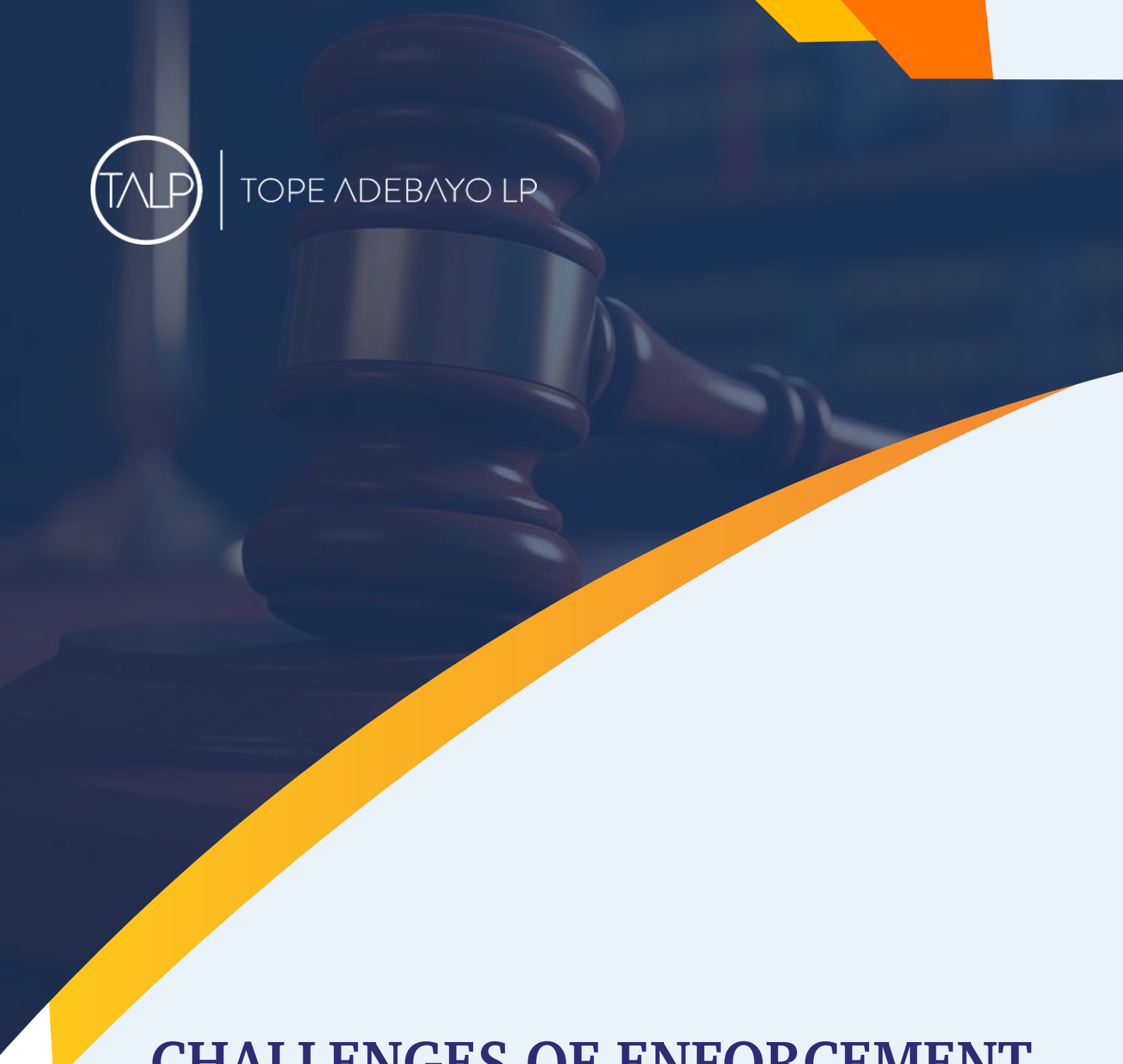
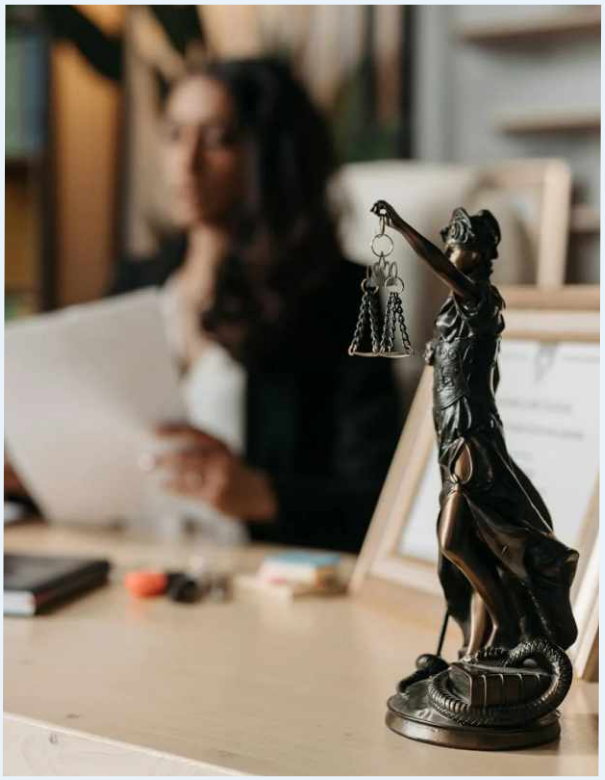


