
CHAMBERS GLOBAL PRACTICE GUIDES

Enforcement of Judgments 2023

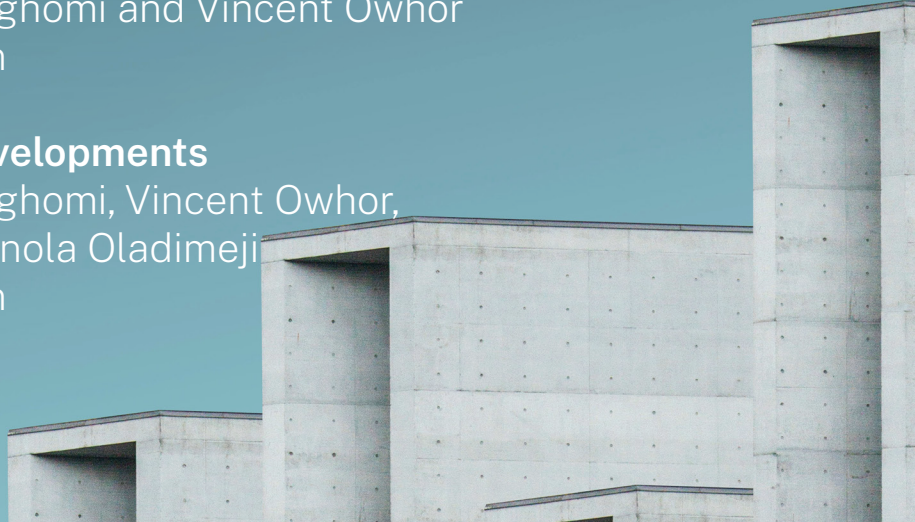
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Nigeria: Law & Practice

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Nigeria: Trends & Developments

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NIGERIA



Law and Practice

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NIGERIA LAW AND PRACTICE

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Streamsowers & Köhn is a reputable full-service law firm with more than 50 skilled lawyers. Its head office is in Lagos, with branch offices in Abuja and Port-Harcourt, Nigeria. The firm specialises in various practice areas, including arbitration, aviation, banking, insurance and intellectual property. Leveraging its intellectual capabilities, managerial expertise, technological proficiency and extensive networks, Streamsowers & Köhn provides valuable legal

services to a diverse clientele. Recent highlights include representing Teleglobe America Inc. in enforcing a foreign judgment obtained from the County Court of Fairfax, Virginia, in which the Court of Appeal recognised the foreign judgment as being registrable in Nigeria, treating it as a judgment of the superior court based on the judgment's satisfaction of the provisions outlined in the Foreign Judgment (Reciprocal Enforcement) Act.

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NIGERIA LAW AND PRACTICE

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1. Identifying Assets in the Jurisdiction

1.1 Options to Identify Another Party's Asset Position

There are no rules or procedures for identifying the asset position of another party in Nigeria, nor for asset disclosure, prior to or at the commencement of an action.

However, in the pendency of a suit, a party can obtain freezing orders to restrain a party from dissipating an asset, dealing with it or removing it from the jurisdiction of the court, having identified such asset. Freezing orders are subject to the discretionary powers of the court, and are usually not granted unless a party shows sufficient reasons that it is necessary to preserve an asset. The principles guiding the decision of a court to grant freezing orders include that:

- there must be a justifiable cause of action against the defendant;
- there must be a real and imminent risk of the defendant removing their assets from the jurisdiction and thereby rendering nugatory any judgment the plaintiff may obtain;
- the applicant must make a full disclosure of all material facts relevant to the application;
- the applicant must give full particulars of the assets within the jurisdiction;
- the balance of convenience must be on the side of the applicant; and
- the applicant must be prepared to give an undertaking as to damages.

Post-judgment, a successful party to a suit can initiate garnishee proceedings for the enforcement of monetary judgments against a judgment debtor, having identified third parties in custody of a judgment debtor's money (garnishees). In such a case, a court may make an order nisi

(initial order) directing garnishees (eg, banks) to disclose any sum of money in their custody that belongs to a judgment debtor, and to show cause why they should not be ordered to pay such sum to the judgment creditor. Upon disclosure by the garnishees, the order nisi is made absolute against the garnishees, mandating them to pay the judgment debtor's funds disclosed as being in their custody to the judgment creditor.

Other options available to obtain information about another party's asset include a search at the Land Registry of the State where the party's immovable property has been identified. Such a search would typically disclose information regarding registered ownership, assignment of interest, encumbrances and discharge of any encumbrance on a property. A party can also conduct a search at the Corporate Affairs Commission (the entity established to regulate the formation and management of companies in Nigeria) to ascertain the shareholding of a party in a company registered in Nigeria, including any charges, mortgages or liens on a company's assets.

2. Domestic Judgments

2.1 Types of Domestic Judgments

A "judgment" is a final decision of the court resolving a dispute between parties and determining their rights and obligations. However, a court may make interim and interlocutory orders before judgment is delivered in a suit. Interim and interlocutory orders are provisional in nature and are usually in the form of injunctions restraining a party from doing an act or mandating a party to act in a particular way.

Interim orders are expected to last for seven or 14 days, depending on the applicable court rules, or as directed by a court pending the hearing of an application that seeks to sustain the injunction until the determination of the suit or the occurrence of a particular event. Interlocutory orders, as they are called, usually take effect until judgment is delivered in a suit.

By nature, judgments could be one or more of the following.

- Monetary judgments are for the payment of a sum of money, referred to as the judgment sum. The party to whom the judgment sum is to be paid is referred to as the judgment creditor, while the party directed to pay the judgment sum is referred to as the judgment debtor. Such judgment takes effect from the date it is pronounced or delivered in court.
- A declaratory judgment is one that confirms or denies a legal right or entitlement, or the position of the law, but contains no specific order to be carried out by the successful party or enforced against the unsuccessful party. Declaratory judgments are discretionary and are granted only in circumstances where the court is convinced by credible evidence. Therefore, declaratory judgments are not given in default of defence or on admissions without the court hearing evidence and being satisfied by such evidence that the plaintiff is entitled to the declaration sought.
- Executory judgments are those which declare the respective rights of the parties and then proceed to order the unsuccessful party to act in a certain way – eg, to refrain from interfering with the plaintiff's rights and pay certain sums or damages for any prior interference. Executory judgments are enforceable if disobeyed.
- Default judgments are usually delivered upon the defendant's failure to follow certain rules of procedure, such as failing to appear in a suit or failing to file a defence to the plaintiff's claims. Such a judgment may be set aside by the court that granted it, upon application by the defendant.
- A summary judgment is one that is given without trial where, upon consideration of the documents filed by the parties at the inception of the suit, the court finds that a defendant has no defence to the claimant's claim. Only claims of liquidated money demand (an ascertained or ascertainable sum of money by simple calculation without any other or further investigation) can be the subject of a summary judgment. Although not preceded by a trial, a summary judgment is given on the merits and can only be set aside on appeal.
- Consent judgments are entered pursuant to the mutual consent of the parties to a suit, who would have filed papers in court containing the terms of settlement of the dispute between them and asked the court to enter said terms as the judgment in the suit. Such judgment serves as a final determination of the dispute between the parties.

