fast. To protect the essence of the procedure, they should grant arbitration cases prompt hearings. In this regard, we recommend that certain state courts be designated as Commercial Courts, which will handle matters arising from arbitration and other commercial matters, and that the federal government create Federal Arbitration Courts to handle international commercial arbitration. This will encourage specialisation and expedite the delivery of justice in arbitration cases.

4.25 Constitutional Amendment for Enforcement of Arbitral Awards

Arbitration is under concurrent list, that is, both States and Federal High Courts have powers to enforcement based on the 1999 federal constitution. This is supported by ACA LFN revised 2004.

In the USA, FAA serves as statutory authority for enforcement of arbitral award. Amendment of the constitution will place enforcement of arbitration award under the exclusive list which means only federal high court will authorize the enforcement.

4.25.1 Constitutional Provision for Enforcement of Arbitral Awards

Enforcement of arbitral awards in Nigeria, have proven difficult over the years because of the fact that there has to be recognition of every arbitral award by the High Court[341] before such arbitral award can be enforced. Where the

[341] ACA, s 31 (1).

arbitral award is not recognized by the relevant court (i.e. either the State High Court or the Federal High Court[342]) it will not be enforced.

The Act on Conciliation and Arbitration, Nigeria states that a judgment shall be made only after the award has been sought and awarded in Nigeria.[343] However, this provision has granted the Courts in Nigeria control over enforcement of Arbitral Award which is in contrast with the provisions non-interference by court contained in ACA[344]. There is the opinion that the non-interference provision should not only exist during arbitral proceeding but even after termination of the arbitral proceeding; when an award has been giving and at large to the point of enforcement of such arbitral award.

The issue of seeking leave of Court for recognition before enforcement of arbitral award has caused a lot of delay in the enforcement of Award which contradicts the sole aim of arbitration that is time consciousness. Arbitration is preferred to Litigation because it saves time, but with the provision that recognition of awards by courts should be done before enforcement can be possible, arbitration has been dragged to almost the same slow level as litigation, coupled with the fact that a party can decide to go to court and insist that recognition of Arbitral award be refused[345] once he has a substantial reason (what then is substantial reason? This remains the decision of the court); all these have led to the conclusion that enforcement of arbitral awards should not be subject to recognition by any court in Nigeria. Therefore it is recommended that the constitution should make provision to annul this current position which will in turn repeal arbitration Award recognition provisions contained in ACA and every other arbitration Law in Nigeria.

The constitution being the grundnorm should be duly amended to include a section that deals with recognition of arbitral award (foreign or local) without it first being recognized by a court in Nigeria, Every arbitral award should be

[342] ACA, s 57.
[343] ACA, s 31(1).
[344] ACA, s 34.
[345] ACA, s 32.

considered a decision of the Nigerian Supreme Court and applied with the same procedure as one.

4.26 Concept of Delocalization

Delocalization in arbitration came up as a result of parties from different countries seeking neutrality in the arbitral process. Parties not wanting the resolution of their dispute to be delayed by rules of their respective countries or the host country but rather a neutral law should be used notwithstanding the location of the seat of arbitration.[346]

Delocalization also extends to the acceptance of an award by the jurisdiction where it is being enforced whether or not the laws of that enforcing jurisdiction allows such award.[347] Basically, delocalization "represents a quintessential choice or mode of international commercial arbitration".[348]

The General Idea of delocalization theory in arbitration is that the law of the seat of arbitration should not interfere with the process of an international arbitration.[349] This is because the interference with the law of the arbitration seat may make enforcement of arbitration awards difficult, because parties can object against its enforcement on the basis that their agreement on law of place of arbitration was not strictly followed.[350]

4.27 Party Autonomy and Delocalized Arbitration

4.27.1 Party Autonomy and Place of Arbitration

[346] ibid.
[347] ibid.
[348] Anglade, L. 2003. The use of transnational rules of law in international arbitration. *Irish Jurist* 101.
[349] Moses, M. 2008. *The principles and practice of international commercial arbitration.* England: Cambridge University Press.
[350] ibid.

