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RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS: THE LAW AND PRACTICE

By

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A. INTRODUCTION

Arbitration is a part of a wide range of processes designed to assist parties in settling their dispute in a most conducive and amicable atmosphere. Arbitration and other similar processes are classified Alternative Dispute Resolution (ADR) methods. Alternative Dispute Resolution refer to a range of mechanisms designed to assist disputing parties in resolving their disputes without the need for formal judicial proceedings.[1] Apart from litigation, which is already common place, arbitration is the most celebrated form of adjudicatory alternative. It is a process in which a third party neutral, after listening to parties in a binding decision resolves the dispute. The essence of arbitration is the decision-making role of the third party neutral. It is usually a right based dispute resolution technique but could also be interest-based as merely advisory[2].

The high points of arbitration include its informality, speed, comparatively reduced cost and the involvement of the parties in choosing their arbitrator. Also available to some extent is the opportunity of having in advance a clear and definitive agreement as to the rules that will govern the arbitral proceedings[3]. At the international level, arbitration provides an attractive

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1 Aina. K: Alternative Dispute Resolution. *Nigerian Law and Practice Journal 1998. Vol. 2. No. 1, Council of Legal Education, Nigerian Law School.* P. 169.

2 *Ibid.* p. 171.

3 Inam Wilson: Exploring The Potentials of Arbitration in Admiralty Practice in Nigeria. *The Guardian Newspaper, Wednesday, October 20, 1998*, P. 36.

option because it provides a mechanism to settle disputes without parties having to be subjected to the jurisdiction of courts other than those of their own choice. Also, the arbitral proceeding could be altered to take into account diverse legal systems and practices attendant to international trade[4].

In view of the foregoing, the purpose of this paper is to discuss the law and practice applicable to the recognition and enforcement of arbitral award. In doing this, I will examine, albeit in passing, the historical and source or origin of arbitration legislations in Nigeria. Since award is central to the recognition and enforcement of arbitration proceedings, this paper will also discuss the various types, form and contents of arbitral award. For the purpose of comparism, the paper will discuss both Domestic and International arbitral proceedings. At the international level, emphasis shall be laid on the different types of International Arbitration Institutions, the mechanism for the arbitral award, the ground for refusing recognition of the award and the option available in case a party is dissatisfied with the arbitral award.

Since arbitration is one of the quickest and simplest mean of resolving dispute devoid of technicalities usually experience in judicial proceedings, this paper ultimate aim is to encourage the use of arbitration in resolving dispute rather than going through the cumbersome and sometime lengthy judicial litigation.

B. LAW APPLICABLE TO ARBITRAL PROCEEDINGS

Although arbitration had been a part of traditional dispute resolution methods in Nigeria, the first Statute on arbitration in Nigeria was the Arbitration Ordinance of 1914, which later became Chapter 13 of the revised Laws of Federation of Nigeria, 1958[5]. This becomes the law of the regions and, later, the states. With the growing importance of arbitration in the country, consequently upon the advancement in international trade, the existing Statute becomes inadequate to cope with the arbitration problems that were frequently arising[6]. It was in order to provide an up-to-date law on arbitration that the Arbitration and Conciliation Decree, 1988[7] was promulgated. In *C.N. Onuselogu Enterprises Limited v. Afribank (Nig.) Ltd.*[8] It was held that

4 *Ibid*

5 Orojo J.O. and Ajomo M.A.: *Law and Practice of Arbitration and Conciliation in Nigeria*, Mbeyi and Associates (Nigeria) Limited, Lagos, 1999, P. 3.

6 *Ibid*

7 Now Cap A18 Laws of Federation of Nigeria, 2004.

8 (2005) 1 N W L R (Pt. 940) 572 at 585, Para. F.

"The relevant law in Nigeria dealing with arbitration is the Arbitration and

Conciliation Act of 1988, Cap 19, Laws of the federation of Nigeria, 1990"

The Arbitration and Conciliation Act (hereinafter referred to as "The Act"), which became operative on 14th March, 1988 provides a unified legal framework for the fair and efficient settlement of commercial dispute by arbitration[9]. The Act adopted the Model Law developed for international commercial arbitration by the United Nations

Commission on International Trade Law (UNCITRAL)[10]. Several states in Nigeria have enacted their own Arbitration and Conciliation Laws following the form of Arbitration and Conciliation Act. Part III of the Act makes specific provisions for international commercial arbitration and conciliation.

From the foregoing, it can be safely said that the Nigeria Arbitration Law is derived from statutes both foreign and local. The foreign ones are the UNCITRAL Model Law, the UNCITRAL Arbitration Rules and the New York Convention, while the local statues are the Arbitration Act, 1914, Foreign Judgment (Reciprocal Enforcement) Act[11], and the Arbitration and Conciliation Act.

C. The Arbitral proceedings

An arbitration is the reference of dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of competent jurisdiction[12]. Arbitration differs from a court of law; however, an arbitrator will hear the reference in a judicial manner, and the ordinary rules of court, procedure and of evidence will be enforced at the hearing. In the case of *N.N.P.C v. Lutin Investments Ltd.*[13] The Supreme Court per **Ogbuagu** (JSC) said as follows:

"An arbitration is the reference of dispute or difference between not less than two persons for

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9 See Inam Wilson *op. cit.* P. 36.

10 *Ibid.*

11 Cap F35 Laws of Federation of Nigeria, 2004.

12 Halisbury Law of England Vol. 1.2, 4th Ed. Para. 501.

13 (2006) 2 N W L R (Pt.965) 506 at 542-543 Paras C-A, (2006) 1 SCM 46 at 72.

determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction—."

The person or persons to whom the reference is made are called "arbitrators"[14]. However, where there is disagreement between the arbitrators appointed by parties, as often the case, the dispute will be referred to another person, usually called "umpire". Arbitration proceeding may arise in any of the following ways:

(i) By order of court – Sometime, a matter may be referred by court, pursuant, to an application by the parties to arbitration agreement, to an arbitrator for a report[15].

