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APPRAISAL OF THE LEGAL REGIME FOR MARITIME INDUSTRY AND ARBITRATION IN NIGERIA: RECIPE FOR ECONOMIC GROWTH[1]

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ABSTRACT
Maritime or Admiralty Law is a distinct body of law that governs maritime questions and offences. It is a body of both domestic law governing maritime activities, and private international law governing the relationships between private entities that operate vessels on the oceans. Issues on marine commerce, marine navigation, marine salvaging, shipping, sailors, and the transportation of passengers and goods by sea, are also within the province of maritime regime. This regime extends to many commercial activities, although land based or occurring wholly on land, that are yet maritime in character. Given these concerns, disputes often arise as in every form of human interaction, and which disputes have been shown by experience as better resolved by resort to arbitration. This paper examines the various arbitration-connected laws enacted and/or operative in Nigeria with a view to stating the adequacy or otherwise thereof. The study discovers that in the light of the need for a viable sector for economic growth that maritime commerce and trade can be, there is need for legislative and statutory review of the legal framework governing the sector.
Key Words: Maritime, Arbitration, Jurisprudence, Shipping, Admiralty, Nigeria

INTRODUCTION
Man developed a body of law which has been variously referred to and described as maritime, admiralty or shipping. He developed this from the law of the merchants or *lex mercatoria* which is often said to be the only true body of International law seen as a lingua franca through which people of different nations can come together to deal with the promise, profits and perils of voyages at sea.[2] As maritime, the legal regime covers matters relating to navigable waters such as the sea, ocean, great lakes or commerce connected therewith. This process of navigating or engaging in commerce through various types of

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[2] George d'Angelo., *Introduction to the Law of Admiralty,* 2003

navigable waters introduces yet the related concept of shipping.[3] *Black's Law Dictionary* defines 'shipping' as 'relating to ships'; as shipping interests, shipping affairs, shipping businesses, shipping concerns, putting on board a ship or vessel".[4] Shipping involves the art of transporting goods often termed 'cargo' from one point to another on any stretch of water. Shipping could therefore be on inland, coastal or international waters and is at all times central to the activities in the maritime industry. Shipping as a means of transportation is unrivalled and serves as a backbone of commerce as we know it today. Maritime law is distinguished from the Law of the Sea which is a body of public international law dealing with navigational rights, mineral rights, jurisdiction over coastal waters and international law governing relationships between nations. Although each legal jurisdiction usually has its own enacted legislation governing maritime matters, admiralty law is characterized by a significant amount of international law developed in recent decades, including numerous multilateral treaties.

The growth of shipping/maritime laws has always been accompanied by the need to provide an effective and efficient means of dealing with disputes. Surely whenever human beings interact, laws are necessary to provide them with sanctions, guidance and a framework for the resolution of disputes. Machinery must exist to facilitate the resolution of problems arising between the owners of ships and owners of cargo, or between the owners of two vessels which collide or indeed between ship owners and those who render assistance to them in times of trouble or difficulty.[5]

The peculiarities of shipping are clearly apparent. There is often a foreign element, although there could of course be contractual or non-contractual disputes arising from activities in coastal waters and other navigable waters adjacent to the sea in which maritime activities take place (cabotage[6] disputes can be arbitrated instead of recourse to litigation). Ships and cargoes are by their nature often transient since they travel between countries. The ability of ships to transit freely in and out of ports is important. Consequently, the desire for business efficacy in dealing with vessels and cargo is understandable. It is no wonder that arbitration and other forms of alternative dispute resolution methods have been very appealing to the maritime industry. This paper therefore, focuses on examination of some legal framework for the maritime arbitration and maritime in Nigeria in order to demonstrate the availability and scope of enabling legislation on the subject. The study would be significant and informative to students and teachers of maritime law.

