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APPRAISING THE ENFORCEMENT REGIME IN THE ARBITRATION AND CONCILIATION ACT(ACA) OF NIGERIA

Kudirat Magaji Owolabi *

Abstract

International businessmen have a choice in the resolution of disputes, they may either resort to litigation or submit the dispute to arbitration. The increasing delay, outrageous cost and undue technicalities associated with the municipal courts, makes commercial arbitration the preferred mode of settlement in the business world. Ordinarily, parties are expected to abide by the terms of award however, where there is a default, the award-creditor may request the court to compel the award-debtor to comply through available enforcement mechanisms. Thus, various States including Nigeria make provision for the enforcement of foreign arbitral awards within her legal system. The aim of this paper is to examine the relevant provisions of ACA relating to enforcement of foreign award, with particular reference to Sections 51 and 52. The objectives therefore is to appraise the legal challenges facing these enforcement regimes as contain in the ACA. The paper revealed that judicial intervention for enforcement of awards frequently frustrates the gains made by resort to arbitration in the first instance. There liance on national legal system in Nigeria for enforcement of arbitral awards have numerous legal challenges.

INTRODUCTION

The recognition and enforcement of awards is very significance for the success of arbitration in the international arena. This is evident by the fact that the enforceability of awards globally is considered one of the primary advantages of arbitration. Theoretically, the term 'recognition and enforcement' are important as they provide official recognition of the arbitration process and confirm its product.¹ Hence, the importance of recognition and enforcement cannot be underestimated in the arbitration system because without an effective enforcement procedure the whole arbitration system is worthless.² Therefore, the enforcement process serves as the most significant stage in the arbitration process.

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1. D.MJLew and L.A Mistelis and SM Kroll, *Comparative International Commercial Law* (Maxwell UK, 2003) 689.

2. Ibid.

Ordinarily, parties are expected to abide by the terms of award however, where there is a default, the award-creditor may request the court to compel the award-debtor to comply through available enforcement mechanisms.³ Courts are allowed to enforce awards emanating from international commercial arbitration by using their own procedural rules.⁴ This is provided for in many international treaties such as Organisation of Islamic Corporation Charter (applicable to Muslims), and notably, in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.⁵ Also, domestic legislation in most States create provisions for enforcement of arbitral awards.⁶

ACA creates two principal enforcement regimes, the first can be found in the provisions of ss 51 and 52 which derived from Arts 35(1) & (2)⁷ and Article 36⁸ of the United Nations Commission on International Trade Law on International Commercial Arbitration 2006 (UNCITRAL)⁹ and the second regime is provided for under s54 that domesticate the New York Convention 1958.¹⁰ However, the scope of this paper is restricted to ss51 and 52 hence, the aim is to examine the relevant provisions of ACA relating to enforcement of foreign award, with particular reference to ss 51 and 52. The objectives therefore is to appraise the legal challenges facing these two provisions of the ACA.

The paper is divided into five parts. Parts I and V are introductory and conclusion parts respectively. The paper analysis various decisions of the Nigerian courts on the descriptions and definitions of 'recognition and enforcement'. This is to lay a foundation as to what the courts consider as the meaning of recognition and enforcement for the purpose of enforcement. The paper discusses and analyses

3. Judicial enforcement may not be necessary if the award-debtor voluntarily complies with the terms of the award. Recognition of arbitral award means to acknowledge and accept an award, hence the meaning of enforcement is beyond mere recognition. For an award to be enforced, it must have been recognised first. Although, an award can be recognised without necessarily being enforced, but there cannot be enforcement without a recognition of such awards.

4. New York Convention on Recognition and Enforcement of Foreign Arbitral Award 1958, 330 U.N.T.S. 38(1959), Art III. See also UNCITRAL Model Law 2006 (United Nation documents A/40/17, annex I and A/61/17, annex), Art 36 and New York Convention 1958, 330 U.N.T.S. 38(1959), Art III

5. Herein after referred to as New York Convention 1958.

6. See Arbitration and Conciliation Act of Nigeria CapA18 LFN 2004 (hereinafter referred to as ACA 2004); English Arbitration Act, Chap 23, 1996.

7. Article 35 deals with enforcement of awards.

8. Article 36 deals with grounds under which an aggrieved party can resist enforcement application before the enforcing courts.

9. UNCITRAL Model Law 2006 (United Nation documents A/40/17, annex I and A/61/17, annex) Herein after referred to as UNCITRAL Law 2006.

10. New York Convention 1958.

provision of Section 51 in detail. This is to discover the area of its strengths and weaknesses. Further, it examines and analyses the grounds for refusal of enforcement under s52. This is to show that enforcement of foreign awards is not automatic in Nigeria, an aggrieved party can resist the enforcement by requesting that the court should refuse the enforcement. in Nigeria.