TOPE ADEBAYO LP

CHALLENGES OF ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN NIGERIA: ADDRESSING THE INCONSISTENCIES IN THE NIGERIAN LEGISLATIONS

INTRODUCTION

Arbitration has become an increasingly preferred mechanism for resolving commercial disputes in Nigeria, offering parties a faster and more flexible alternative to litigation. However, the true effectiveness of arbitration lies in the ability to enforce arbitral awards seamlessly. While Nigeria has made significant strides in aligning its legal framework with international best practices, several challenges continue to impact the enforcement process. In Nigeria, the principal legislations on the enforcement of foreign arbitral awards are the Reciprocal Enforcement of Foreign Judgment Ordinance 1958, Foreign Judgment (Reciprocal Enforcement) Act 1961, and Arbitration and Mediation Act, 2023. This article seeks to highlight the inconsistencies inherent in these legislations that pose a threat to international best practices; and calls for a legislative amendment of those provisions.

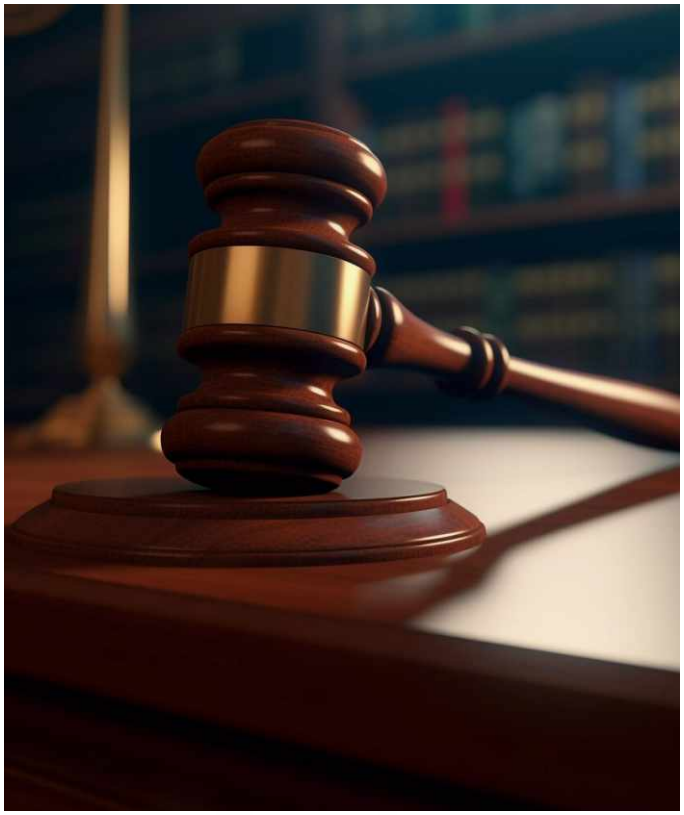


JUDICIAL RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN NIGERIA

In Nigeria, like in most other States, arbitral awards are generally considered final and "binding on all parties, and has the force of judgment."[1] The judicial attitude is that of respect for party autonomy which emphasizes the liberty to agree on the 'rules of the game' and be bound by the outcome. Thus, the Nigerian Supreme Court had in ***Mr. Charles Mekwunye v. Mr. Christian Imoukhuede*** held inter alia: ***"An arbitral award is a final judgment on all matters referred to an arbitrator and as such courts are enjoined to, as much as possible, uphold or affirm and enforce arbitral awards when approached especially in view of the fact that parties had voluntarily resolved or agreed to submit to the jurisdiction of the arbitrator or arbitrators to resolve their dispute."*** [2]

In giving effect to arbitral awards, however, there is a duty on the courts to balance the goal of preserving the finality of arbitration with the public policy of safeguarding the integrity of arbitration as a veritable alternative to litigation.[3] These public policy considerations have been codified in various instruments, including the Arbitration and Mediation Act, the Foreign Judgment (Reciprocal Enforcement) Act, etc.

