"Do post-award remedies appropriately ensure conformity of the arbitral process with the rule of law?"

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The topic of this paper is a complex one, and must be viewed through a lens which looks back at the past through to the modern day. This paper focuses on Africa, although there is a significant degree of international perspective.

The paper is split into a number of different sections: the history of arbitration in Africa; the rule of law in the modern context; post-award remedies in arbitration rules, both local and the well-known ones; the New York Convention's provisions to ensure conformity with the rule of law; African cases and the New York Convention; the post-award position in a few key African jurisdictions and the role of the courts; and finally, some reflections on the future.

1 The History of Arbitration in Africa

Africa is the second largest continent, accounting for more than 20 per cent of the earth's land mass and spread across 54 diverse countries. It is the second most populous continent after Asia, with over 1.1 billion people, projected to increase in multiples of that figure by the end of the century. By 2040, Africa is projected to have the biggest labour force in the world, with at least 15 African cities having populations greater than 5 million by 2030.

The economic growth statistics are equally impressive. In the past few years, at least seven African countries have been amongst the 10 fastest growing economies in the world, namely Nigeria, Ethiopia, Mozambique, Tanzania, Republic of Congo, Ghana and Zambia. This impressive growth is not solely because Africa is starting from a low base (which it did initially); indeed in the past decade or so, Africa has grown faster than East Asia, averaging an economic growth rate of 4.5 per cent since 2000. In terms of the future, the IMF forecasts that over 10 of the 20 fastest-growing economies in the world over the next few years will be in Africa, with Nigeria leading the pack to be in the top 20 world economies by 2020.

All the growth that one sees and hears about is happening across multiple sectors which include oil and gas; mining; banking and finance; fast-moving consumer goods; projects and infrastructure; telecommunications; hospitality and leisure; agriculture; and energy. Africa has 30 per cent of the world's known reserves of minerals; about 10 per cent of its oil and 8 per cent of its gas resources; and the largest cobalt, diamonds, platinum and uranium reserves in the world—much of it unexploited. The opportunities in each of these sectors are significant and some of the statistics are staggering. For example, 60 per cent of the world's arable land is in Africa but much of it is unexploited. Invariably, there has been a growth in the flow of foreign direct investment (FDI) to African countries, both from outside and from within Africa.

There is, as one would expect, a relationship between an increase in FDI into Africa and the development of arbitration and modern arbitral regimes. Arbitration, as a
concept and a method of resolving disputes, is not new to Africa. It has existed in Africa for centuries, going back to ancient times when communities resolved disputes through an individual or council of elders whose word was final and binding. Such disputes were not limited to family or land feuds, but also included commercial transactions. The purpose of this process was for an individual (such as the chief of the village or someone with a similar status) or council of elders to achieve reconciliation, peace and the dissipation of feelings that might otherwise dislocate social structures and the sense of community. The aim was always to have disputes resolved in a quick, cost-effective and binding manner, which has always been the utopian aim of arbitration. Arbitration practices were extensive in Africa, but the cases remained undocumented, and no formal arbitration statute existed until the late 1800s.

Formal arbitration legislation started to be introduced in the late 1800s; built up over time by the adoption, in some African countries, of the English Arbitration Act 1950; then came the incorporation in whole or in part of the UNCITRAL Model Arbitration Law of 1985. Arbitration developed over time up to the modern day with various degrees of sophistication. There is a huge range of arbitration laws and practices within Africa: on the one hand there is Mauritius, the host of ICCA 2016 (the first time the congress has been held in Africa) which has carried out a root and branch review of its arbitration infrastructure giving it an advantage. On the other hand, there are in some cases half-hearted attempts at making a country "arbitration-friendly" with poor results, and no local business or foreign investor confidence in the system. The vast majority of countries are, however, somewhere in the middle, and the direction of progress is towards significant improvements. There has been a proliferation of arbitration centres in Africa, and as of 2015 there were at least five dozen institutions offering arbitration-related services and rules, in addition to the international arbitral institutions\(^2\). Although arbitration is not new to Africa, it is fair to say that no arbitral institution based in Africa has yet established itself as a major international centre. Yet if one looks at the statistics for the well-known arbitral institutions like the LCIA and the ICC, the number of arbitrations originating from Africa has been steadily growing. There is also a strong link between an increase in bilateral investment treaties and multilateral investment treaties and the growth of arbitration in Africa.

The arbitration journey has been a long one in Africa, and it is accelerating as Africa is becoming increasingly important for so many reasons to the rest of the world. There are challenges as one would expect: a proliferation of arbitration institutions (which can create confusion on the part of users); lack of experienced African arbitrators (although this is rapidly changing for the better); lack of a trained judiciary which appreciates the scheme of arbitration, namely a light touch approach, pro-enforcement bias, etc. (although through training and greater awareness this is changing with varying degrees); lack of adequate legal and physical infrastructure (which again is changing, rapidly in some cases, for the better); and reluctance by foreign investors to have arbitrations seated in African cities (this is slowly changing but will take more time). The overall message is one of positive change and development.

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\(^2\) See Appendix 1 to this paper.
Africa is hugely diverse even when it comes to legal systems, possessing countries with legal systems based on common law, civil law, or a mixture of common law and civil law, and with Sharia and African customary law covering certain areas like land and family relationships. One then has to take into account systems like OHADA, a uniform legal framework for business law across 17 Francophone countries. There are then trading blocs where there are certain movements towards the unification of laws and regional judicial bodies (the East African Community, the Economic Community of West African States, the Common Market for Eastern and Southern Africa and the Southern African Development Community). The legal landscape is therefore huge and varied. Thus, one must look at individual countries and not make sweeping generalisations, rather in the same way as one looks at the various international arbitral centres when advising clients.

The obvious aims of making a country "arbitration-friendly" are to attract more foreign direct investment, reduce the risks in the eyes of the foreign investor in investing in a country, and generally raise the profile of a country by adopting and respecting international conventions such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and the International Convention on the Settlement of Investment Disputes 1965 (ICSID).

1.1 Then and now: how is it so different?

As mentioned above, arbitration has been around in Africa for a very long time indeed. Several decades ago, there were very few sets of arbitration rules, conventions and therefore limited post-award remedies as such to ensure compliance of the arbitral process with the rule of the law. In addition the demographics of the parties to many commercial arbitrations were also very different. Disputes were usually between parties from the same community, town or country, and there were therefore strong social, tribal and business relationships to maintain. Non-compliance with awards carried significant penalties: legal, social and commercial.

Fast forward a few decades and the picture is very different. There is a vast number of arbitral centres, rules, laws, conventions and a huge amount of common (and differing) practices and case law. The parties are also very different. As there has been a growth in cross-border investment, arbitrations have significantly increased between foreign and regional parties with a local party. For example in Africa today, investment is pouring in from all over the world in addition to pan-African cross-border investment.

All this means that parties, and losing parties in particular, behave in unpredictable ways. With this, post-award remedies are increasingly present in local legislation, in conventions, in arbitration rules and in countries’ legislation implementing conventions such as the New York Convention.

There are no readily available statistics in Africa, but compliance with awards is an increasing area of difficulty, as is enforcement of awards against African entities for a number of reasons. But it is not alone amongst emerging markets. In 2008, the report on International Arbitration Corporate Attitudes and Practices produced by the Queen Mary’s School of International Arbitration and PricewaterhouseCoopers stated, in the context of recognition and enforcement of arbitral awards: "...there were wider perceptions about the territories where difficulties are likely to appear in enforcement
or execution proceedings. The three most cited regions were Central America, South America and Africa. China was the country cited most often with India and Russia also considered as potentially problematic territories”. The same report listed the problems the interviewees encountered generally when it came to recognition and enforcement which included: the recognition and enforcement procedures (32%), local execution procedures (24%), high costs (12%), time (22%) and perceived corruption of judges and administrative personnel of the local courts (10%). This raises an important question: is enforcement easier in developed countries compared to developing countries? There is too little reliable data to make an accurate guess, but anecdotal and practical experience of many practitioners, including the Author of this paper, would suggest it is generally harder to enforce awards against parties from developing countries, for a huge number of reasons.

2 What does "Rule of Law" mean?

The late Lord Bingham defined the basic contents of the rule of law in his book on the topic3. He suggested that there were eight sub-rules or "strands" which woven together, make up the rule of law. In summary terms, those strands are:

(i) The law must be accessible, intelligible, clear and predictable;
(ii) Issues should be resolved by law, not discretion;
(iii) Laws should apply equally to all;
(iv) The law must protect fundamental human rights;
(v) Disputes must be resolved economically and fast;
(vi) Public powers must be exercised reasonably, bona fide, and appropriately;
(vii) Adjudicative procedures provided by the state should be fair; and
(viii) The state must comply with its obligations in international law.

Some may consider Lord Bingham's definition of the rule of law inappropriate in the context of international commercial arbitration, but subject to appropriate tweaks most are still relevant. Of course, arbitrators perform an essentially contract-based function for specific parties in private, whereas judges carry out a constitutional function for everyone in public, so the rule of law can be said to be central to the role of judges in a way that it is not for arbitrators. However, that does not mean that arbitrators have no part to play in the rule of law or that the rule of law has no part to play in arbitration. Far from it4.

First, the nature of arbitration requires arbitrators to have many of the qualities of judges. In particular, they administer justice, and they must therefore act in accordance with the law and be seen to act in accordance with the law. And the law includes fundamental rights. Secondly, a practical point: if an arbitrator acts inconsistently with fundamental rights, he or she is likely to become unpopular and develop an unfavourable reputation. Thirdly, arbitrators resolve disputes between

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3 Lord Bingham The Rule of Law (2011)
4 Lord Neuberger’s lecture on Arbitration and the Rule of Law, 20 March 2015, Chartered Institute of Arbitrators Centenary Celebration, Hong Kong.
business people or national entities, and in both the commercial and the diplomatic worlds, the rule of law is essential. Fourthly, given that arbitration is the remedy of choice for many commercial parties, there is a powerful case for saying that arbitration should be held to the same high standard we hold the court process, and that must include its rule of law credentials. Fifthly, over the past forty years national legislation and international conventions have given arbitrators ever increasing freedom and power by restricting interference by the courts with arbitrators' procedures and awards. Any increase in freedom or power carries a concomitant increase in responsibility, and an increase in arbitral powers must be accompanied by an increased responsibility to observe fundamental rights5.