2.2 Enforcement of Domestic Judgments

The modes of enforcing domestic judgments in Nigeria, including procedures, are outlined below.

Writ of Attachment and Sale (Writ of Fieri Facias)

A judgment sum becomes immediately due and payable upon a pronouncement in a judgment.

A writ of fieri facias (fi. fa.) is issued for execution against the goods, chattels and immovable property of the judgment debtor for the recovery of any sum of money payable under a judgment

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of a court in case of default or failure of payment. The writ is obtained by completing the praecipe form at the registry of the court.

The writ empowers the sheriff of the court to seize and sell the judgment debtor's property within the jurisdiction to satisfy the judgment debt (except wearing apparel and bedding of the judgment debtor or their family and the tools and implements of their trade, to the value of NGN10). The proceeds from the sale are used to cover sale expenses and offset the judgment debt, with any remaining balance being given to the judgment debtor.

In cases where the court ordered the judgment sum to be paid in instalments, the writ can only be issued after the default in payment of some instalment, and execution may be for the remaining sum and costs then unpaid, or for a part of it as the court may order (either in the judgment or subsequently).

Also, unless they are perishable in nature or the judgment debtor requests so in writing, the seized property cannot be sold until the expiration of a period of at least five days from the date of seizure.

Garnishee Proceedings

This is a method of enforcing a monetary judgment by recovery through third parties (garnishees) who are in custody of the judgment debtor's funds or indebted to the judgment debtor. The judgment creditor steps into the position of the judgment debtor to collect such funds. In most cases, the garnishees are bankers of the judgment debtor.

The judgment debtor files an application ex parte (without notice to the judgment debtor and the garnishees) and, upon being satisfied that

the case is deserving, the court would make an order nisi (initial order) directing the garnishees to disclose the amount standing to the credit of the judgment debtor in their custody and show cause why such sums should not be attached and paid to the judgment creditor in satisfaction of the judgment. The order nisi is served on the garnishees, and each garnishee is expected to file affidavits in court disclosing the judgment debtor's monies in its custody, if any.

Upon disclosure by the garnishees, the order nisi is made absolute against the garnishees, mandating them to pay the judgment debtor's funds disclosed as being in their custody to the judgment creditor, in satisfaction of the judgment sum.

Bankruptcy/Insolvency Proceedings

In this mode of enforcement, where a judgment debtor defaults in payment of the judgment sum, the judgment creditor is at liberty to commence an action against the judgment debtor under bankruptcy proceedings in the case of an individual debtor or winding-up proceedings in the case of a company. However, it must be shown that the judgment debtor is unable to pay its debt in all instances.

Generally, it involves filing a petition and providing evidence of bankruptcy or insolvency. Once the judgment debtor is declared bankrupt or insolvent, their assets are liquidated and the proceeds are distributed among creditors according to their priorities.

Writ of Possession

This is issued for the recovery of premises where the judgment of the court is for the recovery of land, or for the delivery of possession of land, in an action other than an action between landlord

and tenant. An application for a writ of possession is made by filing a praecipe form.

Writ of Sequestration

This is issued upon application to a judge against the property of a person who has had an order or warrant of arrest, commitment or imprisonment made against them but cannot be found, or where a person is taken and detained in custody without obeying the judgment of a court. An application for a writ of sequestration is made to a judge in the prescribed form.

Writ of Delivery

A writ of delivery is issued for the enforcement of a judgment for the delivery of goods. An application for a writ of delivery is made by filing a praecipe form.

Judgment Summons

This is issued by the court upon application of a judgment creditor where a judgment debtor defaults on payment of a judgment sum or any instalment. The judgment debtor is summoned to appear before the court for examination on oath as to their means. An investigation into the judgment debtor's means is conducted, and the court may make an interim order for the protection of any property applicable or available in discharge of the judgment debt. Upon the conclusion of investigations, the court may make one or more of the following orders:

- an order for the commitment of the judgment debtor to prison;
- an order for the attachment and sale of the judgment debtor's property;
- an order for the payment of money by instalments or otherwise by the judgment debtor;
- or
- an order for the discharge of the judgment debtor from prison.

2.3 Costs and Time Taken to Enforce Domestic Judgments

Compliance with a judgment is expected without the need for a demand or enforcement, as it becomes effective upon delivery unless the court specifies otherwise.

Enforcing a judgment in Nigeria entails costs and time, which vary depending on the specific circumstances of each case. The duration of the enforcement process is influenced by several factors, such as:

- the type of judgment (monetary or non-monetary);
- the chosen enforcement procedure employed;
- the amount of the judgment debt;
- the availability and knowledge of the judgment debtor's assets;
- the court from which the judgment originates;
- the specified timeframe for enforcement if any was stated in the judgment;
- any actions taken by the judgment debtor (such as applying for a stay of execution); and
- the possibility of an appeal against the judgment or the order enforcing it.

In terms of costs, there are no fixed fees for enforcing a judgment. Typically, the costs include filing fees and expenses related to executing the judgment.

For monetary judgments, garnishee proceedings are often the most efficient option. This procedure allows the judgment creditor to recover the judgment sum by attaching the judgment debtor's funds in the hands of a third party (the garnishee).

Another effective option – particularly when the judgment creditor possesses knowledge or cer-

tainty regarding the assets of the judgment debtor or within the court's jurisdiction – is the use of a writ of fi. fa. which involves seizing and selling the judgment debtor's properties and chattels to satisfy the judgment debt using the proceeds from the sale.