NIGERIAN MARITIME ARBITRATION REGIME

Nigeria is a coastal state with a vast marine environment harbouring enormous resources. The Nigerian maritime sector has remained largely untapped, yet it has a variety of investment potentials cutting across mining, manufacturing and the service industries.[7] The maritime sector is under the direct supervision of the Federal Ministry of Transport[8] although activities within the sector previously fell under the control of statutory bodies such as; the Nigerian Ports Authority (NPA) which is currently the port operator and regulator, the Nigerian Inland Waterways Authority (NIWA), a statutory body responsible for all activities within the inland waters in the country and also the Joint Maritime Labour Industrial Council (JOMAL1C) is responsible for all forms of maritime related labours.[9] The laws that relate to maritime arbitration in Nigeria are customary law, the common law, Arbitration and Conciliation Act (ACA),[10] the

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3 J C Anishere, *'Maritime Administration in Nigeria (l)* <http://www.shipsandpoils.org/detailadmiralty.php?idl3>accessed on 29 April 2015.

4 B A Garner (ed.), *Black's Law Dictionary* (8th edn, St Paul Minnesota:West Group, 2004) p. 1411

[5]L N Mbanefo. *Essays on Nigerian Shipping* (Lagos: Lomanc Books. 1991) pp. 178-179.

[6]The term "cabotage" is a Spanish word which refers to the maritime trade along country coastlines. In the context of its usage in the study, the term Cabotage refers to the coastal shipping opportunities which exist in respect of Nigeria's coastal maritime trade.

[7] J C Anishere, 'Maritime Administration in Nigeria (1) op cit.

[8] I Uniar, 'How the Maritime Sector Fared' <http://vv^\^^lhisday.coIlVarticles/9__how__the_maritime_sector_fared> accessed on I4lh August. 2012.

[9] JC Anisliere, "Maritime Administration in Nigeria 1' op cit.

[10] Cap A18 Laws of Federation of Nigeria 2004

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention),[11] the United Nations Commission on International Trade Law UNCITRAL (Model Law),[12] UNCITRAL Arbitration Rules,[13] The Foreign Judgement (Reciprocal Enforcement) Act,[14] International Centre for the Settlement of Investment Dispute (1CSID) Act,[15] the Rules of The Small Claims Arbitration Scheme of the Maritime Arbitrators Association of Nigeria,[16] Maritime Arbitrators Association of Nigeria Rules,[17] Arbitration Rules for Maritime Disputes (Non-institutional Administration),[18] The Admiralty Jurisdiction Act,[19] The Admiralty Jurisdiction Procedure Rules,[20] The Federal High Court Act[21], The Federal High Court Rules,[22] etc. This paper will examine only some of these laws.

Customary Law

Customary laws are those generally accepted, primordial but dynamic rules binding on natives of a given community. They are primordial in the sense that they take their roots from ancient times; and dynamic, because they are susceptible to the vagaries of the time. They have become the mirror of accepted usage.[23] In Nigeria, the colonial masters met a body of these indigenous rules when they came. They did not throw away these customs rather they preserved them provided they passed the validity tests.[24] The customary law is the source of our customary law arbitration. Customary arbitration is a system of dispute resolution under customary law by which parties to a dispute voluntarily refer a dispute to a panel- which could comprise their chief(s), elder(s), or some other person(s) - for investigation and resolution in accordance with customary law.

In arbitration, the autonomy of the parties to the arbitration process to determine a variety of issues governing the agreement and the procedure for resolving disputes is also applicable to maritime arbitration. Parties by their agreement may decide to choose a particular customary law as the applicable law in their arbitral proceedings.[25] Where the parties so choose, customary law will apply. It is notable that in such situation the subject matter of the dispute ought to be such that is known to native law and custom.