Elaborating on a few of the above strands:

2.1 Protection of fundamental human rights

The importance of public policy in this connection is recognised in the New York Convention, which permits the refusal of recognition or enforcement of an award if the court considers that "the recognition or enforcement of the award would be contrary to the public policy of that country".

In England, enforcement of a foreign arbitral award will not be permitted where it violates English principles of "natural justice".

It is worth pointing out that arbitration is ultimately totally dependant on the courts, and therefore on access to justice and the rule of law, for its efficacy if a party does not comply with the arbitration rules. Without an effective court system to enforce their procedural directions and (particularly) awards, arbitrators would be toothless. In other words, the success of arbitration rests ultimately entirely on the rule of law.

2.2 Fair adjudicative procedure

An important part of a fair trial is open justice, whereas arbitration almost always takes place in a private context. Open justice is essential because judges must be publicly accountable and independent of all outside influence.

The credibility of arbitration, and therefore the self-interest of all those involved in arbitration, seems to point firmly in favour of more transparency. This is an important theme these days, and there is growing support for awards to be published.

2.3 Exercising powers reasonably, in good faith, and for appropriate purposes

Centrally, arbitrators have a duty to act fairly, to treat the parties before them equally, and give each party a reasonable opportunity to put its case.

2.4 Compliance with international law

It is often remarked that the New York Convention is the most successful convention in the world in terms of adoption, so arbitration has done well here.

5 Ibid
In short, arbitration is not simply compatible with the key features of the rule of law, but it has an increasingly important role to play in upholding those key features, both nationally and internationally as it grows in popularity.

3 Post award remedies

To the losing party, the 'advantage' of arbitration, namely finality, may seem a very bitter pill. The laws of many countries, reflecting the policy of the New York Convention and the Model Law, have 'a pro-enforcement bias'. This means that whilst it may be possible to challenge an arbitral award, the available options are likely to be limited – and intentionally so.

It is usually the law of the seat of the arbitration that contains these limited provisions for the challenging an arbitral award (indeed, under the New York Convention, only the courts of the seat can set aside an award). They are mainly focused on ensuring that the arbitration has been conducted in accordance with basic rules of due process, respecting the parties' equal right to be heard before an independent and impartial arbitral tribunal within the boundaries of their arbitration agreement. Grounds of challenge are rarely concerned with a review of the merits of the tribunal's decision.

A challenge to an award usually takes place in the courts of the seat of the arbitration and it is an attempt by the losing party to invalidate the award on the basis of the statutory grounds available under the law of the seat. In contrast, actions opposing enforcement may take place in any jurisdiction in which the winning party seeks to enforce an award. As long as the state of enforcement is a signatory to the New York Convention, the party against whom the enforcement is sought has the opportunity to rely on the limited exceptions contained in Article V to block such enforcement. The statutory grounds for challenging an award under domestic law often closely resemble the exceptions to enforcement in the New York Convention. As a result, a party who is dissatisfied with the outcome of an arbitration will have at least two bites of the cherry to prevent an award from being given effect: it can challenge the validity of the award in the courts of the seat; and/or it can attempt to block a party seeking to enforce the award in another state under the New York Convention.

4 Correction and interpretation of awards; additional awards; remission of awards

4.1 Correction: There is usually a provision in the relevant arbitration rules, or in the law governing the arbitration for the correction of computational, clerical or similar errors.

4.2 Interpretation: Some arbitral rules permit an arbitral tribunal to issue an 'interpretation' of its award, to resolve any uncertainty as to the precise meaning of an award and therefore the manner in which it is to be performed.

4.3 Additional award: A further power is given to an arbitral tribunal under some rules to deal with any claims that were presented in the arbitral proceedings, but which the tribunal omitted to address in its award.

6 Redfern and Hunter on International Arbitration, 6th edition, Chapter 10, Challenge of Arbitral Awards, page 569-604
Some examples of these provisions are set out below:

**United Nations Commission on International Trade Law (UNCITRAL)**

Article 36: Correction of the Award
Article 39: Additional Award

**LCIA Arbitration Rules 2014**

Article 27: Correction of Award(s) and Additional Award(s)

**ICC Rules 2012**

Article 35: Correction and Interpretation of the Award; Remission of Awards

**The Cairo Regional Centre for International Commercial Arbitration**

Article 37: Interpretation of the award
Article 38: Correction of the award
Article 39: Additional award

**Lagos Regional Centre for International Commercial Arbitration**

Article 38: Interpretation of the Award
Article 39: Correction of the Award
Article 40: Additional Award

**Lagos Court of Arbitration**

Article 38: Correction of the Award
Article 39: Additional Award

**Nairobi Centre for International Arbitration**

Article 30: Correction of Awards and Additional Awards

**LCIA-MIAC**

Article 27: Correction of Awards and Additional Awards

5 **Grounds for Challenge of an Award**

Each country varies in terms of what measure of control it wishes to exercise over an arbitral process that takes place in its territory. In particular, whether it wants to distinguish between 'domestic' and 'international' arbitration. In any given case, it is necessary to consult the law of the country concerned in order to determine the grounds on which a particular award may be challenged.

There are three broad areas on which an arbitral award is likely to be challenged before a national court at the seat of the arbitration. First, an award may be challenged on jurisdictional grounds, that is, the non-existence of a valid and binding
arbitration agreement, or other grounds that go to the tribunal's jurisdiction. Secondly, an award may be challenged on what may broadly be described as procedural grounds, such as a failure to give a party an equal opportunity to be heard. Thirdly, an award may be challenged on substantive grounds, on the basis that the arbitral tribunal made a mistake of law.

6 **Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")**

The New York Convention is probably the most successful convention of its kind. 35 out of 54 countries in Africa are signatories to it, and have incorporated it (in varying degrees) into their own law. It has a pro-enforcement bias and limited circumstances in which recognition and enforcement of an award may be resisted. The key provisions in this regard are set out below.

**Article V**

"1. 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 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; 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

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7 See Appendix 2.
8 Article II:1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
(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 made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.  

Article VI

"If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

There are frequently tensions between the laws and procedures of the courts in the seat of arbitration (when faced with challenges to awards) and a New York Convention state's court's which is dealing with applications for recognition and enforcement in parallel.

This can lead to situations where post-award remedies are not appropriately ensuring conformity of the arbitral process with the rule of law. Indeed such remedies give sore losers the ability to prolong, evade and frustrate enforcement, sometimes permanently.

7 Discussion of some important African cases with an international perspective

A number of important cases heard in the English Courts involving African parties have thrown up issues demonstrating the tensions, and highlighting issues, courts have to grapple with. These involve, amongst other issues:

- Delays in local courts where there are challenges to awards;
- Questions as to whether challenges are bona fide or spurious to obstruct enforcement;
- Deference to local courts/considerations of comity by the enforcing courts;
- Public policy considerations by local and enforcing courts and the differing approaches;
- Fraud and its implications;
- Final and binding awards/double exequatur;

Note that these two grounds can be raised by a court of its own motion, wherever the five grounds listed above must be raised by the party seeking to restrain recognition (and enforcement).
Adjournment of enforcement and for how long when there are local challenges pending in the seat of the arbitration;

Provisions of security when adjourning enforcement/importance of (or lack of) assets in the jurisdiction of the enforcing court; and

Partial enforcement.

NB: References to sections 103 etc. in the cases below are to the English Arbitration Act 1996 which implements the New York Convention in sections 100-104.

7.1 Dowans Holding SA, Dowans Tanzania Ltd v Tanzania Electric Supply Co Ltd10

The Defendant was the state-owned national electricity generation and supply company of Tanzania. It assigned an emergency power off-take agreement (POA) to the first Claimant, and thereafter the second Claimant. The Defendant subsequently claimed that the POA was void ab initio on the basis that it had been entered into contrary to provisions of Tanzanian law, and purported to terminate it. The second Claimant treated that termination as a repudiatory breach. ICC arbitral proceedings followed, and an award of damages was made in the Claimants' favour. The award was filed with the High Court of Tanzania. The Claimants obtained permission from the English court to enforce that award (as a New York Convention award) in England and Wales. The Defendant applied to set aside that order pursuant to s103(2)(f) a of the Arbitration Act 1996, or alternatively (under s103(5)) to adjourn the issue of recognition or enforcement of the award pending the determination of a set aside application in Tanzania. The Claimants applied for orders, in the event that there was an adjournment, for partial recognition and enforcement of the award and for an order, as a term of any adjournment, for security for the sums due under the award. A number of issues arose for consideration, including, first, whether the fact that there were pending petitions, brought by the Defendant and third parties, to set aside the arbitral award in the home jurisdiction of Tanzania meant that the award was not yet binding on the parties. The Defendant applied to set aside that order pursuant to s103(2)(f) of the Arbitration Act 1996, or alternatively (under s103(5)) to adjourn the issue of recognition or enforcement of the award pending the determination of a set aside application in Tanzania. The Claimants applied for orders, in the event that there was an adjournment, for partial recognition and enforcement of the award and for an order, as a term of any adjournment, for security for the sums due under the award.

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The Court held that the issue as to whether the ICC award had become binding on the parties was one for the English court, by way of deciding whether it was in a position to recognise and enforce a New York Convention award, and not by way of the court's assessment of whether the Tanzanian court would consider that it was binding. The award had become, and was, binding on the parties. It was common ground that the intention of the New York Convention was to make enforcement of a Convention award more straightforward, and in particular to remove the previous necessity for a double exequatur (i.e. the need, before a Convention award could be enforced in any other jurisdiction, for it to be shown that it had first been rendered enforceable in the jurisdiction whose law governs the arbitration). The petitions in

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Tanzania were of no relevance to whether the award was binding; nor was the existence of the Defendant's petition.

It could not be said that the Defendant's chances of success of setting aside the award in the Tanzanian court were fanciful. There were substantial hurdles to mount for the Defendant. Its prospects were not fanciful, and hence were real, but were towards the lower end of the scale. An adjournment of the English proceedings would, therefore, be granted. In the circumstances of the case, the court ordered security to safeguard the Claimants in relation to their loss of opportunity and the prejudice suffered by the adjournment.