When a writ of fi. fa. is issued, it maintains a life span of one year from the day it was issued. Where the property attached is movable, it cannot be sold until five days after the day it was seized from the judgment debtor. However, such movable goods may be sold before the five days expire if they are of a perishable nature or if the judgment debtor makes a request to the court by written application.

For the enforcement of judgments against companies, a petition for winding-up is often effective where the company is unable to pay its debt.

Overall, the choice of the most efficient enforcement option depends on factors such as the type of judgment, the availability of assets, and the specific circumstances of the case.

2.4 Post-judgment Procedures for Determining Defendants' Assets

There are no specific post-judgment procedures for determining what assets the defendant holds and/or where they are located. However, the judgment debtor's assets may be discovered through searches conducted at public asset registries like the Corporate Affairs Commission, Lands Registries of the various states, the Federal Lands Registry and the National Collateral Registry.

In certain circumstances, the High Courts can also grant orders like freezing orders, asset disclosure orders or such other orders by which a party can lawfully identify another party's assets

in Nigeria. The power of the courts to do this is derived from Section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

The courts may also grant garnishee orders attaching funds or debts due from a third party to the judgment debtor and the use of the amount of that debt in liquidating the judgment debt. In granting garnishee orders, the courts direct the third party to disclose the amount standing to the credit of the judgment debtor in such third party's custody and control.

Finally, a party can find out what assets the judgment debtor owns through the evidence of the judgment debtor during trial (evidence on oath).

2.5 Challenging Enforcement of Domestic Judgments

An unsuccessful party may challenge the enforcement of domestic judgments by:

- applying to the court where the judgment was delivered (trial court) for it to be set aside if the judgment was not given on the merits – ie, where the judgment did not determine the substantive rights of the parties but was based on matters of practice and procedure; or
- appealing the judgment and obtaining an order for the execution of the judgment to be halted pending the determination of an appeal against the judgment, in which case the judgment cannot be enforced pending the appeal.

Application to the Trial Court to Set Aside its Judgment

An application to set aside a judgment filed at the trial court may be made on the following grounds:

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- when a judgment is obtained by fraud or deceit;
- when the judgment is a nullity;
- when it is obvious the court was misled into giving judgment under a mistaken belief that the parties consented to it; or
- where the originating processes in the suit giving rise to the judgment were not served on the defendant.

In granting such application, the court would generally consider:

- whether it can be shown that the judgment was obtained by fraud of one of the parties;
- the reasons for the applicant's failure to appear at the hearing of the suit;
- whether the party in whose favour the judgment was given would be prejudiced or embarrassed if an order of re-hearing of the suit were to be made, thus rendering such a course inequitable;
- whether there has been undue delay in making the application;
- whether the applicant's case is manifestly unsupportable; and
- whether the applicant's conduct throughout the proceedings had been such as to make their application worthy of sympathetic consideration.

Appealing the Judgment and Obtaining a Stay of Execution

On appeal, a judgment debtor may apply for a stay of execution of the judgment being appealed – ie, an order suspending the execution/enforcement of the judgment during the period of the appeal. In granting such an application, the court would generally consider special or exceptional factors, including:

- the chances of the applicant on appeal;

- the nature of the subject matter in dispute;
- whether the applicant will not be able to reap the benefit of the judgment on appeal if the appeal succeeds;
- where the judgment is in respect of money and costs, whether there is a reasonable probability of recovering these back from the respondent where the judgment has been enforced and the appeal succeeds; and
- where the effect will be to deprive the appellant of the means of prosecuting their appeal.

2.6 Unenforceable Domestic Judgments

Judgments that are unenforceable in Nigeria include the following.

- Declaratory judgments – these are not enforceable as they merely proclaim the existence of a right and do not contain any order that may be enforced. They may, however, be the ground for subsequent proceedings for enforcement where the rights declared have been violated.
- Judgments that are the subject of a valid and pending appeal and an order of a stay of execution.

On appeal, a judgment debtor may apply for and obtain an order of stay of execution of the judgment being appealed pending the determination of the appeal. A stay of execution is an order of the court suspending the execution of a judgment or other court order. Once a stay of execution is granted, the judgment becomes unenforceable until the appeal is determined. An appeal does not on its own operate as a stay of execution, hence the requirement for an application for stay of execution.

2.7 Register of Domestic Judgments

There is no central register of all judgments delivered in Nigerian courts. However, the registrar or

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any other proper officer of a court is required to keep a book called “The Nigeria Register of Judgment”.

Where a judgment delivered in one state is to be enforced in another state in Nigeria, a judgment creditor must apply to the registrar of the court that delivered the judgment for a certificate of judgment to be issued. The judgment creditor is then required to take said certificate to the registrar of any court of similar jurisdiction in the state where the judgment is to be enforced, where the registrar of that court would record the following particulars in The Nigeria Register of Judgment:

- the name of the court;
- the index number of the registration;
- the date of registration;
- the full title and suit number;
- an abstract of the judgment;
- the date of the judgment;
- the full title of the court issuing the certificate;
- the name and address of the party to whom payment is to be made or in whose favour the judgment is given or made;
- the name and address of the party ordered to pay money, or to do or not do any act;
- remarks; and
- the signature of the registering officer.

From the date of registration, the certificate becomes a record of the court in which it is registered and shall have the same force and effect in all respects as a judgment of that court, such that proceedings may be taken upon the certificate as if the judgment had been a judgment of that court.

The registrar of the court where the judgment is to be enforced is required to give written notification under the seal of the court, to the registrar

or another proper officer of the court, where the judgment was given when:

- a certificate of judgment is registered in any court;
- any process is issued in any court upon such certificate; or
- satisfaction of the judgment either in whole or in part is entered upon any such certificate.

Once notified of the satisfaction of the judgment, the registrar of the court where the judgment was given is required to register the satisfaction and notify the registrar of the court where a certificate of the judgment has been registered of said satisfaction. Upon such notification, that registrar must also register the satisfaction of the judgment on the certificate.

Nigerian laws are silent on how and when the name of a judgment debtor can be removed from the register after the satisfaction of a judgment sum. However, as a matter of evidence, such satisfaction would be recognised by courts upon proof thereof.

3. Foreign Judgments

3.1 Legal Issues Concerning Enforcement of Foreign Judgments

Nigeria is not a signatory or party to any treaty or convention on the recognition and enforcement of foreign judgments; therefore, no international treaties/conventions are relevant in this regard.

