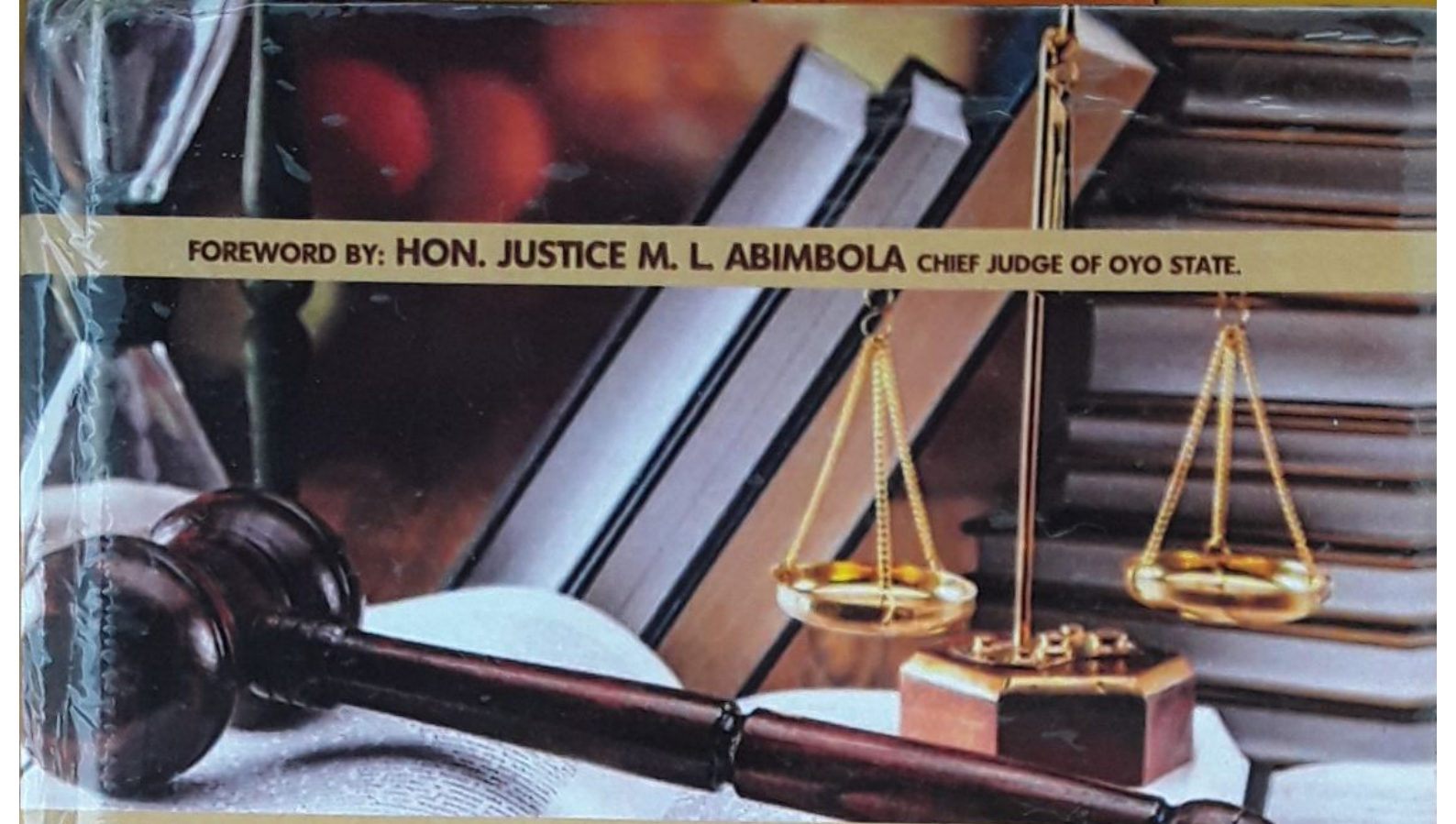




FOREWORD BY: HON. JUSTICE M. L. ABIMBOLA CHIEF JUDGE OF OYO STATE.

PERSPECTIVES ON PUBLIC AND INTERNATIONAL LAW

**ESSAYS IN HONOUR OF
PROF. ALERO E. AKEREDOLU, PhD**

EDITORS: OLADIPO O. SHOLANKE // OLUDAYO J. BAMGBOSE

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A REVIEW OF HISTORICAL DEVELOPMENTS AND LEGAL REGIMES OF ENFORCEMENT OF FOREIGN AWARDS IN NIGERIA

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and

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1. Introduction

The comparative advantages of arbitration over litigation in recent times have made it increasingly necessary for businessmen to include arbitration clauses in international contracts. However, the arbitral proceedings and subsequent award will amount to a colossal waste of time and resources if a winning party to the arbitral proceedings is unable to have the award enforced. The focus of this chapter is, therefore, an examination of the historical developments of the enforcement regimes of arbitral awards in Nigeria. The various legislations, from the colonial period till present, relating to the enforcement of arbitral awards in Nigeria are discussed in the chapter. Before the era of colonialism in Nigeria, the natives who inhabited the place now known as Nigeria used to settle disputes and differences in accordance with the prevailing customary rules and practices of the time. Indeed, the arrival of the English and the introduction of Western contracts with the attendant international flavour made the use of native forms of dispute resolution grossly inadequate.

The Arbitration Ordinance of 1914³ is the first legislative enactment on Western-oriented form of arbitration in Nigeria.

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³Arbitration Ordinance No 16, 1914.