7.2 Soleh Boneh International Ltd v Government of Republic of Uganda and National Housing Corp 11

The plaintiffs (contractors), a consortium of companies registered in Israel, entered into a contract in 1968 to carry out building works in Uganda for the Second Defendants which were an organization closely associated with the government of Uganda. The first Defendant by their Minister of Finance, guaranteed performance of the contract on behalf of the second Defendant (the employers).

In March 1972 there was a decree or decrees of the government of Uganda which had the effect that participation of Israeli nationals in commercial matters quickly came to an end. In 1972 the contractors claimed damages for breach of contract. The dispute was referred to arbitration and a Swedish engineer was appointed as sole arbitrator by the Court of Arbitration of the ICC. The employers maintained that this appointment was invalid but they took part in the arbitration which was held in Sweden.

An interim award was made in 1974 and in 1978 a final award of $9.5m was awarded to the contractors.

Some 13 years later, in 1991, the contractors issued an originating summons in England seeking leave to enforce the award as a judgment.

It was held, at first instance by Mr. Michael Barnes, Q.C. that leave for the enforcement of the award as a judgment would be declined forthwith. Rather, the application would be adjourned for three months and the employers were to provide security in the total sum claimed including interest.

It was held on Appeal, by the Court of Appeal that if the award was manifestly invalid there should be an adjournment and no order for security; if it was manifestly valid there should be either an order for immediate enforcement or else an order for substantial security; and the Court must consider the ease or difficulty of enforcement of the award and whether it would be rendered more difficult if enforcement was delayed. (This became known as the sliding scale test.)

The Judge was right to take into account the fact that an enormous period of time had already been spent in dealing with a preliminary point in the Swedish Courts and that there was an apparent lack of enthusiasm on the part of the employers to continue their application to the Swedish Court.

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The contention that the arbitrator was not validly appointed was seriously arguable and in those circumstances it was a very strong measure to order that the whole amount of the award (including interest for many years) should be put up as security. That should have been done only as an exceptional measure and the right course would be to order security in a significant sum; that would provide a real incentive for the employers to proceed with their Swedish application expeditiously and would also provide some protection for the contractors against any deterioration of their prospects of enforcement. Security would be ordered in the sum of $5m.

7.3 **Continental Tranfert Technique Ltd v The Federal Government of Nigeria et al.**

The Claimant’s supply agreement with various ministers of the government of Nigeria, the first four defendants, broke down and was referred to arbitration in Nigeria, as stipulated in the contract. An arbitration took place and an award was made in favour of the claimant in a sum equivalent to £140 million. The Claimant applied under s 101 of the Arbitration Act 1996 to enforce the award in the United Kingdom and for judgment to be entered in the terms of the award. An interim order granting permission to enforce the award and enter judgment was made. It provided the Defendants with a period of time to apply to set it aside. The Defendants made no application to set aside the interim order and the claimant applied successfully for a final judgment to enforce the award. The Claimant proceeded to enforce the judgment of the court by obtaining charging orders over the property of the Nigerian National Petroleum Company, the fifth Defendant. The Claimant also sought to enforce the award in the United States under the New York Convention. The Defendants challenged the award before the US courts. The award was also the subject of challenge in the Nigerian courts but the matter had not been decided. The Defendants applied to the UK court, out of time, to set aside or to stay the judgment. In relation to set aside, the Defendants relied on s 103(2)(f) of the 1996 Act which provided that enforcement of an award might be refused if it was proved that the award had been set aside by a competent authority of the country in which it had been made. They further relied on alleged material non-disclosure of the Nigerian proceedings and the US proceedings during the application for the final judgment. In relation to the application for a stay, the Defendants sought to invoke the discretionary grounds provided by RSC Order 47 r 1(1). That rule required that there were special circumstances which rendered it inexpedient to enforce the judgment or order.

The Defendants submitted, *inter alia*: (i) that as the award was one which should not be recognized or enforced, s 103(2) applied and it followed that a judgment based on that award should be set aside; (ii) that failure to disclose the UK and the Nigerian proceedings at the hearing for the final judgment was a material non-disclosure which ought to result in the final judgment being set aside; and (iii) that as an application had been made for the setting aside of the award in the Nigerian courts, the UK court had discretion to adjourn the decision on the enforcement of the award, pursuant to s 103(5) of the 1996 Act. The Claimant did not oppose a stay if security was provided.

The court ruled:
It was established law that a mere challenge to an award before the court in the country of origin of the award was insufficient to trigger the discretion to set aside under s 103(2)(f) of the 1996 Act.

In the instant case, s 103(2)(f) was inapplicable as there had only been an application in Nigeria to set aside the award. The fact that there was an application to set aside an award did not mean that the award had been set aside.

Where an application had been made ex parte to the court for the formalising of a procedural position, the duty to make full and frank disclosure was a limited one. That was because such an application was essentially seeking an administrative act; it was not making a new substantive application.

A court in deciding whether the exercise of its discretion to stay an award pursuant to s 103(5) of the 1996 Act had to consider the strength of the case for invalidity of the award, the bona fides of the application to set aside and the ease or difficulty of enforcement of the award and whether it would be rendered more difficult if enforcement was delayed.

In the instant case, on the basis of the material before the court it could not be said that the defendants had shown that there was a real prospect of success in their application to challenge the validity of the award. In so ruling the court was not pre-empting the decision of the Nigerian court but merely making a ruling on the basis of the evidence before the court. It was a possibility that the application was in fact a delaying tactic and given the large amounts at stake it was apparent that any delay in being able to obtain the fruits of judgment was likely to cause significant prejudice.

Although all factors pointed against staying the judgment to enforce the award, given the difficulty of deciding which part of the award was disputed and which was not, a stay would be granted subject to security of £100 m to be provided within 28 days.

**7.4 IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation**

NB: *This is a long running case in the English Courts. It began in 2004 and is still ongoing.*

Both parties are Nigerian entities. The claimant, IPCO, is a contractor specialising in the construction of onshore and offshore oil and gas facilities. By a contract of March 1994, it agreed to undertake works for the design and construction for the defendant, the national oil company of Nigeria (NNPC), of a petroleum export terminal in Nigeria, known as the Bonny Export Terminal Project. The contract was subject to Nigerian law and provided for arbitration in Lagos. The total consideration

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13 In an earlier judgment, [2009] EWHC 2898 (Comm), the Court dealt with an application by the Fifth Defendant, the national oil company of Nigeria, to discharge two interim charging orders and a third party debt order made ex-parte on the application of the claimant.

14 [2005] EWHC 726 (Comm)
for the claimant’s services was in excess of US$ 250m and it was anticipated that both phases, namely design and construction, would take up to 24 months. A dispute arose out of the fact that the project took some 22 months longer to complete than was provided for in the contract. It was referred to arbitration and NNPC was ordered to pay of US$ 152, 195,171 and Naira 5m by an award of October 2004. In November 2004, NNPC began proceedings in Lagos, seeking to set aside the award and to obtain a stay of execution. Later that month the High Court in London ordered, ex parte, that NNPC pay the sum due under the award, following an application by IPCO seeking to enforce the award. NNPC applied to set aside the order, or adjourn its enforcement, pursuant to s 103 of the Arbitration Act 1996. IPCO applied under s 103(5), in the event that NNPC obtained an adjournment, for an order that the defendant provide security for costs.

NNPC submitted that the order should be set aside on the ground, inter alia, that it was procedurally defective, in that, contrary to CPR 62.18(10)(b), the order did not contain a statement that it was not to be enforced until after any application by the defendant within the 14 day period had been finally disposed of, leading to wasted costs associated with a premature application by IPCO. It was not disputed that IPCO would recover US$ 13m.

The court decided that practical justice was best done by adjourning the enforcement of the order on terms, inter alia, requiring NNPC to pay the US$ 13m indisputably due to IPCO and to provide appropriate security in London in an amount of US$ 50m.

The court said that although the order was defective in point of form, the proportionate solution was to penalise IPCO in terms of costs arising from the premature enforcement proceedings. There was no suggestion that NNPC’s application to the Nigerian court was other than bona fide. Nor had there been delay in making that application. In various respects, that application did have a realistic prospect of success. Proper deference had to be shown to the pending Nigerian proceedings. As well as the indisputable sum of US$13m, success for NNPC was likely to leave IPCO with an award of in excess US$50m. Any delay in enforcement was likely to prejudice IPCO, and thus any such prejudice should be minimised. There was a risk of enforcement in Nigeria becoming more complex by its domestic law. As to IPCO, were immediate enforcement ordered without the provision of cross-security, there would be a substantial risk of monies paid out becoming irrecoverable, even if NNPC succeeded before the Nigerian courts.


About three years later, IPCO applied to the court for the second time, asking it to consider whether the continuation of the April 2005 order met the justice of the case, in what it alleged were different prevailing circumstances. In essence, IPCO contended that the resolution of NNPC’s challenge to the validity of the award of which the supervisory, Nigerian, court was seised was taking much longer than first expected (no decision having been given since the making of the 2005 order, and none being expected in the near future), and partly because, it was alleged, the English court had been inadvertently misled in a manner material to its evaluation of costs.
the strength of the challenge. Thus an issue arose as to whether the court should revisit the April 2005 order and, if so, whether it could and should permit enforcement of such part of the award as was, in its view, incapable of challenge. The judge decided that certain factors justified revisiting the first (2005) decision (although such an application would not be lightly entertained). In the event, he gave judgment for the amounts awarded by the arbitrators on two of IPCO's six heads of claim, less credit for part of the $13m paid by NNPC under the judge's order. He accordingly gave judgment in IPCO's favour enforcing part of the award.

NNPC appealed and IPCO cross-appealed.

7.6 Nigerian National Petroleum Corp v IPCO (Nigeria) Ltd 16 – Court of Appeal (2008)

It was submitted that Mr Justice Tomlinson had no jurisdiction to enforce part of the award in such a way and that he should not have revisited the first judge's (Mr Justice Gross) evaluation of the merits of its challenge to the award which in any event was correct. The principal issue which arose, a matter on which there was no domestic authority, was whether part of a New York Convention arbitration award could be enforced. Sections 100 to 103 of the Arbitration Act 1996 reflected the obligations which the United Kingdom assumed as a signatory to the Convention, to which Nigeria was also a party. NNPC submitted that neither the Convention nor the 1996 Act expressly provided for part enforcement of an award where an award was challenged before the competent authority, in the instant case, the court in Nigeria. On the contrary, it contended that the Convention and Act in such a case allocated jurisdiction between the enforcing court and the home court so that it was for the home court to decide whether there was a viable challenge to the whole or any part of the award and the enforcing court was left with the largely mechanistic task of deciding whether to enforce the award as it stood. It submitted that the enforcing court might only do so 'in terms of the award' as an indivisible whole, and it was not entitled to pick and choose which parts of the award it would enforce because that was for the home court to decide.

