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Efficiency and integrity of the legal process in Nigeria

Nigeria is unarguably the largest economy in Africa with an estimated population of about 200 million. The country operates a federal system of government, which allows devolution of power amongst the Federal Government and the 36 federating States. Patterned after the English legal system, Nigerian laws derive majorly from: (i) Nigerian legislation; (ii) received English laws (comprising Common law, equitable principles and Statutes of General application); (iii) Nigerian case laws (judicial precedent); (iv) Nigerian customary laws; (v) Islamic laws; and (vi) international laws and principles. The applicability of English laws and principles is subject to the provisions of Nigerian legislation and courts' decisions. The Nigerian Court system is centralised with all appeals from State and Federal High Courts going to the Court of Appeal and then to the final Appeal Court being the Nigerian Supreme Court.

Nigeria has produced a number of renowned jurists and lawyers within the common law jurisdiction and the system of legal training is continuously being rejigged to equip lawyers in the country to meet the challenges of the 21st Century and to uphold the ethics of the profession. The Rules of Professional Conduct for Legal Practitioners in Nigeria prescribe some ethical standards that regulate lawyers and these include being diligent in prosecuting or defending clients' cases, exhibiting skills and integrity and mandatory continuous legal education. Litigants and their lawyers are also encouraged not to take any steps that would delay the administration of justice. Often, the Appellate Court would discourage interlocutory Appeals that are only geared towards stalling the hearing of a case on the merit particularly where a stay of the Trial Court's proceedings is being sought. The Appellate Court would in appropriate cases refuse a stay of proceedings and advise the parties to go back to the Trial Court and have the case heard on the merit. Nigerian Courts are increasingly becoming pro-arbitration and would, often in deserving cases, mandate parties to honour the terms of their arbitration agreement and also explore amicable settlement of their cases before the judicial adjudication.

The infusion of technology into the Nigerian court system is still at a rudimentary stage as more still needs to be done to fully digitalise the Court system. Starting with the enactment of Evidence Act, 2011 which removed the challenges hitherto encountered in admissibility of electronically generated evidence, there are a number of policies and Court Rules aimed at making the Court system more efficient through technology. One of the policies has detailed guidelines on adopting: ICT Infrastructure; Network Infrastructure; Communication Infrastructure (web portal, email services, portable devices, etc.); Court Technology (Case Management Software, E-filing, Electronic Document Management System, Virtual Library

etc.); and the IT Governance System. The Nigerian Case Management System is a software designed to automate court processes related to case filing, case assignments, delivery of judgments, and generation of statistics and reports. Upon deployment, it will automate the flow of case management in the Courts (i.e. Supreme Court, Court of Appeal, Federal and State High Courts, and the National Industrial Court), and also ensure a smooth, safe and secure electronic exchange of documents between the different levels of Courts. The policies are gradually translating into binding legislation as can be seen in the following non-exhaustive legislation and Rules:

1. Lagos State High Court (Civil Procedure) Rules, 2019: Order 9 Rule 5(1) of the Rules provides that substituted service could be done by electronic means. Order 11 Rule 2(2) and (3) of the Rules mandate every legal practitioner to include his or her email address in the Memorandum of Appearance.
2. Administration of Criminal Justice Act, 2015: Section 15(4) of the Act provides for the electronic recording of confessional statements. This reduces the lengthy process of litigation by reducing time spent on trial-within-trial in criminal proceedings.
3. Court of Appeal (Fast Track) Practice Directions, 2014: Paragraph 14 of the said Practice Directions recognises electronic signature of a document, and electronic service of same.
4. Evidence Act, 2011: Section 84 of the Evidence Act governs the admissibility of electronic evidence. The Act equally recognises electronic signature.
5. Freedom of Information Act, 2011: Section 30(3) defines information to include not only information in written form, but also in electronic form.

The Court system in Nigeria is adversarial in nature and this places a duty on the judges to be impartial and passive in the course of proceedings. In view of the passive posture and the role played by a judge in the adversarial system, the litigants and their lawyers play a more active role in the adjudicatory process. The Nigerian Constitution guarantees every litigant right to fair hearing and equal access to courts. As noted by the Nigerian Supreme Court in the case of ***EHOLOR V. OSAYANDE (1992) LPELR-8053(SC)***, the role of the Judge is to hold the balance between the contending parties and to decide the case on the preponderance of the evidence brought by both sides and in accordance with the rules of the particular court and the procedure and practice chosen by the parties in accordance with those rules. Under no circumstances must a Judge under the system do anything which can give the impression that he has descended into the arena as obviously, his sense of justice will be obscured. Given that there are laws, rules and procedures that regulate litigation, litigants and their lawyers must be abreast with and ensure compliance with the rules and processes as a good case may be struck out and/or dismissed for failure to comply with certain pre-conditions and procedures provided in the laws.