II RECOGNITION AND ENFORCEMENT OF AWARDS IN NIGERIA

Thus, the 'term recognition' and 'enforcement' are two distinct words with different meanings. Courts and scholars have attempted to give meaning to these terms disjointedly and coherently.¹¹

The Court of Appeal in *Tulip (Nig) Ltd v N.T.M.S.A.S*¹² defined recognition as the act of recognising; identification; acknowledgement and admission. Hence, recognition of an award simply means to acknowledge formally; to accept and admit.¹³ Recognition means confirmation that an act done by another person was authorized. It may be raised as way of defence or set-off in any legal proceedings relating to the same subject matter of the award. It therefore serves as a shield, and it is usually used to prevent an attempt to initiate fresh proceedings.

Hence, the term 'enforcement' connotes giving legal force to an arbitral award.¹⁴ The enforcing court is required to effect the award by way of recognising the legal force and to ensure that it is carried out by using such legal sanctions as are available.¹⁵ The type of sanctions available will vary from State to State and may include seizure of the award debtor's property, freezing of bank accounts or even custodial sentences in extreme cases.¹⁶ It is important to note that, it is possible to recognise arbitral award without being enforced. Enforcement of award signifies that, the award is being recognised by the enforcing court who orders its enforcement.¹⁷ International Conventions usually refer to both recognition and enforcement of awards.¹⁸ Thus, the award-creditor has two options here; he may seek for its recognition alone or its recognition and enforcement. This is to clear doubt about the need to make distinction between the Recognition and

11. *Tulip (Nig) Ltd v N.T.M.S.A.S* [2011] 4 NWLR(Pt. 1237) 279; D.M J Lew and L. A Mistelis and SM Kroll(n1)689-690, A Redfern and M.Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) 67.

12. [2011] 4 NWLR(Pt 1237), 279 paras A-B.

13. *Ibid*

14. A Redfern and M. Hunter (n11) 106.

15. *Ibid*

16. D M J Lew and L. A Mistelis and SM Kroll (n1) 691.

17. *Ibid*

18. New York Convention 1958, Art 1(1); Geneva Convention 1927 92 LNTS 301 (1929-30), Art 1 (1).

Enforcement. Enforcement serves the purpose of ensuring the losing party complies with the award and the purpose of the Recognition is limited to the extent that it only serves as a shield, which is the reason the large number of applications are for enforcement.¹⁹ It is therefore doubtful that any award creditor will derive practical benefits from merely applying for recognition, without seeking enforcement.

III ENFORCEMENT OF FOREIGN ARBITRAL AWARD VIA SECTION 51 OF THE ACA

In Nigeria, one of the channels of enforcing foreign awards is by provision of Section 51 of the ACA. The provision stipulates that 'subject to Section 32 of the ACA, courts shall recognise and enforce arbitral award, irrespective of the country in which it is made, upon an application in writing to that court.'²⁰ The ACA further provides that the party seeking for enforcement shall supply: the duly authenticated original award or a duly certified copy thereof; the original arbitration agreement or a duly certified copy thereof; and where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language.²¹

Thus far, Nigerian courts have signify a strong support to both arbitration process and enforcement procedure, this is evident in the case of *Sundersons Ltd & Milan Nigeria Limited v Cruiser Shipping PTE Ltd & Universal Navigation PTE Ltd*,²² where the Court of Appeal recognised and enforced award made in London under the provision of s 51 of the ACA. In this case, the party failed to comply with the requirement contained in s 51(2) by not attaching the original arbitration agreement or duly certified copy of it to the application. In interpreting s 51(2) (b) of the ACA, Court of Appeal observed that failure to attach an original copy of the arbitration agreement to the application for enforcement did not render the application incompetent. The court emphasised that the listed requirements under s 51(2) does not amount to grounds stipulated in s 52 for refusing the application for enforcement. The court therefore exercised its discretion to enforce the award. The court observed that the

19. R Rubino-Sammartano, *International Arbitration Law & Practice* (2nd Revise Ed, Kluwer Int'l, India, 2007)918.

20. ACA s 51(1); *Tulip (Nig) Ltd v. N.T.M.S.A.S* [2011] (Pt 1237)4 NWLR, 274-275, paras H-A.

21. ACA 2004 s 51(2).

22. [2015] 17 NWLR (Pt. 1488) 357.

Appellant did not deny the authenticity of the award or the validity of the arbitration agreement.

The Court of Appeal in *Sundersons & Millers* case above rightly declined objection to the application of enforcement of award on technical grounds. If the court had upheld such objection, that would have been detrimental to the party seeking for enforcement. It is submitted therefore that the court rightly protected the interest of the parties by making an order enabling the enforcement on the foreign award. Furthermore, the court reached a conclusion and struck a balance between technical requirements of the procedure for enforcement of awards and the need to preserve the sanctity of arbitration agreements freely entered by the parties, in circumstances where the resultant awards comply with international enforcement standards.²³ This approach supports international arbitration better than a mechanical application of technical rules on the procedure for enforcement.