The appeal was dismissed. The court held the word 'award' in ss 100 to 103 of the Act should be construed to mean the 'award or part of it'. To be enforceable, it had to be possible to enter judgment 'in terms of the award'. Accordingly, a judge enforcing an award made in a New York Convention arbitration was entitled to order part enforcement of an award. In particular, the court held:

1. The purpose of the Convention was to ensure the effective and speedy enforcement of international arbitration awards. An all or nothing approach to the enforcement of an award was inconsistent with that purpose and unnecessarily technical. There was no objection in principle to enforcement of part of an award, provided that the part to be enforced could be ascertained from the face of the award and judgment could be given in the same terms as those in the award.

2. The purpose behind the Convention was reflected in the language of the 1996 Act, under which enforcement 'shall not be refused' except in the limited circumstances listed in s 103(2) where the court was not required to refuse but 'may' do so. Under

s 103(5), the court might adjourn but only if it considered it 'proper' to do so. The enforcing court's role was not therefore entirely passive or mechanistic. The mere fact that a challenge had been made to the validity of an award in the home court did not prevent the enforcing court from enforcing the award if it considered the award to be manifestly valid.

3. There was nothing which expressly prevented part enforcement in the language of the Convention or the Act.

It followed that the judge had been entitled to order part enforcement of the award in the way that he had. There was no difficulty about entering judgment 'in terms of the award' as the exact correspondence between the award and the judgment showed. The decision of Tomlinson J was affirmed.

In subsequent events, NNPC petitioned the House of Lords for leave to appeal against that decision. In the meantime, NNPC applied without notice for the setting aside order to continue to be stayed on the ground that evidence had recently come to light that the award had been obtained by IPCO's fraud. It submitted, inter alia, that certain documents put before the tribunal had been forged. In the event, the House of Lords refused NNPC leave to appeal the judgment of the Court of Appeal. No order was made on NNPC's without notice application and the application was moved to be heard in the presence of the parties on 16 December 2008. In giving judgement on NNPC's stay application, the judge stayed the setting aside order so as 'to hold the ring' whilst an application was made under s 103(3) of the 1996 Act to set aside that order and/or to order that enforcement of the award be further adjourned. The judge further directed that NNPC should serve detailed particulars of its allegations of fraud and forgery and he set a timetable for the service by both sides of their evidence.

NNPC subsequently served a schedule identifying each and every document relied on in support of an allegation of fraud or forgery. Thereafter, the parties entered into a Consent Order dated 17 June 2009 (the Consent Order) by which it was ordered, inter alia, that: (i) those parts of the order directing payment of parts of the award be set aside; (ii) the decision on enforcement of the award be adjourned; and (iii) there be liberty to apply generally. In June 2011, charges were brought against the original defendants founded on the allegations that a claim in the arbitration had been fraudulently inflated by the use of false and forged documents.

7.7 IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp\(^\text{17}\) - Field J (2014)

In July 2012, IPCO commenced proceedings in England, seeking to enforce the award. It was accepted that IPCO had to satisfy the court that there had been a sufficient change in circumstance since the court had made the adjournment order in May 2008 to warrant a re-exercise of the court's discretion to enforce the award under ss 101 and 103 of the Arbitration Act 1996.

An adjournment granted pursuant to s 103(5) of the 1996 Act was held to be, by its nature, a temporary holding measure. The appropriateness of maintaining such a measure in place would be dependent, crucially, on developments before the supervisory court. A paradigm situation in which the court, exercising its jurisdiction

\(^{17}\) [2014] EWHC 576 (Comm); [2015] 1 All E.R. (Comm) 593; [2014] 1 Lloyd's Rep. 625
under s 103(5), had to reconsider its earlier decision by embarking on a consideration of whether the adjournment of the decision on enforcement remained appropriate was where there had been a significant relevant development in the proceedings before the supervisory court, the pendency of which was the prerequisite to the court having jurisdiction even to consider adjourning the decision to enforce an award.

The court would not lightly entertain a suggestion that the discretion under s 103(5) had to be considered for a second or subsequent time. It would certainly require a significant change in circumstances. However, the court was in those circumstances entitled to consider whether, in the light of such a change, a decision on enforcement should be further adjourned. The need to reconsider the discretion should not ordinarily be regarded as an opportunity to re-run the argument on the strength of the challenge. In the present case, since by entering into the consent order, IPCO had been agreeing that NNPC's pleaded fraud case based on the relevant evidence had amounted to an arguable challenge to the award in Nigeria, a change of circumstance relating to NNPC's fraud case would only be sufficient to re-open the exercise of the court's discretion if it showed that that fraud case was hopeless and/or not bona fide.

Accordingly, the question was not whether there had been a subsequent development which would or might have persuaded the court not to vary the setting aside order in the manner achieved by the consent order. None of IPCO's eight subsequent occurrences demonstrated that NNPC's fraud challenge was hopeless or was not advanced bona fide or was otherwise a reason justifying a re-consideration by the court whether to exercise its discretion to enforce the award in whole or in part. That conclusion meant that the adjournment order, as varied by the consent order, had to remain undisturbed and IPCO's application had to be dismissed. NNPC had established a good prima facie case that was fit to go to trial in Nigeria with the benefit of full discovery and the cross-examination of witnesses.


IPCO appealed against Field J's decision not to enforce an arbitration award made in Nigeria and to further adjourn the enforcement proceedings.

The Court of Appeal held:

1. Insofar as the judge had decided that the court should only consider the reopening of the exercise of its discretion if IPCO showed that the fraud case was hopeless or not made bona fide, he had applied too strict a test. The relevant question was whether there had been a significant change in circumstances since the consent order, which impinged on, or related to, the reason for seeking a variation. While the consent order had been made on the basis that there was a sufficiently arguable challenge to the award to justify a further adjournment, a significant change to the plausibility of the argument for annulment of the award might justify a reconsideration of the exercise of discretion. That would be especially so if taken with other factors such as delay, even if it could not be said that the fraud case was completely hopeless. Although there was a distinction between deciding whether to

reopen the exercise of the court's discretion and, if so, how to exercise it, the considerations were so closely intertwined that it was appropriate to consider the question as a composite one.

2. Considering the strength of the case for challenging the award on the grounds of fraud without reference to other considerations, the judge had not erred in deciding that there were insufficient grounds to exercise discretion afresh in IPCO's favour. There remained a good prima facie case that the award was in part obtained by fraud. However, the situation in respect of the expected delay before any resolution of NNPC's challenge to the award amounted to a change in circumstances which related directly to the reasons for the initial grant of an adjournment, and required reconsideration of the exercise of the court's discretion. The judge's decision that, if exercising discretion afresh, continuance of the adjournment would be ordered on terms that the existing security was maintained "notwithstanding the likely delay", failed to give sufficient weight to the character and extent of the delay, which was such that any challenge to the award was not likely to be resolved for up to a generation. Such a result made a mockery of the aim of the New York Convention to secure the expeditious resolution of commercial disputes and the timely enforcement of awards. The judge had erred in that respect, and it fell to the Court of Appeal to exercise the discretion afresh.

3. There was a need for comity between the courts of friendly foreign states, especially when the court in question was the court of the seat of the arbitration to which the parties had agreed. However, the operation of the Nigerian justice system had not kept pace with the need to give effect to the principles underlying the Convention, leading to an impaired process. The English courts were not to be regarded as some kind of reserve tribunal for determining the validity of awards which should, prima facie, be determined by the court of the seat, but it was necessary to take account of the principles underlying the Convention, to which the UK and Nigeria were both parties, in determining what course to take and, so far as possible, to give effect to them. The appropriate course was to order that IPCO's enforcement application should be adjourned pending determination by the Commercial Court, under s.103(3) of the 1996 Act, as to whether the award should not be enforced in whole or in part because it would be against English public policy to do so. That order was conditional on the provision by NNPC of further security in a form to be agreed. If enforcement was not inconsistent with English public policy, the award would be enforceable in England notwithstanding the challenges to it in Nigeria.

NB: The case is ongoing in England and Nigeria.

8 Post-award remedies in the courts in key jurisdictions in Africa

When looking at the position in each country in Africa, the position is very different. A look at some of the key jurisdictions is helpful when considering the setting aside of domestic awards or the recognition and enforcement of foreign awards. The four countries considered below are Mauritius, Nigeria, Egypt and Kenya.

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19 The Author has advised the Defendant throughout the English proceedings.
8.1 Mauritius

The Award: Challenge

Section 36 of the International Arbitration Act 2008 ("IAA 2008") follows, more or less, the provisions of the UNCITRAL Model Law concerning the form and contents of an award.

Under the IAA 2008, the only recourse against an arbitral award made in an arbitration seated in Mauritius is under s 39, which sets out the grounds upon which the award can be set aside by the Supreme Court:

1. a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which it is subject or failing any indication thereon, under Mauritian law;
2. a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings;
3. the award deals with a dispute not contemplated by the scope of the submission to arbitration; or
4. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, where no such agreement existed, was not in accordance with the IAA 2008.

Under s 39(2)(b) of the IAA 2008, the award may also be set aside by the Supreme Court if it finds that the subject-matter of the dispute was not capable of settlement by arbitration under Mauritian law; the award is in conflict with the public policy of Mauritius; the making of the award was induced or affected by fraud or corruption; or a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced.

A party applying to set aside an award should do so within three months of receipt of the award (s 39(4) of the IAA 2008).

In practice, it is usually difficult to plead public policy in seeking to set aside an award. This is evident from the case of *Cruz City 1 Mauritius Holdings v Unitech Ltd*20.

This case was the first to be heard by the Designated Judges appointed under the IAA 2008 and provided clarity on the meaning of "public policy".

The claimant, Cruz City 1, had applied to the Mauritian Supreme Court under the Act to recognise and enforce two of the three arbitral awards that had been made against the respondents in arbitration proceedings under the rules of the LCIA. The Supreme Court rejected the respondents' arguments which were based on the unconstitutionality of the New York Convention, lack of jurisdiction of the arbitral tribunal and public policy.