[1] Kano State Urban Development Board vs. Fanz Construction Co Ltd (1990) 6 Supreme Court Cases (hereinafter "S.C."), P.103
[2] (2019) 13 NWLR (PT. 1690) PAGE 439 at P. 501
[3] Ecobank v. Admiral Environmental Care Ltd & Ors (2021) Law Pavilion Electronic Law Report (hereinafter "LPELR")-56130(CA)



ENFORCEMENT UNDER THE FOREIGN JUDGMENT (RECIPROCAL ENFORCEMENT) ACT 1961 AND RECIPROCAL ENFORCEMENT OF FOREIGN JUDGMENT ORDINANCE 1958.

A foreign arbitral award can be enforced in Nigeria through either the Foreign Judgment (Reciprocal Enforcement) Act 1961 or the Reciprocal Enforcement of Foreign Judgment Ordinance 1958 as if it were a foreign judgment.[4] While the Reciprocal Enforcement of Foreign Judgments Ordinance (REFJ Ordinance)[5] was promulgated to cover the registration of judgments obtained in Nigeria, the United Kingdom, and other parts of Her Majesty's dominions and territories, the Foreign Judgment (Reciprocal Enforcement) Act (FJRE Act) 1961[6] is intended to have wider reach beyond the Commonwealth States upon positive order made by the Minister of Justice extending Part 1 of the Act to any foreign country in accordance with section 3(1) thereof.[7] The order is to be made upon satisfaction that judgments issued in Nigeria will be treated with substantial reciprocity in terms of enforcement in that foreign country.[8]

It should be noted that the Minister of Justice has not yet issued any positive order for the full implementation of the FJRE Act as required by section 3 of the FJRE Act.

However, section 10(a) of the FJRE Act states that, notwithstanding any other provision of the Act, a judgment issued before the commencement of an order under section 3—applying Part I of the FJRE Act to the foreign country where the judgment was given—can still be registered within twelve months from the date of the judgment, or within a longer period if permitted by a superior court in Nigeria.[9]

[4] Section 2 of the 1961 Act defines the term "judgment" to include an arbitral award
[5] Cap 175, Laws of the Federation of Nigeria and Lagos, 1958, hereinafter referred to as the "REFJ Ordinance"
[6] Cap 152, Laws of the Federation of Nigeria, 1990, hereinafter referred to as the" FJRE Act"
[7] FJRE Act, Section 9(1)
[8] FJRE Act, Section 3(1)
[9] See, Macaulay V R. Z. B. Austria (2003) 18 NWLR (Pt.852) 282