Consequently, the chapter examines the challenges that affected the foundation law vis a vis the regulation of arbitration agreement and enforcement of award in Nigeria from a historical perspective. The paper also identifies and examines two other important received English laws, to wit: the Reciprocal Enforcement of Judgments 1922 Ordinance⁴ and the Foreign Judgment (Reciprocal Enforcement) Act 1960⁵. It is important to state from the onset that, even though these two statutes deal with enforcement of foreign judgments, they do not specifically provide for the enforcement of arbitral awards. The relevance of the Geneva Protocol on Arbitration Clause, 1923⁶ and the Geneva Convention on the Execution of Awards, 1927⁷ to the enforcement of arbitral award is also extensively discussed in the chapter. Modern international instruments which include the New York Convention⁸ (regarded as the foremost international instrument on enforcement of foreign awards) and the UNCITRAL Model law⁹ were thoroughly examined. Finally, the 1988 Arbitration and Conciliation Act¹⁰ which is the primary legislation on Arbitration and other ADR mechanisms in Nigeria is also examined in the chapter.

2. Arbitration Ordinance 1914

Expectedly being a colonial vestige, the Arbitration Ordinance of 1914 was an adaptation of the 1889 English Arbitration Act¹¹. As already observed, the Ordinance was the first legislative enactment which provided parties with the freedom to resolve their disputes

⁴ Cap.175, LFN and Lagos 1558.

⁵ Cap.F35 LFN 1960.

⁶ 27 LNTS 157(1924).

⁷ 92 LNTS 301(1929-30).

⁸ New York Convention on Recognition and Enforcement of Foreign Arbitral Award 1958.

⁹ United Nation Commission on International Trade Law(UNCITRAL) Model Law on International Commercial Arbitration, UN Doc A/40/17,24 I.L.M.1302 (1986).

¹⁰ Decree No 11 1988.

¹¹ 52&53 VICT., c. 49(1889).

through Western arbitration.¹² This foundation statute was embraced and regionally integrated by the four constituent parts that made up Nigeria at the time, to wit: Northern Region, Western Region, Eastern Region and the Southern Cameroons Region. It goes without saying that the introduction of the 1914 Arbitration Ordinance was to ensure the applicability of the English statute to regulate the practice of arbitration, subject to the consent of the parties.¹³ The enactment of the 1914 Ordinance thus provided the needed remedy to the inadequacy of customary dispute resolution in cases involving patents, copyrights and so on.¹⁴ Some of the highlights of the law were: (a) irrevocability of submission by parties to arbitration subject to mutual consent of the parties or with the leave of court,¹⁵ (b) the requirement that agreement to arbitrate must be in writing. Despite the advantages of the binding nature of the arbitral process and the certainty that comes with written documentation, the ordinance had certain defects, chief of which was its scanty provisions and limitations in respect of the important elements of the arbitral procedures.¹⁶ For example, its provisions were only limited to domestic arbitration¹⁷ and, as

¹²Subsequently, the Ordinance was re-promulgated as the Arbitration Ordinance (Act), Laws of the Federation of Nigeria and Lagos, 1958. See Asouzu AA, *Developing and Using Commercial Arbitration and Conciliation in Nigeria* (1994) 1(1) Lawyer Bi-Annual J.

¹³ See Supplementary to The Nigerian Government Gazette Vol. 1, No 66 of Aug. 27, 1914; Supplementary to the Nigerian Government Gazette No 92 of Dec. 10 1914. The Ordinance was introduced as a Bill in the Legislative Council by the then Colonial Attorney-General of Nigeria, R.M Combe. The Colony of Lagos was created in 1862, and in 1863, the main body of English law was introduced in the territory.

¹⁴ Ajayi F.A., "The Interaction of English Law with Customary Law in Western Nigeria: II" (1960), 4 (2) J. of Afri. L., 98-114, 110.

¹⁵See Arbitration Ordinance 1914, Sections 2 and 3.

¹⁶Asouzu A.A., *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge University Press, London, 2001)121.

¹⁷Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (Lawlords Publishing, Nigeria) 19.

such, it had no role to play with regard to international commercial arbitration.¹⁸

Another major challenge was the widely criticised -'statement of case procedure' which limited the powers of arbitrators and provided the court with the latitude to interfere in arbitration proceedings.¹⁹ Also, being a verbatim adaptation of the English Arbitration Act of 1889, the 1914 Ordinance naturally inherited the shortfalls of its predecessor.²⁰

3. Reciprocal Enforcement of Judgment Ordinance 1922

In 1922, the colonial government enacted the Reciprocal Enforcement of Judgment Ordinance 1922²¹ to expedite the enforcement of foreign judgments in Nigeria and the United Kingdom.²² By its name, the 1922 Ordinance expressly applies to enforcement of foreign judgments and not foreign arbitral awards. However it is trite knowledge that an arbitral award enjoys the status of a court judgment and can, therefore, be

¹⁸ See generally, Sections 10, 11, 12 and 15 of the Ordinance..

¹⁹ Case-stated Procedure in the 1914 Nigerian Arbitration Ordinance, Sections 8(b) and 15.

²⁰ Asouzu A.A., *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, 122.

²¹ Cap. 175, LFN 1958.

²² Section 3 (1) of the 1922 Ordinance provides that 'where a judgment has been obtained in the High Court in England or Ireland or in the court or session in Scotland, the judgment creditor may apply to a High Court at any time within 12 months after the date of the judgment or such longer period as may be allowed by the court to have the judgment registered in the court...'. Section 3(1) of the 1960 Act provides that if the Minister of Justice satisfied in the event of the benefits conferred by this Act being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured in respect of enforcement in that foreign country of judgments given in the superior courts in Nigeria may be order (a) that this Part of this Act shall extend to that foreign country; and (b) that such courts of that foreign country as are specified in the order shall be deemed superior courts of that country for the purposes of this part of this Act. Note that the effect of the ordinance also extended to other parts of Her Majesty's Colonies and regions under her Majesty's control.

enforced in like manner. The 1922 Ordinance is thus of vital impact in the execution of foreign arbitral award in Nigeria.²³ However, unlike the judgment of the courts that are self-executory, an award of an arbitral tribunal requires the support of the court for execution²⁴. In other words, before the beneficiary of an arbitral award can take benefit of an award given in his favour, he must obtain leave of the High Court in the state where the award was rendered before it can be enforced like the judgment of the court.²⁵

