THE END FAILS TO JUSTIFY THE MEANS: JUDICIAL INTERVENTION IN ARBITRATION AND CONCILIATION IN NIGERIA

Ahmed Rabiu *

Abstract

For a cheap, speedy and effective dispute resolution mechanism which is a factor and a fundamental requirement for a Foreign Direct Investment (FDI) to flow and flourish, Arbitration and Conciliation Act was enacted to facilitate the settlement of investment and other contractual disputes within Nigeria through arbitration rather than courts. Arbitration has continued to maintain the lead as the preferred mechanism for the resolution of domestic and international business disputes in the Nigerian legal system, the major attraction being the flexibility of the process and the freedom exercised by contracting parties in choosing their own tribunal. The result of such disputes mechanism is an award which incidentally would have to be taken to the regular court for recognition and enforcement. The research recommends the establishment of special courts tasked with the registration and enforcement of foreign and domestic arbitral awards or judgments, or alternatively: administrative recognition of all litigation involving arbitration as *sui generis* and worthy of being fast tracked through the judicial process. Otherwise the end, in the quest for an effective, cheap and speedy alternative dispute resolution mechanism, would not justify the means, in the arbitration process.

Key Words: Judicial, Arbitration, Conciliation, Investment, Foreign, Nigeria

I. Introduction

The starting point to discuss judicial intervention in arbitration and conciliation in Nigeria is the Arbitration and Conciliation Act[1] itself**.** In accordance with the **r**eforms carried out on an effective mechanism for a speedy resolution of commercial dispute, Nigerian authorities have tried to examine the legislative and regulatory central mechanisms of foreign investment in Nigeria. The institutional and various municipal legislations relating to these have been institutionalized in trying to attract investment via various reforms. These reforms included the deregulation of the economy, the new industrial policy of 1989, the establishment of the Nigeria Investment Promotion Commission (NIPC) in early 1990s, and the signing of Bilateral Investment Treaties (BITs) in the late 1990s. Others were the establishment of the Economic and Financial Crime Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC).

The Nigerian Investment Promotion Commission (NIPC) Act of 1995, in particular, aims to remove most of the legal disincentives to foreign investment; one of the most significant of these is the Settlement of Investment Dispute.[2] The

* AHMED RABIU, PhD, Associate Professor, Department of Private and Commercial Law, Faculty of Law, Bayero University, Kano-Nigeria. +2348037045126, rabiu1970@gmail.com

[1] Cap.19 Laws of the Federation of Nigeria 2004

[2] See Section 26 (3) NIPC Act 1995

relevance and desirability of a reliable framework for the settlement of investment disputes cannot be overemphasized, and the Act sets out the mode of settlement of **investment** dispute, which is by arbitration, where mutual discussion has failed in resolving the dispute.

Arbitration and Conciliation Act[3] is the main Nigerian statute dealing with Arbitration. The purpose of the law was clearly spelt out from its long title, that is, to "provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration."

Since the Arbitration Ordinance of 1914, arbitration in Nigeria has metamorphosed from almost a state of non-existence to that of irresistible dominance. The major international arbitration instruments namely the United Nations Commission on International Trade Law (UNCITRAL Model Law)[4] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) have been domesticated[5] as required by the country's constitution for their application. This was achieved in the basic law to wit the Arbitration and Conciliation Act[6] (referred to herein as ACA). This law applies throughout the federation.[7] It however recognizes the applicability of the provisions of other laws in respect of which disputes might be submitted to arbitration or settled in any manner provided under that law concerning certain transactions. Parties are free to choose the law applicable to the arbitration proceedings but where they have not

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

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

[5] See **Section 53** ACA which allows the application of Arbitration Rules set out in the First Schedule, and allows parties to a commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the first schedule to the Act or the UNCITRAL, Arbitration Rule or any other International Arbitration Rules acceptable to the parties.

And **Section 54** ACA which provides for the application of Convention on the Recognition and Enforcement of Foreign Arbitral award where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the convention set out in the second schedule to the Act shall apply to any award made in Nigeria or any contracting state. Where the state has reciprocal legislation recognizing the enforcement of arbitral award made in Nigeria under the Convention, and that the Convention is applicable only to differences arising out of legal relationship which is contractual.