For the enforcement of a foreign judgment in Nigeria, the following laws are relevant:

- The Reciprocal Enforcement of Judgments Ordinance, 1922, Cap 175 Laws of the

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- Federation of Nigeria and Lagos, 1958 (the Ordinance);
- the Foreign Judgments (Reciprocal Enforcement) Act, 1990, Cap F35, Law of the Federation of Nigeria 2004 (the 2004 Act);
- the Sheriff and Civil Process Act 1945, Cap S6, Law of Federation of Nigeria 2004;
- the Judgment Enforcement Rules under Section 94 of the Sheriffs and Civil Processes Act; and
- the various civil procedure rules of the superior courts before which registration and enforcement are sought.

The 2004 Act stipulates that a foreign judgment must first be registered in Nigeria in order to be enforced. The judgment must be final and conclusive (ie, it should not be the subject of an appeal nor pending before any appeal court in the issuing country). The judgment must also be obtained from a court that has the jurisdiction to adjudicate over the matter. A foreign judgment that does not conform with the requirements of the 2004 Act cannot be registered and enforced in Nigeria.

The 2004 Act empowers the Nigerian Minister of Justice (the Minister) to make an order extending its application to any foreign country with substantial reciprocity of treatment on enforcement of judgments made by a superior court in Nigeria. The 2004 Act applies to countries with which the Minister has made such an order of extension.

Furthermore, the 2004 Act allows the registration of foreign judgments prior to the commencement of an order of the Minister extending the applicability of the 2004 Act to a country, within 12 months from the date of the judgment or within any longer period permitted by a superior court in Nigeria.

The Minister is yet to make an order of extension to other countries outside of the commonwealth as provided under the 2004 Act.

3.2 Variations in Approach to Enforcement of Foreign Judgments

In Nigeria, the approach to the enforcement of foreign judgments does not vary by the type of Judgment. By the provision of the 2004 Act and the Ordinance, the approach is the same: every foreign judgment must first be registered in Nigeria before it can be enforced in Nigeria. It is important to state that the registration should be done in the court that has the jurisdiction to enter the subject matter of the judgment; therefore, it should be registered in the State High Court, the Federal High Court or the High Court of the Federal Capital Territory in Nigeria.

3.3 Categories of Foreign Judgments Not Enforced

The categories of judgment that will not be registered in Nigeria are stated in the Ordinance and the 2004 Act.

Under the Ordinance, a foreign judgment is not enforceable if:

- the original court acted without jurisdiction;
- the judgment debtor was not subject to the jurisdiction of the original court – ie, the judgment debtor did not reside nor carry on business within the jurisdiction of the original court and did not submit to that court’s jurisdiction;
- notwithstanding the judgment debtor’s residence or business within the court’s jurisdiction, the judgment debtor was not served with the court process and did not appear in the proceedings;
- the judgment was obtained by fraud;

- there is an appeal pending on the judgment, or the judgment debtor satisfies the court that it intends to appeal against the judgment; or
- the judgment was in respect of a cause of action that for reasons of public policy could not have been entertained by the registering court.

Under the 2004 Act, a foreign judgment is not enforceable if:

- it is an interim or an interlocutory order;
- it is obtained from an inferior court in the foreign country;
- it is not in respect of a monetary sum or, where in respect of a monetary sum, the sum is payable in respect of taxes, or other charges of a similar nature; or
- at the date of the application for registration and enforcement, it had been wholly satisfied or could not have been enforced by execution in the country of the original court.

3.4 Process of Enforcing Foreign Judgments

To register a foreign judgment in Nigeria, the judgment creditor files a motion *ex parte* (an application without notice to the other party) seeking leave of the court (the State High Court or Federal High Court) to register the judgment.

The court can enforce a successfully registered judgment in compliance with the provisions of the Sheriffs and Civil Processes Act in the same way as a domestic judgment. The process of such enforcement includes the following.

Garnishee Proceedings

This process entails attaching any money that belongs to the judgment debtor but is in the custody of a third person, known as the “garnishee”. The judgment creditor files an application for the

grant of garnishee order nisi. The application filed by the judgment creditor is served on the garnishees, along with the enrolment of the order nisi of the court to show cause why the money to the credit of the judgment debtor should not be attached and paid to the judgment creditor. Where the procedure is successful, the court will make the order nisi absolute for the satisfaction of the foreign judgment.

Writ of Fi. Fa.

A writ of *fi. fa.* is issued for execution against the goods, chattels and immovable property of the judgment debtor for the recovery of any sum of money payable under a judgment of a court in the case of default or failure of payment. The writ is obtained by completing the praecipe form at the registry of the court. This is applicable where the amount obtained from the garnishee proceedings is insufficient to pay off the judgment sum.

3.5 Costs and Time Taken to Enforce Foreign Judgments

The costs involved in the enforcement of a foreign judgment include the professional fees of the legal practitioner that will represent the judgment creditor, the monetary sum of the foreign judgment that is expected to be registered and the statutory cost of the court where the foreign judgment will be registered. Under the provisions of the Sheriff and Civil Process Act, the costs of the garnishee proceedings, together with the debt owed, are directed by statute to be paid by the garnishee within a time prescribed by the court.

When a writ of *fi. fa.* is issued, it maintains a life span of one year from the day it was issued. Where the property attached is movable, it cannot be sold until five days after the day it was seized from the judgment debtor. However, mov-

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able goods may be sold before the five days expire if they are of a perishable nature or if the judgment debtor makes a request to the court by written application.

In general, a writ of *fi. fa.* and an order for garnishee proceedings are most appropriate where the foreign judgment to be enforced is a monetary sum.

It usually takes between six months and one year to enforce a foreign judgment. Under the provisions of the 2004 Act, a foreign judgment can be enforced at any time within six years from the date it was delivered. This estimated period can extend where enforcement is being challenged.

3.6 Challenging Enforcement of Foreign Judgments

The following legislation governs the registration and enforcement of foreign judgments in Nigeria:

- the Reciprocal Enforcement of Judgments Ordinance, 1922, Cap 175 Laws of the Federation of Nigeria and Lagos, 1958 (the Ordinance); and
- the Foreign Judgments (Reciprocal Enforcement) Act, 1990, Cap F35, Law of the Federation of Nigeria 2004 (the 2004 Act).