Despite this friendly support of the judiciary for the recognition and enforcement of foreign award in Nigeria, one may question the need by the drafter of the ACA when on one side putting courts under obligation to recognise and enforce arbitral award and, on the other side, subject the court to s 32 of the Act. Why is the reference to s 32 instead of s 52 of any significance? There is no justification for inserting s 32 into the provision of enforcement of foreign award. This is because s 32 appears to be applicable to domestic awards and it only offers the opportunity for aggrieved parties to request the court to refuse enforcement of award without more. The provision of s 32 also did not list grounds under which enforcement may be refused. Specifically, s 52 is applicable to foreign awards and it permits the aggrieved party to seek for refusal of such award on certain grounds. This argument is strongly demonstrated on the manner in which the provisions of the ACA are structured and categorised. It comprises of four (4) parts and three (3) schedules. s 52 came from Parts III of the ACA which is specifically applicable to foreign awards in Nigeria, while s 32 falls under Part II, which is explicitly for domestic awards. The confusion in making reference to s 32 in s 51 and subjecting the provisions of the latter to the former, respectfully

23. Supreme Court of Nigeria in *M V Lupex v NOCS Ltd* [2003]15 NWLR (Pt 844)469 also emphasised on the importance of maintaining the sanctity of international arbitration agreement.

shows inelegant drafting or costly mistake. This is an area which requires clarification and needs to be addressed to avoid injustice.

Another noticeable concern in the provision of s 51 is that, ACA did not specify any particular mode for recognition and enforcement of an award. This has been left for the High Court Rules of various States in Nigeria. Only the High Court (both Federal and State) has jurisdiction to entertain an application for the recognition and enforcement of arbitral awards.²⁴ Thus, both State High Court Rules and the Federal High Court Rules are to be observed depending on which courts are asked to enforce the award.²⁵

The High Court of Lagos State (Civil Procedure) Rules, 2019 provides in Order 28 Rule 3 as follows:

- (1.) An application in any ADR proceedings under these Rules shall be by Originating Motion on Notice.
- (2.) The application may be brought: (a) revoke an arbitration agreement; (b) appoint an arbitrator; (c) stay proceedings; (d) remove an arbitrator or umpire; (e) seek injunction against arbitration; (f) to enforce or set aside an award.

Order 28 Rule 4 further provides:

- (2) An application to set aside or remit any award may be brought at any time within three (3) months after such award has been made and published to the parties provided that a Judge may by Order before or after the expiration of three (3) months extend the time allowed by this Rule to set aside or remit an award.

Could this be interpreted to mean the parties are required the use motion on notice to commence an application for recognition and enforcement of an arbitral award?²⁶ Motions are only authorised for interlocutory applications which are specifically allowed under the rules of courts.²⁷ One may therefore question the aptness of either the motion on notice or writ of summon for the commencement of enforcement proceedings.

Aside from the State High Court Rule, Federal High Court (Civil Procedure) Rule, 2018 must also be mentioned. Though the most unusual and inconsistent provision is Order 19 Rule 13 for the enforcement of arbitral awards. The Rule provides that an application to enforce an award on an arbitration agreement in the same manner as a judgment or order may be made ex parte, but the court hearing the application may order it to be made on notice. Again, this particular

24. ACA 2004 s 57 (1) which defines High Court to include High Court of a State, High Court of Federal Capital Territory, Abuja or the Federal High Court.

25. *Magbagbeola v. Sanni* [2002] 4 NWLR (Pt 756) 193.

26. See also Order 39 Rule 4 of Oyo State High Court (Civil Procedure) Rules, 2012.

27. Lagos State High Court (Civil Procedure) Rules 2019, Order 43 Rule 1.

rule is confusing and vague. This is so because all ex-parte applications need be supported by affidavits which shall state sufficient grounds why delay in granting the order sought would entail irreparable damage or serious mischief to the party.²⁸ The danger here is that conflicting affidavits from both sides can complicate the enforcement proceeding thereby cause issue(s) which has been resolved by arbitrator(s) to be re-opened at the enforcement stage. Certainly, a summary and time saving procedure is desirable.

Based on the foregoing and from the wordings of s 51, enforcement of award in Nigeria is not automatic, it is subject to grounds listed in s 52 of the ACA. This provision contains grounds upon which an aggrieved party can oppose the application tendered by the winning party to enforce the award. Therefore the analysis of these grounds is discussed below.