Delocalized arbitration is a part of the wider concept of *party autonomy*. The concept stipulates that parties are granted the freedom to assign any seat of arbitration or not do so. Regardless, the court has a directive of carrying out its judicial powers, to determine the process of arbitration. An example is the provision of the English Arbitration Act which provides that;[351]

> *"Where the seat of arbitration is not in England..... or no seat has been appointed or decided, the court has the same power to stay legal proceedings and impose arbitral awards as if England were the seat of arbitration."*[352]

The section then clearly permits the court to exercise the power in relation to secure the attendance of any witness, in such a situation to support the arbitral proceeding.

4.27.2 Party Autonomy and Use of Procedural Law

In effect, the exclusion of domestic procedural law by the parties, which is applicable at the venue for arbitration will be limited to an access to the court. The national court has an obligation for the protection of the parties.[353] Therefore, where the parties decide on a delocalized arbitration, they have by implication, included the necessary and relevant statutory provision provided by national laws on international arbitration. Hence, by the contract that is made, the court is limited in its ability to interfere or intervene in the choice of a mechanism to resolve the dispute. This means that although the court can intervene, it will be limited to the minimum standard of protection granted under the law, hence, respecting the party' place as autonomous in making the agreement.

4.27.3 Party Autonomy in Choosing Substantive Law

On the subject of delocalization, many regulations of national application provide that to give an award, the tribunal is to make its decision in line with

[351] ACA, s 2(2).
[352] ACA, s 2(2).
[353] Dubai Islamic Bank, 1 Lloyds Rep. 65, 75.

the law which is chosen by the parties.[354] Clearly, this is a broad perspective to the subject, wherein the parties choose which law is applicable, be it national or non-national law.[355] Where a non-national law is applicable, the concept of delocalization is then adopted.[356] Therefore, when the parties agree on a delocalized law to be applicable, the failure of the tribunal to render its award based on that law would be deemed as an irregularity.

4.27.4 Party Autonomy, Public Policy and Lex Arbitri

The court's role in a delocalized arbitration is difficult to establish, For these reasons, the award is legally unenforceable because the state court may be denied jurisdiction for insufficient grounds.[357]

This may not interprete as a grant of power to the court for the assumption of jurisdiction over a dispute and the consequent setting aside of a delocalized arbitration clause. However, despite the court's jurisdiction over the parties, the case will be decided in another country. As a result, the court's jurisdiction will therefore be tied to international arbitration law.

[354] D.S.T. v. SIT. See also Binder, P. 2000. International commercial arbitration in UNCITRAL Model law jurisdictions. *Kluwer Law International.*
[355] Trajković, M. 2000. *Međunarodno arbitražno pravo.* Serbia: Pravni Fakultet.
[356] Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H. Respondents v. Shell International Petroleum Co. Ltd., 1 AC 295, 1990. See also Binder, P. 2000. International commercial arbitration in UNCITRAL Model law jurisdictions. *Kluwer Law International.*
[357] Halifax Financial Services Ltd. v. Intuitive Systems Ltd., 1 ALL ER (Comm) 303, Q.B. 1999.

4.28 Enforcement Issues

To understand how important the transnational question is to delocalization is, it is critical to consider whether or not the award is rendered within or beyond a nation's borders.[358] The delocalization of arbitration is important in deciding the nature of an arbitration, be it national or foreign arbitration.[359] The question of whether a procedure on arbitration is under the principle of national lex arbitri is easily answered where the parties to the agreement, do not allow any parts of an arbitration to be fixed in a particular place Many legislations allow you to agree to arbitration outside of their territorial jurisdiction. As a result of this, many national courts would function within their role in the applicable national law, and this is usually limited to public policy concerns.[360] Hence, many national legislations on arbitration, inclusive of the judiciary accept and the convenience of the place of arbitration and any limitation in applying national laws.[361] Also, many times, regulations on arbitration recognize that parties to the procedure agree to base their arguments on non-legal or non-national considerations, this is based on the merits of their case.[362] Where the parties choose that, the tribunal is indebted to follow their decision. Furthermore, it can be assumed that international arbitration is extra-territorial because of domestic and international laws are under national jurisdiction.[363] Parties to a dispute have a substantial freedom of choice in international arbitration: rather than being obligated to follow their national laws.