The Ordinance

The registration and enforcement of a foreign judgment may be challenged under the Ordinance on the following grounds:

- the original court acted without jurisdiction:
 - (a) the judgment debtor was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, and did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or

- (b) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court, and did not appear notwithstanding that they were ordinarily resident or were carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;

- the judgment was obtained by fraud;
- the judgment debtor satisfies the registering court either that an appeal is pending or that they are entitled and intend to appeal against the judgment; or
- the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

The 2004 Act

Under the 2004 Act, a judgment debtor may challenge the registration and enforcement of a foreign judgment in Nigeria on the grounds that:

- the judgment sought to be registered and enforced is an interim or interlocutory order;
- the judgment was obtained from an inferior court in the foreign country;
- the judgment is not in respect of a monetary sum or, where it is in respect of a monetary sum, the sum is payable in respect of taxes or other charges of a similar nature; or
- at the date of the application the judgment had been wholly satisfied, or the judgment could not have been enforced by execution in the country of the original court.

4. Arbitral Awards

4.1 Legal Issues Concerning Enforcement of Arbitral Awards

The legal issues relating to enforcement of an arbitral award are as follows.

Arbitrability of the Subject Matter

The arbitrability of the subject matter of the dispute is one of the key considerations by the courts in Nigeria in the enforcement of arbitral awards.

Invalidity of the Arbitration Agreement

Where the arbitration agreement is not valid under the law indicated by the parties in their contract or for whatever reason under the law of the country where the award was made, the arbitral award will not be enforceable.

Tax Disputes

Tax disputes are considered not arbitrable in Nigeria. In *Esso Exploration and Production (Nig.) Ltd v FIRS* [2017] LPELR-51618 (CA), the Court of Appeal decided that tax disputes are not arbitrable in Nigeria because tax is a matter regulated by statute and is a matter of public interest that cannot be settled by arbitration.

Public Policy Considerations

Regard would also be had to whether the contract sought to be enforced is contrary to public policy. For instance, if the subject matter of the contract is illegal, the Nigerian courts would refuse to enforce the award on the basis that it is contrary to the public policy of Nigeria to enforce illegal contracts.

Time Limitation

Section 8(1)(d) of the Limitation Law of Lagos State (with similar provisions in the Limitation Laws of other states in Nigeria) provides that

every application to enforce an arbitral award must be brought within six years from the date the award was given. The implication is that a party cannot successfully bring an action for the enforcement of an arbitral award outside the statutory six-year limit.

Judicial Interference: Merit Reviews of Arbitral Awards and Delays

Nigeria recently enacted the Arbitration and Mediation Act, 2023 (AMA), repealing the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria 2004 (ACA). The Act clearly seeks to eliminate the frequent interference by the courts in arbitral proceedings and awards. Under the ACA and the Act, the national courts are precluded from interfering in arbitral proceedings and awards, except under stringent and limited grounds provided in the Act itself. Equally, the court cannot consider the merit of the arbitral award as the court is not sitting in appellate jurisdiction over the arbitral proceedings and award. Under the ACA, practitioners had frequently used the omnibus grounds of “misconduct of the arbitrator” or “an error on the face of the award” to ask the court to set aside awards. This omnibus grounds then became an unruly horse and weaponised delays to the enforcement of awards in the national courts.

However, this bar to arbitration and the enforcement of awards in Nigeria has now been decisively dealt with under the new Act, Section 55(2) of which expressly prevents a court from setting aside an arbitral award on “the ground of an error on the face of the award”. This essentially prevents the court from overturning an award on the basis that it believes the tribunal incorrectly applied the law. Section 55(5) of the Act introduces a more onerous test for an award to be set aside, which is likely to result in fewer successful challenges to arbitral awards in courts. It is no

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longer sufficient for a party simply to show that one of the grounds for setting aside an award is present: it must also show that the ground “has caused or will cause substantial injustice to the applicant”. The Act, therefore, adopts a far more robust approach to the setting aside of arbitral awards, reducing the ability for the courts to intervene in, and potentially set aside, arbitral awards, thereby enhancing the finality and preservation of the awards.

According to Section 56(1) of the AMA, parties may stipulate in their arbitration agreement that an application to review an arbitral award be made to an Arbitration Review Tribunal (ART). Like the court, the ART is unable to review an award on the merits and can only set aside an arbitral award on specified grounds. The AMA empowers the court to review the decision of the ART. The court may uphold the reviewed decision of the ART or set it aside for the status quo to revert to the original award. The degree of judicial intervention is limited by subsection 9, which provides that the court may only set aside an award made by the ART where the subject matter in dispute is not capable of settlement by arbitration under the laws of Nigeria, or where the award is contrary to public policy.

Section 56(7) of the AMA provides that an application to the ART does not preclude an application to the court; an application for review by the court or the ART must be made within three months from the date the award was received. Thus, to fall within the limitation period, an aggrieved party may simultaneously institute an action in court for the enforcement of the award without prejudice to the proceedings at the ART. The proceedings may be stayed pending the determination by the ART, and may be resuscitated thereafter.

4.2 Variations in Approach to Enforcement of Arbitral Awards

In Nigeria, the approach to enforcement is the same for different types of arbitral awards. The few exceptions are awards given by the International Centre for Settlement of Investment Disputes (ICSID) and awards with certain subject matters. Section 1(1) of the ICSID (Enforcement of Awards) Act Cap I20, Laws of the Federation of Nigeria, 2004 provides that, if it is expedient to enforce an award made by the ICSID in Nigeria, a copy of the award duly certified by the Secretary-General of the Centre shall be filed directly at the Supreme Court of Nigeria by the party seeking its recognition for enforcement in Nigeria.

Except for ICSID awards, other arbitral awards can be enforced at the Federal High Court, the High Court of a state and the High Court of the Federal Capital Territory, Abuja, unless the parties agree otherwise.

The Act is silent on the subject matter jurisdiction of the court in enforcement proceedings that can be filed before a superior court as provided in the Act. A superior court is defined in the Act as the High Court of a State or the Federal capital Territory, Abuja, or the Federal High Court. However, recent trends and decisions of the court lean toward registration and enforcement in the court whose jurisdiction covers the subject matter of the arbitral award sought to be enforced. Where the subject matter of the award sought to be registered is under the exclusive jurisdiction of the Federal High Court, as provided by Section 251(1) of the 1999 Constitution, the Federal High Court would be the appropriate court to commence the enforcement proceedings.