Common Law

The common law represents a proportion of the sources of Nigeria law. It is part of the Received English law.[26] Historically, the common law evolved from the English custom and was the body of law developed and administered by the king's Courts. The common law is one of the sources of the law of arbitration in Nigeria. The common law rules on arbitration form part of the Nigerian law because of reception of English law into Nigeria. The common law arbitration is *parol* in nature. It may also be written. It is worthy of note that in the present commercial and business relationships between merchants and businessmen, common law arbitration is hardly resorted to because of its *parol* nature which makes its terms uncertain and also because common law arbitration operates in respect of an existing dispute and

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[11] 1958

[12] 1985

[13] United Nations Commission on International Trade Law Arbitration Rules 1976

[14] Cap F35 Laws of Federation of Nigeria 2004

[15] International Centre for Settlement of investment Dispute (Enforcement of Awards) Act, Cap 120 Laws of Federation of Nigeria 2004.

16 Rules of The Small Claims Arbitration Scheme of the Maritime Arbitrators Association of Nigeria 2006.

17 Maritime Arbitrators Association of Nigeria Rules, May 2006.

[18] Arbitration Rules for Maritime Disputes (No Institutional Administration) June 12 2010.

[19] Cap A3 Laws of Federation of Nigeria 2004.

[20] Admiralty Jurisdiction Procedure Rules 2011.

[21] Cap F12 Laws of Federation of Nigeria 2004.

[22] Federal High Court (Civil Procedure) Rules 2009.

[23] *Alfa v Arepo* (1963) WNLR 95, 97 cited in C A Obiozor, *Nigerian Arbitration Jurisprudence* (Onitsha: Allied Press & Co, 2010) p.77.

[24] C A Obiozor, *Nigerian Arbitration Jurisprudence* (Onitsha: Allied Press & Co, 2010) p. 78.

[25] Arbitration and Conciliation Act 2004, op at, s. 47(1).

[26] *Osafile v Odi (No 1)* (1990) 3 NWLR (Pt 137) 130.

[27] G C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (Enugu: lyke Ventures, 2004) p. 18.

not future ones.[27] But where parties in their maritime arbitral agreement choose common law as the applicable law, the arbitral tribunal will conduct the arbitral proceedings in accordance with the common law in resolving their maritime dispute.

NIGERIAN MARITIME LEGISLATION

It is a fact that the majority of this planet is covered with seas and oceans and that to get from one part of it to another, it has, since time immemorial, been necessary to traverse large bodies of water. Over the ages, men have been compelled to traverse the oceans in vessels of increasing sophistication in pursuit of trade and commerce, acquisition of new territories, exchange of ideas, diplomatic relations, sporting relations etc. A myriad of problems requiring detailed regulation will inevitably arise from the seemingly simple interaction of man with the waters that cover the earth. Nigeria has made credible effort at creating a comprehensive legal framework for her maritime aspirations.

a) Merchant Shipping Act

A basic legislative framework of maritime was already in existence in Nigeria before and as at the time of independence in I960.[28] Soon after independence, in 1962, the Merchant Shipping Act based on the British Merchant Shipping Act of 1894 (as amended) was enacted. The Merchant Shipping Act forms the bedrock of the country's maritime safety administration. It is the main legislation. The Merchant Shipping Act 1962 was later repealed,[29] resulting to The Merchant Shipping Act 2004. The objective of the Act sets out and streamlines the merchant shipping aspect of the maritime sector and consolidates and amends the law relating to merchant shipping and matters incidental and connected thereto. The extant law is The Merchant Shipping Act 2007 which was enacted to provide for merchant shipping and related matters. This Act lays down a list of regulations for ships operating in Nigeria regarding licensing, registration, certification and penalties for non-compliance with the Act.

b) Coastal and Inland Shipping (Cabotage) Act 2003[30]

The Act came into force in April, 2004 and aimed at reserving the costal shipping for Nigeria national. In essence, the system of maintaining the domestic shipping industry is being regulated by the Cabotage Act. The Act is part of the policy of government to create opportunities for Nigerian to participation in all sectors of the economy. The enactment of the Act was also in response of the yearning of Nigerian stakeholders within the maritime industry both in the public and private sector for legislative intervention to stimulate the participation of Nigerians in its domestic coastal trade. In recognition of the technical capacity of the shipping industry, Section 51 of the Act provides for a transition period of one year within which the necessary modalities and guidelines for the smooth running of the Cabotage regime would be developed. To facilitate the enforcement of the Cabotage Act, the Honorable Minister of Transport constituted a committee on the modalities for the implementation of the Cabotage on the 12th of February, 2004. The act was divided into four; enlightenment/ sensitization, operations and enforcement, Cabotage Vessel Financing Fund, and Legal/Regulatory Framework.