Privilege and disclosure

Both the evidential rules and professional ethics regulate and protect the confidentiality of clients in Nigeria. The principle of attorney-client privilege acts as assurance to the litigants or clients that information made available in the course of the relationship with his lawyers would be protected from disclosure to a third party except where consent is given for such disclosure and/or under permitted exceptions. The Evidence Act, 2011 forbids a legal practitioner from disclosing any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client, or from

stating the contents or conditions of any document with which he has become acquainted in the course of his professional employment. He is also not allowed to disclose any advice given by him to his client. Provided that nothing shall protect from disclosure – any such communication made in furtherance of any illegal purpose or any fact observed by any legal practitioner in the course of his employment as showing that any crime or fraud has been committed. Interestingly, the duty of a legal practitioner not to disclose client's confidentiality continues even after his professional relationship has been terminated.

In some instances, parties to a transaction provide for a non-disclosure clause in their agreement. It is expected that both parties should honour their respective obligations in such agreement and refrain from disclosing to a third party. It is also the case that law enforcement agencies in the course of investigation often require certain information from individuals or organisations and the law creating such agencies often require that such requests are complied with. Failure to release such information is often considered an offence.

However, attempts in the past to hide under the statutory provisions by law enforcement agencies and regulators to infringe on client-lawyer privilege was resisted by the Nigerian Bar Association (the umbrella body of all lawyers in Nigeria). For instance, in 2014, the Association went to Court to challenge the Federal Government, acting through a Special Control Unit against Money Laundering (SCUML), the National Financial Intelligence Unit (NFIU), the Economic and Financial Crimes Commission (EFCC) or otherwise howsoever from seeking to enforce the provisions of Section 5 of the Money Laundering Act (MLA) in relation to legal practitioners. The Nigerian Bar Association had sought an order of the court deleting legal practitioners from the definition of "Designated Non-Financial Institutions (DNFIs)" as contained in Section 25 of MLA, an order of perpetual injunction restraining the Central Bank of Nigeria from seeking to implement its circular reference FPR/CIR/GEN/VOL.1/028 dated August 2, 2012 in relation to legal practitioners. Section 5 of the MLA requires a Designated Non-Financial Institutions (DNFIs) whose business involves one of cash transactions to record and make available certain information regarding their clients prior to any transaction involving a sum exceeding US$1,000 or its equivalent. Failure to comply with the requirements within seven days from the date of transaction is an offence punishable upon conviction with a fine of N250,000 for each day of default and suspension, revocation or withdrawal of licence by the appropriate licensing authority as the circumstances may demand. Section 25 of MLA defines "DFNI" to mean "dealers in jewellery, cars and luxury goods, chartered accountants, audit firms, tax consultants, clearing and settlement companies, **legal practitioners**, hotels, casinos, supermarkets, or such other businesses as the Federal Ministry of Commerce or appropriate regulatory authorities may from time to time designate".

The decision of the Federal High Court was affirmed by the Court of Appeal on June 14, 2017 in an Appeal between the Central Bank of Nigeria and Registered Trustees of the NBA.

Costs

As noted in the case of ***BONUM (NIG) LTD V. IBE & ANOR (2019) LPELR-46442(CA)***, the position of the Nigerian law is that costs follow the event and a successful party should not be deprived of his costs unless for good reasons. However, the award of costs is always at the discretion of the Court as to which discretion must be exercised both judicially and judiciously. The essence of awarding cost is to compensate the successful party for part of the losses incurred in the litigation. Costs cannot cure all the financial losses sustained in the litigation. It is also not meant to be a bonus to the successful party, and it is not to be

awarded on sentiments. The award of costs being a matter within the discretion of the trial Court, an appellate Court will not normally interfere in the exercise of discretion by the trial Court in awarding costs except where it is shown not to have been exercised judicially and judiciously. Costs are, however, not meant to punish the unsuccessful party. As provided in the Civil Procedure Rules of the Federal and State High Courts in Nigeria, in fixing the amount of costs, the principle to be observed is that the party who is in the right is to be indemnified for the expenses to which he has been necessarily put in the course of proceedings, as well as compensated for his time and effort in coming to Court. Such expenses shall include: (a) the cost of legal representation and assistance of the successful party to the extent that the Judge determines that the amount of such cost is reasonable; and (b) the travel and other expenses of parties and witnesses to the extent that the Judge determines that the amount of such expenses is reasonable, and such other expenses that the Judge determines ought to be recovered, having regard to the circumstances of the case. When costs are ordered to be paid, the amount of such costs shall, if practicable, be summarily determined by the Judge at the time of delivering the judgment or making the order. When the Judge deems it to be impracticable to determine summarily the amount of any costs which he has adjudged or ordered to be paid, all questions relating thereto shall be referred by the Judge to a Taxing Officer for taxation. In recent times, the Courts have been awarding what they often described as punitive costs against not just litigants but their lawyers, who engage in frivolous action.