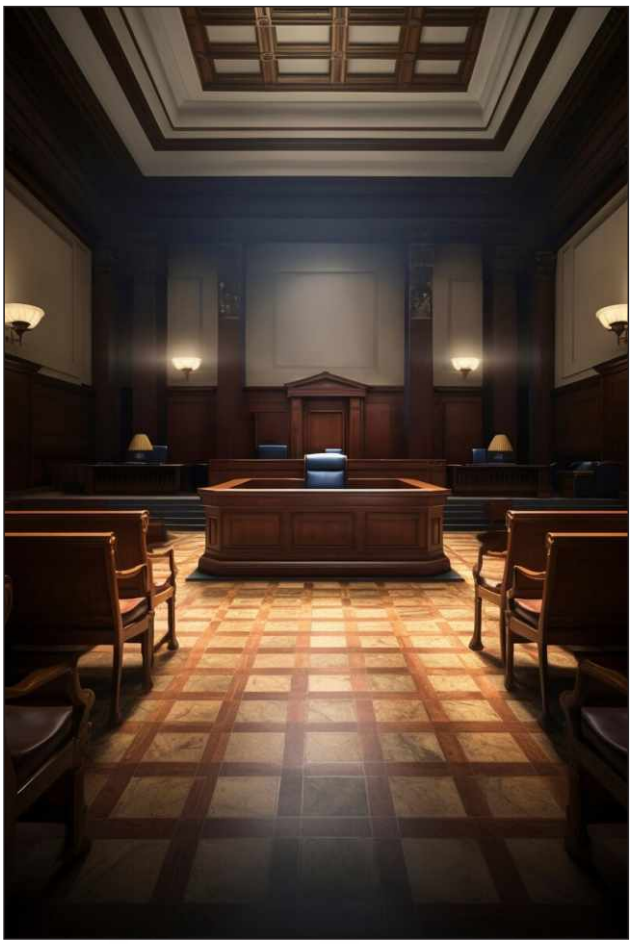
Section 2 of FJRE Act defines judgment to include "an award in proceedings on an arbitration if the award has in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place ..." Also, section 4 (1)(b) of the FJRE Act, provides that such judgments, including awards, would be refused registration and enforcement if at the time of the application, "it could not be enforced by execution in the country of the original court." What is clear from the above provisions is that for a foreign award to be enforceable in Nigeria under the FJRE Act, it must be capable of enforcement as a judgment at the seat. In Tulip (Nig.) Ltd. v. N.T.M. S.A.S, the Nigerian Court of Appeal, Lagos Division held that "an arbitral award made in England can only be elevated to the status of a judgment if the party in whose favour the award was made had applied before the English High Court for leave to enforce the arbitral award in the same manner as a judgment and once the High Court in England grants such an order, it then becomes a judgment of the English High Court. It is only then that the Reciprocal Enforcement of Judgments Ordinance ... and Foreign Judgments (Reciprocal Enforcement) Act will apply."[10]

The implication of the above is that only awards granted exequatur at the seat can be registered, recognized, and enforced in Nigeria under the REFJ Ordinance or the FJRE Act. Without prejudice to the ideological differences of various approaches for enforcement of awards annulled at the seat, it is not in contention that annulled awards cease to exist, at least, in the seat and cannot be enforced therein. The consequence is that such annulled awards cannot be enforced in Nigeria under the REFJ Ordinance or the FJRE Act. This is because there are no provisions for the exercise of discretion to checkmate the grounds for the annulment under the above laws.

While the REFJ Ordinance was enacted to ease the reciprocal enforcement of judgments obtained in Nigeria, the United Kingdom, and other parts of Her Majesty's dominions under the protection of the United Kingdom, the FJRE Act specifically grants authority to the Minister of Justice to make an order, expanding reciprocal treatment to any foreign country demonstrating substantial reciprocity regarding enforcement of judgment obtained in Nigeria. Unfortunately, the Minister of Justice is yet to make any positive order in this regard till date.