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4.3 Categories of Arbitral Awards Not Enforced

Arbitral awards are not enforceable in the following instances:

- if the party against whom an award is sought to be enforced furnishes proof of the presence of vitiating elements, such as:
 - (a) the arbitration agreement was invalid by reason of the incapacity of one of the parties thereto, or was not valid under the governing law of the jurisdiction of either the contract or the seat of arbitration;
 - (b) the award deals with a dispute that does not fall within the terms of the submission to arbitration;
 - (c) the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties; or
 - (d) the award has been set aside by a court at the seat of arbitration; or
- if the court finds that the subject matter of the dispute is not arbitrable under Nigerian law, or that enforcement of the award would be against public policy, as discussed in **4.1 Legal Issues Concerning Enforcement of Arbitral Awards**.

The application for the enforcement of arbitral awards must be filed within six years of the date of delivery of the award.

4.4 Process of Enforcing Arbitral Awards Enforcement of Domestic Arbitral Awards

In Nigeria, the available means of enforcing an arbitral award depend on the laws of the place where the award is to be enforced.

The AMA provides frameworks for the enforcing of arbitral awards in Nigeria, and the Lagos Arbitration Law 2011 provides for modes of enforcement of arbitral awards and interim measures.

The appropriate procedure for enforcing a domestic award depends on the type of arbitral proceedings and the parties involved.

Order 43 Rule 1 of the High Court of Lagos State Civil Procedure Rules 2019 states that all applications shall be by motion, while Order 43 Rule 3(1) states that every motion shall be on notice, unless otherwise provided or permitted by any law or rules. Therefore, an application for the enforcement of arbitral awards thereunder would be by a motion on notice.

Order 52 Rule 16(1) of the Federal High Court (Civil Procedure) Rules 2019 provides that an application for enforcement of an award can be made through a motion ex parte (without notice to the other party). A widely held view is that the courts ought to order the application to be brought on notice to accord the other party the right to a fair hearing.

Furthermore, parties seeking to enforce an award must provide the arbitration agreement or, in the alternative, a certified copy of the arbitration agreement and the original arbitral award or a certified copy of the initial arbitral award, as provided under Section 32(2) of the AMA. These documents would be attached to an affidavit in support of the application for the enforcement of arbitral awards.

Enforcement of Foreign Arbitral Awards

Under the provisions of Section 91(5) of the AMA, an arbitration is international if:

- the parties to an arbitration agreement have their places of business in different countries at the time of the conclusion of that agreement;
- the seat of the arbitration, if determined under the arbitration agreement, or any place where

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a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is situated outside the state in which the parties have their place of business; or

- the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

The award emanating from an international arbitration can be enforced by any of the following procedures.

- Registration of the award under the Foreign Judgments (Reciprocal Enforcement) Act, 1990, Cap 1525, Law of the Federation of Nigeria 2004, Section 2 of which defines foreign judgments as arbitral awards. The award will be registered with the Nigerian court that has jurisdiction to hear the dispute, and it will be enforced as the judgment of the court.
- By instituting an action to enforce the award – here, a plaintiff will be required to prove to the court that there is an arbitration agreement, an arbitration award and an absence of irregularity in the conduct of the arbitration.
- Enforcement under the AMA, which provides that an arbitral award is binding and enforceable in Nigeria regardless of the country in which it was made. The party seeking to enforce the award shall apply to the court by a motion on notice supported by an affidavit, the duly authenticated original award or a duly certified true copy thereof; the original arbitration agreement or a duly authorised true copy thereof; and where the award or arbitration agreement is not made in the English language, a duly authorised translation thereof into the English language.
- Enforcement under the New York (Enforcement and Recognition of Arbitral Awards)

Convention 1958, which is ratified in Nigeria. The AMA states that awards from an international arbitration are enforceable in Nigeria under the New York convention, provided the country it originated from will accord Nigeria similar recognition.

- Enforcement of awards made by the ICSID are enforceable by registering them at the Supreme Court under Section 1(1) of the ICSID Act.

4.5 Costs and Time Taken to Enforce Arbitral Awards

There are no specific/definite costs outlined or expected for the enforcement of an arbitral award. However, processing the enforcement of arbitral awards involves the payment of administrative fees, such as filing fees paid to the court and professional fees paid to counsel (which varies) for representation in court.

The law provides for a limitation period of six years within which an application for the enforcement of an arbitral award must be brought. There is no ambiguity in the timeframe within which an action to enforce an arbitral award must be brought. A proceeding to enforce an arbitral award typically lasts between 12 and 18 months. However, it is usual for unsuccessful parties to appeal the decision; the appeal process can take an indeterminable period, typically another two or three years.

4.6 Challenging Enforcement of Arbitral Awards

An arbitral award is regarded as a final judgment and, as such, courts are enjoined to, as much as possible, uphold or affirm and enforce arbitral awards when approached. However, the law recognises instances where the enforcement of an arbitral award may be challenged. Section 58(1) of the AMA provides limited grounds for

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the challenge of the enforcement of an arbitral award, as follows.

- A party to the arbitration is under a legal incapacity: the AMA provides that a person is under a legal incapacity if they are under the age of 18, or are of unsound mind. If it can be proven that a party was under any of these conditions at the time of entering into the arbitration agreement, then the award may be challenged on those grounds.
- Invalidity of the arbitration agreement: a party may challenge the enforcement of an arbitral award if the party furnishes proof that the arbitration agreement is not valid under the law to which the parties have indicated it should be applied, or that the arbitration agreement is not valid under the law of the country where the award was made.
- Lack of service or breach of fair hearing: a party may seek to challenge the enforcement of an award on the ground that proper notice of the appointment of an arbitrator or of an arbitral proceeding was not given, or that the party was otherwise not able to present its case.
- Jurisdictional grounds: a party may challenge the enforcement of an arbitral award on the ground that the arbitrator had no jurisdiction as there is no valid and binding arbitration agreement or, if there was jurisdiction, the arbitrator exceeded that jurisdiction in the manner in which the decision was rendered. However, if the decision of the point not submitted to the jurisdiction of the arbitrator can be separated from the parts of the award submitted to the arbitrator, only the part of the award that contains decisions on the point not submitted may be set aside.
- Context of the award: a party can also argue that the award was not made in accordance with the agreed rules of the arbitration, or that the composition of the arbitral tribunal was not in accordance with the agreement of the parties.
- The matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria: awards that determine matters that are not arbitrable under Nigerian law are not enforceable. Matters that are beyond the scope of arbitration in Nigeria include criminal matters, taxation matters, disputes involving the interpretation of the constitution, illegal contracts and matrimonial causes.
- Public policy reasons: in Nigeria, public policy is a ground for challenging an arbitral award. However, what constitutes public policy and when an award violates public policy are not clearly defined in the AMA. In practice, Nigerian courts have been reluctant to interfere with arbitral awards on the grounds of public policy, preferring to narrowly construe this ground. However, in recent decisions of the Court of Appeal, arbitral awards that offend specific provisions of statutes have been set aside on the grounds of public policy.
- Status of the award: a party may challenge the enforcement of an 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 the award was made. It is pertinent to note that the AMA allows a mechanism known as the Award Review Tribunal (ART). Under Section 56(6) of the AMA, an ART constituted in the same way as the tribunal in the original arbitration can be convened and, within 60 days, can either uphold or set aside an arbitral award. This provision is only applicable if parties expressly provide in their arbitration agreement that awards can be reviewed by an ART. It is noteworthy that enforcement proceedings must be stayed during an ART review, so any enforcement proceedings may