Security for costs: Order 25 of the Federal High Court (Civil Procedure) Rules, 2009 provides for payment of security for cost. Either the Plaintiff or the Defendant is entitled to apply that the opposing party pay a sufficient security for cost subject to the conditions stated in the Rules. For instance, either the Plaintiff or Defendant may at any stage of the proceedings apply that the opposing party pay security for cost if that opposing party is ordinarily resident outside jurisdiction or has changed his address during the course of the proceedings with a view to evading the consequence of the litigation. The principles discussed above on costs, also apply in fixing the amount of security for cost. Under the Federal High Court Civil Aviation Procedure Rules, which regulates *in rem* action in aviation proceedings, the Court is permitted to require the Plaintiff at whose instance an aircraft, asset or other property has been arrested either at the commencement of the suit or at any time in the course of the proceedings, to give security for costs. Similarly, in admiralty action *in rem* involving an arrest of ship/vessel, the Applicant for an arrest warrant is mandated to make an Undertaking as to damages in favour of the Defendant, in the event that the arrest is adjudged to be wrongful. However, different principles apply in the determination of the amount to be pledged in *in rem* actions. Lastly, security for cost is also a common practice in election petition litigation.

Litigation funding

In Nigeria, parties are generally responsible for their litigation costs. At the moment, there is no legislation regulating Litigation funding by a third party in the country. The Rules of Professional Conducts for Legal Practitioners, 2007, however, permit a lawyer to enter into a contract with his client for a contingent fee in respect of a civil matter undertaken for a client. Provided that the contract is reasonable and not vitiated by fraud, mistake, or undue influence. The Contingency Agreement will also be vitiated if it is contrary to public policy. Another attempt at litigation funding is the Fundamental Rights (Enforcement Procedure) Rules, 2009 which permits a third party to file a fundamental right action on behalf of a party whose fundamental right has been violated. The Rules define an Applicant to mean

"a party who files an application or on whose behalf an application is filed under these Rules".

Nigerian Courts have often tried to draw a distinction between the Contingency fee arrangement, the common law champerty, and maintenance. As it relates to professionals, the views expressed by Courts were very strict and narrow prior to the regime of contingency fee arrangement under the 2007 Rules of Professional Conduct. However, such strict view has given way to a more flexible approach to the issue as seen in the case of ***Egbor & Anor v. Ogbebor (2015) LPELR-24902(CA)***, where the Court of Appeal considered the question whether fees agreements by a professional acting within the scope of operation of his profession to recover debt constitute or fall within the purview of a champertous agreement? In resolving the issue, the Court was of the view that the determination of whether the relationship is champertous or contrary to public policy is to be ascertained, not on the basis of the assertions of the defence, but on the basis of the facts on which the plaintiff founded his cause of action. And given that the Plaintiff/Respondent's case as borne out by the pleadings and the evidence he adduced was that he was engaged to recover the debt on which he stated that he would be entitled to 15% as fees based on the Scale of Fees prescribed by the Institute of Chartered Accountants of Nigeria for recovery of debt, his action was competent and maintainable in law. From this decision, it was made clear that a situation where a person elects to maintain and bear the costs of an action for another in order to share the proceeds of the action or suit is champertous.

Interim relief

Generally, interim reliefs are often sought in cases of extreme urgency. The applicant needs to show in his affidavit sufficient facts to demonstrate how the delay in granting the order sought will entail irreparable damage or serious mischief to him. He must show that there is urgency. What is required is real urgency and not self-induced urgency. An interim injunction order, being a temporary order, is usually meant to restrain a person from doing an act or series of acts or to command a person to undo an act or series of acts towards the subject matter of a suit or an applicant pending the happening of an event, usually the hearing and determination of a Motion on Notice. By its very nature, an interim injunction has a very short lifespan, though it can be renewed. It is also sought when there is a need to maintain the *status quo ante* and preserve the res/asset before putting the opposing party on notice. As noted by the apex Court in the case of ***Oyeyemi v. Irewole Local Govt.(1993) LPELR-2881(SC)***:

> "Also it must be noted that the whole purpose of an order to maintain the status quo is to preserve the res, the subject matter of the litigation, from being wasted, damaged, or frittered away, with the result that if the appeal succeeds, the result would be nugatory in that the successful appellant could only reap an empty judgment."

In a mortgage-related dispute, the Plaintiff or Receiver may also apply for an interim relief to take possession of the property before putting the Defendant on notice. Another type of interim relief called mareva injunction is also available and can serve as a protective measure in respect of the defendant's assets. In an application for a Mareva injunction, the Applicant has the burden to establish by relevant and cogent facts in the supporting affidavit all of the following, to wit: a) he has an action against the Defendant within the jurisdiction; b) he has a good arguable case; c) the Defendant has assets within the jurisdiction and must give the particulars of such assets; d) there is a real and imminent danger that the Defendant will remove the assets from the jurisdiction and thereby render nugatory any judgment which

the Plaintiff may obtain; e) he must give full and frank disclosure of all material facts relevant to the application; f) he must show that the balance of convenience is on his side; and g) he must be prepared to give an undertaking as damages. Other types of injunctions include mandatory, interlocutory and Anton Piller injunction.