[6] Cap A18, LFN, 2004

[7] See C.G.D.E Geophysique v Etuk (2004) 1 NWLR 853 at 20

predetermined the law, the arbitral proceedings shall be governed by the ACA[8].

However, it could be observed for this purpose that problem of dispute settlement remained intact notwithstanding the NIPC Act 1995 and the ACA. This is because after the arbitration the arbitral award shall be recognied as binding and subject to section 31[9] and section 32[10] shall, **upon application in writing to the court, be enforced by the court.**

This paper examines the judicial intervention in the recognition and the enforcement through the courts and analyse the impact of such intervention to the realisation of a cheap and speedy settlement of investment dispute in Nigeria.

II. Arbitration Process in Nigeria

Although this law[11] purports to domesticate the operation of the New York Convention, it introduced some modifications to its application. It seems to apply only to disputes arising from contractual legal relationship and not otherwise.[12] Thus, some writers have submitted that the Arbitration and Conciliation Act ACA is a breach of treaty obligation since it derogated from the provision of the Convention to which Nigeria is a party,[13] which is supposed to apply to disputes arising in any legal relationship *"whether contractual or not."*

Similarly, in its Interpretation section[14] the Act defines 'arbitration' to mean " a commercial arbitration whether or not administered by a permanent arbitral institution ". However, more elaborate is the definition in *Stroud's Judicial Dictionary*[15] relying on Romilly M.R[16] states that: "Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between parties"

Furthermore, *Halsbury Laws of England*[17]defines arbitration as: "An

[8] Section 15(1) and (2) ACA 2004
[9] section 31 (1) ACA 2004
[10] ibid
[11] ACA LFN 2004
[12]See Convention on the Recognition and Enforcement of Foreign Arbitral Award, New York, 10th June, 1958, 330 U.N.T.S. 38 No. 4739 (entered into force on 7th June, 1959) Art. II(1) which provides for „whether contractual or not"; see also Art 7(1), UNCITRAL Model Law
[13]Idornigie, P. (2004) The Principle of Arbitrability in Nigeria Revisited, Journal of International .Arbitration. 21-3 279-288
[14] Section 57(1) ibid
[15] Third Edition, Vol.1 at P.180
[16] See Collins v Collins 28 LJ Ch. 186
[17] Third Edition Vol. 2

arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than in court of competent jurisdiction,"[18] Another reputable author[19] on the subject explains arbitration from the point of view of agreement. According to him: "When two or more persons agree that a dispute or potential dispute between them shall be decided in legally binding way by one or more impartial persons in a judicial manner, that is upon evidence before him or them, the agreement or a submission to arbitration. When, after a dispute has arisen, it is put before such person or persons for decision, the procedure is called arbitration and the decision when made is called award"

It would seem, if the term "arbitration" is used merely as descriptive of a simple and speedy determination of a cause, without reference to a formal procedure but in accord with the customs of a trade, the designation arbitration is proper.

Learned Authors, Redfern and Hunter posit that in its origins, the concept of arbitration as a method of resolving disputes was simple:

"The practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of law; and after courts have been established by the state and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle them with less formality and expense than is involved in a recourse to the courts."[20]

Arbitration is a dispute resolution mechanism between two or more persons by seeking and accepting a decision by a third party of their choice. An essential component of arbitration is an agreement to arbitrate, which implies a submission to arbitration. Generally, the import is that the submission is voluntary[21] even though there are cases where arbitration is imposed by statute.[22]

The use of arbitration as a dispute resolution mechanism is quickly gaining

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

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

[20] Redfern & Hunter, "Law and Practice of International Commercial Arbitration, 2nd Ed. (1991), p.22

[21] See Commerce Assurance Limited V. AlhajiBuraimohAlli (1992) 3 NWLR (Pt 232) 70

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

ground in Nigeria. The principal advantages of arbitration are the opportunity to be able to appoint a person with relevant knowledge to resolve the dispute as well as the relatively shorter time taken to resolve the dispute as compared to litigation, which takes much longer. Disputes arising out of basic commercial contracts are common, it has become a real alternative to court proceedings, particularly for disputes arising from commercial transactions[23].