(ii) By statute – Sometimes, the relationship between parties may be governed by statutory provision, which compels them to seek settlement of any dispute that arises from such relationship by arbitration rather than resulting to court or other means[16].

(iii) By agreement of the parties – This is the most common way in which arbitration proceeding arises. Thus, section 1 (i) of the Act[17], provides thus:

" Every arbitration agreement shall be in writing contained

(a). In a document signed by the parties;

(b). In an exchange of letter: telex, telegrams or other means of communication which provides a record of the arbitration agreement; or

(c). In an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another."

In the case of *Gates v. Arizona Brewing Co*[18]. The court said as follows:

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[14] See the Case of *Magbagbeola v. Sanni* (2005) 11 N W L R (Pt. 936) 239 at 253 Paras. D-E.

[15] The Court having Jurisdiction are State High Court and Federal High Court. See Section 52 of the Act.

[16] Example is the Trade Disputes Act Cap T8, LFN, 2004 which enjoined Workers Union to resort to arbitration for settlement of industrial dispute rather than embarking on strike action and or lockout e.g. Industrial Arbitration Panel (IAP).

[17] See Cap A18, Laws of Federation of Nigeria, 2004.

[18] Ariz 266, 269, 95 p. 2d, 49-50 (1939).

> **"Broadly speaking, arbitration is a contractual proceeding whereby the parties to any controversy or dispute in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in the place of the tribunal provided by the ordinary process of Law".**

For the purpose of enforcing the agreement between parties to refer their dispute to arbitrator; the Uniform Civil Procedure Rules[19] provides *inter alia* that where a dispute is referred to one or more arbitrators, the arbitrators shall be nominated by the parties in such manner as may be agreed upon between them.

The decision of the arbitrators or of the umpire is called the "award"

D. The Award

An award is a final determination of a particular issue of claim in the arbitration[20], i.e. the final decision of the arbitrator in the settlement of controversy[21]. The award may be contrasted with procedural orders and directions in the course of the proceedings. Thus, the decision on the pleadings or the admissibility of evidence will be a procedural order and a decision on jurisdiction will be an award. But sometimes, the line between the two may be blurred[22].

In practice, the arbitrator usually closes the hearing with a statement that the award is reserved[23]. This give him the opportunity to study the papers and his notes and write up his decisions called considered conclusions and award[24]. Where however there is more than one arbitrator, their decision shall, unless otherwise agreed by the parties, be made by a majority of all its members. Similarly, and, unless otherwise agreed, the arbitrators must make their award

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[19] Order 19, Rule 1.

[20] See Russel on Arbitration, 21st Edition, P. 249, quoted by. Orojo J.O and., Ajomo M.A. *op. cit,* P. 238.

[21] *Ibid.*

[22] Orojo J.O and., Ajomo M.A. *op. cit,* P. 238.

[23] See Craig Osborne Ed. *Introduction to Legal Practice Volume 2.* 2nd Edition, Sweet and Maxwell 1989 at P. 88.

[24] *Ibid.*

within three months after entering on the reference or after having been called on to act by notice in writing from any party to the submission on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award[25].

The presiding arbitrator is the chairman and therefore takes charge of the conduct of the proceedings and of the deliberations of the arbitral proceeding. Thus by virtue of section 24 (2) of the Act, he may also, subject to the authorization of the parties or co-arbitrators to decide questions relating to the procedure to be followed.

i. Types of Award

Article 32 (1) of the Arbitration Rules[26] provides thus:

> "In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial award".

An award is final if it determines all the outstanding issues on the arbitration It is then final and binding being a complete decision on the matter dealt with in the arbitration. In the case of *Ebokan v. Ekwunibe & Sons Trading Co,.*[27] It was held that:

> "Once an arbitral award has been made and there is nothing intrinsically wrong with the proceedings or even the time limit for challenging it has expired, the award becomes final and binding and it should be entered as judgment of the court and enforced accordingly"

The handing down of a final award normally renders the arbitral tribunal *functus officio.* Thenceforth, it ceases to have competence to deal with the dispute and the special relationship between it and the parties' terminated[28].

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[25] Dr. Orojo J. O. *Nigerian Commercial Law and Practice* ,Sweet and Maxwell, Vol. 1. London, 1983, P. 243.
[26] First Schedule to Arbitration and Conciliation Act, Cap A18, LFN, 2004.
[27] (2001) 2 N W L R (Pt. 696) 32 at 44
[28] Orojo J.O and., Ajomo M.A. *op. cit,* P. 238.

An interim award is one, which deals with a preliminary question such as the issues of jurisdiction of the arbitral tribunal or the law applicable[29]. This type of award is very useful because it enables the arbitral tribunal to dispose of matters, which tend themselves for determination in the course of the arbitral proceedings[30].

It is not easy to distinguish between an interim and a partial award. The two terms are sometimes used interchangeably[31]. However, in civil law jurisdiction partial award is used to describe an award, which disposes of one or more of the monetary or other main issues between the parties. Often, it orders payment on account to be made in respect of a particular claim or claims.

An interlocutory award refers to a decision of the arbitral tribunal on a procedural question. The better view is that this type of decision should not be referred to as an award, but should rather be characterized as a procedural order[32].

Apart from the aforementioned types of arbitral award, there are other types of award not expressly listed in Articles 32 (1) of the Arbitration Ordinance, but contained in the provision of the Act. These are "default" and "agreed" award. Default award may occur in any of the three ways listed under section 21 of the Act. Thus, where the claimant fails to state his claims as required under the Act. The arbitral tribunal shall terminate the proceedings; similarly, when the respondent fail to state his claim, the arbitral tribunal shall continue with the proceedings base on the claimant's allegation, and finally, if any party to the arbitral proceedings fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceeding and make an award[33]. Any award make in these three instances, is called default award.