Even though the 1922 Ordinance primarily focuses on the execution of judgments of the High Court of England or Ireland or the Court of Session in Scotland, the Governor-General is also empowered to extend its application to judgments delivered in other parts of Her Majesty's colonies.²⁶ Another highlight of the Ordinance is the provision that allows a judgment creditor to apply to a High Court in Nigeria within twelve months from the date of the judgment or such longer period as the court may allow for the registration of the judgment.²⁷

One major limitation of the 1922 Ordinance is its restrictive scope as it applies only to money judgments or award for a specific sum. Also, such judgment or award must be final and conclusive and must have decided the rights and liabilities of the parties making it *resjudicata* in the country where it was delivered.²⁸ Another limitation of the Ordinance lies in the fact

²³ 1960 Act, Section 2 and 1914 Ordinance, Section 2.

²⁴ (2017) Uniport L.R, 140.

²⁵ Wallace P., 'Enforcement of Foreign Judgment under Nigeria Law'. Available at <http://www.elexica.com/en/legal-topics/disputes-resolution-commercial/25-enforcement-of-foreign-judgments-under-nigerian-law>. Accessed 17 November, 2017.

²⁶ 1922 Ordinance, Section 5.

²⁷ 1922 Ordinance, Section 3. Note that before such foreign award can be executed in Nigeria, it must be capable of being enforced in the country of its origin and accorded the status of a judgment in the country where it was made.

²⁸ Wallace P, 'Enforcement of Foreign Judgment under Nigeria Law'. Available at <http://www.elexica.com/en/legal-topics/disputes-resolution-commercial/25-enforcement-of-foreign-judgments-under-nigerian-law>. Accessed 17 November, 2017.

that for such an award to be enforced there must be evidence that a similar judgment from Nigeria would be accorded the same status in the country where the judgment obtained in Nigeria is sought to be enforced.²⁹

It is important to note that, in 1960, the Foreign Judgments (Reciprocal Enforcement) Act No 31 of 1960 came into existence, thus necessitating the question whether the 1922 Ordinance is still a valid law in Nigeria. We submit that the position of the law is that an Act continues to remain in force until it is amended or repealed.³⁰ Therefore, where a particular law is not expressly repealed, such law remains valid. In view of the fact that there is no provision in the Foreign Judgments (Reciprocal Enforcement) Act No 31 of 1960 repealing the 1922 Ordinance, the Ordinance is still an existing law in Nigeria. This is notwithstanding the fact of its non-inclusion in the Laws of the Federation of Nigeria.

4. GENEVA Protocol on Arbitration Clause, 1923

In the 1920s a legal instrument of global significance that came into being was the 1923 Geneva Protocol on Arbitration Clauses ('the 1923 Protocol'). Article I of the Protocol stated:

Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is

²⁹ Ibid. See also Sections 2, 3 and 4, 1914 Arbitration Ordinance. See the case of *Marine and General Assurance Co. Plc v. Overseas Union & Others* [2006] 4 NWLR (pt 971) 622; and *Andrew Mark Macaulay v. R.Z.B Australia* [2003] 18 NWLR (pt 852) 282.

³⁰ Olawoyin A.A., "Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws" (2014) 10(1), *J.P Int'l*, 120-141, 135.

to take place in a country to whose jurisdiction none of the parties is subject.³¹

The 1923 Geneva Protocol provided parties with the freedom to decide on the composition of the arbitral panel and allowed parties to choose to be governed by the law of the place of arbitration.³² Unfortunately the relevance of the Geneva Arbitration Clause of 1923 to Nigeria was severely limited. This is because, Nigeria being a colony of the British, was excluded from enjoying the benefit of the Protocol.³³ The provision of the Protocol was expressly prevented from applying to states under the Colony and Protectorate of the British.³⁴

Despite not applying to Nigeria in colony, the 1923 Geneva Protocol had significant impact on the development of International Commercial Arbitration. The purpose of the Protocol was two-fold. First, it guaranteed the implementation of the arbitration clauses globally and, secondly, it guaranteed the national implementation of arbitral awards in the state of origin in which it is given.³⁵ As already observed, the major drawback of the Protocol was the non-application of its operation to States under British control. The challenge necessitated its replacement by a more universal legal instrument.

5. Geneva Convention on Execution Of Award 1927

In response to the challenge of the 1923 Geneva Protocol, the League of Nations in 1927, adopted the Geneva Convention for the Execution of Foreign Arbitral Awards³⁶ - "the 1927

³¹ This provision of the Protocol is a forerunner of Article II of the 1958 New York Convention with slight modifications.

³² See Geneva Protocol on arbitration Clause 1923, Article 2.

³³ See Geneva Protocol on Arbitration Clause 1923, Article 3.

³⁴ The concerned states were Gambia, Colony and Protectorate of Kenya, Southern Rhodesia (Zimbabwe), Gold Coast (Ghana), Uganda, Mauritius, Northern Rhodesia (Zambia) and Nigeria.

³⁵ Lew J.M.D., Mistelis L.A. & Kroll S.M., *Comparative International Commercial Arbitration* (Kluwer Law International, Hague, 2003) 179.

³⁶ Lew J.M.D., Mistelis L.A. & Kroll S.M., *Comparative International Commercial Arbitration*. 20.