In essence, the aim of the Cabotage Act in Nigeria is principally to reserve domestic coastal trade ("cabotage or cabotage trade") within Nigerian coastal and inland waters to vessels built and registered in Nigeria, wholly owned and wholly manned by Nigerian citizens. However, foreign owned vessels and companies are allowed to participate in cabotage trade within Nigerian waters subject to obtaining a waiver and/ or a licence from the Federal Ministry of Transport.

This Act seeks to restrict the use of foreign vessels in domestic coastal trade, promote the development of indigenous tonnage and *inter alia,* establish a cabotage vessel financing fund.[31] This is one of the most far

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[27] G C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (Enugu: lyke Ventures, 2004) p. 18.

[28] Merchant Shipping Act of 1894

[29] It was first repealed into Merchant Shipping Act Cap 224 Laws of the Federation of Nigeria 1990. Later the Merchant Shipping Act Cap Mil Laws of the Federation of Nigeria 2004 was enacted.

[30] Coastal and Inland Shipping Act No 5 Laws of Federation of Nigeria 2003.

[31] C Asoluka (ed.), *National Maritime Authority's Compilation of Maritime Laws* (Lagos: El-Machi Publishers Ltd. 2003) p.400.

reaching polices taken by Government to give effect and form to the development of local capacity in the industry. Cabotage policies are the building blocks of maritime infrastructure upon which the transport industry depends. A national maritime infrastructure can make positive and direct impact in the growth of the Nigeria maritime sector and provide meaningful engagements and exchange of technology with other maritime nations of the world.[32] The idea of a cabotage regime in Nigeria is highly desirable basically for all the advantages it is bound to offer for the maritime industry and the nation as a whole. This was the basis for the enactment of the Act.[33]

c) Admiralty Jurisdiction Act 1991

The Admiralty Jurisdiction Act was formerly a Decree[34] and at present is known as the Admiralty Jurisdiction Act.[35] The Act was enacted pursuant to the federal legislative powers and vests the Federal High Court with jurisdiction with respect to Admiralty matters. This Act without any doubt is enacted to provide for the extent of the jurisdiction of the Federal High Court in admiralty matters and matters connected thereto. It is seen as maritime arbitration legislation because it provides for stay of proceedings or dismissal of proceedings brought under the Act in favour of arbitration. The proceedings will either be stayed or dismissed if the claim concerned should be determined by arbitration whether in Nigeria or elsewhere.[36] It also sets out to protect the admiralty jurisdiction of the Federal High Court in Nigeria as far as the maritime contract or the parties to the maritime contract have their jurisdiction in Nigeria.

However, there seems to be an inconsistency with regard to some provisions of Nigerian Arbitration and Conciliation Act. Sections 2 and 4 of the Arbitration and Conciliation Act give parties the right to arbitrate and section 5 gives them a right to apply to stay proceedings issued in breach of agreement to arbitrate. Section 20 of the Admiralty Jurisdiction Act of 1991 (AJA) however nullifies any agreement by any person or party to any cause, matter or action which seeks to oust the jurisdiction of the Federal High Court if it relates to any admiralty matter falling under the Act (including matters falling under any convention to which Nigeria is a party) and therefore operates. Section 20 of the Admiralty jurisdiction Act provides thus:

> Any agreement by any person or party to any cause, matter or action which seeks to oust the jurisdiction of the court shall be null and void, if it relates to any admiralty matter fallen under this Act and if:
>
> a] The place of performance, execution, delivery, act or default is or takes place in Nigeria; or
>
> b) Any of the parties resides or has resided in Nigeria; or
>
> c) The payment under the agreement (implied or express) is made or is to be made in Nigeria; or
>
> d) In any admiralty action or in the case of a maritime lien, the plaintiff submits to the jurisdiction of the court and makes a declaration to that effect or the rem is within Nigerian jurisdiction; or
>
> e) It is a case in which the federal government or the government of a state of the federation is involved and the federal government or government of the state submits to the jurisdiction of the court, or
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> f) There is a financial consideration accruing in, derived from, brought into or received in Nigeria in respect of any matter under the admiralty jurisdiction of the court; or
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> g) Under any convention, for the time being in force to which Nigeria is a party, the national court of a contracting state is either mandated or has a discretion to assume jurisdiction;

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[32]E Akabogu & V Onyinke, *Maritime Cabotage in Nigeria* (Lagos: Olisa Agbakoba & Associates. 2004) p. 3
[33]Ibid, p.4.
[34]No 59 of 1991.
[35]Cap A5 Laws of Federation of Nigeria 2004.
[36]Admiralty Jurisdiction Act 2004 op cit, s. 10

> h) In the opinion of the court, the cause, matter or action should be adjudicated upon in Nigeria.[37]

In the case of *Panormos Bay & Ors v Olam Nigeria Plc*[38], the Court of Appeal stated that Section 20 AJA had altered the position in admiralty matters thereby modifying the ACA and limiting enforceable arbitration agreements to those having Nigeria as their forum. The arbitration clause in the Bill of lading was rendered null and void as it was deemed to oust the jurisdiction of Nigerian courts to exercise their admiralty jurisdiction over the case. Maritime arbitration is no doubt international in nature and they must therefore be recognized and given proper effect to in our courts. The general tendency is for our courts to "guard jealously" their jurisdiction and to refuse to accede to requests for stay of Nigerian proceedings in favour of foreign proceedings merely because foreign law is chosen as the proper law of the leasing agreement.[39] It is clear that dispute resolution and maritime arbitration throw up important questions for national policy development for countries engaged in maritime affairs. Though there are no universal answers, one theme that should be kept close by is the international character of the general maritime law and the chauvinistic municipal policy, which is not based on considerations reasonably reflected in international norms and expectations.

The effect of section 20 has come under considerable debate in Nigeria. In the case of *Panormos Bay & 3 Ors v Olam Nig Plc*[40] the respondents sued for the sum of $100,000 USD or its Naira equivalent being special and general damages for the loss of 4,535 bags of rice covered by three bills of lading. Upon being served with the respondents claim, the appellants applied for a stay of proceedings pending reference to arbitration based on clause 7 of the bill of lading. The respondents relied on section 20 of the Admiralty Jurisdiction Decree.[41] The trial court found that there was a provision for reference to arbitration but nevertheless refused the application. The appellants appealed to the Court of Appeal. The appeal was unanimously dismissed. The Court held, on the effect of section 20 of Admiralty Jurisdiction Decree[42] now Act on arbitration clause in the bill of lading that prior to the coming into force of the Act, section 2 and 4 of the Arbitration and Conciliation Act applied in all contracts having arbitration clause without any limitation whatsoever. However, section 20 of the Admiralty Jurisdiction Act has altered the existing position in admiralty matters thereby modifying sections 2 and 4 of the Arbitration and Conciliation Act and limiting enforceable arbitration agreements to those having Nigeria as their forum. The Court stated that since the object of the clause in the bill of lading is to oust the jurisdiction of Nigerian court to exercise its admiralty jurisdiction over the case, the said clause is null and void.