With respect to the agreed award, if, during the arbitral tribunal proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the arbitral proceedings, and shall, if requested by the parties and not objected to by the arbitral tribunal, such an agreement shall be recorded in the form of an arbitral award on agreed terms. The agreed award shall have the same status and effect as any other award on the merits of the case[34].

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29. Ezejiofor G. The Law of Arbitration in Nigeria, Longman Nigeria Plc, Lagos, 1997 P. 94.
30. *Ibid.*
31. *Ibid.*
32. *Ibid*
33. See Section 19 of the Arbitration and Conciliation Act, which make provisions for filling of claim and of defense
34. See Section 25 of the Arbitration and Conciliation Act.

ii. Form and Contents of Award

For an award to be valid, it must conform to the requirements of the domestic law of the place of arbitration[35]. In this regard, an arbitral tribunal should strictly adhere to these

requirements and thereby produce a valid award which will be given recognition and therefore enforceable in the place of arbitration and in other jurisdictions[36]. A valid award

would also serve as a defence of *res judicata* in any subsequent judicial proceeding between the same parties[37]. An arbitral award, like a court judgment, must not only be in writing, it must also be signed, with the date and place where it was made clearly recorded[38]. It must carry the signatures of all the arbitrators if there is more than one arbitrator. The signature of the majority of the arbitrators with however suffice if the reason for the absence of any signature is stated on the award[39].

A copy of the award, made and signed by the arbitrators shall be delivered to each party[40]. The practice however is that, when the award is ready, the arbitrator writes to the parties to notify them that the award is ready and that they can collect it.

E. International Arbitration Proceedings

Before dealing with the recognition and enforcement of arbitral awards, it will be apposite at this juncture to examine in passing, international arbitration proceedings. It should be immediately noted that "arbitration" under the Arbitration and Conciliation Act cover only commercial transactions. Accordingly, section 57 of the Act defines "arbitration". Thus:

> "Commercial arbitration whether or not administered by a permanent arbitral institution".

In order to appreciate the scope of the commercial transactions under

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[35] Ephraim Akpata: *The Nigerian Arbitration Law in Focus*, West African Book Publishers United, Lagos, 1997, P. 75.
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*
[40] See Section 26 (4) of the Act.

the Act, Section 57 further defines the word "commercial" to means

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

The distinction between commercial and other types of arbitration is of practical importance, for a number of reasons. Firstly, it serves to distinguish arbitrations relating to trade and business transactions from arbitrations between states over boundary disputes and other differences of political dimensions[41]. Secondly, a state which has adhere to the New York Convention may, pursuant to the so-called commercial reservation, reserve its obligations under the convention only in respect of contracts, which are considered as commercial under its national law[42]

An arbitration is international if:

"(a). the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different countries;

(b). one of the following places is situated outside the country in which the partiers have their places of business;

(i). the place of arbitration if such place is determined in, or pursuant to the arbitration agreement,

(ii). any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

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41 Ezejiofor G. *op. cit*, P. 134.

42 See Simpson & Fox International Arbitration (1959) referred to by Ezejiofor G. *op. cit*, P. 134.

(c). the parties have expressly agreed that the subjec matter of the arbitration agreement relates to more than one country; or

(d). the parties despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration".

From the above statutory provisions, it can safely be said that in considering where to start an arbitration process. The connecting factor will be the place of business of the parties, the place of performance of the agreement or the place with which the subject matter of the dispute is most closely connected. Finally, it seems that under paragraphs (b) and (c) of section 57 (2), the parties to an arbitral agreement may on their own agreement internationalized an arbitral process.

a. Types of International Arbitration

Arbitration, are broadly classified into two types: ad hoc and institutional

i. Ad-hoc Arbitration

An ad-hoc arbitration is one conducted pursuant to an agreement which does not refers to an institution charged with setting up the arbitral tribunal and administering the proceedings, but is rather intended to be self-executing[44]. The arbitration is conducted within the framework of the submission and any applicable law[45]. The parties to an ad-hoc arbitration make provisions for the procedure to be followed in the arbitration. Most domestic arbitrations in Nigeria are ad-hoc as there is no local arbitration that can administer them[46].

The advantage of an ad-hoc arbitration is that the parties can make provisions to fit the particulars facts of the dispute between them[47], however, in order to save themselves the problem of drawing up comprehensive rules which may, in any case, be very ineffective, parties often adopt a set of arbitration rules, of a non-commercial international organization, which are usually set

[44] Orojo, J.O. and Ajomo M.A. *op. cit.* P. 55.
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.*

out in a small booklet. The adoption of the UNCITRAL Arbitration Rules is becoming increasingly popular around the world.

ii. Institutional Arbitration

There are a number of permanent institutions around the world, among the best known of these are: the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), the International Centre for the Settlement of Investment Disputes (ICSID). The Asian African Legal Consultative Committee (AALCC), and the World Intellectual Property Organization Arbitration and Mediation Centre (WIPO). Each of these institutions formulate rules and provide facilities for the conduct and supervision of arbitral proceedings which take place in countries other than those they have their permanent offices.

Some of the functions, which these institutional arbitrations perform include *inter alia* to assist in the constitution of tribunals; provision of administrative and logistic services as well as supervising the arbitral proceedings.

It should be noted that each of the aforementioned institutions have their standard rules, as such where parties intend to adopt institutional rules of any institution, they should acquaint themselves with the rules of the institution chosen, this is to ensure that all the matters relevant to their particular circumstances are provided for, otherwise, any provision which they would not have wished to govern their transaction would be incorporated by their default.

b. International Arbitration Procedure

An international arbitration to which a Nigerian national or state agency is a party can be held in a foreign country under the aegis of an arbitration constitution. Such arbitration can also be held in Nigeria if the parties choose the country in their arbitration agreement as the place of arbitration, even if the dispute-giving rise to the arbitration has no other Nigerian connection[48].