Convention". The signatories to the 1927 Convention agreed to enforce arbitral awards obtained under the 1923 Protocol in the jurisdiction of another contracting party.³⁷ The 1927 Convention was assented to by many states and contained noteworthy provisions.³⁸ A most remarkable feature of the Convention is the fact that it was the first bilateral agreement that deals with the execution of foreign arbitral awards. The objective of the Convention was to broaden the scope of the preceding Geneva Protocol on Arbitration Clause and to enable the enforcement of an arbitral award in a state other than that in which it was obtained.³⁹

Unfortunately for the development of arbitration in Nigeria, the 1927 Convention, like the 1923 Clause, was also not directly applicable to Nigeria. The provisions of Article 10 of the Geneva Convention expressly excluded the colonies or territories under the control of any of the contracting party except where the contracting party intended that the Convention to be applicable in its colony. Sadly, there was no provision by the British for the extension of the application of the Convention to Nigeria. Consequently, the 1927 Convention, like its predecessor, had little or no relevance to arbitral proceedings or enforcement of arbitral awards in Nigeria.

Another major challenge that bedevilled the 1927 Convention lay in the strict requirement that the party wishing to enforce the award must satisfy the prescribed conditions for recognition⁴⁰. That is, the party in whose favour the award was given must have had the award confirmed in the State where the arbitration had taken place. The condition is known as *double exequateur*.

³⁷ See Geneva Convention 1927, Article 1.

³⁸ Signatory States to Geneva Convention are 149, see www.arbitrationindia.com/geneva_convention_1927.html access on 9 September 2018. Also see Articles 2,3,4,5, Geneva convention 1927.

³⁹ Note that Article 2 the Convention provided for certain circumstances upon which the recognition and enforcement of arbitral awards may be refused/ may be set aside or nullified.

⁴⁰ See United Nations, Notes on Dispute Settlement in International Commercial Arbitration, UN, New York, 2005, 201-22.

The requirement of *double exequatur* greatly affected the success of the 1927 Convention. Consequently, the ICC commenced the groundwork of a draft review of the Convention and submitted same to the United Nations⁴¹. The essence of the review was, firstly, to consolidate the 1923 Protocol and the 1927 Convention into a single document and, secondly, to ensure that awards given are regarded, *prima facie*, as worthy of recognition.⁴² The result is the emergence of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards more popularly known as "the New York Convention".

6. New York Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June, 1958, known as the New York Convention – "the 1958 Convention", is one of the foremost global commercial agreements worldwide with over 149 assenting parties. In fact, it is regarded by some as the most significant and fruitful global Convention of the universe,⁴³ and as one of the foremost pacts in respect of commercial transactions.⁴⁴ Since the Convention came into force about 60 years ago⁴⁵, the principles of the New York Convention have aided the emergence of significant documents such as the

⁴¹ The United Nations replaced the League of Nations.

⁴² Lew J.M.D., Mistelis L.A. & Kroll S.M., *Comparative International Commercial Arbitration*. 20

⁴³ *ibid.* 18-22.

⁴⁴ See Annan K., "Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration", in *Enforcing Arbitration Awards under the New York Convention, Experiences and Prospects* (Paper presented at "New York Convention Day" in the Trusteeship Council Chamber of the United Nations Headquarters, New York on 10 June 1998 to celebrate the 40th anniversary of the Convention on Recognition and Enforcement of Foreign Arbitral Awards concluded on 10 June 1958, New York: United Nations) p. 2.

⁴⁵ At the United Nations Conference on Commercial Arbitration, the 1958 New York Convention came into existence.

UNICTRAL Model Law on International Commercial Arbitration, 1985, and several other domestic guidelines on arbitration. The 1958 New York Convention has also been stated to be the most fruitful bilateral agreement in the area of international trade law.⁴⁶ It is the mouthpiece of the various agreements and regulations on arbitration which guarantee the recognition of arbitral awards.

The New York Convention came into existence as a result of the proposal of the International Chamber of Commerce (ICC) in 1953 due to the need to ensure the enforcement of award in a State other than the State in which the award was rendered in relation to commercial disputes.⁴⁷ In fact, a committee set up by the United Nations Economic and Social Council (ECOSOC) affirmed that it would indeed be appropriate to have an innovative Convention which would look beyond the Geneva Convention in enabling the execution of foreign arbitral awards.⁴⁸

The New York Convention is the first international arbitration instrument that Nigeria assented to as an independent nation. The country signed up to the Convention on 17th March, 1970. However, it took another eighteen years before it was domesticated into the country's municipal laws in 1988 via the enactment of the Arbitration and Conciliation Decree⁴⁹ (now Act). The New York Convention is recognised in Section 54 of the ACA and the second schedule to the ACA.⁵⁰

⁴⁶ Sanders P., "Foreword", in *ICCA's guide to the interpretation of the 1958 New York Convention: a handbook for judges* (The Hague, Netherlands, International Council for Commercial Arbitration, 2011) 7.

⁴⁷ See TAWIL, Guido and ZULETA, Eduardo, "Historia de la Convención de Nueva York" in TAWIL, Guido, (editor). *El Arbitraje Comercial Internacional*, Buenos Aires: Abeledo-Perrot, 2008, 29.

⁴⁸ See United Nations Economic and Social Council, Report of the committee on the Enforcement of International arbitral awards, retrieved from <http://daccess-dds>

ny.un.org/doc/UNDOC/GEN/N55/080/97/PDF/N5508097.pdf?OpenElement [accessed on January 6, 2017].

⁴⁹ Decree No 11, 1988.

⁵⁰ Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (Lawlords Publishing, Nigeria) 156

Article III of the Convention enjoins every State to recognise arbitral awards to be binding and enforceable subject to the procedures of the State where the award is sought to be enforced.⁵¹ This provision mandates a foreign award to be enforceable without the imposition of unnecessary conditions and excessive costs, and not to be more onerous than the conditions for domestic awards.⁵² Essentially, there are two basic objectives of the New York Convention;⁵³ one is the recognition and enforcement of foreign arbitral awards and the other relates to the effectiveness of arbitration agreement.⁵⁴ As already observed, a major innovation of the Convention is that the award itself must be regarded as *prima facie* worthy of enforcement, thus the court must enforce the award except the party refusing enforcement shows that there exists one of the listed exceptions in Article V of the Convention.⁵⁵

The New York Convention is a major improvement over the 1927 Geneva Convention in several respects which include⁵⁶: (a) provision of a broader description of enforceable awards,⁵⁷ (b)

⁵¹ United Nation Commission, "UNCITRAL Secretariat Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Award 1958". <<http://www.newyorkconvention1958.org>> accessed on 18 May, 2018.