On the issue of public policy, the Supreme Court stated that it has the power to exercise "ultimate control over the arbitral process where it is considered to be

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20 *Cruz City 1 Mauritius Holdings v Unitech Ltd* 2014 SCJ 100.
against the public policy of this country. It cannot therefore be said that there are no protective provisions of the institutional integrity of the Supreme Court in such matters."

Further, the Supreme Court stated that it was clear that under art. V(2)(b) of the New York Convention it has the power to decide that the recognition or enforcement of the award would be contrary to the public policy of Mauritius. On this point, the respondents argued that the arbitral tribunal in Cruz committed a serious illegality by awarding damages in breach of s.74 of the Indian Contract Act. The Supreme Court considered that the respondents' argument was misconceived because the question which in fact had to be determined by the Supreme Court was whether the enforcement of the award sought would be against the public policy of Mauritius, and not against the public policy of India.

On the meaning of public policy, the Supreme Court in Cruz referred to the following extract from Redfern and Hunter on International Arbitration21:

"In an attempt at harmonization, the International Law Association's Committee on International Commercial Arbitration has sought to offer definitions of the concepts of 'public policy', 'international public policy', and 'transnational public policy' and recommends that '[t]he finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances', such exceptional circumstances being the violation of international public policy. The Committee defined international public policy as that "part of the public policy of a state which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award". The Supreme Court also considered French materials in its judgment, quoting from Droit de L'arbitrage Interne et International by Christophe Seraglini and Jerome Ortscheidt. The Supreme Court's reference to international material (including English and French sources) in its judgment is perhaps an indication of the international approach that the Mauritius courts will take when considering issues relating to international arbitration."

In essence, the Supreme Court in Cruz stated that any party who wishes to rely on the public policy ground must show with "precision and clarity in what way and to what extent enforcement of the award would have an adverse bearing on a particular international public policy of [Mauritius] and not only must the nature of the flaw in the arbitration proceedings be unambiguously described but a specific public policy must be identified and established by the party relying on it.

There is one possible exception to the general principle that an arbitral award with a Mauritian seat is not generally subject to any appeal or challenge other than that set out in s 39 of the IAA 2008. The First Schedule to the IAA 2008 includes provisions which only apply if the parties so agree by express reference to that Schedule or to that specific provision. Those provisions include an appeal mechanism on Mauritian points of law. If the parties agree that the First Schedule applies, an appeal may be made on a question of Mauritian law, which is clarified to exclude any questions where "the award of the tribunal was not supported by any evidence or any sufficient

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21 Redfern and Hunter on International Arbitration, 5th edition at para. 11.117.
or substantial evidence", or that "the arbitral tribunal drew the incorrect factual
inferences from the relevant primary facts". For the court to intervene, the court
must be satisfied that the determination of the question of Mauritian law concerned
could substantially affect the rights of one or more of the parties.

**Enforcement of an Award and the Role of the Local courts**

Until 1996, the enforcement of any arbitral award in Mauritius was governed by the
Mauritian CPC, based on French law. The enforcement of domestic arbitral awards is
still governed by the Mauritian CPC. Article 1026-8 of the Mauritian CPC provides that
a party wishing to enforce a domestic award is required to seek a writ of execution
(exequatur) from a judge in chambers.

In 1996, Mauritius ratified the New York Convention. This was subject to a
reservation of reciprocity, meaning that Mauritius would only enforce arbitral awards
of other countries that have also ratified the New York Convention.

In 2001, Mauritius incorporated the New York Convention into its domestic law with
the enactment of the Convention Act, which provides that the Supreme Court will
hear any application under the Convention Act with a right of appeal to the UK
Judicial Committee of the Privy Council.

Both foreign arbitral awards and international arbitral awards governed by the IAA
2008 are enforced according to the terms of the Convention Act (as provided in s.40
of the IAA 2008).

In 2013, certain improvements to the arbitration regime were made by way of (i) the
IAA Amending Act; and (ii) the IA Rules in respect of the enforcement of foreign
arbitral awards in Mauritius.

The procedure and grounds for recognition and enforcement of international and
foreign arbitral awards follow the Convention Act exclusively and not in any way the
Mauritian CPC.

Any party who intends to enforce a foreign arbitral award may so do so by way of an
application to the Supreme Court under s.4 of the Convention Act.

Further, the Convention Act (as amended by the IAA Amending Act) abolished the
reciprocity rule that was previously contained in the Mauritian CPC, which has the
effect of permitting the enforcement under the New York Convention of foreign
arbitral awards made in states who are non-signatories to the New York Convention.

Procedural rules governing procedure in the Supreme Court under the IAA 2008 and
the Convention Act are set out in the IA Rules. Rule 15 of the IA Rules provides that
a party applying, by way of an enforcement claim, for recognition and enforcement
of a foreign award shall, at the time of filing the enforcement claim:

1. supply the documents required under art.IV of the New York Convention as
   reproduced in the Convention Act;

2. state the name and the usual or last known place of residence or business of the
   applicant and of the person against whom it is sought to enforce the award.
state either:

(a) that the award has not been complied with; or

(b) the extent to which it has not been complied with at the date of the application; and

4 attach a proposed draft order granting recognition of the award and, where appropriate, authorising the enforcement of the award in the same manner as a judgment of the court and containing a statement of the right by the respondent to make an application to set aside the provisional order and a statement of the restrictions on enforcement provided in paragraph (7) of r.15.

Upon receipt of an enforcement claim, the Chief Justice shall verify compliance with regard to the above-prescribed conditions and issue a provisional order granting recognition of the award or authorising the enforcement of the award in the same manner as a judgment of the Court.

The Supreme Court also has exclusive first instance jurisdiction over all applications for enforcement. Further, s.42(2) of the IAA 2008 provides that the parties have a right of appeal to the UK Judicial Committee of the Privy Council against a decision of the Supreme Court.

Mauritius' pro-arbitration attitude is evident from the Supreme Court's decision in Cruz where it recognised and enforced the order sought by the applicant and declared the foreign award executory in Mauritius. In that respect, it is important to note that the Supreme Court in Cruz rejected the respondents' contentions on the issues of constitutionality, jurisdiction of the arbitral tribunal and public policy.

The process for the enforcement of a foreign arbitral award, where it is resisted, may take between three to six months, depending on the availability of court dates and the availability of the parties, or even longer if substantive challenges are made to the award. In Cruz, in which several substantial legal arguments were made against the enforcement of the award, it took 11 months from the application for enforcement to the final decision of the Supreme Court.

Any party who intends to resist an application for the enforcement and recognition of a foreign award may rely on the grounds set out in art.V of the New York Convention, as reproduced in full in the Schedule (s.2) to the Convention Act.

It should also be noted that the Convention Act, as amended by the IAA Amended Act, repealed the enforceability provisions as provided for under the Reciprocal Enforcement of Judgments Act 1923.

**Are foreign awards readily enforceable in practice?**

There have not been many reported cases on the issue but the new framework of recognition of foreign arbitral awards introduced by the IAA Amendment Act and the decision in Cruz suggest that Mauritius courts will be more inclined towards enforcing arbitral awards and will interpret the provisions of the New York Convention strictly.

In applying and interpreting the IAA 2008 and in developing the law applicable to international arbitration in Mauritius, the courts in Mauritius are allowed to have
recourse to international materials relating to the UNCITRAL Model Law (as amended) and to its interpretation. This special feature of the IAA Act 2008 allows the Mauritian courts to better discharge their functions under the IAA Act 2008.

The IAA Amending Act brought some major changes to the law of international arbitration in Mauritius and, more importantly, changes relating to the enforcement of foreign arbitral awards:

1. the reservation of reciprocity was removed so that any foreign arbitral award could be enforced in Mauritius (regardless of whether the country in which the award had been made had ratified the New York Convention);

2. notwithstanding any other enactment, no limitation or prescription period provided for in the laws of Mauritius shall apply in respect of recognition and enforcement of an arbitral award under the Convention Act;

3. French was made an official language for enforcing awards and so translations from French to English are no longer required before being submitted to the Supreme Court for enforcement;

4. a pool of six Designated Judges was created, designated for a period of five years by the Chief Justice as being the only judges who shall hear applications under the IAA 2008 and the Convention Act. This should promote consistency in case-law and consistency of practice in applications relating to international arbitration matters;

5. procedural changes designed to make enforcement more accessible for international parties, such as a presumption against oral evidence, rapid timetables, hearings listed according to parties' time estimates and on consecutive days (to try and avoid multiple trips to Mauritius) and costs following the event (i.e. the losing party paying the legal costs of the winning party); and

6. application by way of an enforcement claim under r.15 of the IA Rules for an award to be recognised and enforced.

8.2 Nigeria

*Enforcement of an Award and the Role of Nigerian Courts*

An arbitral award is binding and subject to the satisfaction of the procedural requirements. For enforcement an award must, upon application in writing to the court, be enforced by the court. An award may, by leave of the court or a judge, be enforced summarily in the same manner as a judgment or order to the same effect.

The provision of the Act which allows summary enforcement of an award in the same manner as a judgment or order does not affect the existing procedure under the common law. Thus the beneficiary of an award may commence an action upon the award, i.e. an application to enter judgment in terms of the award.

The party relying on an award or applying for its summary enforcement under the ACA 1988 must supply: (a) the duly authenticated original award or duly certified

22 ACA 1988 s.51(1).
23 ACA 1988 s.31(3).
24 *Commerce Assurance Ltd v Alli* (1992) 3 NWLR (Part 232) 710 (SC).
copy thereof; and (b) the original or a duly certified copy of the arbitration agreement.\textsuperscript{25}

For foreign arbitral awards, Nigeria is a party to the New York Convention, and its provisions have been implemented in s 51(1) of the ACA 1988. Therefore, an arbitral award must, irrespective of the country in which it is made, be recognised as binding and will be enforced by the court upon an application by a party.\textsuperscript{26} Foreign awards have been enforced in Nigeria, and Nigerian awards have been enforced in foreign countries on the strength of Nigeria’s ratification of the New York Convention.