Nigeria should hold some attraction as a forum, or seat, or locus arbitri for international arbitrations. Under normal circumstances, the law of the place of arbitration governs the arbitration and is characterized as the *lex arbitri*[49],

[48] Ezejiofor G. *op. cit*, P. 163.

[49] The Law of the place of Arbitration.

unless the parties stipulate otherwise[50]. If Nigeria is chosen as the place of arbitration, the Nigerian law of arbitration becomes the *lex arbitri* and its provisions will regulate the arbitration. It should be noted that, *lex arbitri* is quite distinct and different from the "governing law" or the "applicable law" or the "proper law" of the contract. These are the law choosing by the parties themselves and which they want their contract to be governed. However, matters which are regulated by the *lex arbitri* include the following: the arbitrability of a dispute, the validity of appointment of the arbitrators, the conduct of the arbitration, interim measure of protection, whether or not to proceed, *ex aeguo et bono*, form and validity of award and finality of award[51].

The Nigerian law is therefore well adapted to the requirements of international commercial arbitration and is also liberal and flexible enough to allow parties to choose the rule which best fit their wishes and desires.

Again Nigeria has acceded to the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards. Therefore, award made in Nigeria can be enforced in foreign countries, on the basis of reciprocity in accordance with the provisions of the Convention[52].

F. Recognition and Enforcement of Award

An award, though like a judgment in that they are both adjudicatory, cannot be executed like the judgment of a court. It does not mean, of course, that a party cannot obey the directions in an award[53]. The party against whom the award is made may voluntarily obey the order and comply, since the award is binding as between the parties and their privies. In the case of *Doleman and Sons v. Ossett Corporatio*[54].

Fletcher Moulton L.J. stated inter alia:

> "It has long been a practice in certain contracts for the

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50 Parties can in fact choose a procedural law, which is foreign to the forum of the arbitration. This is the type of position contemplate under section 57 (b) and (c) of the Act.

51 Redfern and Hunter. *Law and Practice of International Commercial Arbitration* 1991. P. 79 referred to by Ezejiofor G. *op. cit*, P. 163.

52 See Section 54 of the Act.

53 Orojo, J.O. and Ajomo M.A. *op. cit.* P. 297.

54 (1912) 3 K B 257 at 267.

> contracting parties to name a private tribunal to whom contractually they give authority to settle disputes under that particular contracts. If a dispute has been brought before that private tribunal thus constituted, and an award made, that award is binding on both parties and concludes them as to that dispute. In effect, the parties have agreed that the rights of the parties in respect of that dispute shall be as stated in the award, so that in essence it partakes of the character of "accord and satisfaction by substituted agreement". The original rights of the parties have disappeared, and their place has been taken by their right under the award".

Most arbitral award duly made is to be recognized and voluntarily carried out, it is when the losing party is not willing to comply with the award that the question of recognition and enforcement by the winning party arises.

Recognition and enforcement of award is governed under the Act by sections 31 and 51. While section 31 deals only with domestic arbitration, section 51 governs recognition and enforcement of international arbitral award. It should be noted that recognition and enforcement are not one and the same thing. For instance, an award may be recognized without being enforced, however, once parties enforced an award, it is symbolic of recognition. For instance, where a party institutes an action, the defendant may plead an arbitral award as a *res judicata and* pray the court to recognize the said award.

Enforcement, in Nigeria, of an international award made in Nigeria, as in most other states is a relatively easy process, for it involves the same processes as are applied for the enforcement of an award in a domestic arbitration. Conversely, enforcement of a foreign award, that is made outside the country poses a complex question, and this is often govern by the treaty rules. Thus, a foreign award cannot be enforced locally as if it were a judgment of a court in Nigeria. In *Maritius Steam Navigation Co. Ltd. v. International Shipping Line Ltd*[55]. In that case, the applicants obtained an award in London against the respondent, from an arbitrator appointed under the Arbitration Act, 1950 of the United Kingdom and instituted proceedings

[55] (1969) N C L R 174.

in Lagos to enforce it. In rejecting the application, the court pointed out, *inter alia*, that the Arbitration Act applied only to Nigeria and that a foreign award will not be enforced here unless registered under the Foreign Judgment (Reciprocal Enforcement) Act[56].

G. Distinction between recognition and enforcement.

The words "recognition" and "enforcement" are concerned with having the award carried into effect. However, both words are distinct concepts. For instance, an award may be recognized without being enforced, but where it is enforced, it is deemed to have been recognized.

If court is invited to grant a remedy in respect of a dispute, which has been arbitrated, the party in favour of whom the award was made will naturally raise an objection to such an invitation[57]. He will produce the award to the court and urge it to recognize the same as valid and binding on the parties and to terminate the new proceedings before it on the principle of *res judicata*. If the court recognizes the award, the issue or issues raised in the action which had been previous arbitrated will be struck out and the new action dismissed if in its entirety relates to the issue treated in the award. By dismissing the action, it means that the court has recognized the award even though, it has not been enforced, steps can then be taken by the winning party to enforce the award.

H. Consequences of refusal of recognition or enforcement

If a court refuses to enforce an award, it presupposes that the successful party has failed to achieve what he wanted. In other words, he cannot seize the property of the loser party in the country to satisfy the award. However, such party can take solace in the fact that the award is still valid and subsisting, and can if he so wishes sought the enforcement of the award in another country where the losing party has property. Whether he succeeds or not will depend on the reason for which enforcement was earlier refused[58]. If

[56] Now Cap. F 35, Laws of the Federation of Nigeria, 2004.
[57] Ezejiofor G. *op. cit*, P. 174.
[58] *Ibid.*

enforcement was refused on the ground of public policy, he may find another country in which the same considerations do not apply[59]. The requirements of public policy vary from country to country and what is contrary to public policy in one country may not be so in another country. However, if, for example, enforcement is refused because the arbitral tribunal failed to give a fair hearing to the losing party, it may not be possible to enforce the award anywhere. Such a procedural misconduct is unlikely to be condoned by the courts of any state. In that event, the party seeking enforcement may start a new arbitration if it is not already time barred. Another difficult task, which may render an award unenforceable, is when the losing party has no property in the country that its internal public policy is amenable to the award that is being sought to be enforced.