IV GROUNDS FOR REFUSAL OF AWARDS UNDER SECTION 52 OF THE ACA

When an application is made under s 51 to enforce the award, the other party may request the court to refuse to recognise and enforce such award.²⁹ s 52 of the ACA contains grounds for refusing recognition and enforcement of foreign award in Nigeria. The aggrieved party can bring an application under s 52 on the following grounds:³⁰ where there is incapacity of the parties,³¹ or invalid arbitration agreement,³² lack of due process,³³ on jurisdictional issues;³⁴ or where award contains decisions or matters which are beyond the scope of submission to arbitration,³⁵ or where the composition of the tribunal or procedure not in accordance with arbitration agreement or relevant law,³⁶ or the award is not yet binding or has been set aside or suspended.³⁷ The courts can also refuse enforcement if finds the subject matter inarbitrable³⁸ or/and where award is in conflict with public policy of Nigeria.³⁹ The first set of the defenses however,

28. *Ibid*, Order 19 Rule 13(2)

29. C. A. Candide-Johnson and O. Shasore, *Commercial Arbitration Law and International Practice in Nigeria* (LexisNexis, US, 2012) 99.

30. ACA 2004 s52(2), *Continental Sales Ltd v R Shipping Inc* [2013] 4 NWLR, 88, para C-F; *Sundersons Ltd. v C.S. PTE Ltd* [2015] 17 NWLR (1488), 373, paras C-G.

31. ACA 2004 s52(2)(a)(i).

32. *Ibid*, s 52(2)(a)(ii).

33. *Ibid*, s 52(2)(a)(iii).

34. *Ibid*, s 52(2)(a)(iv).

35. *Ibid*, s 52(2)(a)(v).

36. *Ibid*, s 52(2)(a)(vi) & (vii).

37. *Ibid*, s 52(2)(a)(vii).

38. *Ibid*, s 52(2)(b)(i).

39. *Ibid*, s 52(2)(b)(ii).

which can be raised by the aggrieved party are intended to safeguard the parties against private injustice, and the second set serves as an explicit catchall for the enforcement of a country's own vital interests.

These grounds for refusal of enforcement of foreign awards however, are of considerable importance. They represent an internationally accepted standard because they are identical with the grounds in the New York Convention 1958, as contained in the Second Schedule of.⁴⁰ The grounds for refusal under s 52 do not include an erroneous decision in law or in fact by the arbitral tribunal. A court seized with an application for recognition and enforcement under the ACA may not review the merits of the award.⁴¹ This is laudable as it tends to prevent recalcitrant award debtors from using enforcement or refusal proceedings to reopen the hearing of the issues decided in the award. It also appears that the burden of proof is on the party opposing the application.⁴²

These specified grounds contain in s 52 are of great importance as they signify a globally recognised standard which is identical with the provisions in the Second Schedule of ACA⁴³ and the UNCITRAL Model Law.⁴⁴ The burden of proof remains with the party resisting the application for enforcement.⁴⁵ Hence, it is apposite to examine each of these grounds stipulated in s 52 of the ACA in order to assess the judicial attitude in this perspective.

A. Legal Capacity of the Party

The first ground under which an award-debtor can challenge an award is where there is evidence of deficiency in the party's legal capacity to the arbitration. This right of challenge availed to the award-debtor is provided for in s 52(2) (a) (1) of the ACA and in the Second Schedule of ACA, ArtV (1) (a). Conventionally, capacity in this regard demands each party to arbitration to possess a required legal capacity to create an arbitration agreement.⁴⁶ Hence, parties to arbitration does not necessarily refer to an individual alone, but it could also be

40. The first four of these grounds also appear in the European Convention of 1961. A Commentor on that Convention has described these grounds for refusal as grounds 'common to most system of judicial review award at the seat of the arbitration.'

41. D.M.J Lew and L.A Mistelis and S.M Kroll (n1).

42. See introductory sentence of s 52 that enforcement may request the court to refuse if party furnishes proof of the grounds listed in that paragraph. P.O Idomigie, *Commercial Arbitration Law and Practice in Nigeria* (Lawlord Press, Nigeria, 2015)302.

43. Second Schedule of the ACA 2004 contains provision of the New York Convention.

44. UNCITRAL Model Law 2006 Art 36.

45. See introductory sentence in Section 52 which afford party opportunity to request the court to refuse enforcement if party furnishes proof of the grounds listed therein

46. P.O Idomigie (n42) 305.

partnerships, corporations, State and States agencies etc.⁴⁷

With regard to an individual, parties' choice of contract law of a particular State determines the capacity.⁴⁸ Ordinarily, the general law of contract regulates the legal capacity of the parties however, various States' contract law differ as regard the determination of parties' legal capacity. In Nigeria, legal capacity is examine through parties' choice of contract law as selected to govern their arbitration contract and where parties made no choice, the contract law of the place where arbitration agreement was concluded determines the legal capacity.⁴⁹

As regards corporate entities, the contract law put in place at the State where such company/ corporation incorporated its business determines it legal capacity.⁵⁰

However, some States impose restrictions on the capacity of it agencies, corporations and parastatals through their arbitration laws as a measure to regulate practice of arbitration particularly where State or it agency is a party.⁵¹ In Nigeria, there is no such restriction. However, France in its French Civil Code prohibits arbitration in a dispute that affects public interest at large, particularly, where a public agency or State is a party.⁵² In Saudi Arabia, the State or its agencies need approval of the relevant authorities in order to obtain their legal capacity to enter into arbitration agreement as it relates to international commercial arbitration.⁵³ This restriction on legal capacity in some arbitral regimes have been subject to criticism.⁵⁴ It is the contention of the scholars that efforts of these States would have produced positive result if it had been concentrated on the arbitrability of disputes submitted for arbitration. Once the subject matter is arbitrable, State or its agencies and corporations should have the liberty to choose the appropriate means of settling future disputes.