[10] Tulip (Nig.) Ltd. v N.T.M. S.A.S supra at Note 156

ENFORCEMENT UNDER THE ARBITRATION AND MEDIATION ACT, 2023



The Arbitration and Mediation Act ("AMA") was enacted in May 2023 and contains innovative improvements on the state of the erstwhile Nigerian law on arbitration (the now repealed Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria, 2004 ("ACA")) to reflect international best practices.[11] Section 57(1) of AMA explicitly recognizes the binding nature of both domestic and foreign arbitral awards on the parties. It provides that "an arbitral award shall, irrespective of the country or state in which it is made, be recognized as binding, and on an application in writing to the court, be enforced by the court…" This provision attenuates the reciprocity reservation made by Nigeria to the New York Convention. Thus, the use of irrespective of the country or State" broadens the enforceability of foreign awards with little or no attention to the country such an award emanated from. Additionally, the requirement of exequatur as per confirmation of the award by the court of the seat is dispensed with under the AMA.

Section 58 of AMA provides exhaustive grounds upon which the Nigerian courts 'may' refuse recognition and enforcement of awards. Specifically, section 58(2) provides that "irrespective of the country in which the award was made, the Court may only refuse recognition or enforcement of an award – (a)(viii) 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;" This provision is identical with Article V(1)(e) of the New York Convention.

It is noteworthy that section 60 of AMA mandates Nigerian courts to enforce a convention award under the governance of the New York Convention but without prejudice to sections 57 and 58 of AMA.[12] This implies that a convention award is still subject to the grounds for refusing recognition and enforcement under section 58 of AMA.

[11] Harrison Ogalagu & Nnamdi Ezekwem, "The Nigerian Arbitration And Mediation Act, 2023 - The Dawn Of A New Era For Arbitration And Mediation Practices In Nigeria, www.topeadebayolp.com accessed on 6th September 2024
[12] The Convention has been domesticated into Nigerian law by Section 60 and the Second Schedule to the AMA 2023

THE INCONSISTENCIES IN ENFORCEMENT OF FOREIGN AWARDS UNDER THE FOREIGN JUDGMENT (RECIPROCAL ENFORCEMENT) ACT 1961, THE RECIPROCAL ENFORCEMENT OF FOREIGN JUDGMENT ORDINANCE 1958, AND THE ARBITRATION AND MEDIATION ACT, 2023.

As stated earlier, under the REFJ Ordinance and FJRE Act, recognition and enforcement of foreign awards are limited to awards obtained in the United Kingdom, other parts of Her Majesty's territories; and states whose awards have been empowered to be enforced in Nigeria pursuant to the Minister of Justice's positive order under section 3 of the FJRE Act, which executive order is yet to be given. The recognition and enforcement of awards obtained from the aforementioned countries in Nigeria is based on reciprocity treatment. Thus, such awards are recognized and enforced upon satisfaction that judgments or awards issued in Nigeria will be treated with substantial reciprocity in those countries.

On the contrary, section 57(1) of AMA (which replicated the provision of section 51 of ACA) explicitly recognizes the binding nature and enforceability of foreign awards "irrespective of the country or state" in which it was made. The AMA dispenses with the requirement of reciprocity as a pre-condition for the recognition and enforcement of foreign awards. This provision resonates with the objectives of the New York Convention which promotes cross-border arbitrations of which Nigeria is a signatory. **In Calais Shipholding Company v. Bronwen Energy Trading Ltd,**[13] the Court of Appeal giving credence to Section 51 of ACA held that "...the Arbitration and Conciliation Act provided a simpler and much easier approach to the registration in Nigeria, of such foreign awards. **... Thus, subject to Section 32 and 51(2) of the Arbitration and Conciliation Act, an arbitral award obtained anywhere in the world can be registered and recognized by any Court in Nigeria ..."**