Worldwide Freezing Order: A freezing order is one of the equitable remedies available in Nigerian Courts. The freezing order usually restrains a party from handling or disposing of assets within jurisdiction until rights of parties to an action are determined. In Nigeria, the concept of the Worldwide Freezing Order (WFO) is not commonly employed, especially in civil disputes, mainly because the process is fraught with jurisdictional issue, particularly as it relates to registration and enforcement. In the few instances where Nigerian Courts have issued a WFO, it is usually a form of asset preservation and tracing mechanism employed by the Economic and Financial Crimes Commission (EFCC), an Agency of the Federal Government of Nigeria responsible for the enforcement and implementation of laws for economic and financial crimes in Nigeria. For instance, on 31 December 2009, the Federal High Court sitting in Lagos, in a case involving ***EFCC v. Dr Erastus Akingbola***, (former Managing Director of Intercontinental Bank Plc) granted a WFO on assets in Nigeria, Ghana, Canada, Switzerland, England and the USA. Similarly, in the case involving the ***EFCC v. Deziani, Aluko & Omokore***, the Federal High Court granted a WFO on assets in Nigeria, Canada, Switzerland, England and the USA. Concerns have been raised over the enforceability of such orders in Nigeria, especially when issued by a Foreign Court in view of the procedure for the registration and enforcement of a foreign judgment in the country; more so, as such orders are usually issued at interlocutory stage. Registration and enforcement of a WFO issued by a foreign Court in Nigeria will obviously encounter difficulty, especially where it does not satisfy the requirements of a valid foreign judgment under the Foreign Judgment Enforcement legislation.

Enforcement of judgments/awards

The recognition and enforcement of foreign judgments in Nigeria is governed mainly by the following statutes and laws:

1. the Reciprocal Enforcement of Judgments Ordinance (Chapter 175 of the Laws of the Federation of Nigeria and Lagos, 1958) ("**Judgment Enforcement Ordinance**");
2. the Foreign Judgment (Reciprocal Enforcement) Act (Chapter C35 of the Laws of the Federation of Nigeria, 2004) ("**Judgment Enforcement Act**"); and
3. common law.

The Judgment Enforcement Ordinance applies to judgments from the Courts of countries such as England, Scotland, Ireland, Sierra Leone, Ghana, Gambia, Barbados, Bermuda, Gibraltar, Grenada, Jamaica, Leeward Islands, Newfoundland, New South Wales, St Lucia, St Vincent, Trinidad and Tobago, and Victoria.

The Judgment Enforcement Act, on the other hand, provides that the Minister of Justice may by Order direct that the provisions of this Act shall apply to judgments from superior courts of any foreign country that accord substantial reciprocity of treatment for judgments made by the superior courts in Nigeria. However, the minister has made no order pursuant to this section. At common law, the judgment creditor may enforce a foreign judgment by bringing a fresh action usually under the undefended list procedure, to enforce the judgment.

For a foreign judgment to be recognised and enforced in Nigeria under any of the three legal regimes mentioned above, the judgment must satisfy the below-listed requirements:

- the judgment must be a judgment of a superior court of the foreign country and the foreign court must have acted within its jurisdiction;
- the judgment must be a money judgment and must be for a certain sum;
- the judgment must be final and conclusive between the parties thereto – interlocutory orders or judgment cannot be enforced;
- the judgment debtor was duly served with the relevant court processes;
- the judgment was not obtained using fraud;
- there is no pending appeal and the judgment debtor has shown no intention to appeal the judgment; and
- enforcement would not contradict public policy in Nigeria.

A party may challenge the recognition and enforcement of a foreign judgment that does not meet any of the above conditions. A challenge to an enforcement of a registered foreign judgment may be made within fourteen (14) days or such longer time/period as the court may permit. Application for enforcement can be made at the State or Federal High Court. Given the jurisdictional war between these two Courts in Nigeria, it is safer to consider the subject matter of the foreign judgment in deciding whether to approach the State or Federal High Court. The Lagos State High Court recently held in Suit No. M/563/2013: ***Access Bank Plc. v. Akingbola*** (unreported), that the judgment of the High Court in England could not be registered and enforced in the Lagos State High Court, because the subject matter of the underlying suit was a matter within the exclusive jurisdiction of the Federal High Court under section 251(1)(e) of the Constitution of the Federal Republic of Nigeria 1999. Section 251(1)(e) of the Constitution confers exclusive civil jurisdiction on the Federal High Court over matters arising from the operation of the Companies and Allied Matters Act or any other enactment replacing that Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act. This case equally brought up an interesting issue relating to public policy requirement earlier mentioned above. For instance, the Applicant had approached the Federal High Court for the recognition and enforcement of the same judgment in the Federal High Court in Suit No. FHC/L//CP/469/2014: ***Access Bank Plc. v. Akingbola*** (unreported), but the Federal High Court refused the application for registration on the ground that the original court refused to grant leave to the judgment debtor to appeal against the judgment, which refusal for leave to appeal is contrary to section 241(1) of the 1999 Constitution. The court reasoned that if the case had been heard in Nigeria, the judgment debtor would have had a constitutional right to appeal without leave. While we await the decision of the Appellate Court in respect of the Appeals filed to challenge the decisions, it is advised that the judgment creditor appreciates the dynamics of the foreign judgment enforcement regime in Nigeria and should seek proper legal advice before approaching the Court.