4.29 Power to set aside and Award

[358] Minmetal v. Ferco Steel, 1 All ER Comm 315, 1999.
[359] See Rubino-Summartano, M. 1982. Nationality of awards and applicable substantive and procedural law. *Journal of Commercial International Arbitration* 48: 47. Mustill, M. and Boyd, S. 1989. *The law and practice of commercial arbitration.* 38-39.
[360] See Rutherford, M and Sims, J. 1996. *The arbitration act 1996: a practical guide.* London: Sweet & Maxwell. 4.
[361] Paulsson, P. 1986. Arbitration's un-restriction In Belgium. *Arbitration International* 2: 68.
[362] Olatawura, O. 2003. Arbitration on a Decentralized basis under the English Arbitration Act 1996: Evolution or Revolution? *Law and Commerce 30:* 62.
[363] Goode, R. 1992. The adaptation of english law to international commercial arbitration. *Arbitration International* 8: 14.

Sections 29, and 30(1) of the Act provide for the setting aside of a domestic arbitration award. The combined effect of this section allows a party who is aggrieved by an arbitral award to file a request for additional award or an application to refuse an award within 3 months of the date of the award or, in a case falling under Section 28 of the Act, from the date the request for additional award is disposed of by the arbitral tribunal or an application to refuse an award is made, and if the application is not made within the time period provided for, the party may sue the arbitral tribunal.[364] Such application must be made by a party to the agreement or his personal representative. The Court in ***Arbico (Nig) Ltd v.NMT Ltd***[365] interpreted Section 29 and 30 of ACA which makes provisions for grounds to set aside an award, If the award goes outside the boundaries established by the dispute settlement of arbitration, or if the arbitrator commits misconduct, one of the objections raised by the other party before the tribunal is substantiated.[366] Section 48 makes provision for the setting aside of an award by the court in an international arbitration on any of the nine circumstances or grounds set out in the section which includes where "the subject matter of the dispute is not capable of settlement by arbitration under laws of Nigeria or where the award is contrary to public policy of Nigeria."[367] Very key is that the grounds under the first subsection must be proved with facts by the party who alleges, however, under Subsection (b) the court must make a finding by itself.

4.30 The New York Convention and Delocalized Award

The New York Convention requires National Courts to recognize and enforce foreign awards subject to Articles III and IV. By virtue of article, procedure and honesty is required to conform to the exemption to contract and public policy. The agreement to arbitrate shall be recognised only if the agreement is null, inoperative, or if it is incapable of being performed. Parties are expected

[364]Araka v. Ejeagwu, 15 NWLR 692, 2000. See also United Insurance v. Stocco, 8 NSCC 96, 1973.
[365] Arbico (Nig) Ltd v.NMT Ltd, part 789, 15 NWLR 7, 2002.
[366]Baker Marine v. Chevron, part 681, 12 NWLR 393, 2000.
[367] ACA, s 48 (b).

to be referred to arbitration if there is a valid arbitration agreement in pursuance to article II (3). By virtue of article VII which is known as pro-enforcement, does not affect the validity of other bilateral or multilateral agreements concerning hr recognition and enforcement of foreign arbitral awards. This implies that agreements and awards are to be enforced under the convention, another treaty or any national law that s favourable than the convention. To this effect, implementation of the New York Convention and its applicability is only for international arbitration and not domestic.

The general objective is to facilitate international trade and investment by providing a secure means of amicable dispute resolution mechanism. There are provisions on party autonomy, procedures for confirming and annulling awards, enforcement of arbitration agreements by national courts in conjunction with the recognition and enforcement of foreign awards.

It is subject to the New York Arbitration Law as a result of the convention generally being enforced within a state.[368] This explains why the New York Convention does not apply to international awards. In further clarification, the English court re-enforced this position of the general principle of law, which governs contractual relationship in ***Deutsche Schachtbau v. S.I.T***. the court maintained that the application received was in consonance with the international nature of the subject of the contract, hence, any claim that there was an inconsistency with the Convention was rejected and found the English public policy non-enforceable.[369]

Article 1(1) (a) of the New York Convention further elucidates on the applicability of the New York Convention to delocalized arbitration where it provided for awards not considered domestic or the subject of the laws applicable in another state and relates that where such awards are rendered in

[368] See Redfern, A., and Hunter, M. 2004. *Law and practice of international commercial arbitration*. 4th ed. London: Sweet & Maxwell. See also Berg, A.J.V.D. 1981. *The 1958 New York arbitration convention, aimed at establishing a uniform standard of judicial interpretation.* Netherlands: Kluwer Law International.