Furthermore, under the REFJ Ordinance or FJRE Act, foreign judgments (including arbitral awards) must be registered in Nigeria as a prerequisite for recognition and enforcement.[14] However, the position under the AMA (as well as the repealed ACA), is that the requirement of registration of a foreign arbitral

[13] (2014) LPELR - 23122(CA). See also, Emerald Energy Resources Ltd v. Signet Advisors Ltd (2020) LPELR - 51385(CA)
[14] Orojo J.O & Ajomo M.A, (1999) Law and Practice of Arbitration and Conciliation in Nigeria, Mbeyi & Associates (Nig.), p. 304

award as a condition precedent is not necessary. Hence, in **Ogbuneke Sons and Company Ltd v. ED & F Man Nigeria Ltd & Ors, the Court of Appeal held thus: "truly, and as was pointed out by the learned counsel for the appellant, the requirement of registration before recognition is not contained in the provision of section 51(1) of the Arbitration and Conciliation Act 1988. … In relation to the present case, the implication of the provision of section 51(1) of the Arbitration and Conciliation Act 1988, is that a foreign award remains binding, without any requirement of registration and even before an application in writing for enforcement is made to the court."**[15]

It is also important to state that under the FJRE Act, an application for the registration of the foreign award must be filed within 6 years (where the Minister of Justice has made a positive order under section 3) or 12 months (where the Minister of Justice has not made a positive order under section 3) of the delivery of the award to the appropriate court.

It follows that where the award creditor fails to apply for the registration of the award within the time frame provided by the FJRE Act, such an award cannot be enforced. However, under the AMA, there is no provision for registration or time frame for registration of an award. This implies that enforcement of foreign arbitral awards can be initiated at any time without impediment as to timeframe.

Further, Section 4(1)(b) of the FJRE Act provides that judgments, including awards, will be denied registration and enforcement if, at the time of the application, they "could not be enforced by execution in the country of the original court." The FJRE Act's above provisions align with the double exequatur prerequisite inherent in the 1927 Geneva Convention, which the New York Convention abolished. It is important to note that the double exequatur prerequisite is non-existent under the AMA (as well as repealed ACA). The Court of Appeal in Emerald Energy Resources Ltd v. Signet Advisors Ltd held that "the relevant provision to determine how an arbitral award from England or anywhere in the world can be enforced is Section 51 of the ACA which I had reproduced above. The relevant provision is Section 51 and once this provision is adhered to, the foreign arbitration award will be enforced in Nigeria. … Thus,

[15] (2010) LPELR - 4688(CA)

subject to Section 32 and 51(2) of the Arbitration and Conciliation Act, an arbitral award obtained anywhere in the world can be registered and recognized by any Court in Nigeria without recourse to a foreign Court to first adopt same as its judgment."[16]

Whereas the above position is consistent with the policy objectives of the New York Convention, it must be noted that the Court in Emerald's case did not strike down or void sections 2, 3(1), and 4(1)(b) of the FJRE Act for being inconsistent with ACA nor did the court hold them inapplicable to enforcement of foreign arbitral awards in Nigeria. Also, there is nothing in AMA to suggest that the position has changed. Accordingly, an award debtor may seek to rely on the FJRE Act to resist enforcement of an award and there is no clear direction on how the courts should resolve the dilemma.

As discussed above, there is still a yearning gap on the state of the law in Nigeria on enforcement of foreign arbitral awards, especially if annulled at the seat. The provision of the FJRE Act requiring that a foreign award should not be registered in Nigeria if "it could not be enforced by execution in the country of the original court" constitutes an imposition of more onerous conditions for recognition and enforcement of foreign arbitral award in Nigeria and in effect negates the obligation under Article III of the New York Convention. Apparently, the freedom of a State to "recognize and enforce awards pursuant to conditions it determines for itself"[17] is made "subject only to compliance with the international obligations it has undertaken in this respect"[18] including obligations under the Convention.