⁵² Lew J.M.D., Mistelis L.A. & Kroll S.M., *Comparative International Commercial Arbitration* (Kluwer Law International, Hague, 2003)694.

⁵³ Ibid, 21.

⁵⁴ See Sanders P., "The making of the Convention" in *Enforcing Arbitration Awards under the New York Convention, Experiences and Prospects*, Paper presented at "New York Convention Day" in the Trusteeship Council Chamber of the United Nations Headquarters, New York on 10 June 1998 to celebrate the 40th anniversary of the Convention on Recognition and Enforcement of Foreign Arbitral Awards concluded on 10 June 1958, New York: United Nations, p. 4.

⁵⁵ See New York Convention Article III.

⁵⁶ Lew J.M.D., Mistelis L.A. & Kroll S.M., *Comparative International Commercial Arbitration*, 20.

⁵⁷ Article I provides thus, 'This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the States where their recognition and enforcement are sought.'

prevention of courts of contracting States from deciding on issues that are already covered by arbitration agreement whether existing or future disputes, except where the issue in contention is incapable of being settled by arbitration,⁵⁸ (c) elimination of the *double exequatur* procedure,⁵⁹ (d) shifting of the burden of proof, that is, shifting of burden of proof from the party seeking the enforcement of the award to the party objecting to the enforcement of the award,⁶⁰ (e) provision of comprehensive list of circumstances in which an award could be refused. These are the only circumstances under which a court may justify the refusal of an application for enforcement of award.⁶¹

Even though the New York Convention is praised as a progressive piece of legislation, it still has some limitations capable of impeding the full realisation of its objectives. For example, the use of the vague expression "may" as used in Article V(1) of the Convention,⁶² has been recognised by

⁵⁸ New York Convention 1958, Article II. 48.

⁵⁹ Under the New York Convention, the only requirement needed is the application to and approval of the court of the place of enforcement subject to the procedures of the court of the enforcing state. See Lew J.M.D., Mistelis L.A. & Kroll S.M., *Comparative International Commercial Arbitration*. 20.

⁶⁰ Prior to the New York Convention, the party who wished that an award be recognised and enforced has to show both to the court of the place of the arbitration and the court where it is to be enforced that the award is legitimate and that there exists no reasonable cause to refuse the enforcement. The New York Convention has remedied this by providing that the person who wishes to annul an award must show reason for the nullification. In other words, the burden lies not in the party seeking to enforce the award but the party refusing to enforce it.

⁶¹ See Art V (1) New York Convention 1958. The New York Convention allows municipal courts to refuse enforcement only on specified grounds. Some of the grounds include: incapacity on the part of the parties or invalid arbitration agreement, lack of proper notice, arbitral award exceeding the scope of arbitration, lack of proper procedure or improper composition of the tribunal, award not binding or set aside or suspended. Note however that the court can by itself refuse the enforcement on the ground of arbitrability and public policy. See Article V (2) (a) and (b) New York Convention 1958.

⁶² Article V provides that recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought proof that (a) the parties to the agreement referred to

domestic courts to allow for unfettered discretionary powers of the courts in the enforcement of awards even where a condition may exist for rejection of such award.⁶³ In *China Agribusiness Development Corporation v Balli Trading*⁶⁴, the Supreme Court of Hong Kong held:

Even if a ground of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all the circumstances.

However, the New York Convention does not have sufficient provision for the exercise of this discretion; it therefore falls on the enforcing judge to decide what is fair and just in each situation.

in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made or, (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case or, (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration or, (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement was not in accordance with the law of the country where the arbitration took place or, (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which or under the law of which, that award was set aside.

⁶³ See *Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV)* 1994 Revue de l'Arbitrage; *Chromalloy Aeroservices v Arab Republic of Egypt* 939 F.Supp. 907 (D.D.C. 1996); *Baker Marine (Nag)Ltd v. Chevron(Nag)* 191 F.3d 194(1999)909 (US Court of Appeal for the 2nd Circuit, US); and *Spider v. Calzaturificio Technica, S.P.A* 77 F. Supp. 2d279(S.D.N.Y. 1999). See also Kenneth RD, "Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (2002), 37 Tex. Int'l L.J. 43-88, 57; Albert Jan van B, "New York Convention of 1958: Refusals of Enforcement" (2007), 18 ICC Bulletin, 1-17, 15.
⁶⁴ [1998] 2 Lloyd's Rep 76, p. 79.

An analysis of the provision of Article V (1) (e) may be required to order to drive home the point. Article V (1) (e) provides that enforcement of award may be refused if the award has not yet become binding on the parties, or has been set aside⁶⁵ or suspended by a competent authority.⁶⁶ Contrarily, Article VII further allows contracting States to enforce arbitral award pursuant to provisions of domestic laws or treaties that are more favourable to enforcement.⁶⁷ The provisions of articles V (1) (e) and VII seem to be in conflict and thus requires reconciliation.

There have been divergent opinions on this issue both by the courts and scholars. Olawoyin argued that the use of word "may" in article V (1) (e) grants courts discretion to enforce awards that have been set aside in the country of origin⁶⁸. He argued further that the use of the word "shall" in Article VII (1) compels enforcements of an otherwise unenforceable award if domestic law provides more favourable minds.⁶⁹ Some other views argue that, Article VII does not require the imposition of more favourable rights.⁷⁰ In their opinion, Article V grants courts

⁶⁵ Annulment is also called "vacatur" and "set aside."