[369] Deutsche Schachtbau-und Tiefbohrgesellschaft mbH and Others v. Shell International Petroleum Company Limited, International Legal Materials, Vol. 27, No. 4. July 1988.

another state, it may not necessarily represent a domestic award.[370] Clearly therefore, the intention of the parties is the particular test in applying foreign regulations or non-substantive laws to the subject matter in dispute to be categorized as international or foreign awards.[371]

There are basically two principles that guide delocalized arbitration:

i. Arbitration must not be contrary to public policy
ii. Autonomy of the parties

In this manner, allowing deliberate denial of the availability of an arbitration forum therefore invites arbitration agreements to be repudiated. Delocalized arbitration serves the interest of the parties. There are therefore particular advantages to delocalized arbitration, they include:

i. The guarantee of a neutral forum which applies sufficient procedure
ii. Limitation to the influence of national courts
iii. Excluding the limitation of the *lex fori*
iv. The limitation of issues on the conflict of laws between state agencies or governments and other parties, hence the submission to the laws and regulations in a neutral foreign state
v. Parties can therefore create procedural rules to guide the resolution of disputes with specificity to the transaction and their interest[372]

Conclusively therefore, delocalized has been deployed more in recent time and possessive so much significance, hence to assume that every international arbitration is based on certain national legal regimes would be the neglect of reality, and to invalidate an agreement or award on the basis of it's delocalization would be a denial of fact and an unjust approach.[373] The globalization of transactions and the need for dispute resolution of effective

[370] See Pryles, M.1993. Foreign awards and the New York convention. *Arbitration International* 9: 259.
[371] Deutsche Schachtbau-und Tiefbohrgesellschaft mbH, op. cit. p.142
[372] See also Paulsson, P. 1986. Arbitration unbound in Belgium. *Arbitration International* 2: 68.
[373] See Star Shipping AS v. China National Foreign Trade Corp., (The Star Texas), 2 Lloyds Rep 445, 1993. See also Parsons & Whittemore v. Societe Generale De L'Industrie Du Papier (RAKTA), 2d Cir 508 F. 1974.

nature seems the basis for the flourishing nature of arbitration on the national scene, despite legal barriers and obstacles.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1. Summary

The center point of this research is focused on the enforcement of arbitral award and the judicial practices in Nigeria in conjunction with the USA. The research focused on nitty-gritty of arbitration, the review of literatures of scholars and academic writers, the characteristics of energy arbitration with full details of ICSID, ECT among others. Furthermore, arbitration involving states or state linked parties and investment arbitrations was analysed. It discussed the enforcement of energy arbitration awards with emphasis on statutes and case laws other than New York Convention. The research further accessed ICSID in detailed analysis. It was able to detect that constitutional amendment and delocalization of arbitration will serve as revolutionary templates for time saving energy arbitration in Nigeria and it now rounded up with various practicable recommendations that would yield great results.

5.2 Conclusion

International Commercial Arbitration is an emerging market globally, that require countries with future investments drive to encourage concerted efforts in this area of dispute resolution towards acquisition of foreign direct investment.

This study examined the implementation of the Energy Arbitration Award and the legal proceedings in the United States and Nigeria. It accessed the workings and efficiency of ICSID, New York Convention, Statues and National Laws in

conjunction with other investment treaties. It pointed out the rational for the preference of enforcing arbitration awards on the energy disputes in the USA rather than Nigeria. The research work determined how to reverse the trend.

Arbitration being a party structured dispute resolution mechanism should not anchor itself in a discriminating way of enforcement with a preference to one jurisdiction than another. It is apparent that the Nigerian Businessmen prefer the enforcement of the arbitral award in foreign climes as against Nigeria due to the arbitral rules and laws existing in the country which discourages arbitration.

This research discovered that necessary reforms are required for the growth and development of arbitration in Nigeria. The radical reforms in arbitration rules will make Nigerian arbitration leverage with foreign arbitration particularly the standard of the United States of America.

Enforcement of award in international commercial arbitration is sin qua non effectiveness of arbitral tribunal decision. Enforcement of awards in energy arbitration is paramount for the growth and development of energy sector. It should be noted that no serious investor in energy sector would like to waste his investment if arbitration as a mechanism of dispute resolution is not properly secured.

It is worthy of note that enforcing foreign arbitral awards takes different forms in different countries. This could be as a result of inadequate basic laws or even difficulties attached to procedure. As regards Nigeria, we see the strides it has made in dispute resolution mechanisms and by extension enforcing foreign arbitral awards. Nigeria falls into the category of not having its house together to a large extent. A lot must be done to reform existing laws on arbitration so as to ensure ease of the process.