Surprisingly, while construing the provision of Art V (1) (a) of the Second Schedule of ACA which is similar to s 52(2) (a) (i), some judges have held that

47. A. Redfern and M. Hunter (n11) 145.

48. P.O. Idornigie(n42) 305.

49. ACA 2004 s 52(1)(a), P.O. Idornigie(n42) 305-310

50. Ibid.

51. French Civil Code Act No 75-596, 1975, Art 2060; Implementation of the Saudi Arabian Arbitration Regulation Decree of 13 03 1399 (H) 1980.

52. French Civil Code Act No 75-596, 1975, Art 2060.

53. Implementation of the Saudi Arabian Arbitration Regulation Decree of 13 03 1399 (H) 1980. Swiss PIL Act Chap 12 1987, Art 177(2).

54. F.G. Goldman, 'International Commercial Arbitration,' in *Gaillard E & Savage J* (ed) (Kluwer law, Hague, 1999), 539; J. Paulsson, 'May a State invoke its internal law to repudiate consent to international Commercial Arbitration?' (1986) 2 *Arb Int'l*, 48-98. 76

the defence of incapacity could be raised by the aggrieved party to challenge the enforcement application notwithstanding the status of the party involved.⁵⁵ This position creates doubts in the regimes of the States who placed restrictions therefore, one may describe the arguments of scholars who criticised the restriction on the legal capacity as a tenable one that deserves a reconsideration.

However, some courts and scholars have attempted to enlarge the scope of legal capacity in arbitration beyond what is necessary. The Spanish Supreme Court in *Union De Cooperativas Agrícolas Epis-Centre v La Palentina SA*⁵⁶ held that failure to obtain power of attorney offends incapacity ground under the New York Convention as contained in the Second Schedule of ACA.⁵⁷ This decision has created concerns that require caution. Legal capacity and power of attorney cannot be fused and construed as meaning the same thing because, there is clear distinction between the two. Although some writers have argued that incapacity as a ground should cover where the party acts beyond the authority or power conferred on him,⁵⁸ this attempt is dangerous. The issue of legal capacity of the party should be given restrictive interpretation, extending it beyond what is necessary will have drastic effects on the finality of the award.

B. Invalid Arbitration Agreement

By s 52(2) (a) (ii), invalid arbitration agreement creates another ground which gives right of challenge to the award-debtor to approach the court and seek for refusal of enforcement. This is comparable to the ground found in the second aspect of Art V (1) (a) contains in the Second Schedule of ACA which is identical with s 52(2) (a) (ii). The chosen arbitration law regulating the arbitration proceeding is relevant to resolve the issue of validity of the arbitration agreement.⁵⁹ Where no arbitration law is elected or where parties could not reach a consensus, arbitration law put in place at the seat of arbitration determines the

⁵⁵ *R L v JSC Z factory*, Supreme Court, Georgia [2 April 2004], a-204-sh-43-03, *Agimpex S A v J.F. Braun & Sons, Inc.*, Supreme Court, Greece, [14 January 1977], IV YB Com Arb 269 (1979)

⁵⁶ 17 February 1998, XXXVII YB Com Arb 533 (2002).

⁵⁷ *Dana Feed A/S v OOO Arctic Salmon*, Federal Arbitrazh Court, Northwestern District, Russian Federal, 9 December 2004, XXXIII YB Com Arb Arb (2008)

⁵⁸ *F G Goldman* (n54) 539; *J Paulsson* (n54) 76

⁵⁹ *Ibid*

validity.⁶⁰ However, judicial cases illustrate that courts are eager to consider the available arbitration law of the State particularly where arbitration proceeding was heard, whether or not parties had chosen the applicable law.⁶¹ This was the situation in a case in Sweden where the court applied the law of the seat of arbitration without first considering whether the parties had earlier selected their choice of an applicable law.⁶²

C. Lack of Due Process

Another ground that constitutes a ground for refusal of enforcement is provided in s 52(2) (iii). This is similar to the provision found in Art V (1) (b), Second Schedule of ACA. This provision demands every arbitration proceeding to follow proper procedure as chosen by the parties. The provision aims to ensure that proper due process is observed as it relates to the notice of appointment of the arbitrators, notice of proceedings as well as parties' presentation of their case before the arbitral panel. The key motive is to instill and boost parties' confidence in the international arbitration as a system that is fair and just regardless of the status of an individual party to the arbitration.⁶³