I. Enforcement Systems.

There are two methods of enforcement of award. These are summary enforcement of award and enforcement by Action. The two shall be considered under the domestic awards and foreign award.[60].

a. Enforcement of Domestic Awards

Section 31 of the Act governs the enforcement of domestic award. The section provides thus:

> "(1). An arbitral award shall be recognized as binding and subject to this section and section 32 of this Act, shall, upon application in writing to the court, enforced by the court.
>
> (2). The party relying on an award or applying for its enforcement shall supply
>
> (a) .The duly authenticated original award or a duly certified copy thereof;
>
> (b). the original arbitration agreement or a duly certified copy thereof.
>
> (3). An award may, by leave of the court as a judge, be enforced in the same manner as a judgment or order to the same effect."

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[59] *Ibid.*

[60] Orojo, J.O. and Ajomo M.A. *op. cit.* P. 298.

Ordinarily, when the losing party to an arbitral award voluntarily complies with terms contained in the award, it puts an end to the dispute between the parties. However, in practice, neither of the parties is usually completely satisfied with the award, but they are often prepared to accept it and abide by its terms, since, the parties, prior to the arbitration proceeding would have agreed in a contract that dispute arising therefrom shall be settled by arbitration. Despite that clause and reference of the dispute to arbitration, a losing party may be so dissatisfied with the award that he does not wish to implement its terms. In such situation, he can either commence legal action to challenge the award or prepared to oppose any action that may be brought to enforce the award. In such a scenario, the options available to the successful party are codified in section 31 of the Act. These will be treated in turn.

b. Enforcement by Action

By virtue section 3(1) of the Act, an award shall be enforced if an application is made for its enforcement and recognized by the court. It is a principle of the common law that a party to arbitration is entitled to enforce the resultant award by an action at law[61].

Arbitral awards, according to the common law, are inherently binding and enforceable. This is so, because the parties here, in effect, agreed that their rights in respect of the dispute shall be as stated in the award[62].

While an application for recognition simpliciter may be made in any state (country), depending on the circumstances necessitating the application, the application for recognition and enforcement is made in the state or states in which the party that had lost in the award has assets to meet the awards[63].

It appears that application for the leave of court under section 31(1) is made *ex parte*. However, in an appropriate circumstance, the court may give order that the respondents be put on notice.

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61 See the case of *Doleman and Son v. Ossett Corporation (Supra)*. See also *Ebokan v. Ekwenibe & Sons Trading Co (Supra)* at P. 41, Paras. E – H.

62 Ephraim Akpata, *op. cit*, P. 115.

63 *Ibid.* at P. 92.

In practice, such application must be supported by an affidavit, which must give full detail of the facts and grounds upon which the applicant relies, in addition, a certified true copy of the award must also be attached to the application as exhibits[64]. The object of this procedure is to convince the court, of the need to grant the application. The court will normally grant the application unless it has reason under section 32 to refuse the recognition or enforcement of the award. Under section 31 (1) of the Act, two alternative methods of enforcement are open to the successful party, 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[65].

c. Summary procedure under section 31 (3)

The subjection provides thus:

> "An award may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect".

This is a summary procedure to enforce an award. The procedure is less expensive and is conducted expeditiously. The subsection is almost identical with section 13 of the

repealed Arbitration Ordinance and also *in pari material* with section 25 of the English Arbitration Act of 1950. Pursuant to section 25 of the English Act, the author of *Russell on Arbitration*[66], has listed 8 cases when award will not be enforced as a judgment. These are:

(i) When the arbitration agreement is oral

(ii) When the award is merely declaratory

(iii) Where the award is a foreign one

(iv) Where the award is made under a statute which expressly provided for mode of enforcing it

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64 See Section 31 (2) of the Act.

65 Ephraim Akpata, *op. cit*, P. 92.

66 See the 19th Edition, PP 403-406.

(v) Where the award is lacking in clarity
(vi) Where the award is made in foreign currency
(vii) Where there is real ground for doubting the validity of the award.
(viii) Where the court, for any reason, cannot give judgment to give effect to the award.

Previously, leave would be granted in reasonably clear cases; since it is not intended, on an application for leave to enforce an award to try a complicated or disputed or difficult question of law.

If it is not reasonably clear that the award should be enforced, the party seeking to enforce it must be left to his remedy by action when the matter can be raised on proper pleadings and dealt with in proper form[67]. This test has recently been reversed by Lord

Denning M.R. in *Middlemiss and Gould (A Firm) v. Hartle Pool Corporation*,[68] where he stated thus:

"The summary procedure should be used in nearly all cases"

It follows therefore that; leave would normally be granted to enforce the award as a judgment, unless there is a real ground for doubting the validity of the award and on any of the grounds listed above[69].

Where there is a genuine doubt as to the validity of the award, a party who wishes to challenge it can do so by opposing the application for leave under section 32 of the Act.

d. Objection to recognition and enforcement of award.

As provided by section 31 (1) an arbitral award can only be enforced by the court subject to section 32 and the provision of section 31 itself In effect if the request of any of the parties to an arbitration that recognition or enforcement of the award be refused is granted, the award will neither be recognized nor enforced.[70]

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[67] See the dictum of Scrulton L. J. in *Re Boks & Co. v. Peters, Rushton & Co. Ltd.* (1919) 1 K.B. 491 at 497-498.