The United States of America for many years have favored enforcing foreign arbitral awards and have shown such by bringing up defences or alternative

basis for its enforcement. However, the **NYC** which happens to be the foremost law on the subject matter, limits the enforcement procedure and by extension these defences formulated by the courts. This seems to limit enforcement of arbitral awards within the USA and foreign states. This is of course a far cry from the local Arbitration Act which is somewhat liberal in its approach to the subject matter. There is also the problem of limitation of the Convention which doesn't cater to definitions and concepts which end up being misconstrued, and thus has the potential of slowing the pace of the process. These need to be looked at seriously.

At this juncture, more internationally acceptable conventions and statutes must be put in place to ensure ease of enforcement especially statutes that limits the interference of national laws in the enforcement of awards. Existing conventions should be looked at critically so as not to stall possible enforcement mechanisms put in place by contracting states. The parties involved in the process must be confident that there exists laws that will aid the process and will achieve its set purpose.

This study concluded that if delocalization of arbitration is embraced, it means the enforcement of arbitration awards would have been upgraded in Nigeria beyond the template of American statue that requires FAA as regulatory authority for Arbitration in the USA. This means both the proceedings and enforcement of arbitration awards are delocalized without any states and national court required for the enforcement.

Energy is crucial to the world's economy, therefore the law and procedure of arbitration proceedings need to be streamlined toward uniformity. This entails that legal structures and related mechanisms put in place must be friendly, ascertainable and predictable for energy businesses to thrive and become more profitable to all stakeholders.[374]

5.3 Recommendations

[374] Yemi Oke, Nigerian Energy Resources Law and Practice, Oil & Gas Law (Practice, Cases & Theories) 2019.p.419

Having discovered that arbitration is an emerging market in the world, it should be noted that arbitration in Nigeria requires surgical operations. Findings from this research present various solutions to Nigeria to control and maintain a healthy arbitration environment:

- Arbitration in Nigeria should be totally delocalized so that the effect of state and national laws as it concerns the enforcement of international arbitral awards will be minimised. Basically a situation whereby national laws serve as a detriment for arbitral proceedings coupled with the challenges witnessed in the recognition and enforcement of the resultant awards, delocalization should be embraced in order to save the arbitration template from being subject to any interference from the legal framework of local jurisdictions.
- Constitutional amendment is necessary in other to take the Enforcement of Arbitration Award beyond the Jurisdiction of any Court in Nigeria. This invariably will be far above FAA which will be statutory act in the United States of America. Presently both Federal and States have concurrent jurisdiction on arbitration however, constitutional amendment to place arbitration on the exclusive list should be effected so that total control of arbitration will be within the auspices of the Federal government. This will expunge the friction between the Federal and state laws on arbitration.
- Section 14 of the NNPC Act CAP 320 LFN 1990 makes provision that in any action against the corporation there must not be issued any execution or attachment and that any judgment debt owed by the corporation shall be paid from the fund reserve of the corporation and ministerial approval is required. It is suggested that the need for ministerial approval should be amended.
- Also, Section 84 of the Sheriff Civil Process Act that requires the Attorney General's approval before attaching State's properties and funds should be expunged so as to allow easy enforcement of arbitral awards.
- NYC, UNCITRAL Model Law and ICSID actually assisted in the enforcement of arbitral awards. However, they need to be complemented by local statutes because NYC has not covered certain aspects of the foreign awards. The

annulment of Yukos' foreign awards for accountability in that country can serve as a yardstick. The provision of the UN Convention as stated in ACA Cap A18 LFN 2004, should be amended to provide for foreign award at the country of origin and make it enforceable by bilateral treaty.

5.4 Contribution to Knowledge

There are lots of things to be learnt from the United States of America Arbitration system by Nigerian Arbitration. Although arbitration is still evolving in Nigeria but far from the minimum global standard particularly the United States of America arbitration template.

1. The research identified specific disparities in international arbitration practices in developed and developing countries.
2. The research identified specific judicial practices of developed countries that are supportive of international arbitration as basis for rethinking arbitration processes in the developing nations.
3. The research identifies measures for bridging the gaps in enforcement and judicial practices of arbitration in Nigeria and other developing countries.

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