A party may rely on a foreign judgment to set up issue estoppel or *res judicata* and Nigerian courts may recognise such judgment even though the judgment is not enforceable in Nigeria. As it relates to a limitation period within which to apply for enforcement, whilst the Judgment Enforcement Ordinance provides for 12 months, the Judgment Enforcement Act, provides for six years. However, section 10 of the Judgment Enforcement Act provides that until an order has been made by the minister of justice, a foreign judgment must be registered within 12 months of being passed, unless the court permits a longer period. Under the common law regime, the limitation period for enforcement of judgments in Nigeria is either ten (10) or twelve (12) years from the date of judgment, depending on the State where the enforcement of the judgment is sought.

Upon the registration of a foreign judgment in Nigeria, the judgment creditor will take steps to enforce and execute the judgment through any of the judgment enforcement procedures provided under the Sheriffs and Civil Process Act and the Judgments (Enforcement) Rules. The available options for the enforcement of monetary judgment include Garnishee Proceedings, Writ of Fieri Facias (Fifa), Writ of Sequestration and Winding Up, in case of companies.

Enforcement of Arbitral Award: An arbitral award shall, irrespective of the country in which it is made, be recognised as binding and shall, upon application in writing to the court, be enforced by the Nigerian Court. Application is made to the High Court (Federal or State). Nigeria is signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the said Convention has been domesticated under the Arbitration and Conciliation Act, 1988. A party seeking recognition and enforcement of an arbitral award under the New York Convention shall satisfy the court that:

1. there was an arbitration agreement;
2. the dispute arose within the terms of the submission;
3. the arbitrators were appointed in accordance with the clause which contains the submission;
4. the making of the award; and
5. the amount awarded has not been paid.

Arbitral award once recognised and registered becomes a judgment of the Court and the judgment creditor may use any of the judgment enforcement mechanism discussed above to enforce the award.

Recognition and Enforcement of Award under Convention on International Centre for Settlement of Investment Disputes (ICSID) (Washington Convention): The ICSID is a forum for arbitrating disputes arising under contracts, local investment laws and international treaties between a ratifying state and a national of another ratifying state. Nigeria has ratified the ICSID Convention since 23 August 1965. Pursuant to this, the legislature enacted the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act CAP I 20, LFN, 2004 ("**the ICSID Act**"). Article 25 of the ICSID Convention provides for the jurisdiction of ICSID which shall extend to legal disputes arising from investment, between a contracting state (or any of its agencies or subdivision) and the nationals of another contracting state which the parties to the dispute consent in writing to submit to the Centre. Section 1 (1) of the ICSID Act provides that if it is expedient to enforce in Nigeria an award made by the International Centre for Settlement of Investment Disputes, a copy of the award duly certified by the Secretary-General of the Centre, shall be filed at the Supreme Court of Nigeria by the party seeking its recognition for enforcement in Nigeria. The award shall for all purposes have effect as if it were an award contained in a final judgment of the Supreme Court, and the award shall be enforceable as such.

Section 1(2) of the ICSID Act gives the Chief Justice of Nigeria the power to make rules or to adopt any rules of court necessary to give effect to this section. Though the Chief Justice of Nigeria is yet to make the rules in this regard, the party seeking recognition may rely on relevant Supreme Court rules. Section 232(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) confers original jurisdiction on the Supreme Court, as may be expanded by an Act of the National Assembly. ICSID Act is an Act of the National Assembly. Section 26(3) of the Nigerian Investment Promotion Commission Act ("NIPC Act"), provides that: "Where in respect of any dispute, there is disagreement between the

investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rules shall apply." Note that Section 26(2) of the NIPC Act provides for settlement of investment dispute involving a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties. See the United Nations Commission on International Trade Law (UNCITRAL) Model Law, which the ACA mirrors with minimal differences. Nigeria is a party to some Regional Conventions concerning the recognition and enforcement of arbitral awards. See, for instance, the ECOWAS Energy Protocol. Article 26 thereof provides for the settlement of disputes between a contracting state and an investor by the ICSID. Foreign Investors may utilise the provisions of ICSID Act and apply directly to the Supreme Court for enforcement in applicable cases and this will go a long way to fast track the recognition and enforcement process.