[68] (1972) 1 W L R 1643.

[69] See for instance the following cases, *United Nigeria Insurance Co. v. Adene* (1972) 2 U I L R 342;
Re Stone v. Hastie (1903) 2 K B 463; *May v. Mills* (1974) 30. TLR 288.

[70] Ephraim Akpata, *op. cit.* P. 93.

In practice, a party who wishes to object to the recognition or enforcement of the award can apply to the court at any time after the receipt of copy of the award. This procedure becomes necessary in view of the fact that an application and order for enforcement are usually made *ex parte*, unless the court, on reasonable ground orders the other party to be put on notice. The Supreme Court of Nigeria has laid down important rule on this point in the case of *Nathaniel Kotoye v. Central Bank of Nigeria*[71]

Where it was held that:

> " Clearly wherever the need arises for the determination of the civil rights and obligations of every Nigeria, ... the court shall hear both sides not only in the case but also in all material issues in the case before reaching a decision which may be prejudicial to any party in the case."

The Supreme Court position in the above case was predicated on the constitutional right of every Nigerian to fair hearing in any legal proceedings in which they are parties as enshrines in section 36(1) of the Federal Republic of Nigeria Constitution, 1999[72].

As would be observed, section 32 of the Act did not provide for any grounds that will guide the court in granting application file under it. Due to this *lacuna*, reference would be made to section 26 of the English Arbitration Act[73], which is *in pari material* with Nigerian Act, section 31 (3). Under section 26 of the English Act, one of the valid ground upon which a loosing party can attack application for the enforcement of the award is that the arbitrator had no jurisdiction to make the award, or to make some part of it.

Again, **Bernstein** in his book titled *Handbook of Arbitration Practice*[74], give example of grounds upon which an application for enforcement of award be challenged as follows:

(i) That the arbitrator was disqualified, in that he lacks some prerequisite envisage under the arbitration agreement;

(ii) That the award, though valid when made, it has ceased to be

71 (1989) 2 SC (Pt. 1) I at 21-22.

72 Note that the case of *Nathaniel Kotoye v. Central Bank of Nigeria (Supra)* was decided under the 1979 Constitution but now applicable under the present 1999 Constitution.

73 1950.

74 3rd Edition, P. 261.

binding having been subsequently discharged by subsequent agreement between the parties; and

(iii) that there was no valid submission, so that the entire arbitration or some part of it, was a nullity.

A successful plea of any of these fundamental defects will render the award unenforceable. In *Bellshill and Mossend Co-operative Society Ltd. v Dalziel Co-operative Society* Ltd[75], two cooperative societies were members of a cooperative union. They had a dispute as to overlapping in their trading and cooperative activities. The dispute was referred to arbitration in accordance with the rules of the union. The award forbade the respondents from trading in a particular locality. The respondents did not accept this decision and as a result left the union soon after. This action was commenced by the appellant for a declaration that the award bound the respondents even after they had withdrawn from the union. It was held that on the respondents' withdrawal from the union, its rules ceased to bind them. The arbitration agreement, it was reasoned, was merely ancillary to the agreement of the cooperative societies to organize themselves into a union.

J. Recognition and Enforcement of Foreign Award.

Practically all system of law imposes certain limitation on the recognition and enforcement within their jurisdiction of foreign institutions and laws respectively[76]. What could then initially be considered as rule on the recognition and enforcement of the foreign arbitral awards was seemed to have been laid down in the case of *Mauritius*

Steam Navigation Co. Ltd. v. International Shipping Lines Ltd[77], where the court took the view that the Arbitration Act applied only to Nigeria and that a foreign award will not be enforced here unless registered under The Foreign Judgment (Reciprocal Enforcement) Act[78].

It should be noted that this case was decided under the old Arbitration Ordinance[79] of the 1958, which contained only 19 sections and provided only for domestic arbitration, hence, the reason for the court position in that

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[75] (1960) A. C 832.
[76] Agbede I.O. *Themes on Conflict of Laws*, Shanesons C.I. Limited, Ibadan, 1989, P. 80.
[77] (*Supra*).
[78] Cap. 13, Laws of Federation of Nigeria and Lagos, 1958
[79] 1914.

case was not far fetched. Coincidentally, however, the Convention on Recognition and Enforcement of Foreign Arbitral Awards, otherwise called the New York Convention was held in the early part of the 1958, that is, on the 10th June, 1958. The Convention introduced a new dimension to the entire practice and procedure on the recognition and enforcement of foreign arbitral award in Nigeria. The New York Convention came into force in that year, however, Nigeria, being a colony of the British Government at the material time could not subscribe to the Convention. Similarly, at the material time, the country has not enacted any law relating to International Commercial Convention. Consequently however, the promulgation of the Arbitration and Conciliation Decree of 1988[80], which became operative on 14th June, 1986, provided a radical approach and completely changed the mechanisms for the recognition and enforcement of the foreign award in Nigeria. Another landmark development on this issue is that Nigeria is now a signatory to the New York Convention.

There are two parallel provisions for recognition and enforcement of international award in the Arbitration and Conciliation Act, 2004, namely sections 51 and 52, which provide for application for recognition and enforcement of award, and grounds for refusing recognition and enforcement, on the one hand, and section 54 which provides for the application of the New York Convention 1958, on the other hand[81]. These will now be considered in turn:

i. Recognition and Enforcement of Foreign Awards under Sections 51 and 52.

Prior to the promulgation of the Arbitration and Conciliation Act of 1958, the two methods of enforcing foreign arbitral awards were by registration under the Foreign Judgements (Reciprocal Enforcement) Act[82] and under the New York Convention of 1958. Under the Foreign Judgements (Reciprocal Enforcement) Act, a foreign award may be registered in the High Court at any time within six years after the date of the award[83]. If at the date of application for registration it could be enforced in the country of origin.