For the first time in Nigeria, Arbitration and other forms of Alternative Dispute Resolution(ADR) is given constitutional backing as a means of settlement of disputes. Specifically, Section 19 (d) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999, provides for the settlement of disputes by Arbitration, Mediation, Conciliation, Negotiation and Adjudication.

This is in recognition of the crucial role Arbitration and other forms of ADR now play in the resolution of various types of disputes. The constitutional status accorded Arbitration and other forms of ADR for the settlement of disputes[8] is a complementary role to the judicial powers conferred on the courts by the Constitution.[24] The growing success of arbitration as a mechanism for settling commercial disputes lies in the fact that, one would, today, rarely find any contract between domestic or international parties without an arbitration clause or agreement of some sort, whether ad hoc or institutional, to be conducted under the auspices of the world's leading arbitration institutions.[25]

Arbitration as a dispute resolution mechanism has several advantages and attractions over and above Litigation. It is, for instance, convenient and expeditious.[26] It is cost effective, and generally helps in maintaining business relationship of the parties. Again, informal nature of arbitration proceedings saves the parties from the rancorous tendencies and consequences often associated with litigation.[27] Arbitration is a form of extrajudicial dispute resolution that parties can use to achieve speedy and high-quality results in settling disputes. Arbitration constitutes a much broader and more efficient dispute resolution system than the public courts system.

[23]Adekoya o. and Emagun D, (2012) Arbitration Guide IBA Arbitration Committee, Nigeria P.20
[24] Paul Mitchard, *A Summary of Dispute Resolution Options*, *in* martindale- hubbell international arbitration and dispute resolution directory 3–24 (1999).
[25] Ibid.
[26] Peters, D. Arbitration and Conciliation Act Companion, (2006) Lagos Dee-Sage Nigeria Limited, Lagos. P18
[27] Ibid.

Arbitration is not part of the State system of courts. As already noted, it is a consensual procedure based on the agreement of the parties. Nevertheless, it fulfills the same function as litigation in the State court system. The end result is an award that is enforceable by the courts, usually following the same or similar procedure as the enforcement of a court judgment.

With regard to the courts' support for arbitration, Nigerian courts are today generally believed to be arbitration-friendly, as they would readily enforce arbitration agreements and awards. In the case of *Kano State Urban Development Board v Fanz Construction Co Ltd*[28]where the Supreme Court held that the courts strive to uphold arbitration agreements so that even loose and brief expression such as "arbitration to be settled in a ["named place"] or "suitable arbitration clause" will often be given sufficiently precise meaning to ensure arbitration.[29] A further review of the decided cases shows a general recognition by Nigerian Courts of arbitrations as a good and valid alternative dispute resolution mechanism. In *C.N. OnuseloguEnt. Ltd. v. Afribank (Nig.) Ltd,*[30] the Court held that arbitral proceedings are a recognized means of resolving disputes and should not be taken lightly by both counsel and parties. However, there must be an agreement to arbitrate, which is a voluntary submission to arbitration.

Where there is an arbitration clause in a contract that is the subject matter of Court proceedings and a party to the Court proceedings promptly raises the issue of an arbitration clause, the Court will order a stay of proceedings and refer the parties to arbitration.[31]

However, in *Afribank Nigeria Plc v Haco*[32] the Court granted interim relief and directed the parties to arbitrate under the provisions of ACA. Upon the publication of the award the parties returned to the Court for its enforcement as judgment of the Court.

[28](1990) 4 NWLR (part 142) 1 and 33,
[29]See also the Supreme Court's decision in *M V Lupex v Nigeria Overseas Chattering & Shipping Ltd* (2003) 15 NWLR (part 844) 469.
[30](2005) 1 NWLR Part 940 577
[31]See sections 4 and 5 of the ACA. See sections 6(3) and 21 of the Lagos Law, which empowers the Court to grant interim orders or reliefs to preserve the *res* or rights of parties pending arbitration. .Although the ACA in section 13 gives the arbitral tribunal power to make interim orders of preservation before or during arbitral proceedings, it does not expressly confer the power of preservative orders on the Court and section 34 of the ACA limits the Courts' power of intervention in arbitration to the express provisions of the ACA.
[32](Unreported FHC/L/CS/476/2008)