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be challenged on the ground that the award is undergoing review by the ART.

- **Issues of limitation:** the challenging party can also argue that enforcement of the award is barred by limitation. This means that the time for bringing an action to enforce the award has lapsed.

A party may appeal to a higher court, in this case the Court of Appeal, against a decision recognising and enforcing an arbitral award. The appeal process is distinct from the process of recognising and enforcing the arbitral award at the High Court before which the judgment is first sought to be recognised and enforced. Where the High Court has made a final order recognising the award, the judgment debtor may thereafter appeal to the Court of Appeal seeking to set aside the order of the High Court.

Trends and Developments

Contributed by:

Omono Blessing Omaghomi, Vincent Owhor,
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Streamsowers & Köhn

Streamsowers & Köhn is a reputable full-service law firm with more than 50 skilled lawyers. Its head office is in Lagos, with branch offices in Abuja and Port-Harcourt, Nigeria. The firm specialises in various practice areas, including arbitration, aviation, banking, insurance and intellectual property. Leveraging its intellectual capabilities, managerial expertise, technological proficiency and extensive networks, Streamsowers & Köhn provides valuable legal

services to a diverse clientele. Recent highlights include representing Teleglobe America Inc. in enforcing a foreign judgment obtained from the County Court of Fairfax, Virginia, in which the Court of Appeal recognised the foreign judgment as being registrable in Nigeria, treating it as a judgment of the superior court based on the judgment's satisfaction of the provisions outlined in the Foreign Judgment (Reciprocal Enforcement) Act.

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NIGERIA TRENDS AND DEVELOPMENTS

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Paschal Ukah is an associate in the dispute resolution group at Streamsowers & Köhn. He utilises his adeptness, knowledge of laws and judicial precedents to provide creative, nimble and insightful solutions to clients. Paschal is a result-driven professional with years of experience in litigation and arbitration. He has successfully acted as counsel in complex disputes before superior courts of record. Paschal is experienced in overseeing high-level operations, and is interested in the intersection of arbitration and the energy sector. He is a member of the Nigerian Bar Association (NBA), NBA Section on Business Law, and the International Chambers of Commerce – Young Arbitrators Forum.



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The logo for Streamsowers & Köhn, featuring the firm's name in a serif font with a red underline under 'KÖHN'. Below the name, the words 'BARRISTERS, SOLICITORS & ARBITRATORS' are written in a smaller, sans-serif font.

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Enforcement of Judgments in Nigeria: an Analysis of the Award Review Tribunal Provided Under the Arbitration and Mediation Act, 2023

The Arbitration and Mediation Act 2023 (“the Act”) was assented to by the former President of the Federal Republic of Nigeria, President Muhammadu Buhari, on 26 May 2023 after several years of review and criticism of the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria 2004 (ACA).

The Act repealed the ACA and is primarily focused on providing a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation. It provides a legal framework for the resolution of disputes through arbitration and mediation, and establishes a system for the recognition and enforcement of awards. One of the innovative provisions in the Act is the Award Review Tribunal (ART), which has the power to review and set aside arbitral awards.

This article provides an analysis of the ART, dealing with the composition, limit and scope of the ART, the significance thereof and the challenges involved in ART proceedings. The article also presents guidelines for parties in deciding whether to consider the ART mechanism.

Composition of an ART

An ART is not mandatory but is an opt-in mechanism that is only applicable if the parties expressly provide in their arbitration agreement that awards can be reviewed by an ART. In other words, the parties have the autonomy to determine if an ART will be applicable to their dispute and award and, as such, must have contemplated the use of an ART prior to the commencement of the initial arbitration proceedings. Parties can choose to incorporate the ART into their original

pre-dispute arbitration clause or can agree to the ART process in a separate post-dispute submission agreement. The Act does not contemplate an agreement to refer an award to an ART after the original award has been issued.

When parties opt for an ART, the procedure for its composition is to be incorporated in the arbitration agreement. Therefore, parties must take this into consideration when drafting the arbitration agreement or clause in their main agreement for one, post-dispute. For instance, the agreement could stipulate the number of arbitrators to constitute the ART, the procedure to be followed by the ART and the timelines for decision making. These express terms vest the ART process with efficiency and prevent delays in the appointment process after an award has been delivered by the original tribunal. However, where the parties do not make provisions on composition, the Act provides that the number of the ART shall be the same as the first instance tribunal.

The composition of the ART is concluded when the arbitrators accept their respective appointment after the disclosure of any conflicts of interest (where applicable). The provisions of the Act on the appointment of arbitrators, the grounds for challenge, the immunity of an arbitrator, the competence of an arbitral tribunal to rule on its jurisdiction, the joint and several liabilities of the parties for the arbitrator’s fees and expenses, liens on the award, etc, also apply to the ART.

An application for the commencement of the ART can only be made within three months of the award being delivered. A party that intends to challenge an award by review is required to make a written representation (“Notice of Challenge”) to the other party indicating its intent to challenge the award. The following documents

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are required to be annexed to the Notice of Challenge:

- the original award or a certified copy;
- the original arbitration agreement or a certified copy; and
- a certified English translation of the award or the arbitration agreement where they are not made in English.