Cross-border litigation

Keeping with the common law principle of *pacta sunct servanda*, the Nigerian Courts often uphold the foreign jurisdiction clause in agreement between or amongst parties by insisting that choice of forum and law agreed by parties shall apply. Thus, as a general rule, in the relationship between national law and international agreements, freely negotiated private international agreement, unsullied by fraud, undue influence or overwhelming bargaining power would be given full effect. This means that, where such contract provides for a choice of foreign forum or law, such clause would be upheld unless upholding it would be contrary to statute or public policy. The English Court principle ("**Brandon test**") established by Brandon J. in The Eleftheria (1970) Lloyds Rep P.94 AT 99–100 has been applied by the Nigerian Courts with the slight addition in granting a stay of proceedings in support of proceedings in a foreign forum. The Brandon test states that: (1) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not; (2) the discretion should be exercised by granting a stay unless strong cause for not doing so is shown; (3) the burden of proving such strong cause is on the plaintiffs; (4) in exercising its discretion, the Court should take into account all the circumstances of the particular case; and (5) in particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.

(b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.

(c) With what country either party is connected and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would: (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In the case of ***Sonnar Ltd. v. Nordwind (1987) LPELR-3494(SC); (1987) NWLR (Pt. 66)520***, the Nigerian Supreme Court, per Kayode Eso JSC while interpreting the foreign jurisdiction clause in a bill of lading adopted the above principle and added yet another condition to the effect that stay of the Nigerian proceedings would not be granted where the granting of a stay would spell injustice to the plaintiff, such as where the action is already time-barred in the foreign court and the grant of stay would amount to permanently denying the plaintiffs any redress. The Supreme Court in this case, however, refused stay of proceedings in Nigeria on the ground that if the action is stayed, the Appellant/Plaintiff would not be able to bring any action in German Court as the case must have been statute barred.

However, in ***Nika Fishing Co. Ltd v. Lavina Corp. 2008 LPELR-2035 (SC)***, the Supreme Court distinguished the facts of *Sonnar Ltd v. Nordwind* and granted a stay thereby giving effect to the agreement of the parties to settle any dispute arising under the Bill of Lading in the country where the carrier has his principal place of business. Similarly, in *M. V. Lupex v. N.O.C. & S. Ltd.* [2003] 15 NWLR (pt.844) 469; (2003) LPELR-3195(SC), the Supreme Court stayed proceedings in Nigeria to enable parties continue with arbitration proceeding in London.

International arbitration

The Federal law on arbitration is the Arbitration & Conciliation Act, Cap A18 Laws of the Federation of Nigeria (LFN) 2004 (the Act). The Act is based on the UNCITRAL Model Law and incorporates the UNCITRAL arbitration rules. As noted earlier, the Arbitration & Conciliation Act also ratifies and incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Some constituent states have their respective arbitration laws such as the Lagos State Arbitration Law No.10 of 2009 which applies to all arbitrations within the state except where the parties have expressly agreed that another law should apply and the Lagos Court of Arbitration Law No.8 of 2009 which establishes a court of arbitration in Lagos State.

In recent times, Nigerian Courts have manifested pro-arbitration tendencies in their decisions and this comes as very cheering news for stakeholders in the arbitration industry. We have also witnessed an increase in arbitration institutions in the country and a growing number of resource persons and counsel with requisite expertise and capacity to handle complex arbitrations both within and outside the shores of Nigeria. Some of the recent pro-arbitrations decisions of the Nigerian Courts can be seen in the cases of ***Statoil Nigeria Limited v. Nigerian National Petroleum Corporation [2013] 14 NWLR (pt. 1373) 1*** and ***Nigerian Agip Exploration Limited v. Nigerian National Petroleum Corporation (Appeal No. CA/A/628/2011) (Unreported)*** delivered on 25 February 2014) where the Court of Appeal held that Nigerian Courts cannot issue anti-arbitration injunctions.

The above decisions can be contrasted with the later decision in the case of ***SPDC v. CRESTAR INTERGRATED NATURAL RESOURCES LTD (2015) LPELR-40034(CA)***, where the same Court of Appeal (Lagos Division) considered the effect of section 34 of the Arbitration and Conciliation Act which limits the power of Courts in Nigeria to interfere with arbitration proceedings. In its Application for an Order of injunction restraining an arbitration in London, the Applicant (Crestar) had argued that the arbitration was oppressive, vexatious and unconscionable as it would expose it to needless expenses and risk of being adjudged to have submitted to the arbitration. Despite the arguments of SPDC that section 34 of the Act applies to the proceedings, the Court of Appeal, however, agreed with Crestar

and issued an anti-arbitration injunction against the London proceedings. The Court distinguished the facts of ***Statoil Nigeria Limited v. Nigerian National Petroleum Corporation*** in coming to its conclusion.