The Courts in Nigeria are often inclined to uphold the provisions of sections 4 and 5 of the ACA provided the necessary conditions are met. A live case in point is the case of Minaj *Systems Ltd. v Global Plus Communication Systems Ltd. & 5 Ors.*[33] In this case, the Claimant instituted a Court action in breach of the arbitration agreement in the main contract and on the Defendant's application, the Court granted an order staying proceedings in the interim for 30 days pending arbitration. In *Niger Progress Ltd. v N.E.I. Corp.*[34] the Supreme Court followed section 5 of the ACA, which gives the Court the jurisdiction to stay proceedings where there is an arbitration agreement. In *M.V. Lupex v. N.O.C*[35] the Supreme Court held that it was an abuse of the Court process for the respondent to institute a fresh suit in Nigeria against the appellant for the same dispute during the pendency of the arbitration proceedings in London. In *Akpaji v Udemba*[36]the Court held that where a defendant fails to raise the issue of an arbitration clause and rely on same at the early stage of the proceeding but takes positive steps in the action, he would be deemed to have waived his right under the arbitration clause.

The only formal requirement is that the arbitration agreement should be in writing, either executed by the parties, or evidenced in an exchange of letters, telex, telegrams or other means of communication, which provide a record of the agreement. An exchange of points of claim and of defense in which the existence of an arbitration agreement is alleged by one party and not denied by the other party will also fulfill the legal requirement.[37]

The award in arbitration is further regulated by the ACA, Section 26 of the Act and Article 32 of the Rules provide for formal requirements of an award. These requirements include: the award must be in writing; it must be signed by all the arbitrators or a majority of them; it must detail the reasons for the decision must be given, except where otherwise agreed by the parties; the date and place of the award must be stated. The Act does not specify the relief and remedies, which the arbitrator can give in his award. However, in practice, the arbitrator can make awards for payment of money, of specific performance, of an injunction (where a third-party will

[33]Unreported Suit No. LD/275/2008
[34](1989) 3 NWLR (Part 107) 68
[35](2003) 15 NWLR (Part 844) 469
[36](2003) 6 NWLR (Part 815) 169
[37] See, section 1(1) c ACA

not be affected), or of a declaration for the rights of one or both of the parties.

It is not clear whether arbitrators can award punitive or exemplary damages but they can award interest on the sum of money awarded. With regard to the rate of interest, the arbitrators are guided by what is fair and just in the absence of any specific provision of the law or agreement of the parties. The arbitrators may award compound interest if it is fair or agreed to by the parties or provided by the law governing the issue or by the custom of the trade in dispute[38].

By the provision of section 31 ACA an arbitral award shall be recognized as binding and subject to the section and section 32 of the Act, shall, upon application in writing to the court, be enforced by the court. The party seeking to enforce the award will apply to the High Court within the jurisdiction where it wishes to enforce for recognition and enforcement of the award. The application must exhibit the original or a certified true copy of the arbitration agreement and the award. The other party must be put on notice and may then request the court to refuse recognition or enforcement of the award. In practice, the Courts in Nigeria will recognise and enforce an arbitral award in the absence of any valid and convincing ground for setting aside or for refusal of recognition and enforcement. A party applying for the recognition and enforcement of an arbitral award shall furnish the Court with:

(i) The duly authenticated original award or a duly certified copy thereof; [39]

(ii) The original arbitration agreement or a duly certified copy thereof; and [40]

(iii) Where the award or arbitration agreement is not made in English Language, a dully certified translation thereof in to English Language[41]

Grounds for refusal include that there is incapacity of a party, there was an invalid arbitration agreement, there was lack of notice of the proceedings, there was lack of jurisdiction by the arbitral tribunal, there was improper composition of the arbitral tribunal, the subject matter was not proper for arbitration, that the award is not binding, was set aside or was suspended at origin, or dictates of public policy[42].Where an application for the refusal to recognize an award is before the court, the court may

[38],Adekoya O. and Emagun D. (2012) Arbitration Guid *e*I BA Arbitration Committee, Nigeria P.22
[39]section 31 (2) (a) ACA
[40] Section 31 (2) (b) ACA
[41] See also Section 51(1) a,b,c ACA , See also *Adwork Limited v Nigeria Airways Limited* (2000) 2 NWLR (Pt.645) 415
[42] See Section 52 ACA

upon application stay execution of the award pending the determination of the application.[43]

Once the local court grants recognition and enforcement of an award, the award is treated as a judgment of the registering court and enforced in a similar manner.[44] A writ of execution or garnishee order can be issued to compel payment of a money award. The rules of civil procedure will apply, and a party can apply to court in respect of the award, usually to seek payment on favorable terms.