Globally, the significance accorded to the principle of fair hearing cannot be over emphasised. The Supreme law in Nigeria provides in s 36 of 1999 Constitution that court or tribunal acting in judicial capacity should observe fair hearing.⁶⁴ The principle of fair hearing demands equal opportunities to the parties without being bias to one party against the other during and after the proceeding.⁶⁵ Hence, s 52(2) (a) (iii) requires a 'total denial' of the right to be heard, for it to constitute a ground of refusal under this provision.⁶⁶ Thus, the court observed that party who presented his case in a form of a letter, was not denied of his right to fair hearing.⁶⁷ Likewise, physical attendance at the proceedings is not an evidence to show that principle of fair hearing was observed. However, lack of due process as contained in s 52 (2) (a) (iii) overlaps with s 52 (2) (b) (ii) that deals with public policy ground. Violation of due process is as good as violation of fair hearing and, thereby constituting a breach of public policy. It is not surprising that parties can raise both provisions in an effort to resist enforcement of award.⁶⁸ This was what happened in the U.S case, where the court rightly upheld the application seeking

60. J. Paulsson (n54) 76.

61. *G.A. Pap-KG Holzgrosshandlung v Ditta Giovanni G Pecoraro*, Court of Appeal of Naples, Italy, 1978, VI Y.B. Com. Arb 228 (1981).

62. *Planavergne S.A. Fontanes v Kalle Bergander Stockholm AB*, Svea Court of Appeal, Sweden, 2001, T 4645-99.

63. *Ibid.*

64. *Bill Const. Co. Ltd v Imani & Sons Ltd* [2006] 19 NWLR (Pt. 1013) 1.

65. *Stabilili Visinoni Ltd v Mallinson & Partners* [2014] 12 NWLR (Pt. 1420) 202, paras E-G.

66. *Continental Sales Ltd v R. Shipping Inc* [2013] 4 NWLR (Pt. 1343).

67. *Ibid.*

68. *Parson & Whittemore Overseas Co., Inc v Societe General de l'Industrie du Papier RAKTA and Bank of America* 5008F.2d 969 (2nd Cir., 1974).

to resist enforcement on the ground that the party was denied fair hearing to present its case thereby, contradicting US public policy.⁶⁹

D. Excess of scope of Jurisdiction

s 52(2) (a) (iv) provides ground to challenge an award where the arbitral panel acted outside the power and right conferred on him in the agreement. Second Schedule of ACA, Art V (1) (c) contains a replica of this provision.⁷⁰ The important question relevant to this paper is the position of the law where an award contains reliefs not sought in the parties' pleadings before the tribunal. Does s 52(2) (a) (iv) extend to cover such a situation? Nigerian courts have not yet ruled on this issue of concern, therefore, UNCITRAL guide can be of help here. Going by the UN interpretation guide on Art V (1) (c), which is a similar fashion of s 52(2) (a) (iv) of the ACA, distinction exist between reliefs sought in the pleadings and those subjects specified in the arbitration agreement.⁷¹ Arbitral awards that deal with the reliefs not sought cannot be challenged under Art V (1) (c). This is because arbitrators are permitted to grants reliefs not sought, provided the reliefs are within the wider discretion of the arbitral panel.⁷² This is usually so where such reliefs are consequential to the main reliefs sought in the agreement. It is therefore, hoped that this same reasoning will be adopted by the Nigerian courts when faced with such an issue so as to do justice base on the individual cases.

E. Beyond the parties' Submissions in the Agreement

An award may be challenged on the ground that the award covers 'matters' that cannot be linked with the submissions in the arbitration agreement. The word 'matters' in s 52(2) (a) (v) can generates two distinct meaning. First, parties may, by arbitration agreements, specifically identify subjects over which the tribunal is authorised to have jurisdiction. Second, through arbitration agreement, parties

⁶⁹ Ibid.

⁷⁰ S.M Kroll, 'Commentary on the German Arbitration Law' (10th Book of the German Code of Civil Procedure) in Bockstiegel, Kroll & Nacimento (eds) *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International, 2008)243.

⁷¹ Ministry of defense of the Islamic Republic of Iran v Gould, Inc., 1992, 969 F.2d 764; The Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc., District Court, Southern District of California, United States of America, 1998, Civ Case No 98-1165-B.