Limit and scope of the powers of the ART

In the law of arbitration, the principle of party autonomy postulates that the award shall be final and there should be no judicial review on the merit by way of an appeal. This view has been consistently taken by the Nigerian courts. In a recent decision of the Supreme Court in *NNPC v Fung Tai Engineering Co Ltd* (2023) LPELR-59745 (SC), it was held that courts do not sit on appeal over an award made by an arbitral tribunal for the purpose of a “rehearing”, just like an appeal in a civil proceeding. The court further held that a court cannot embark on a review of the points of dispute already decided by the tribunal for the purpose of substituting its own views on the facts and the law.

The above position also applies to an ART. In effect, an ART challenge does not involve a review of the factual or legal merits of the award but rather a limited review of the award of the First Instance Tribunal. Unlike the International Institute for Conflict Prevention & Resolution (CPR) and the American Arbitration Association-International Centre for Resolution arbitral appeal mechanisms, which allow parties to challenge an award for “error of law that is material and prejudicial” and “determinations of fact that are clearly erroneous”, the ART only allows a review of the award on the narrow grounds set out in Section 55 of the Act. These grounds include the following.

- A party to the arbitration is under a legal incapacity.
- Invalidity of the arbitration agreement: a party may apply for review of an award if the party furnishes proof that the arbitration agreement is not valid under the law to which the parties have indicated it should be applied or that the arbitration agreement is not valid under the law of the country where the award was made.
- Lack of service or breach of fair hearing: a party may apply for review of an award on the grounds that proper notice of the appointment of an arbitrator or an arbitral proceeding was not given or that the party was otherwise not able to present its case.
- Jurisdictional grounds: a party may apply for review of an award on the ground that the arbitrator had no jurisdiction as there is no valid and binding arbitration agreement or, if there was jurisdiction, the arbitrator exceeded that jurisdiction in the manner in which the decision was rendered.
- Context of the award: a party can also argue that the award was not made in accordance with the agreed rules of the arbitration, or that the composition of the arbitral tribunal was not in accordance with the agreement of the parties.
- The subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria: awards that determine matters that are not arbitrable under Nigerian law are not enforceable. Matters that are beyond the scope of arbitration in Nigeria include criminal matters, taxation matters, disputes involving the interpretation of the Constitution, illegal contracts, statutory declaration over land, matrimonial causes, etc.
- Public policy reasons: a party may apply for review of an award if the party furnishes proof that the original award conflicts with pub-

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lic policy. However, what constitutes public policy and when an award violates public policy are not clearly defined in the Act.

Proceedings of an ART

The Act does not make specific provisions for the conduct of the proceedings of the ART. Subject to the agreement of the parties, an ART is required to conduct its proceedings in an appropriate manner. This could generate controversy, as the Act does not define the “appropriate manner”.

Similarly, the Act does not stipulate the procedure to be followed by the ART. It is uncertain whether a document-only review would be required or a full oral hearing. However, given the nature of the proceedings of the ART, a document-only review should be required, except in exceptional circumstances. However, the parties can remove this uncertainty by expressly stating the procedure to be adopted by the ART in the arbitration agreement.

An ART is empowered either to set aside the award in full or partly, or to affirm the award in full or in part. An ART is required to render its decision in the form of an award within 60 days from the date on which it is constituted. It is pertinent to note that this timeline is not mandatory but persuasive; therefore, the ART is at liberty to render its decision in more than 60 days. This uncertainty may elongate the delivery of the award of the ART and consequently pose a delay in the enforcement of an arbitral award.

Court intervention in proceedings and decisions of an ART

The Act seems to have limited the extent of court interference in arbitration proceedings, except as otherwise provided by the Act. However, an application for the enforcement of an award may

be made to the court during the pendency of a review by the ART. The court is also empowered to issue a preservative order or security pending the review by an ART. This provision appears to undermine the autonomy of the ART and grants courts more court interference during the review by the ART.

The Act also grants courts the power to further review the decision of the ART. The court may set aside an ART award where it finds that the ART based its decision on unsupportable grounds. In such circumstances, the court is required to restore the original award.

Similarly, where the ART affirms an award, an application to the courts for a further review can only be made on the grounds of public policy and arbitrability. This provision is commendable as it will reduce judicial interference and allow for a more efficient and focused arbitration process, thereby ensuring the finality of arbitration.

Significance of the ART mechanism

The ART opt-in mechanism gives parties the opportunity for a further review of the original award by an arbitral tribunal within a reasonable time before approaching the national courts.

Another major significance of the ART mechanism is that it limits the extent of court intervention in arbitration to questions of public policy and arbitrability only. Therefore, parties who adopt the ART process may be assured that the courts can only set aside an ART award that affirmed the original award on limited grounds.

Challenges of the ART

An ART can be challenged on the following grounds.

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- Additional cost implication: an ART mechanism will likely incur some additional cost as an entirely separate process will be invoked, with its own attendant fees and cost structures.
- Delay: a frequently expressed concern regarding the ART is its potential to extend the dispute resolution timeline. Arbitration's status as a more efficient alternative to courtroom litigation is one of its most valued attributes.
- Enforcing the award during the pendency of the ART proceedings: another challenge that may be posed is the interference of the court during the pendency of an ART mechanism. This implies that an award creditor may still initiate enforcement proceedings even if the ART is reviewing an award.
- Specific timeframes for ART proceedings and the decision-making process: parties may agree on specific timeframes for ART proceedings and the decision-making process in the arbitration agreement. This will assist in curtailing any delay that may be posed during the appointment process and during the conduct of the ART proceedings.
- Review mechanism: parties should consider if the nature of potential disputes and their complexities necessitate a review mechanism, especially because an ART award is subject to a further challenge in courts, albeit on limited grounds. This is to avoid prolonging the process before enforcement of the award.

The outlook

Given the optional nature of the ART mechanism, parties should consider various issues and their practical ramifications before pursuing an ART process so that, if such a process is adopted, it will best serve their needs. The following should be considered in deciding whether to opt for the ART mechanism.

- Appointment of arbitrators: parties may contemplate the propriety of using a single arbitrator for both the original arbitral proceedings and the ART where such is expedient. A sole arbitrator in the underlying arbitration could also potentially reduce both the time and cost to finality, somewhat counterbalancing the additional cost and delay of adopting a review process in the first instance.

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