Thus, in resolving the conundrum, it is important to observe that Nigeria has signed, ratified, and domesticated the New York Convention, with an obligation to comply with its provisions. Therefore, Nigeria cannot shirk or justify a breach of the obligations on the altar of municipal legislation. The Nigerian Supreme Court has held in Abacha & Ors v. Fawehinmi, that when a treaty has been enacted into law by the Nigerian National Assembly, it becomes "elevated to higher pedestal" in relation to other municipal legislations and "if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to

[16] (2020) LPELR - 51385(CA)
[17] Gaillard, E. supra at note 17, p. 136
[18] Ibid

breach an international obligation."[19] Consequently, the obligations created under the Convention should prevail over the specifications of the FJRE Act on compulsory exequatur of the seat and reciprocity requirement.

Secondly, the AMA is a specific legislation in terms of arbitration and arbitral awards and was enacted later in time than the FJRE Act with the effect that the AMA's provisions should prevail over the FJRE Act in the event of conflict. In AMCON v. Canvass Farms Ltd, (where the author represented the respondent) the Nigerian Court of Appeal held that the AMCON Act 2010 is a specific legal regime enacted later in time than the Companies and Allied Matters Act. 2004 "and should therefore, in the event of any conflict or inconsistency between the two enactments … prevail."[20] Accordingly, sections 57 and 58 of AMA should be interpreted in a manner that will prevail and override the provisions of sections 2, 3(1), and 4(1)(b) of FJRE.

NEED FOR HARMONIZATION

Flowing from the inconsistencies in the foreign awards enforcement legislations in Nigeria as gleaned from the preceding sub-heading, it is clear that there is a need to harmonize these legislations to ensure consistency and efficiency in the enforcement of foreign arbitral awards. Undoubtedly, the differences in the provisions of the FJRE Act, REFJ Ordinance, and AMA can lead to legal uncertainties, duplication of procedures, and conflicting outcomes.

It is important to state that both the FJRE Act and the REFJ Ordinance have been in existence for over six decades without any form of amendment or reform. As expected, some of the provisions of these legislations are obsolete and do not reflect the current trend of international best practices. On the other hand, the AMA is more recent in time and its provisions mirror the objectives of the New York Convention regarding cross-border enforcement of foreign arbitral awards and international best practices. Thus, there is an urgent need for the Nigerian Legislature to take active and positive steps in amending the FJRE Act and the REFJ Ordinance in line with the AMA to abrogate the inconsistencies and, also, to reflect the current trends on the enforcement of foreign arbitral awards.

[19] (2000) LPELR - 14(SC)
[20] (2021) LPELR-54651(CA)

One of these trends is the reservation of the enforcement Court's discretionary right to review, upon an application to enforce an award rendered unenforceable at the seat (which includes set-aside awards), the grounds for which the award was rendered unenforceable. This discretion is necessary to differentiate Convention grounds for set aside, from a seat's parochial local considerations. In this regard, the Nigerian Courts could adopt the hybrid approach which offers an opportunity to assess the set-aside decision of the seat[21] (or any of the grounds for set aside or annulment) and this finds justification on the basis that there could be circumstances where set aside could arise from local bias or parochialism especially where one of the parties is a national of the seat. Therefore, Nigerian Courts if given this discretion, may feel justified to disregard the set aside (or other grounds for annulment) which does not reflect the Convention standards or violates public policy of the State.[22]

Thus, the harmonization of these laws will streamline foreign awards enforcement process, reduce legal complexities, and provide clear guidelines for the Nigerian courts and parties involved. Furthermore, the harmonization of these laws in line with the AMA would promote international trade and investment by reinforcing confidence in the legal system, ensuring that foreign judgments and arbitral awards are treated equitably and predictably.

PROCEDURE FOR RECOGNITION AND ENFORCEMENT OF AWARDS IN NIGERIA

Judicial assistance ensures the effectiveness of arbitration as a private arrangement supported by national and international legal order in terms of respect for party autonomy and the sanctity of contract. Thus, a successful party seeking the recognition and enforcement of a foreign award must apply to a court of competent jurisdiction to enforce such an award.