The decision in ***SPDC v. Crestar*** notwithstanding, Nigerian Courts have continued to exhibit a friendly approach towards arbitration. The Civil Procedure Rules of various Courts in Nigeria have provisions aimed at encouraging parties to explore alternative dispute resolution mechanisms which includes arbitration. Not long ago, the immediate former Chief Justice of Nigeria, Justice Walter Onnoghen, issued a circular dated 26 May 2017 directing the Heads of Court to issue Practice Directions aimed at mandating parties to honour their arbitration agreements. The Courts will refuse to entertain any matter emanating from a Contract that has an arbitration agreement and may award substantial cost against the Party who instituted an action in breach of the arbitration agreement. The objective is to discourage parties from resorting to litigation in breach of an arbitration agreement. In September, 2017, the Chief of Judge of Federal High Court in compliance with the Chief Justice of Nigeria's Directive, issued a Practice Direction directing Judges of the Federal High Court to decline jurisdiction and refuse to entertain any action instituted in breach of an arbitration agreement.

Sections 4 and 5 of the Arbitration and Conciliation Act give the Court the power to stay proceedings in an action which is the subject of an arbitration agreement. It is not clear whether the Federal High Court Practice Direction in question seeks to take away the Court's discretion under section 5 of the Arbitration and Conciliation Act. It is submitted that the discretion of the Court on whether to stay proceedings or not has not been taken away as the Practice Direction cannot amend the provisions of the Act. This is because if there is a conflict between section 5 of the Arbitration and Conciliation Act and the Practice Direction, the former will prevail.

Nigeria has a number of arbitration bodies which have contributed immensely in enriching arbitration culture and practice in Nigeria. The institutions are:

i. **The Nigerian Institute of Chartered Arbitrators**: The Nigeria Institute of Chartered Arbitrators (NICArb) is the premier arbitration institute in Nigeria founded in 1979 under the leadership of former Attorney General of Nigeria and former judge of the World Court at The Hague, Judge Bola Ajibola, SAN, KBE and duly incorporated in 1988 under the Companies Act as a legal entity Limited by Guarantee. There are at present five categories of membership of the Nigerian Institute; Qualified Mediator, Young Arbitrators Network, Associates, Members and Fellows.

ii. **Lagos Court of Arbitration (LCA)**: Established under the Lagos Court of Arbitration Law, 2009, the LCA is an independent, private sector-driven, International Centre for the resolution of Commercial disputes via Arbitration and other forms of alternative dispute resolution (ADR). Ideally located within the International Centre for Arbitration and ADR (ICAA), Lagos, Nigeria, the LCA's use of internationally recognised neutrals, modern facilities and the adoption of innovative technology, make the LCA an efficient and best-in-class arbitration institution.

iii. **The Chartered Institute of Arbitrators (UK) (Nigeria Branch)**: The Nigeria Branch is one of the branches of the Chartered Institute of Arbitrators (CIArb), United Kingdom. The Nigerian Branch was granted approval by the Institute in 1999 having fulfilled the requirements to be granted Branch status. Since then it has grown in its membership and has over 1,137 members. Its membership cuts across all disciplines including practitioners in Law, Construction, Shipping, Engineering, Insurance,

Banking, Accounting, Oil & Gas, etc. The Chartered Institute of Arbitrators is recognised as the professional body for training and examination of those seeking to become qualified arbitrators, mediators and other ADR Practitioners.

iv. **The Maritime Arbitrators Association of Nigeria**: Incorporated in 2005, the main objective of the body as can be gleaned from its name is to educate the public and maritime industry stakeholders on the importance of arbitration and Alternative Dispute Resolution mechanism. Membership is mainly drawn from admiralty practitioners, shipping agents, marine insurers and other professionals.

v. **The Society of Construction Industry Arbitrators**: Society of Construction Industry Arbitrators (SCIARB), formerly known as the Institute of Construction Industry Arbitrators, was established in 1993 as a specialist Arbitration and other Alternative Disputes Resolution (ADR) body in the Construction Industry. The Society is one of the leading arbitral institutions in the construction Industry in Nigeria. The Society was inaugurated on the 15 October 1993, as essentially a muti-disciplinary Society with members drawn from the professions related to the construction industry. The Society is a Specialized Alternative Dispute Resolution (ADR) body in the construction industry.

Regulatory investigations

Nigeria has a number of regulations and laws that impact on consumer and business affairs, particularly in the regulated aspects of the economy such as financial services, power and energy, food and drugs processing and production, communications, mining and capital market.