⁷² Telenor Mobile Communications AS v Storm LLC, District Court, Southern District of New York, United States of America, 2007, 524 F. Supp. 2d 332.

can explicitly agree to impose the outcome of the arbitration (award) on the parties only.⁷³ On the first point, the enforcing court will assess and determine whether the award emanates from the specified subjects mentioned in the agreement.⁷⁴ The court in Italy took this position where the arbitration agreement between the parties specifically conferred jurisdiction on the arbitrator to hear and determine only on non-technical disputes between them to an arbitral tribunal if a dispute arises. The Appellate Court refused to enforce the technical part of the award that was not in contemplation in the arbitration agreement.⁷⁵ As regard the second point, an aggrieved party can resist enforcement of awards on the ground that the award was given against a person that was not intended in the agreement between the parties.⁷⁶

A US court refused to grant an enforcement order because the tribunal gave an award against a third party who was not envisaged in the agreement.⁷⁷ Hence, the issue is whether an award emanates within the contemplated 'matter' or 'parties' as intended within the submission of the agreement. This was the reason why some scholars argued that only specified issues in the agreement are 'matter' intended by the parties.⁷⁸

The ACA further provides that if summited disputes can be disjointed from those not submitted, only parts of awards emanate from submitted disputes will be enforceable.⁷⁹ This was the position in an English case where the court enforced only parts that are subject of arbitration.⁸⁰ This is a welcome development as this locus ensures all efforts in the arbitration proceedings are not a total waste.

F. Composition of Panel of Tribunal and Procedural Rules do not comply with the Agreement

The sixth and seventh grounds in which the aggrieved party can challenge an award is where the arbitral panel was not properly composed or procedure used in the arbitration proceeding violates the agreement.⁸¹ Ordinarily, the courts assess the violation of these grounds by examining what is provided for in the parties'

73. G.B Born, *International Commercial Arbitration* (Sweet and Maxwell, Hague, 2014) 1369-72.

74. Ibid

75. General Organization of Commerce and industrialization of Cereals of the Arab Republic of Syria v. SPA. Simer [1981] VIII Y.B Com Arb 386 (1983).

76. First Investment Corp. (Marshall Island) v. Fujian Mawei Shipbuilding Corp [2007] Min Si Ta Zi No. 35, XXXV Y.B Com Arb 349, (2010).

77. FIAT SPA v. The Ministry of Finance and Planning of the Republic of Suriname, [1989] WL 122891.

78. A Redfern and M. Hunter (n11) 3544-45.

79. See R M A & F C v. U.E.S Ltd [2011] 9 NWLR (Pt. 1252) 407, paras B-F.

80. Nigeria (NNPC) v IPCO (Nigeria) Ltd, Court of Appeal in England [2008] ECWA Civ 1157; IPCO (Nigeria) Ltd v Nigeria National Petroleum Corp [2008] EWHC 797.

81. ACA 2004 s 52(2)(a)(vi).

arbitration agreement between them.⁸² Thus, where parties failed or could not reach consensus in the arbitration agreement on the composition of the panel or on procedure to be adopted, the position of the arbitration law of the State where arbitration took place will be access on these issues to guide the court.⁸³

It is imperative to observe that the chosen arbitration law that parties agreed on to govern the issues of composition or arbitral procedure may conflict with the mandatory rules of the seat of arbitration or enforcing State. This is the question of balancing both the parties' independence and the public interest. One side of the argument is that if parties obey the mandatory rules of the State where arbitration proceedings took place, in violation of their agreement, such violation should not constitute a ground to challenge the award at the enforcement stage.⁸⁴ The second side of the argument is that arbitration agreement between the parties supersedes mandatory rules, therefore parties' agreement prevail.⁸⁵

The first argument was adopted in *M.V Panormos Bay v Plam Nig Plc*⁸⁶ where the Nigerian court observed that mandatory law of Nigeria would prevail regardless of any prior agreement consented to by the parties particularly, where such an agreement contradicts public policy or violates any existing law in Nigeria.⁸⁷ However, where party voluntarily took part either impliedly or by conduct in the procedure or law adopted in the arbitration proceedings, he cannot later resist the enforcement of such award emanating from the outcome of such proceedings that he initially submitted himself to.⁸⁸

G. The Award Non-binding, Set Aside or Suspended

This is another ground under which the aggrieved party can challenge the award where it is not binding or has been suspended. This provision of the ACA is in

82. *Polimaster Ltd, NA & SE Trading Co, Ltd v. RAE Systems Inc.* Court of Appeals, Ninth Circuit, United States of America, 28 September 2010, 08-15708, 09-15369; *Rederi Aktiebolaget Sally v. S. I. Termarea*, Court of Appeal of Florence, Italy, 1978, IV Y.B. Com. Arb. 294 (1979).

83. ACA 2004 s 52(2)(a)(vii); P.O. Idornigie, 'Report of the Secretary-General: Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (New York, 1958), A/CN.9/168, in *X Yearbook of the United Nations Commission on International Trade Law* (UN, Hague, 1979) 106.

84. *M.V Panormos Bay v Plam Nig Plc* (2004) 5 NWLR [Pt. 855] 1, 14; *Tawa Petroleum v M.V. Sea Winner* (1) 3 NSC, 25.

85. *Ibid*.

86. (2004) 5 NWLR [Pt. 855] 1, 14.