\textit{Recourse Against Award - Setting Aside and Request for Refusal of Recognition and Enforcement}

Both domestic and foreign arbitral awards can be challenged in the Nigerian courts. Where a place in Nigeria is the seat of the arbitration, an application may be made to set the award aside, regardless of whether the arbitration is a domestic or international arbitration. Where the seat of the arbitration has been in another country, an application may be made to refuse recognition or enforcement of the award.

The grounds upon which an arbitral award may be set aside are:

(i) that the award contains decisions on matters which are beyond the scope of the submission to arbitration\textsuperscript{27};

(ii) that the arbitral proceedings or the award is characterised by misconduct on the part of the arbitrator; or

(iii) that the arbitral proceedings or award has been improperly procured.\textsuperscript{28}

With regard to a foreign award, an application may be made for refusal of its recognition or enforcement on the following grounds:

(i) incapacity of a party to the arbitration agreement\textsuperscript{29};

(ii) invalidity of the arbitration agreement\textsuperscript{30};

(iii) lack of due process\textsuperscript{31};

(iv) dispute not contemplated by submission to arbitration\textsuperscript{32};

(v) award outside scope of reference;

(vi) composition of arbitral tribunal or arbitral procedure inconsistent with arbitration agreement\textsuperscript{33};

\textsuperscript{25} ACA 1988 ss.31(2) and 51(2).
\textsuperscript{26} See also LSAL 2009 s.56(1).
\textsuperscript{27} ACA 1988 s.29(2).
\textsuperscript{28} ACA 1988 ss.29 and 30; see also \textit{Araka v Ejeagwa} (2000) 15 NWLR (Part 692) 684 (SC).
\textsuperscript{29} ACA 1988 s.52(2)(a)(i).
\textsuperscript{30} ACA 1988 s.48(a)(ii).
\textsuperscript{31} ACA 1988 s.48(a)(iii).
\textsuperscript{32} ACA 1988 s.48(a)(iv).
\textsuperscript{33} ACA 1988 s.48(a)(vi).
(vii) composition of arbitral tribunal or arbitral procedure inconsistent with the ACA 1988;34
(viii) lack of arbitrability under the laws of Nigeria;35
(ix) breach of the public policy of Nigeria.36

Also, s.52(2)(a)(viii) of the ACA 1988 provides that a party may seek refusal of recognition or enforcement of a foreign arbitral award on the ground that the award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which the award was made.

This provision implements art.V(1)(e) of the New York Convention, and is enacted in Nigeria in identical terms as s.103(5) of the English Arbitration Act 1996. The principles that guide the application of s. 103(5) of the English Arbitration Act have been articulated in a number of English judicial decisions involving Nigerian entities, including IPCO v Nigerian National Petroleum Corp37 in which the court stated that:

(i) the provision embodies a pre-disposition to favour enforcement of New York Convention awards;
(ii) the provision is a compromise between (i) the concern that enforcement should not be frustrated merely by the making of an application in the award's country of origin, and (ii) the concern that judicial proceedings that are pending in the award's country of origin should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction;
(iii) the court is unfettered when considering the exercise of its discretion. Ordinarily, relevant considerations will include the following: (a) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (b) whether the application before the court in the country of origin has at least a real (i.e. realistic) prospect of success, and (c) the extent of the delay occasioned by an adjournment and any resulting prejudice; and
(iv) the fact that the arbitration was domestic in the country of origin must generally be likely to enhance the deference due to the court exercising supervisory jurisdiction in that country; comity and common sense are likely to require no less, and pre-empting the decision on a challenge to an award before the court exercising supervisory jurisdiction in the country of origin would be a strong thing in a case where all parties were domiciled or incorporated in that country.

8.3 Egypt

Enforcement of an Award and the Role of Egyptian Courts

The application for enforcement of the arbitral award must be accompanied by the following:

34 ACA 1988 s.48(a)(vii).
35 ACA 1988 ss.48(b)(i) and 52(b)(ii).
(i) the original award of a signed copy of the award;
(ii) a copy of the arbitration agreement;
(iii) an Arabic translation of the award, certified by a competent organism, in case the award was not made in Arabic; and
(iv) a copy of the procès-verbal attesting the deposit of the award pursuant to art.47 of the Law. 38

The filing of an action for annulment does not suspend the enforcement of the arbitral award. Nevertheless, the court may order suspension of the award if the applicant requests it in his application and such request is based upon serious grounds. The court must rule on the request for suspension of the enforcement within 60 days of the date of the first hearing of the request. If suspension is ordered, the court may require the provision of a given security or monetary guarantee. When the court orders a suspension of enforcement, it must rule on the action for annulment within six months of the date when the suspension order was rendered. 39 An application for the enforcement of an arbitral award is not admissible before the expiration of the period during which the action for annulment should be filed in the court registry. 40

The application to obtain leave for enforcement of the arbitral award cannot be granted unless the court is satisfied that:

(i) it does not contradict a judgment previously rendered by the Egyptian courts on the subject-matter in dispute;
(ii) it does not violate the public policy in the Arab Republic of Egypt; and
(iii) it was properly notified to the party against whom it was rendered. 41

The Court of Cassation has held that:

"enforcement requires a request for enforcement to be submitted to the president of the Cairo Court of Appeal. The order shall not be granted except after having ascertained that the arbitral award does not contradict a judgment previously rendered in Egypt, it does not violate the public policy and the completion of a proper notification. In the event that the president of the court objects to the issuance of the order, a challenge shall be submitted to the Court of Appeal." 42

An order refusing to grant enforcement may be subject to a petition lodged, within 30 days from the date thereof, before the competent court referred to in art.9 of Law no.27 of 1994. 43 By contrast, art.58(3) of the Law provides that an order granting leave for enforcement is not subject to appeal. 44 The Supreme Constitutional Court

38 Article 56 of Law no.27 of 1994.
39 Article 57 of Law no.27 of 1994.
40 Article 58(1) of Law no.27 of 1994.
41 Article 58(2) of Law no.27 of 1994.
42 Court of Cessation Challenge no.966 JY 73, hearing of 10 January 2005.
43 Article 58(3) of Law no.27 of 1994.
44 This prohibition was held unconstitutional by the Supreme Constitutional Court of Egypt on the grounds that there should be equality between the rights of the parties (Challenge no.92 of the JY 21, hearing of 6 January 2001.
has held that art.58(3) is unconstitutional on the ground that it violates the principle of the equality between citizens under arts 40 and 68 of the Constitution. In the light of this judgment, both an order granting leave for enforcement and one refusing to grant enforcement are amenable to review by the court.

The enforcement of foreign arbitral awards in Egypt is governed by the New York Convention. The Court of Cassation has held that the "New York Convention (1958) is applicable in Egypt since it has been ratified by the parliament, even if it contradicts the Egyptian Arbitration Law No.27 of 1994. Furthermore, Article (1) and (2) concerning recognition and enforceable of arbitral awards requires any member state to recognize and enforce international arbitral awards unless it falls within the cases stipulated by Article (5) of the said convention or it was not arbitrable or was against public policy."46

Arbitration awards rendered in Egypt have been enforced outside Egypt notwithstanding Egyptian court judgments nullifying the award. In Chromalloy Aeroservices v Arab Republic of Egypt, Chromalloy Aeroservices ("Chromalloy"), an American corporation, entered into a military procurement contract with the Air Force of the Arab Republic of Egypt ("Egypt") to provide parts, maintenance, and repair for helicopters. A dispute arose and Chromalloy commenced arbitration proceedings on the basis of the arbitration clause in the contract. An arbitral tribunal found for Chromalloy. Egypt filed an appeal with the Cairo Court of Appeals, seeking nullification of the award, and filed a motion with the United States District Court for the District of Columbia to adjourn Chromalloy's petition to enforce the award. The Cairo Court of Appeals suspended the award and Egypt filed a motion in the United States District Court to dismiss Chromalloy's petition to enforce the award. Subsequently, the Cairo Court of Appeals issued an order nullifying the award. The District Court granted Chromalloy's petition to enforce the arbitration award and rejected Egypt's motion to dismiss. After satisfying itself that Chromalloy had complied with the formal requirements of Article IV NYC, the District Court noted that under Article V(1)(e) NYC it had discretion to decline to enforce the award that "has ... been set aside ... by a competent authority of the country in which, or under the law of which, that award was made". It further noted that while Article V NYC provides a discretionary standard Article VII(l) NYC requires that "the provisions of the present Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law ... of the country where such award is sought to be relied upon". The District Court thus concluded that it had to consider Chromalloy's claims under the applicable U.S. law and found that the arbitral award was proper as a matter of U.S. law. It further found that the arbitration agreement between Egypt and Chromalloy precluded an appeal to the Egyptian courts. It concluded that the decision of the Cairo Court of Appeal nullifying the award did not have res judicata effect in the United States and that recognizing the decision of the Egyptian court would violate United States public policy in favour of final and binding arbitration of commercial disputes.

**Setting Aside**

Accordingly, since the publication of this decision in the Official Gazette on 18 January 2001, the party against whom the exequatur is issued may challenge it before the competent court within 30 days of the date of the decision.

46 Court of Cessation Challenge no.10350 JY 65, hearing of 1 March 1999.
A party can only have recourse against an arbitral award by means of an action for annulment, and an arbitral award may be annulled only if:

(i) there is no arbitration agreement, if it was void, voidable or its duration had elapsed;

(ii) either party to the arbitration agreement was at the time of the conclusion of the arbitration agreement fully or partially incapacitated according to the law governing its legal capacity;

(iii) either party to the arbitration was unable to present its case as a result of not being given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond its control;

(iv) the arbitral award failed to apply the law agreed upon by the parties to govern the subject matter in dispute;

(v) the composition of the arbitral tribunal or the appointment of the arbitrators was in conflict with this Law or the parties' agreement;

(vi) the arbitral award dealt with matters not falling within the scope of the arbitration agreement or exceeding the limits of this agreement. However, in the case when matters falling within the scope of the arbitration can be separated from the part of the award which contains matters not included within the scope of the arbitration, the nullity affects exclusively the latter parts only;

(vii) the arbitral award itself or the arbitration procedures affecting the award contain a legal violation that causes nullity.

The court adjudicating the action for annulment must ipso jure annul the arbitral award if it is in conflict with the public policy in the Arab Republic of Egypt. A commentator on Egyptian jurisprudence has opined that:

"such invalidity may be a result of the invalidity of the original contract itself in case it violates the public policy, for example a contract for the sale of smuggled goods from customs; or ... invalidity based on the ground that the subject matter of the dispute is against public policy despite the fact that the original contract is valid."