There are two alternative methods of enforcement of an award[45] open to an applicant, namely;

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

Thus the two alternative methods are fundamentally different. The summary method treat the award as an existing judgment and only seeks to enforce it. The enforcement by action seeks to get judgment in terms of the award. There can, therefore, be no question of a proceedings by way of summary procedure to enforce the award being pleaded as *estoppel per rem judicatam*, as in that case the court itself decides nothing. It simply enforces the award as if it were a judgment.[46]

The duration of enforcement proceedings depends on whether the other party contests the award or not. There is no expedited procedure for the enforcement of an award. Awards like court judgment must be enforced within 12 years from the date they become enforceable.[47] A party to arbitration may be deemed to have waived his right to object to any non-compliance from the award that any requirement under the arbitration agreement, has not been complied with and yet precedes with the arbitration without stating his objection to such non-compliance.[48]

There are no special rules that apply to the enforcement of an award against a State or State entity. However, it should be noted that awards may be enforced against a State or State entity where there is a waiver of diplomatic immunity.[49] Awards may also be

[43] Section 52 (3) ACA See *Baker Marine Nig. Ltd v Chevron Nig. Ltd* (2000) 12 NWLR (Pt.681) 393
[44] Section 31 (3) ACA
[45] See Supreme Court Practice, 1979, paragraph 3787 Vol. 2
[46]at PP.723-724 ibid.
[47]Adekoya O. and Emagun D. (n38).
[48] Section 33 ACA
[49]Under Section 2, 5(2), 7, 8 10 and 16 of the Diplomatic Immunity and Privileges Act, Cap D9, Laws of the Federation of Nigeria, 2004.

enforced where the State engages in commercial transactions, which are subject of arbitration. In these situations, the State's entry into an arbitration agreement is treated as a waiver of immunity.[50]

An award disposes of all disputes between parties that were submitted to arbitration. Thus if a party brings a Court action on the same subject matter that has been disposed of by arbitration and on the same cause of action, the Court will dismiss the action on the ground that the issues are *res judicata* on the basis of issue estoppel[51]. Issue of estoppel arises where an issue had earlier on been adjudicated by a Court of competent jurisdiction between the same parties. The law is that either party to the proceedings is estopped from raising that same issue in any subsequent suit between the same parties and the same subject matter. In the case of *Oyerogba v. Olaopa.*[52] Issue of estoppel also arises in respect of issues which ought to have been raised in the former suit but which were not raised. It applies to issues raised but not expressly decided; such issues are deemed to have been decided by implication and thus *res judicata.*[53]

Issue estoppel has been held to extend to arbitration.[54] The question of whether an arbitral award will operate, as *res judicata* has not been fully tested in Nigeria but the provision of section 31 of the ACA implies that an arbitral award has the same effect as the judgment of Court.[55] It has also been found that as a panacea to the regular courts and adjudication process, generally, many commercial agreements now contain an arbitration clause and a wide range of disputes are increasingly being referred to arbitration especially in the construction, capital markets, oil and gas, maritime, and banking industries. Within these industry sectors, disputes involving breach of contract terms and shareholder disputes are common.

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

[50]PUNUKA Attorneys & Solicitors Nigeria 2010 <http://www.iclg.co.ukiclg> to: international arbitration visited on 26/6/2019
[51] ibid
[52](1998) 13NWLR pt. 583 p .512.
[53] PUNUKA (n50).
[54] See *Middlemiss v. Hartlepool Corporation* (1973) 1 A.E.R. 172
[55]See sections 31(1) & (3) which provide that an arbitral award shall be recognised as binding and may be enforced in the same manner as a Court judgment or order to the same effect.