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80 Later Designated Act.

81 See. Orojo, J.O and. Ajomo M.A, op. cit. P. 304.

82 Cap 152, Laws of Federation of Nigeria, 1990 Now Cap F35 Laws of Federation of Nigeria, 2004.

83 See Sections 2 and 4 of the Foreign Judgment (Reciprocal Enforcement), Act. LFN 2004.

However, section 51 of the Act makes it clear that such an award will be recognized as binding and enforceable by the court on application. For avoidance of doubt, section 51 of the Act provides thus:

> "(1). An arbitral award shall, irrespective of the country in which it is made, be recognized as binding and subject to this section and section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.
>
> (2). The party relying on an award or applying for its enforcement shall supply:-
>
> (a). the duly authenticated original award or a duly certified copy thereof;
>
> (b). the original arbitration agreement or a duly certified copy thereof; and
>
> (c). where the award or arbitration agreement is not made in the English language, a duly certified transmission thereof into the English".

It should be noted that the wording of this section is based on Article 35(1) of the UNCITRAL Model Law. By virtue of this section, international arbitral award is binding and enforceable in Nigeria irrespective of the country in which it is made. The over sweeping provision of this section mark a clear departure from the provision of New York Convention, which make a foreign award to be only binding and enforceable in a contracting state and where there is reciprocal treatment of international awards.

Furthermore, the provision of this section is fashioned after section 31 of the Act, which deals with recognition and enforcement of domestic award. In practice, the procedure for the enforcement of a foreign award is by a motion *ex parte* for the leave of court supported by affidavit evidence, which must contain material facts and all necessary documentation. Since not every foreign or international commercial agreement or award is made in the English language which is the lingua franca of Nigeria, sub-section (2) (a) of this section provides that a duly certified translation of the award or arbitration agreement be supplied to the court when an application is made to it for recognition and enforcement.

The certification shall be by an official or sworn translator or by a diplomatic or consular agent. This directive is contained in Article IV Paragraph 2 of the second schedule to the Act[84]

Once this is done, the court will grant recognition and enforcement of the award made in any country whatsoever, without the requirement of reciprocity, unless one or more of the grounds of refusal listed in section 52 are present[85].

ii. Grounds for refusing Recognition of Enforcement.

Any of the parties to an arbitration agreement may request the Court to refuse recognition or enforcement of the award[86]. Section 52 (2) therefore set down in minute detail the grounds upon which court may either refuse or grant an application for the enforcement of foreign arbitral award.

The grounds amongst others includes

(i) that a party to that arbitration agreement was under some incapacity; or

(ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied or under the law of the country where the award was made; or

(iii) that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceeding; or

(iv) that the award deals with a dispute not contemplated by or not falling within the terms of the submission; or

(v) that the award contains decisions or matters which are beyond the scope of the submission to arbitration; or

(vi) that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties; or

(vii) that the composition of the arbitral tribunal, or the arbitral

[84] Ephraim Akpata, *op. cit.* P. 139.

[85] Ezejiofor G. Enforcement of Arbitral Award in Nigeria (1981). *Journal of Business Law*, P. 319.

procedure , was not in accordance with the law of the country where the arbitration took place; or

(viii) that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which the award was made; or

(ix) that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or

(x) that the recognition or enforcement of the award is against public policy of Nigeria.

It is observed that this section is based on an Article V of the New York Convention and it is also in conformity with Article 36 of the UNCITRAL Model Law. This section has thus provided uniform rules pursuant to which court may refuse recognition and enforcement of an award. Going by the Model Law, the uniform rules apply whether or not the award was made in a state that has not adopted the Model Law. On the other hand, by Article 1(3) of the New York Convention, any state may on the basis of reciprocity declare that it will apply the Convention, to the recognition and enforcement of awards made only in the territory of another contracting State[87].

It should be noted that the objective of subsection (3) of section 52 is to provide mechanisms for preventing any step to frustrate recognition and enforcement of foreign arbitral award. The subsection provides measure of checks and balances on the parties to an arbitral proceeding when it states thus:

> "where an application for the recognition of an award has been made to a court referred to in subsection (2) (a) (vii) of this section, the court before which the recognition or enforcement is sought may, if it considers it proper, postpone its decision and may on the application of the party claiming recognition or enforcement of the award order the other party to provide appropriate security"

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[86] See Section 52 (1) of the Act.

[87] Ephraim Akpata, *op. cit.* P. 145.

By ordering a stay of the recognition and enforcement of proceedings before it, the 'foreign' court would be avoiding a possible awkward situation, which may arise if the court of the country in which the award was made were to set aside the award after it, the foreign court, would have recognized or enforced the award. Where the justice of the case demands it, to protect the interest of the party requesting recognition and enforcement, at his request the foreign court would require from the other party opposed to recognition and enforcement to give suitable security.[88]

iii. Recognition and Enforcement under New York Convention.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the United Nations Conference on International Commercial Arbitration in 1958. As noted earlier, Nigeria, being a British colony at the material time to this convention did not accede to the Convention until 17th March, 1970, and pursuant to the promulgation of the Arbitration and Conciliation Act of 1988, the provision of the New York which is incorporated as Second Schedule to the Act is operative in Nigeria with full recognition.

Article 1.1 of the Convention provide thus:

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

In line with the above Article, section 54 of the Nigerian Arbitration and Conciliation Act provides as follows.

> "(1). Without prejudice to sections 51 and 52 of this Act,
>
> where the recognition and enforcement of any award arising out of an international commercial

[88] Ezejiofor G. *The Law of Arbitration in Nigeria*, Longman Nigeria Plc, Lagos, 1997, P. 180.

arbitration are sought, the Convention on the Recognition and Enforcement of Foreign

Awards (hereafter referred to as "the Convention") set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any contracting state"

(a). Provided that such contracting state has reciprocal legislation recognizing the enforcement or arbitral awards made in Nigeria in accordance with the provision of the Convention;

(b). that the Convention shall apply only to differences arising out of legal relationship which is contractual.