⁶⁶ There are two reasons for Article V (1) (e) refusing to impose a compulsory duty on the party to recognise an annulment. First, it is the New York Convention's drafters' intention not to impose upon the enforcement court a duty to accept the annulment rendered by court or under the law making the decision to annul the award. Second, the New York Convention seeks to distinguish between the jurisdiction of the original court and the enforcement court. The general idea is that if jurisdiction is constrained to the place where the arbitration takes place, coherence within international law would be compromise.

⁶⁷ Chan RY, 'Enforcement of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy' (1999) 17 B.U. Intl L.J 147-162, 149

⁶⁸ Junita F., 'Pro-Enforcement Bias under Article V of the New York Convention in International Commercial: Comparative Overview' (2015), Indonesia L. Rev. Vol. 5(2), 140-164, 141.

⁶⁹ Kenneth R.D., 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards'. 57; Albert Jan van B, 'New York Convention of 1958: Refusals of Enforcement'. 15.

⁷⁰ Paulsson J., 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 Intl & Comp. L. Q., 358-375, 360; Schwartz E.A.,

discretion either to enforce or to refuse to enforce annulled awards⁷¹ even if more favourable rights exist under domestic law. It is thus argued that Article VII does not apply to the annulments ground in sub I(e) but rather its application is limited only to the other grounds in sub (I) a-d of Article V of the New York Convention.⁷²

Notably, the Convention is silent on the standards required for annulling an arbitration award, or when annulments should have extra-territorial effect. The relationship between these two provisions, therefore, creates the possibility of the application of disparate national rules of enforcement and consequent conflicting decisions of municipal courts regarding the enforcement of awards that have been set aside in the place of arbitration.⁷³ This is evident in the following cases: *Hilmarton*⁷⁴, *Chromalloy*⁷⁵, *Baker Marine*⁷⁶ and *Spider*.⁷⁷

In *Chromalloy Aero Services v Arab Republic of Egypt*,⁷⁸ the District Court enforced an award rendered in Egypt even though the Egyptian Courts had annulled the award. The Court in *Chromalloy* relied on article VII in emphasising that the grounds stipulated in Article V for refusing recognition and enforcement are merely permissive.⁷⁹ The court stated that, while the language in Article V was discretionary, Article VII required courts to allow parties

⁷⁰ 'A Comment on Chromalloy: Hilmar ton, an l'americaine (1997) 14 J. Int'l Arb 125-140, 125.

⁷¹ Albert van B., "Non domestic Award Under the New York Convention of 1958" (1985) 6 Pace L. Rev, 25-65, 42.

⁷² Roger P.A., "The American Influence on International arbitration" (2003) 10 Ohio St. J Disp. Resol. , 69-79. 69. Chromalloy and Hilmar ton are common parlance for two leading cases that address the topic of the enforcement of annulled awards and will be discussed in more depth.

⁷³ See *Societe Pablak Ticaret Limited Sirketi v Norsolor S.A* (1984) YB Comm Arb. 1986 489 (Cour de Cassation); *Societe Hilmar ton Ltd v Societe OTV* (1994) YB Comm Arb. 1995 663 (Cour de Cassation).

⁷⁴ *Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV)*.

⁷⁵ *Chromalloy Aeroservices v Arab Republic of Egypt*.

⁷⁶ *Baker Marine (Nag) Ltd v Chevron (Nag)*.

⁷⁷ *Spider v Calzaturificio Technica, S.P.A.*

⁷⁸ 939 F. Supp. 907 (D.D.C 1996).

⁷⁹ *Ibid*, 909.

to avail themselves of a better option under local law.⁸⁰ The court concluded that, under US law, the arbitration award was entitled to recognition. In *Baker Marine(Nig)Ltd v Chevron(Nag)*,⁸¹ the Second Circuit Court of the U.S. held that an award set aside in Nigeria could not be enforced in the enforcing Court (the U.S.). Unlike *Chromalloy*, the court recognised that Article V (1) (e) does not compel a Court to respect an annulled award and no sufficient reason existed to override the judgments of the Nigerian court.⁸² The court in *Spider v Calzaturificio Technica, S.P.A.*,⁸³ followed the second Circuit's reasoning in *Baker Marine* and refused to enforce the award.

The effect of the above contrasting decisions is that the uncertainty regarding enforcement of awards that have been set aside at the place of arbitration inevitably means recourse to litigation at the enforcement stage.⁸⁴ The purpose of Article VII is to maximise enforcement of awards even when those awards are subject to challenge under Article V. If the more favourable-right provision is mandatory, as its language indicates, the grounds for non-enforcement must be discretionary.⁸⁵ The Convention cannot expect a court to apply the provision of Article V to refuse to enforce an award and, at the same time, still expect the application of more lenient domestic law to grant enforcement of the very award.⁸⁶

⁸⁰ Ibid, 909-910.

⁸¹ 191 F.3d 194(1999)909 (US Court of Appeal for the 2nd Circuit, US).

⁸² Ibid, 197.

⁸³ 77 F. Supp. 2d279(S.D.N.Y 1999).

⁸⁴ Pierre M., "Revisiting Hilmar ton and Chromalloy" in Berg AJV (ed.) *International and National Courts: The Never Ending Story* (International Council Commercial Arbitration, ICC a Congress Series, 2001)172.

⁸⁵ Robert C.B., "Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention" (2011)37 N.C J. Int'l. Com. Reg. 1013-1053, 1034.

⁸⁶ Kenneth D., "Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards".60.