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

III. Enforceability of Awards in Nigeria.

The enforcement of the decision of any dispute resolution process is the most crucial part of the exercise. This is because without the possibility of enjoying the fruit of the judgment or award, the entire dispute resolution process amounts to an exercise in futility. Unlike court judgments, arbitration awards themselves are not directly enforceable; a party seeking to enforce an arbitration award must resort to judicial remedies. In the case of arbitration, enforcement ordinarily ought to be a non-issue, as the arbitral process is initiated based on the express consent of the parties, with the intention that the final award of the tribunal is binding on the unsuccessful party. Where the unsuccessful party fulfils this intention and voluntarily complies with the terms of the award, the matter concludes on a seamless note. However, in practice, especially in international arbitration, it is not often the case that the unsuccessful party adopts this seamless approach. The successful party is therefore left with no alternative but to seek enforcement of the award.

In Nigeria, there are generally three ways to enforce foreign arbitral awards:

1. Enforcement through an action upon the award under common law.
2. Enforcement through the Foreign Judgment Registration and Enforcement Statues: Reciprocal Enforcement of Judgments Ordinance 1922[56], or the Foreign Judgments (Reciprocal Enforcement) Act[57]
3. Enforcement through the Arbitration and Conciliation Act.[58]

IV. Challenges of Judicial Intervention in the Enforcement of Arbitral Award

Recognition and enforcement are vital parts of arbitration. Without the

[56] Cap. 175, Laws of the Federation of Nigeria (LFN) 1958
[57] Cap. F35, Laws of the Federation of Nigeria 2004.
[58] Cap. A18, Laws of the Federation of Nigeria 2004.

likelihood for the winning party to enforce the arbitral award in its desired country, the entire arbitration process becomes pointless. Of course, if an unsuccessful party instantly carries out the terms of an arbitral award, the question of recognition or enforcement of the award doesn't arise. Yet this is often largely not the case, largely in regard to foreign arbitral awards, the unsuccessful party may be unwilling to go with the terms of the award or could even apply to challenge it. Lamentably, the arbitrational process cannot by itself enforce its own award because a reward simplicita doesn't have the force of a judgment of court. As such, it usually implies that the victorious party could have won the battle but is yet to win the war. The disposition of Nigerian courts to enforce foreign arbitral awards and also the ease or difficulty of doing so are issues of huge concern to any foreign person who desire to enforce an arbitral award in Nigeria.

The party against whom an arbitral award is made may voluntarily obey the order and comply since the award is binding between the parties. Every arbitral award duly made is to be recognized as binding and is expected to be complied with. It is when it is not complied with that the question of enforcement by the winning party arises. The reality in Nigeria is that almost the enforcement of most awards are subjected to excruciating obstacles and resistance.[59] In Domestic Arbitral Award in Nigeria, Section 31 (1) ACA provides that an arbitral award shall be recognized as binding and shall upon application in writing to the court be enforced by the court. Recognition and Enforcement are not one and the same thing. An award may be recognized without being enforced. But an award enforced is an award recognized. For example, when an award is pleaded for the purpose of the defence of res judicata.

Two alternative methods of enforcement of domestic arbitral award are available to a successful party, thus:

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

The procedure for obtaining enforcement of an award is set out in Section 31 (2) and (3) of the ACA**.** Thus the party wishing to enforce an award shall bring an application before the High Court, annexing:

1. The duly authenticated original award or duly certified copy thereof;

[59] Akpata E, "The Nigerian Arbitration Law in Focus" (1997), Lagos, West African Book Publishers p.92

2. The original arbitration agreement or a duly certified copy thereof thereafter the party shall apply to the court for leave to enforce the award.

An award recognized by a court shall for all intent and purposes be treated as a judgment of that court. The court will give judgment in the terms of the award. And as stated in subsection (3) "an award may, by leave of court or a judge, be enforced in the same manner as a judgment or order to the same effect"[60]

International arbitral awards in Nigeria like domestic award are binding on the parties. The procedure for recognition and enforcement is the same except that where the award or arbitration agreement is not made in English language; a duly certified translation in to the English language must accompany the applicant for leave. Section 54 of the Arbitration and Conciliation Act, 1988 also makes the New York Convention on the recognition and Enforcement of Foreign Arbitral Awards applicable to Nigerian courts; it stipulates instances where the convention will be applicable in Nigeria.