The action for annulment of the arbitral award must be brought within 90 days of the date of the notification of the arbitral award to the party against whom it was made. Parties may agree to exclude nullity actions against an award. An agreement to exclude a nullity action against an award is valid and enforceable only if such agreement was concluded after the award was rendered and notified to the parties. In other words, a waiver of the right of recourse is not valid prior to issuing the award.

The Court of Cassation has held:

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47 Article 52(1) of Law no.27 of 1994.
48 Article 53(1) of Law no.27 of 1994.
49 Article 53(2) of Law no.27 of 1994.
50 Dr Fathy Waly, Arbitration in Domestic and International Commercial Arbitration, p.228.
51 Article 54(1) of Law no.27 of 1994.
"The action for annulment of the arbitral award is not considered an appeal on the award as it does not accommodate the re-consideration of the subject of the dispute."\[52\]

8.4 Kenya

**Enforcement of an Award and the Role of Kenyan Courts**

Domestic arbitration awards can be enforced in accordance with the relevant provisions of the Arbitration Act 1995 ("the Act")\[53\] International arbitration awards shall be recognised as binding and enforced in accordance with the New York Convention\[54\] or any other convention to which Kenya is a party which relates to arbitral awards.\[55\] Apart from the ICSID Convention, Kenya is not party to any other conventions dealing with enforcement of international arbitration awards. For both domestic and international arbitration, the mode of approaching the High Court for enforcement is the same. The Act requires that the High Court be furnished with a duly authenticated original arbitral award or a duly certified copy thereof. In addition, the parties should supply the original arbitration agreement or a certified copy to the High Court. The High Court has the discretion to overlook these requirements if there is a sufficient explanation why these documents cannot be produced. The arbitration award must be provided in English and if the original award is not in English, the Act requires a duly certified translation to be provided to the court.

A court is unlikely to refuse to enforce an award on account of a failure to comply with the foregoing procedural requirements. In the case of *Structural Construction Co Ltd v International Islamic Relief Organisation*\[56\] the applicant failed to furnish the original or certified copy of the arbitration agreement. The court held that the omission was not fatal to the application and a copy of the arbitration agreement that was annexed to the applicant’s supporting affidavit was held to be acceptable for purposes of enforcement of the award.

Section 37 provides the grounds on which the court may refuse to recognise or enforce an arbitral award irrespective of the state of origin of the award. This section mirrors art.5(2) of New York Convention.

The court may refuse to enforce or recognise an arbitral award if, at the request of the party against whom it is invoked (or at the High Court’s own motion for grounds (8) and (9)):

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

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made; or

\[52\] Court of Cassation Challenge no.7307 JY 76, hearing of 8 February 2007.
\[53\] Arbitration Act 1995 s.36(1).
\[55\] Arbitration Act 1995 s.36(2).
\[56\] Structural Construction Co Ltd v International Islamic Relief Organisation, High Court Nairobi, Miscellaneous Case no.596 of 2005.
the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

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

(vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence; or

(viii) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ix) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

If an application for the setting aside (discussed below) or suspension of an arbitral award has been made, the court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.57

The fact that a party has failed to apply to set aside an award within the prescribed time in the Act does not preclude that party from objecting to an application seeking to enforce the award.58

Setting Aside

The only recourse in the Act against a domestic or international arbitral award (seated in Kenya only) is to set aside the award. Section 35(2) of the Act states the grounds for setting aside an arbitral award. The grounds are the same as the grounds for refusing to recognise an arbitral award in s.37 of the Act, save for ground (6) above.

The Act requires that an application for setting aside an arbitral award must be made within three months of receipt of the award.59 The courts strictly apply this time-limit

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57 Arbitration Act 1995 s.37(2).
58 National Oil Corp of Kenya (NOCOK) v Prisko Petroleum Network Ltd, High Court Civil Case no.27 of 2014 [2014] eKLR.
59 Arbitration Act 1995 s.35(3).
to prevent applications made in bad faith as a delaying tactic. This was observed in Nancy Nyamira v Archer Diamond60 where the court held that:

". . . Given the objectives of the Arbitration Act stated above, it is important that Courts enforce the time limits articulated in the Act - otherwise Courts would be used by parties to underwrite the undermining of the Act."

Public policy is a common ground used for setting aside an arbitral award, largely due to the wide interpretation given to this ground. The uncertainty around the meaning of public policy gives the court opportunity to interfere with arbitration proceedings.61

In the Kenyan case of Christ for All Nationals,62 Ringera J held that:

"Although public policy is a most broad concept incapable of precise definition... an award could be set aside under section 35(2Xb)(ii) of the Arbitration Act as being inconsistent with public policy of Kenya if it was shown either it was:

(a) inconsistent with the constitution or any other laws of Kenya; or

(b) inimical to the national interests of Kenya, or

(c) contrary to justice and morality (including corruption, or fraud or an award founded on a contract that is contrary to public morals)."

Arbitrability of claims

As stated above, where the subject-matter of the dispute is not arbitrable in Kenya, this would be a ground for setting aside an arbitral award. The following types of claims are not arbitrable in Kenya: criminal cases; insolvency; bankruptcy; divorce; and tax.

No appeal of a decision to set aside an award

The Court of Appeal in Hinga v Gathara63 stressed the finality of an arbitral award and affirmed that an arbitral award will not be set aside unless it falls within the grounds in s.35 of the Act. In this case, Hinga applied to the High Court to set aside the arbitral award on the grounds that he had not been notified of the delivery of the award. The Court of Appeal held that this was not one of the prescribed grounds for setting aside; further, one cannot apply to set aside an award after three months even if it was for a valid reason. The Court of Appeal noted that: "... in entering an arbitration agreement, parties gave up most of their rights of appeal and challenge to the award in exchange for finality of the award". The Court of Appeal also stressed that even if the applicant had properly applied to the High Court to set aside the

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60 Nancy v Nyamira v Archer Diamond Morgan Ltd, Civil Suit 110 of 2009 [2012] eKLR.
62 Christ For All Nationals v Apollo Insurance Co Ltd [2002J 2 EA 366
63 Anne Mumbi Hinga v Victoria Njoka Gathara Court of Appeal at Nairobi, Civil Appeal no.8 of 2009 [2009] eKLR
award under s.35 of the Act, there was no right to appeal the decision of the High Court. The finality of the decision of the High Court on an application to set aside an award was recently confirmed in the landmark judgment by the Court of Appeal in the *Nyutu v Airtel* case. The Court of Appeal noted that such an appeal could only lie if the parties had agreed to it in their agreement or if the Court of Appeal was satisfied that a point of law of general importance was involved, the determination of which would substantially affect the rights of one or more of the parties.

**Appeal of an Award**

No appeal can lie on an international arbitral award in Kenya.

With regard to domestic arbitral awards, appeals can lie on a question of law if the same has been agreed to be possible between the parties. Such an appeal shall be to the High Court. The High Court can either determine the question of law or confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration.

The decision of the High Court is subject to appeal to the Court of Appeal if: (a) the parties agreed to this prior to the arbitral award; or (b) the Court of Appeal decides to hear the appeal, being of the opinion that a point of law of general importance is involved, the determination of which will substantially affect the rights of one or more of the parties.

The Court of Appeal in *Kenya Shell v Kobil* held that public policy considerations may endure in favour of granting leave to appeal just as they would discourage it. In this case, leave to appeal on a question of law was denied on the ground of public policy. The court stated that:

"We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy ... We do not feel compelled therefore to extend the agony of litigation on account of the issue raised by the Applicant."

**9 Reflections on the Future**

There are certain legal and institutional parameters which have come to be almost universally accepted when evaluating a country’s arbitration regime, namely: the role of the courts (whether their jurisprudence is pro- or anti-arbitration); the status of investment treaties and investment protection legislation; the existence and functioning of arbitral institutions; the quality of the national arbitration legislation; and the scope for and efficacy of the enforcement of domestic and foreign arbitral awards. International arbitration on any continent is an increasingly costly affair. In Africa this cost, both from government and corporate perspectives, is unaffordable. This has led to the efforts by a number of African countries to promote themselves as new centres for arbitration in Africa. These new centres are and will certainly be able to accommodate and handle domestic arbitration cases, but unless they are developed with proper expertise and direction, they will not morph into centres
capable of attracting and handling international disputes. The ingredients for success are a critical mix of know-how, neutrality, financial certainty, hands-off government interest, statutory and court support and marketing.

The Role of the Courts

The relationship between the court and any arbitral tribunal is key. Courts can be asked to intervene in granting interim measures and conservatory relief, assist arbitral tribunals in taking evidence, and they are also instrumental in the recognition and enforcement of arbitral awards. Moreover, in appropriate circumstances, courts can set aside or refuse to register arbitral awards. The courts in Africa are perceived to be very slow, somewhat partial with an overall lack of technical expertise. Unfortunately, there remains a high level of corruption, which evidences itself in lost files, consistently adjourned hearings and tampering with court records. In some countries, government ministries and parastatals continue to receive preferential treatment. Finally, there continues to be a view amongst much of the judiciary that arbitration is an improper intrusion into the court’s jurisdiction.

Improper court intervention in arbitration is being tackled in a number of countries. Mauritius has established special rules of procedure (Supreme Court (International Arbitration) Rules 2013) that judges should follow when dealing with arbitration issues and has designated six judges to deal with nothing but arbitration applications. Kenya enacted the Arbitration (Amendment) Act 2009 empowering the court to perform its assistive role and also restricted its powers to intervene in arbitral proceedings such as the restriction on appealing matters beyond the High Court. Lagos state in Nigeria enacted a new Arbitration Law in 2009 which includes special fast-track rules for arbitration-related litigation.

The case of Kenya Tea Development Agency Ltd v Savings Tea Brokers Ltd\(^{67}\) has reiterated the need to respect arbitration and that courts’ inherent powers do not extend to arbitration. Rather, court intervention is permissible only where the Arbitration Act expressly permits.

In Egypt, courts can assist tribunals through interim or conservatory measures, but cannot invoke inherent powers to intervene in arbitration. Applications to the court against decisions made by a tribunal can be made only after the final award has been issued.