(2). In this part of this Act. "the appointing authority" means the Secretary-General of the permanent Court of Arbitration at the Hague".

By virtue of section 54 quoted above, Nigeria has taken advantage of the Reciprocity provision of the convention as contain in Article 1.3, which provides that in signing or ratifying or acceding to the Convention, a state may, on the basis of the reciprocity declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Pursuant to this Article, Nigeria has made the reciprocity reservation so that only awards made in contracting state which undertake to recognize and enforce awards made in other contracting states, including Nigeria [known as "convention awards"] will be recognized and enforced in Nigeria. [89]

The Convention provides that each contracting state shall recognize and enforce the awards to which the convention applies in accordance with its

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[89] *Ibid.* P. 178.

local procedural rules. In practice, therefore, the procedure require to obtain recognition and enforcement of foreign award of contracting states are stated in Article IV of the Convention. A person applying for the recognition and enforcement of a Convention award must supply

a. The duly authenticated original award or a certified copy thereof".

b. The original agreement referred to in Article II or duly certified copy thereof.

Also by Article V (2), if the said award is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement shall produce a translation of the award into such language, which shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Under the convention, once the applicant duly applied to the court and supply the necessary documentation, the court will grant recognition and enforcement, unless there is a contrary application before the court to refuse the application.

K. Refusal of Recognition and Enforcement.

Recognition and enforcement of an international arbitral award may be refused if a party against whom the award is invoked requests that its recognition and enforcement be refused. Such party must establish before the court any of the following grounds:

i. Incapacity of one of the parties or invalidity of the agreement under the applicable law.

ii. Absence of proper notice of appointment of arbitrators or the proceedings.

iii. Award dealing with differences not contemplated, or those beyond the scope of submission.

iv. Composition of arbitral tribunal or the arbitral proceeding not in accordance with agreement.

v. Award not yet binding on parties on which has been set aside or suspended.[90]

Apart from the above grounds, recognition and enforcement may be refused

[90] See Article V.1

also if the competent authority in the country where recognition and enforcement are sought finds that:

i. the subject matter or the difference is not capable of settlement by arbitration under the law of that country; or

ii. the recognition or enforcement of the award would be contrary to the public policy of that country[91]

Article VI further provides that if an application to set aside the award is made in the country in which it was made, the authority before which it is sought to be enforced may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the party to give suitable security. In the case of *M.V. Lupex v. Nigeria Overseas Chartering & Shipping Ltd*[92]. The Supreme Court per **Uthman Mohammed JSC** said as follows:

> "The court should not be seen to encourage the breach of a valid arbitration agreement particularly if it has international flavour. Arbitration which is a means by which contract disputes are settled by a private procedure agreed by the parties has become a prime method of settling international commercial disputes. A party generally cannot both approbates and reprobates a contract. A party to an arbitration agreement will in a sense be reprobating the agreement if he commences proceedings in court in respect of any disputes within the purview of the agreement to submit to arbitration".

The provision of Article VI is *in pari material* with the provision of section 52 [3] and it is hereby submitted that the objective of these provisions is to checkmate frivolous application for either enforcement or for the refusal of enforcement of foreign arbitral award. At least, it has the tendency of preventing a losing party from frustrating application for recognition and enforcement.

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91 See Article V.2

92 (2003) 10 SCM 71 at 80-81.

L. CONCLUSION

Sections 31, 32, 51,52 and 54 of the Act govern the mechanisms for the recognition and enforcement of an arbitral award under the Nigerian Arbitration Act. Both sections 31 and 32 deal with recognition, enforcement and grounds for refusing recognition and enforcement of domestic arbitral award. The provisions of these sections do not pose much difficulty since the objective of the sections relates to domestic commercial arbitral agreement. Conversely, however, the provision of sections 51, 52 and 54 relate to recognition and enforcement of international arbitral awards. Thus, the implementations of the sections are quite complex because of different legal system that operates in different countries. Despite the seeming cumbersome nature of recognition and enforcement of foreign arbitral award. The identical nature of the provisions on recognition and enforcement of arbitral award whether at local or at the international level have lessen the burden of parties to arbitration proceedings.

The different approach adopted by sections 51 and section 54 of the Act notwithstanding, the import of these sections are to give effect to foreign arbitral award, thus in recognition and enforcement of foreign award. The objective is not to impose onerous condition for the recognition and enforcement of Convention awards. A state party to the Convention undertakes to enforce awards to which the Convention applies in accordance with its local procedural rules.

Furthermore, action under section 54 is without prejudice to application under section 51, this means that enforcement can be sought under any of the sections. For instance, a party who is entitled to apply for recognition and enforcement of an award under sections 51 and 54 can choose to do so under any one of them. The procedure for securing recognition and enforcement under the two sections is the same under both sections, recognition and enforcement can be opposed by a person against whom the award is invoked. The grounds of opposition in the two sections are identical and therefore, it seems that nothing extra ordinary is gained by choosing to proceed under one section rather than another.

Finally on the point of refusal to recognize a foreign award, one, and a very strong connecting factor for the grant of an application for the recognition and enforcement of foreign award is that the application must comply with

the public policy of the country where the applicant proposes to enforce the award. What is not clear however is that who or what determine public policy of country? This poser is very germane on the ground that the doctrine: "public policy" is an elusive policy, which defies precise meaning[93]

For the above reason, it is suggested that the grounds for refusing recognition and enforcement of foreign arbitral award should be restricted to reasonable other grounds listed in the Act,[94] rather than relying on nebulous ground like public policy

[93] Yakubu J.A. Limits to the application of foreign laws, Malthous Press Ltd. Lagos, 1999, P. 11.

[94] See Sections 32 and 52 of the Act.