As simple as the procedure for enforcement of arbitral award may seem, it is not always an easy ride! Most often than not, an unsuccessful party at arbitration dissatisfied with the award in a domestic or international arbitration may do either of the following: commence legal proceedings challenging the award, or prepare to oppose any action that may be brought to enforce the award.[61] While Section 52 of Arbitration and Conciliation Act provides for refusal of recognition or enforcement of a foreign award and grounds for such refusal, Section 32 which provides for recognition or enforcement of a foreign award does not specify grounds for such refusal. However, in practice unsuccessful parties in domestic arbitrations have often appropriated the grounds mentioned in Section 52 to challenge the award. The grounds include incapacity of any of the parties, invalid arbitration agreement, improper notice of appointment of arbitrators or proceedings, jurisdiction of arbitrators, award going beyond scope of submission and composition of tribunal and procedure adopted by arbitrators.

It should be observed that enforcement by action on the award is a comparatively cumbersome procedure. It enables the party opposing the award to reopen the points which had been canvassed in the arbitral proceedings and thereby

[60] ibid
[61] Ezejiofor, The Law of Arbitration in Nigeria, (Longman Nigeria Plc.; 1997) p. 115

set up a new case for litigation.[62] More often than not, these hearings are long drawn out there by defeating one of the cardinal advantages modern day arbitration set out to exploit. Now it is imperative to note that, the end does not justify the means. One of the major advantages parties factor into their selection of arbitration, as their preferred dispute resolution mechanism is that it is relatively less cumbersome than litigation. This advantage is significantly pronounced in Nigeria, given the laborious process of litigation within the jurisdiction. It is therefore an unfortunate irony that parties who deliberately avoid litigation and its associated stresses, have to resort to litigation in order to enforce the award of their chosen alternative to litigation.[63]

Essentially, enforcement could be a cumbersome process where the unsuccessful party mounts a spirited challenge, as the legal system's inadequacies such as lengthy delays, and undue weight on technicalities, could be manipulated to their advantage. Using an example of a case handled by our law firm, a consent judgment entered in the High Court of England was registered in Nigeria in 2003 for enforcement, however the opposing party challenged the registration based on a technicality. Although the challenge was dismissed at the High Court and the Court of the Appeal (in 2013), the appellant further appealed to the Supreme Court. The matter is still yet to be heard by the Supreme Court, and we are in the year 2019, several years after the judgment was obtained. The point being made here is that the unsuccessful parties readily rely on loopholes, ambiguities and technicalities as a springboard to frustrate the hearing of applications seeking to enforce foreign arbitral awards and judgments.[64] These and many more other challenges make the arbitration process to push the contracting party from bad to worse in the quest for an effective and speedy commercial dispute resolution mechanism.

V. **Conclusion**

The most efficient means of tackling these challenges would be the establishment of special courts tasked with the registration and enforcement of foreign and domestic arbitral awards or judgments, or alternatively: administrative recognition of all litigation involving arbitration as *sui generis* and worthy of being fast tracked through

[62] ibid P.121
[63] Rotimi Adeniyi, A. (2018) "Enforcement of Foreign Arbitral Awards in Nigeria" accessed at https://medium.com › enforcement-of-foreign-arbitral-awards-in-nigeria-fc2...visited 25th August 2019
[64] ibid

the judicial process. Although these courses of action have long been recommended, we still await their implementation. In the meantime, the best advice to concerned parties is to conduct their international or domestic arbitration as efficiently as possible, to avoid availing the unsuccessful party an opportunity to frustrate the recognition and enforcement of the award in Nigeria. Ideally, Nigerian counsel should be consulted before, during and after conclusion of the arbitration proceedings to ensure the smooth enforcement of the award when obtained.[65] Otherwise the end, in the quest for an effective, cheap and speedy alternative dispute resolution mechanism, would not justify the means, in the arbitration process. Although grounds for attacking an arbitration award in court are limited, efforts to enforce the award can be fiercely fought, thus necessitating legal costs that negate the perceived economic incentive to arbitrate the dispute in the first place.

[65] ibid