In South Africa, whilst the overall climate towards international arbitration is negative, the courts have insisted on not interfering unnecessarily with arbitral processes. For example, the Supreme Court of Appeal in the case of Telecordia Technologies Inc v Telkom SA Ltd\(^{68}\) upheld the principle that courts’ intervention in international commercial arbitration should be minimal. Also, in Lufuno Mphaphuli & Associates v Andrews\(^{69}\), the court held that the constitutional right to have disputes resolved by way of open public hearing cannot be invoked to justify court interference with any tribunal’s decision, because by agreeing to resolve the dispute through private arbitration the parties had chosen not to exercise that right.

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67 Kenya Tea Development Agency Ltd v Savings Tea Brokers Ltd [2015] eKLR.
68 Telecordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA).
In Nigeria, arbitration unfortunately often becomes a hostage of the legal system through its long court-appellate process and the wide inherent powers which extend to arbitration matters. In the case of *Nigerian National Petroleum Corp v Statoil (Nigeria) Ltd*, the court granted injunctions stopping arbitration proceedings. In what was seen as a new beginning for arbitration in 2013, the Court of Appeal held that the court had no power to invoke its general inherent powers over arbitration. However, in 2014 in the case of *Statoil (Nigeria) Ltd v Federal Inland Revenue Service*, the Court of Appeal reversed the progress by invoking those inherent powers and allowed a third party to challenge an arbitral award.

It is clear that government judicial agencies, no doubt aided by NGOs and the private sector, must increase the training given to the judiciary in terms of ADR. The backlog of court cases in all jurisdictions can only be significantly reduced if ADR is promoted. The development of commercial courts and judges trained in ADR processes is critical.

From an international perspective inter alia, court protection for domestic (particularly government) entities, especially through ex-parte applications, can render any decision from an international arbitral tribunal nugatory.

**The Modernisation of Arbitration Law**

In order for African countries to develop and establish a credible reputation in hosting international arbitrations, all countries must implement and adhere to legislation that reflects international standards and practices. Many arbitration acts are outdated and some are not even based on the UNCITRAL Model Law. For example, the Arbitration Act of South Africa was enacted in 1965 and did not adopt the Model Law. Similarly, in Tanzania the current arbitration legislation was drafted in 1932. It has not been revised since this time and as such is also not in tandem with the Model Law.

In Sub-Saharan Africa, only 9 out of 48 countries have passed legislation based on the UNCITRAL Model Law (Nigeria, Kenya, Uganda, Zimbabwe, Madagascar, Mozambique, Zambia, Mauritius and Rwanda). Kenya and Lagos state in Nigeria have amended their statutes to reflect the 2006 amendments to the Model Law which provides detailed provisions on interim remedies. Some countries, such as Zambia and Zimbabwe, although they adopted the Model Law, made numerous modifications to their applicability to arbitrations conducted within the relevant country. This naturally impinges on a country's ability to claim that it complies with current arbitration standards.

For those countries which have not adopted the Model Law, there is also a conflation between domestic and international arbitration encouraged by arbitration acts that pay lip service to the notable success of the New York Convention. In Mozambique, for example, the Arbitration Act, does not distinguish between an award and a judgment as the word "sentencia" covers both events. The result is a clash in civil code as to whether Mozambique has reciprocity (its New York Convention reservation) with a particular country or not.

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70 *Nigerian National Petroleum Corp v Statoil (Nigeria) Ltd FHC/L/CS/1043/2012.*

Enforcement of Foreign Arbitral Awards

The ability to enforce an arbitral award is an important factor to consider when selecting the seat of arbitration in any commercial or investment agreement. The obligation and process of recognition and enforcement of foreign awards in Africa is subject to many varying sets of legislation. Domestic arbitration law will often contain additional restrictions on recognition and enforcement, and defences such as public policy and capacity, will be specific to the country in question. This has led to different treatment of foreign arbitral awards in different countries.

By way of example and summary of the position in the gateway jurisdictions, Kenya acceded to the New York Convention in 1989 with a reciprocity reservation. Pursuant to art.2(5) and (6) of the Constitution 2010, the New York Convention forms part of the laws of Kenya. Indeed, s.36 of the Arbitration Act 1995 (Cap 49 Laws of Kenya), as amended by the Arbitration (Amendment) Act 2009, expressly provides that:

"[a]n international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards."

It follows, therefore, that a foreign arbitral award made in a non-contracting state may also be recognised and enforced in Kenya, where there is a bilateral or international agreement ratified by Kenya providing to that effect. A notable example is recognition and enforcement of ICSID arbitral awards.

Section 37 of the Arbitration Act (Kenya) 1995 reiterates the grounds for refusal of recognition or enforcement of an arbitral award contained under art.V of the Convention. However, the 2009 Amendment Act adds another ground, namely: where "the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence". Additionally, it is possible for arbitral awards made in a commonwealth or a reciprocating country to be enforced under s.3 of the Foreign Judgment (Reciprocal Enforcement) Act (Cap 43 Laws of Kenya). The grounds for refusal of recognition or enforcement under the latter Act are not entirely the same as those in the Arbitration Act.

South Africa acceded to the New York Convention in 1976. In 1977 it enacted the Recognition and Enforcement of Foreign Arbitral Awards Act. Unfortunately, the 1977 Act adds five more potential defences to enforcement of awards, and the Protection of Businesses Act no.99/1978 allows for additional challenges to enforcement of awards. Under s.1 of the 1978 Act, arbitral awards made outside of South Africa will not be enforced in South Africa without the consent of the Minister of Economic Affairs, where an award relates to a transaction:

"Connected with the mining, production, importation, exportation, refinement, possession use or sale of or ownership to any matter or material, of whatever nature whether within, outside, into or from [South Africa]."

This, in its language, is a very wide exception.
In Nigeria, foreign arbitral awards can be recognised or enforced in a number of ways. First, foreign awards can be enforced under the New York Convention to which it acceded in 1970 with a reciprocity reservation and a limitation to contractual disputes which are considered commercial under the laws of Nigeria. Nigeria domesticated this Convention under s.54 of the Arbitration and Conciliation Act (Nigeria) 1990 (which is attached as the Second Schedule to the Act). Secondly, recognition or enforcement can be achieved under s.51 of the Arbitration and Conciliation Act 1990. This section waives the requirement of reciprocity. Thirdly, awards can be recognised under the Foreign Judgment (Reciprocal Enforcement) Act which also follows a different enforcement process and different defences. Finally, foreign awards may also be enforced by action at law (suit for enforcement of the award by way of court summons). However, this last process will be extremely slow as it shifts the burden of proof to the party seeking enforcement and it has to follow the normal civil court process.

Recognition and enforcement of foreign awards in Egypt is, in theory, efficient. The substantive law applicable is the New York Convention to which Egypt acceded in 1959 without any declaration or reservation. To facilitate this process, the Egyptian courts have consistently held that the process provided under the Egyptian Arbitration Law and the Egyptian Code of Civil Procedure does not apply to international arbitral awards. To aid the process even further, the court ruled in the John Brown Engineering case [2005] that a party seeking enforcement of a foreign arbitral award can use the expedited procedure under art.56 of the Egyptian Arbitration Law. One negative development, however, is the 2008 Decree issued by the Ministry of Justice which empowered it to scrutinise foreign awards before they are lodged for enforcement. This scrutiny focuses largely on the issues of arbitrability and public policy.

Foreign arbitral awards in some African countries may also be recognised and enforced under the Riyadh Arab Agreement for Judicial Cooperation (1983) (Riyadh Convention). African state parties to this Convention are Egypt, Algeria, Djibouti, Mauritania, Morocco, Tunisia, Libya, Somalia and Sudan. The Riyadh Convention has an additional ground for refusal of recognition or enforcement, that is, where any part of an award is "in contradiction with the provisions of Islamic Shari’a, the public order or the rules of conduct of the requested party". For this reason, the Riyadh Convention may not be favourable, where not all disputants subscribe to the Islamic Shari’a.

From the foregoing, it is clear that the process of recognition and enforcement of foreign arbitral awards in Africa is subject to different laws not only among different states but also within a given state. These multiple laws on enforcement are often conflicting. Besides, additional defences to enforcement such as public policy, corruption or national interest are capable of subjective and inconsistent definitions.

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10 Conclusion

So do post-award remedies appropriately ensure conformity of the arbitral process into the rule of law? It really does depend on the mix of parties and their intentions, the courts and their national laws concerned, the tribunal and the arbitration rules.

There are plenty of examples where the remedies ensure conformity. Equally, there are plenty of examples where conformity is difficult or impossible. In the end, it boils down to the parties involved.
### Appendix 1

**Arbitration Centres in Africa**

<table>
<thead>
<tr>
<th>Country</th>
<th>Name</th>
<th>Website (or address if no website)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Algeria</td>
<td>Annaba Mediation and Arbitration Centre, Annaba</td>
<td>8 Place Tarik Ibn Ziad, Annaba, Algeria</td>
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<tr>
<td>Algeria</td>
<td>Mediation and Arbitration Centre of the Algerian Chamber of Commerce and Industry, Alger</td>
<td><a href="http://www.caci.dz/">http://www.caci.dz/</a></td>
</tr>
<tr>
<td>Angola</td>
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<td>Website and address not available</td>
</tr>
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<td>Benin</td>
<td>Arbitration, Mediation and Conciliation Centre of the Chamber of Commerce and Industry of Benin</td>
<td><a href="http://www.cciibenin.org">http://www.cciibenin.org</a></td>
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<td>Akpakpa, Cotonou, Benin</td>
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<td>Democratic</td>
<td>Centre for Arbitration of</td>
<td>733, Av. Colonel Ebeya, Commune de la</td>
</tr>
<tr>
<td>Country</td>
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<td>Website (or address if no website)</td>
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Appendix 2
African Signatories to the New York Convention 1958

For an up-to-date list of signatories, see [http://www.uncitral.org](http://www.uncitral.org).

<table>
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<th>Entry into force</th>
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1. Declarations or other notifications pursuant to art i(3) and art. X(i):

   (a) This State will apply the New York Convention only to recognition and enforcement of awards made in the territory of another contracting state.

   (b) This State will apply the New York Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law.


   - Angola
   - Cape Verde
   - Chad
   - Ethiopia
   - Eritrea
   - Equatorial Guinea
   - Gambia
   - Guinea Bissau
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