87. P.O. Idornigie (n42) 106.

88. *Atoju v Triumph Bank Plc* [2016] 5 NWLR (Pt. 1505) 305, paras D-E.

paripasu with the provision in the Second Schedule of ACA, Art V (1) (e). The ACA did not define the term 'binding' and thus the subject is left for the Nigerian courts to determine the circumstances under which an award should be considered binding. However, where the court is face to determine the question whether the award before it can be regarded as 'binding', the first relevant to search is the law of the State where the award was given.⁸⁹ Conversely, courts may also use their discretion to interpret what a binding award should be and the courts could apply them together.⁹⁰

As regards setting aside, the award must have been effectively set aside for it to constitute a refusal ground for enforcement. This ground requires actual pronouncement of the court declaring an award as being set aside. Hence initiating a court case as a move to set aside an award is insufficient to raise this challenge.⁹¹ In essence, only if the party had successfully won the set aside case with the pronouncement of the relevant court, will he have the right to challenge the award under this ground.⁹²

Hence, an award can also be challenged via s 52 (2) (a) (viii) if it is established that 'in the courts of the State in which, or under the law of which, the award was made,' the award has been suspended by the relevant court. The meaning of the word 'suspended' is not very clear under the ACA. However, the interpretation giving to Art V (1) (e) will be of help. It has been observed that this requires judicial suspension of the award from the relevant courts.⁹³ Therefore, it is only courts of 'competent authority' that can successfully suspend the award before such a suspension can constitute a ground for resisting an award under the law. The relevant question here going by the wordings of Art V(1)(e) is, what is a 'competent authority' of the country in which or under the law of which the award was made?

While Art V(1)(e) does not itself define the terms 'competent authority,' there is little doubt that these terms refer to the court or courts having jurisdiction to suspend awards in each State.⁹⁴ The terms 'in which ... that award made' are

⁸⁹ F.G. Goldman (n54) 974-75.

⁹⁰ Ibid.

⁹¹ United Nation Commission, 'UNCITRAL Secretariat Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Award' <<http://www.newyorkconvention1958.org>> accessed 18 May, 2022.

⁹² Ibid.

⁹³ Creighton Ltd v. Government of the State of Qatar (Ministry of Public Works), District Court, District of Columbia, United States of America [1995] 94-1035 RMU, XXI Y.B. Com Arb.

⁹⁴ Resort Condominiums International Inc v Ray Bolwell and Resort Condominiums, Pty Ltd. Supreme Court Of Queensland, Australia. 29 October 1993, XX Y.B. Com. Arb (1995) stating that the reference to 'competent authority' in Art V(1)(e) means a Court and not the arbitrator.

understood to refer to the State of the place of the arbitration.⁹⁵ A court from the Cayman Island also envisaged that in a certain State, this power could be entrusted to a special tribunal or a special executive arm of government.⁹⁶ However, the New York Convention 1958 does not provide guidance as to the meaning of the expression 'under the law of which', with very few exceptions, courts have generally rejected arguments that these terms referred to the law applicable to the merit. Courts have decided that it referred instead to the procedural law governing the arbitration, in the rare situation where the parties have selected a law to govern the arbitration that is different from the law of the place of arbitration. In *KarahaBodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara-Pertamina*⁹⁷ where the court observed that the reference to the law under which the award was made 'undoubtedly refers to the law which governed the procedural law of the arbitration, not the substantive law of the contract.' Also, in *Bharat Aluminium Co., v Kaiser Aluminium Technical Service, Inc.*,⁹⁸ that the expression 'under the law of which' referred to the procedural law of the arbitration in the case that it was different from the law of the seat of the arbitration, and not to the substantive law governing the underlying contract. Hence, the same interpretation is shared by the commentators of the Convention.⁹⁹ As a result, an award can only be refused upon application for if it has been set aside or suspended by the competent courts of the place of the arbitration, or as the case may be, competent courts in the State of the law chosen by the parties to govern the arbitration. If the award has been set aside or suspended in any other State, this does not constitute a valid ground for denying enforcement.¹⁰⁰

95. N. Darwazeh, 'Article V(1)(e)' in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (H. Kronke, P. Nacimiento et al. eds, 2010) 301, 319; C. Liebscher, 'Art V (1) (e)' in *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10 1958- Commentary* (R. Wolff ed., 2012) 356 and 374, para 404

96. *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court, Cayman Islands, 17 June 1988, XIV Y.B. COM. ARB (1989).

97. Court of First Instance, High Court of the Hong Kong Special Administrative Region, Hong Kong, 27 March 2003 [2003] HKCU 288

98. Supreme Court, India, 6 September 2012. Civil Appeal No. 7019 of 2005.

99. N. Darwazeh (n95) 320-321; C. Liebscher (n95) para 409

100. United Nations Commission, 'UNCITRAL Secretariat Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Award'. <<http://www.newyorkconvention1958.org>> accessed 18 May, 2022