7. Foreign Judgments (Reciprocal) Enforcement Act

The Foreign Judgments (Reciprocal Enforcements) Act⁸⁷ was passed in 1960 to provide for the procedure for the enforcement of judgments obtained in foreign countries in Nigeria and, at the same time, to facilitate the enforcement of judgments obtained in Nigeria in other countries.⁸⁸ Section 2 of the Act defines judgment to include award obtained in arbitration proceedings. Section 6 of the Act deals with the circumstances upon which the enforcement of foreign judgment may be set aside. By Section 3 of the Act, the Minister of Justice is empowered to extend the reciprocal treatment to any foreign country that gives similar treatment to judgments obtained in Nigeria.⁸⁹

Unfortunately, the Minister is yet to give effect to the power. The refusal of the Minister of Justice to give the order became a subject of contention⁹⁰ in the case of *Marculey v R. Z. B. Australia*.⁹¹ In the case, the Supreme Court declared substantial provisions of the 1960 Act to be "dormant and inoperative" in the absence of direct order by the Minister of Justice as required by Section 3. However, the Apex Court went further to state that, in the absence of such order by the Minister, Section 10 (a) of the 1960

⁸⁷ See the long title to the Foreign Judgment (Reciprocal Enforcement) Act Cap F35 Laws of the Federation of Nigeria 2004.

⁸⁸ Foreign Judgment (Reciprocal Enforcement) Act 1960, Section 1.

⁸⁹ 1960 Act, Section 3.

⁹⁰ Inam W., "Nigeria: Supreme Court Creates Pitfalls on Enforcement of Foreign Judgments in Nigeria". Available at <http://www.mondaq.com/nigeria/x/31865/supreme+court+creates+pitfalls+on+enforcement+of+foreign+judgmen+t+in+nigeria>. Accessed 17 October, 2017. See also Omoaga G., Legal Regime for the Enforcement of Foreign Judgments in Nigeria: An Overview. Available at <http://ng.vlex.com/vid/regime-enforcement-judgment>. Accessed on 17 October, 2017.

⁹¹ [2003] 18 NVLR (pt. 852) 282.

Act⁹² could be invoked in the alternative. The court took a similar position in the case of *Vab Petroleum Inc. v Mr Mike Momoh*.⁹³

Olawoyin, while criticising the pronouncements of the Supreme Court in the two cases, observed that the approach adopted by the Court has led to a state of confusion and uncertainty in this aspect of the law.⁹⁴ According to him, the purport of Section 10(a) is in relation to judgments obtained after the issuance of the order by the Minister; therefore, the provision of Section 10(a) cannot stand on its own and, thus, cannot be invoked in the absence of an express order by the Minister. The failure of the Minister to make this order is thus a major setback for the applicability of the Act.

The Foreign Judgments (Reciprocal Enforcements) Act comprises thirteen sections, however the operative sections of the Act are Sections 1-3 only. It appears that the remaining sections, that is, section 4 – 13 are inoperative because the applicability of their provisions are directly tied to section 3.⁹⁵ As it is, 1960 Act can be said to be dormant and inoperative. It can thus be argued that the only applicable law governing the enforcement of foreign judgment and arbitral award in Nigeria prior to the promulgation of the Arbitration and Conciliation Act of 1988 was the 1922 Ordinance. Furthermore, it is important to observe that the 1960

⁹² Section 10(a) provides that "Notwithstanding any other provision of this Act, a judgment given before the commencement of an order under Section 3 of the Act applying Part I of this Act to the foreign country where the judgment was given may be registered within 12 months from the date of the judgment or such longer period as may be allowed by a superior courts in Nigeria".

⁹³ (2013) 14 NWLR [pt. 1374] 284

⁹⁴ Olawoyin A.A., "Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws" (2014), 135; Inam W, 'Nigeria: Supreme Court Creates Pitfalls on Enforcement of Foreign Judgments in Nigeria'. Available

at <http://www.mondaq.com/nigeria/x/31865/supreme+court+creates+pitfalls+on+enforcement+of+foreign+judgment+in+nigeria>. Accessed 17 October, 2017.

See also Omoaga G, Legal Regime for the Enforcement of Foreign Judgments in Nigeria: An Overview. Available at <http://ng.vlex.com/vid/regime-enforcement-judgment> Accessed on 17 October, 2017.

⁹⁵ Ibid.

Act deals exclusively with judgments, with little reference to arbitral awards.

8. Arbitration and Conciliation Act 1988

After independence and, sequel to the discovery of oil, Nigeria witnessed some economic development. There was a surge in the volume of international commercial transactions, thus leading to increased level of disputes within the sector.⁹⁶ The 1914 Arbitration Ordinance and other arbitration laws had become inadequate in the settlement of disputes arising from commercial transactions⁹⁷. This situation prompted the Nigerian government to amend her arbitral laws to meet global standards.⁹⁸

Consequently, in 1988, the ruling military government enacted the Arbitration and Conciliation Decree (No.11 of 1988)⁹⁹ (now known as the Arbitration and Conciliation Act) to regulate the law and practice of commercial arbitration in Nigeria¹⁰⁰. The 1988 Arbitration Act, unlike previous arbitral regimes in Nigeria, is

⁹⁶Asouzu, "The Legal Framework for Commercial Arbitration and Conciliation in Nigeria", p.228.

⁹⁷ See Adegbite, "Law and Business Activities in Nigeria" in Osibanjo & Kalu (eds.), *Law Development and Administration in Nigeria* (Federal Ministry of Justice, Lagos 1990) 667, 694.

⁹⁸ See Oyekunle, "International Commercial Arbitration in the Contemporary World from the Point of View of African countries", p.68, 71; According to Oyekunle, it would have been perilous for the nation to be left behind in the rules of the game of international arbitration. Thus it had to review its laws to create a more favourable climate for commercial activities to flourish in its territories and to accommodate foreign entrepreneurs.

See Chukwumerie, "Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector" (2003) 4(5) J.W.I. 827. Chukwuemerie also sees it as a desire by the country to put itself amongst the legally sophisticated countries capable of becoming venues for the conduct of international commercial arbitration.

⁹⁹ Hereinafter called 'the 1988 Arbitration Act'. The Law was enacted on March 14, 1988. See Cap.19, LFN 2004.