Recent developments in regulatory controls

The Federal Competition and Consumer Protection Act, 2018: Prior to the enactment of the Federal Competition and Consumer Protection Act, 2018 ("**FCCP Act**") there was a dearth of a comprehensive antitrust and competitive legislation in Nigeria. Though, Investment and Securities Act, 2007 (which regulates the capital market operations) had wide antitrust provisions which mostly come into play when Security and Exchange Commission (SEC)'s consent is sought for, in mergers between business entities, the FCCP Act remains the only Nigerian legislation with all-encompassing and comprehensive provisions regulating competition and protecting the interests of consumers across all sectors in the country. The FCCP Act repeals the Consumer Protection Council Act and sections 118–128 of the Investment and Securities Act, 2007. By repealing the aforementioned sections, SEC no longer reserves the power to approve mergers, acquisitions or business combinations between companies, except takeovers. Nevertheless, there has been a growing call by stakeholders and professionals on the need for the FCCP and SEC to collaborate in the area of merger and acquisition approval as this will bring about the needed harmony in the industry.

Implementation of Basel 3 and the International Financial Reporting Standard 9: Effective from January 2019, financial institutions in Nigeria migrated to International Financial Reporting Standard 9 (IFRS 9) accounting standard aimed at improving disclosure by forcing lenders to provide for existing losses as well as those that might occur in the future. Measures are also being put in place to implement Basel 3 to meet with global standards. Basel 3 and International Financial Reporting Standard 9 (Financial Instruments) (IFRS 9) will strengthen risk management in the financial sector especially in the area of

non-performing loans ("NPLs"). On 5 March 2019, the Central Bank of Nigeria ("**CBN**") the apex regulatory body for the banking and financial sector, issued a Circular on Guidance to Other Financial Institutions on the implementation of IFRS 9. It is hoped that the Implementation of the Basel 3 would lead to higher Capital Adequacy ratio for banks, while that of IFRS 9 would raise the criteria for recognition of NPLs.

Impact on litigation landscape

Banks in Nigeria spend huge resources and time in loan recovery litigation. The Asset Management Corporation of Nigeria ("AMCON") is saddled with the statutory responsibility, among others, of purchasing and recovering the non-performing loans disbursed by eligible financial institutions (banks) to their customers. Despite the role of AMCON in this regard, the rate of NPLs has continued to rise with the total amount of NPLs of Nigerian banks for the year 2018 reported to hit N1.79 trillion.

Judicial supervision of regulatory bodies

The State and Federal High Courts in Nigeria have both supervisory and original jurisdiction over the activities of regulatory agencies depending on whether the body is an agency of State or Federal Government. This supervisory jurisdiction can be exercised through the mechanism of judicial review or a regular action challenging the action of the Agency. Section 251(1)(r) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) specifically confers jurisdiction on the Federal High Court on any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies. The Investment and Securities Act, 2007 established the Investment and Securities Tribunal with the power amongst other things to determine capital market disputes. The Tribunal and the Federal High Court equally exercise jurisdiction over the decision of Securities and Exchange Commission depending on the subject matter of the dispute. Recently, the Federal High Court (Lagos) granted an interim injunction restraining the Securities and Exchange Commission from removing Messrs Wale Tinubu and Omamofe Boyo as Oando Plc's Group Chief Executive Officer and Deputy Group Chief Executive Officer, respectively. The Courts in Nigeria would always intervene, in deserving cases, to check-mate the activities of regulatory bodies and government agencies. In doing so, the Courts seek to balance the need for strong regulatory institutions with powers to checkmate market abuse and infractions while protecting the consumers of goods and services and the need to prevent the abuse of such powers by those regulatory bodies and government agencies.

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Munirudeen is a Partner at Paul Usoro & Co and currently, the Deputy Head of the Dispute Resolution and Advocacy Group in the Firm. In that capacity, he directly supervises and is involved in all contentious and non-contentious Litigation and Dispute Resolution matters which the Firm handles. Munirudeen, a skilful advocate, joined the Firm in 1998, at which time he worked in both the Transactional and Dispute Advocacy Practice of the Firm. This afforded him the opportunity to sharpen and broaden his knowledge and experience in the Transaction and Commercial Practice of the Firm, as well as cut his legal teeth in Advocacy. Munirudeen has appeared before the various Court hierarchies and Tribunals in Nigeria on behalf of high-net-worth individuals, companies, multinational corpoarions and government agencies. He has several successful judgments to his credit.

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Prince is an Associate at Paul Usoro & Co and currently heads one of the Teams in Advocacy and Dispute Resolution Practice Group of the Firm. An astute and outstandingly fast-thinking and resourceful legal practitioner, with a knack for dispute resolution and advocacy, his passion for law practice has never been hidden. He has advised and represented indigenous and multinational clients on a broad range of practice areas and highly complex legal issues spanning banking and financial services, maritime, white-collar crime defence, energy and power, solid minerals, communications, capital market, intellectual property, media and entertainment law, taxation, debt recovery and general civil litigation. Prince has an interest in writing and his articles on a wide range of legal issues have been published in both online and print media.

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