This is the purpose of Article IV of the Convention as well as Section 57 of AMA. Specifically, Section 57 of AMA provides that "an arbitral award shall, irrespective of the country or state in which it is made, be recognized as binding, and on an application in writing to the Court, be enforced by the court subject to the provisions of this section and section 58 of this Act". Flowing from the first limb of the above provision, an arbitral award is automatically recognized as binding, irrespective of the country or state in which it was made. By implication, the application referenced above relates to the enforcement of an arbitral award.

Further to the above, it is also clear that AMA did not stipulate the nature of the written application envisaged by its section 57. However, it has also been held that an application for enforcement of foreign arbitral award cannot be made exparte.[23] It follows that the application contemplated by AMA must be on notice.

[21] See Van den Berg, Albert Jan, supra at Note 45, pp. 179, 190-3
[22] Park, W. W., (2012) Arbitration of International Business Disputes: Studies in Law and Practice, 2nd ed., Ch. II.C.2 - Duty and Discretion in International Arbitration, Oxford University Press, pp. 355, 363
[23] CITEC International Estates Limited v. Federal Housing Authority (2019) LPELR-48066(CA)

Furthermore, Section 57 (2) of AMA provides that a party relying on an award or applying for its enforcement shall supply the original award or a certified copy of it; the original arbitration agreement or a certified copy of it; and where the award or arbitration agreement is not made in the English language, a certified translation of it into the English Language. This implies that such an application to enforce an arbitral award must be accompanied by the aforementioned documents and translated into English language (if necessary).

Finally, Section 57(3) of AMA provides that an "award may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect." The above provision could be utilized in a situation where an award creditor has apprehension of assets dissipation by the award debtor. In this regard, the award creditor can bring an application seeking leave of court to enforce the award in the same manner as a court's judgment, alongside a prayer to preserve the subject assets for the satisfaction of the award. This may be achievable among other things, by freezing order and garnishing the award debtor's money with a third party.

CONCLUSION

The enforcement of arbitral awards across different jurisdictions is a crucial factor for the success of international trade and commerce. The New York Convention which Nigeria is a signatory to, plays an essential role in facilitating this objective. To this end, Nigeria has enacted the Arbitration and Mediation Act 2023 (AMA) which mirrors the objectives of the New York Convention in ensuring cross-border enforcement. However, there are manifest inconsistencies between the AMA and other existing laws in Nigeria on the enforcement of foreign awards such as the Foreign Judgment (Reciprocal Enforcement) Act 1961 (FJRE Act) and the Reciprocal Enforcement of Foreign Judgment Ordinance 1958 (REFJ Ordinance). Therefore, there is a need for the harmonization of these laws to bring them in conformity with international best practices and standards.

It is also important to observe that Nigeria has signed, ratified, and domesticated the New York Convention, with an obligation to comply with its provisions. Thus, there is a need for Nigeria to preserve the discretion in Article V and other in-built standards in the Convention in its quest to recognize and enforce foreign arbitral awards, without which it will be in breach of treaty obligations. Nigerian courts should also interpret the provisions of AMA more liberally and in a manner that will supersede the requirements of the FJRE Act in order to maximize the objectives of same. In all, there is justification for Nigerian courts to maintain a positive attitude towards a foreign arbitral award by adopting a Westphalian representation of arbitration where each State determines, "based on its own conceptions, what constitutes a valid arbitration and, subsequently, a valid award."[25]

[24] See: Order 26 Rule 2 of the Federal High Court (Civil Procedure) Rules 2019; Order 43 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 2019, High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018; Dr. C.A. Obiozor, "The Machinery for Enforcement of Domestic Arbitral Awards in Nigeria - Prospects for Stay of Execution of Non-Monetary Awards" https://www.ajol.info/index.php/naujilj/article/view/138189/127910#:~:text=There%20are%20three%20enforcement%20systems,3)%20of%20the%20same%20Act. accessed on 19th November 2024. The source referred to the repealed Arbitration and Conciliation Act's provision on recognition and enforcement of awards

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