¹⁰⁰ The law was made applicable throughout the Federation. See Section 58 of the Act; as a Decree in 1988, the Act had a Section 58(2) which expressly repealed the 1914 Act, the sub-section was however removed when it was revised and incorporated in Cap.18, LFN 2004.

more comprehensive and regulates both domestic¹⁰¹ and international arbitration.¹⁰² It provides for a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation.

Even though the 1988 Arbitration Act derives from three other arbitral regimes, including the 1914 Arbitration Ordinance, New York Convention and the UNCITRAL Rules,¹⁰³ the Act is primarily based on the UNCITRAL Model Law¹⁰⁴ (a set of 36 Articles) drafted by a working group of the UN to govern all international arbitrations. It was finally adopted by the UN Commission on International Trade Law (UNCITRAL) on June 21, 1985.¹⁰⁵ The Resolution of the UN General Assembly envisages that all countries should give due consideration to the Model Law, in view of the desirability of uniformity of the law on arbitral procedures and the specific needs of international

¹⁰¹ Part I of the ACA: Sections 1 to 36 deals with domestic arbitration. see Orojo and Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, p.166; Idornigie, "Anchoring Commercial Arbitration on Fundamental Principles" (2004) 23(1) *Arbitrator and Mediator* 65.

¹⁰² Part 3 of the ACA: Sections 43 to 54 deals with international arbitration.

¹⁰³ The UNCITRAL Rules was adopted by the Commission on 28th April 1976 and approved by the General Assembly of the United Nations unanimously on 15th December 1976; The Rules contained in the First Schedule to the Act, which applies to both domestic and international arbitration are by and large *ipsissimaverba* of the UNCITRAL Arbitration Rules. The UNCITRAL Rules offers a wide-ranging procedural guideline on arbitral proceedings. It contains provisions for all steps of the arbitral procedure from the arbitration agreement to the recognition and enforcement of the arbitral award. See Section 53 of the 1988 Arbitration Act. See Akpata, *The Nigerian Arbitration Law in Focus*, p.6. see also Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria*. 146-147.

¹⁰⁴ The final text of the UNCITRAL model law on International Commercial Arbitration is contained in the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, June 3-21, 1985, 40 C.N. GAOR Supp. (No. 17) at 82-94, C.N. Doc. A/40/17 (1985).

¹⁰⁵ In view of the technological revolutions in the global arbitral process, there was an amendment of the Model Law in 2006 to develop the structure for acceptability. For example, it now includes more detailed provisions for interim measures.

commercial practice.¹⁰⁶

9. Enforcement of Foreign Arbitral Awards under ACA 1988

With respect to the recognition and enforcement of foreign awards in Nigeria, the 1988 Arbitration law provides for a vibrant, robust and more effective enforcement system. The law provides for two principal arbitral regimes under the 1988 Arbitration Act. The first is contained in the provisions of Sections 51 and 52 which derive from Art. 35(1) & (2)¹⁰⁷ and Art. 36¹⁰⁸ of the UNCITRAL Model Law and the second arbitral regime is provided for under section 54 which makes reference to the application of the New York Convention¹⁰⁹.

Section 51(1) of the 1988 Arbitration Act mandates the relevant courts in Nigeria to recognise arbitral award as binding and enforceable upon a written application made to the court irrespective of the country in which the award was made. Section 51(2) further provides for the requirements to be satisfied by the party applying for the enforcement of the arbitral award. Section 52 of the Arbitration Act states the various grounds for refusing recognition or enforcement the arbitral award.

¹⁰⁶ See One Hundred and Seventy Sixth Report of the Law Commission of India on the Arbitration and Conciliation (amendment) Bill, 2001, p. 5. See Amasike C. J., *Arbitration and Alternative Dispute Resolution in Africa* (Abuja, Nigeria, Yaliam Press Ltd 2007) 7; Asouzu A. A., *International Commercial Arbitration and African States* (Cambridge University Press, Cambridge 2001) 28. The model law brought a radical revolution to the arbitration process. For example, the Model law allows for oral arbitration arrangements, a situation that proved impossible under past arbitral regimes particularly in third world States where much reliance is placed on physical relationship. See Sellman P., *Law of International Trade* (Old Baily Press, London 1997) 63.

¹⁰⁷ Art. 35 deals with recognition and enforcement of awards. Art. 35(2) has been amended by the Commission at its 39th session in 2006.

¹⁰⁸ Art. 36 deals with grounds for refusing recognition and enforcement of awards.

¹⁰⁹ The New York Convention has already been discussed in an earlier part of the chapter.

Unlike the situation under the New York Convention, the advantage of the provisions of Sections 51 and 52 to the Act is that reciprocity is not included as a condition for recognition and enforcement, thus businessmen can take advantage of the enforcement regime irrespective of the country in which the award was made. Furthermore, the existence of two arbitral regimes, under the 1988 Arbitration, affords parties to international arbitration contracts the freedom to elect the enforcement regime they intend to pursue.

10. Conclusion

The paper did a historical review of the various laws dealing with the enforcement of foreign arbitral award in Nigeria from the colonial era to date. The many challenges affecting some of the laws were highlighted and discussed. The history of enforcement regimes, regarding foreign arbitration awards, dates back to the enactment of Arbitration Ordinance of 1914. Despite the coming into existence of several international arbitration conventions relating to enforcement of foreign awards, the Nigerian state being a colony of Britain did not benefit from these laws.

After independence, the 1914 Ordinance which was exclusively a domestic law proved inadequate to meet the challenges affecting enforcement of foreign arbitral awards in Nigeria. Thus, the Nigerian government responded by updating its laws to meet internationally-accepted standards. The consequence of that was the enactment of Arbitration and Conciliation Act of 1988 which, as at today, is the principal law regulating international commercial arbitration in Nigeria. The paper observed that the 1988 Arbitration Act provides for two arbitral regimes regarding the enforcement of foreign arbitral awards via section 51 and 52 (UNCITRAL Model law) and section 54 (New York Convention). The benefits and challenges of the enforcement regimes contained in the 1988 Arbitration were also examined.