In the instant case, section 20 is seen as a statutory limitation to the enforcement of the purported arbitration agreement. Also in an earlier decision in the case of *Sonnar (Nig) Ltd & Anor v Partenreedi M S Nonvind & Anor*[43] the Supreme Court held that a similar arbitration clause ousted the jurisdiction of Nigerian courts. It was declared null and void. These two cases spring up the question whether an arbitration agreement constitutes an ouster of the court's jurisdiction. In other words, can parties to an arbitration agreement be prevented from enforcing the agreement on the ground that it ousts the jurisdiction of the courts? This was the issue that came up in the case of The *MV Panormos Bay* v *Olam (Nig) Plc*[44] Obiozor in reviewing the *Panormos Bay* states that:

> The decision is not, with the greatest respect, supportable. It would seem that the court misconstrued the notion of stay of proceedings.... The idea is to compel parties to respect their agreement to refer a dispute between them to a private tribunal of their choice. In making an order for stay of proceedings, the court proceeds on the premise that since the parties, by mutual consent, agreed

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[37] Admiralty Jurisdiction Act, s. 20.
[38] (2004) 10 CLRN 77
[39] See *LAC v AAN Ltd* (2006) 2 NWLR (Pt 963) 49
[40] (2004) 5 NWLR (pt. 865) 1.
[41] Admiralty Jurisdiction Decree No 59 of 1991, now Admiralty Jurisdiction Act Cap A5 Laws of the Federation of Nigeria 2004.
[42] No 59 of 1991.
[43] (1987) ANLR584.
[44] Supra

> to go arbitration; it would in effect be putting the cart before the horse to first proceed to court. The arbitration agreement, on which the order of stay of proceedings is based, does not, by any imagination, approximate to a challenge of the court's jurisdiction[45]

It is submitted with respect that the decision of the Court of Appeal in the *Panormos Bay* was clearly wrong. The position of the law is that an arbitration agreement, per se, does not amount to an ouster of the court's jurisdiction. In a plethora of earlier decisions including AIDC v *Nigeria LNG Ltd*[46] the Supreme Court has rejected the view that an arbitration agreement ousts the jurisdiction of the courts. In MV *Lupex v Nigeria Overseas Chartering & Shipping Ltd*[47] the Supreme Court set aside the decision of the High Court which was affirmed by the Court of Appeal refusing to grant a stay of proceedings over a suit commenced in breach of charter party agreement which provided for arbitration in London under English Law. The Supreme Court affirmed the binding nature of arbitration agreements and made an order for stay of proceedings of an action which was brought in derogation of such agreement.

However, the Court of Appeal seems to have realized its *per incuriam* judgement and had a divergent view in the recent case of *Onward Enterprises Limited v MV Matrix* & 2 Ors[48] and held that section 20 of the Admiralty and Jurisdiction Act did not prevent the enforcement of a foreign arbitration clause in a bill of lading in that case and refused to follow its earlier decision in the *Panormos Bay supra.* The court rather followed the Supreme Court decision in the *M V Lnpex* v *Nigerian Overseas Chartering and Shipping Limited.* Nigerian courts respect arbitration agreements and would decline jurisdiction where necessary and refer matters to arbitration. Therefore, Litigants who commit to arbitration in their contractual agreement should respect such.[49]

Parties to an international arbitration, as in case of *Panormos Bay,* are at liberty to choose their *locus arbitrii* or forum for arbitration. It does not matter that the dispute involves admiralty. It does not expressly override the provisions of jurisdiction clauses contained in contracts of carriage of goods by sea which provide that the courts of a specified foreign country would have jurisdiction in the event of a dispute. It is submitted that the kernel of the provision of section 20 is to ensure that maritime claims that have relative attachment in Nigeria as enumerated under the section should be adjudicated in Nigeria. The parties should not by their agreement decide to adjudicate it outside Nigeria. But be it as it may, parties have autonomy to agree on any issue in their agreement. Arbitration clause therefore, does not oust the jurisdiction of Nigerian courts; rather it is a condition precedent to litigation.

d) Arbitration and Conciliation Act Cap A18 LFN 2004

The Arbitration and Conciliation Act 2004 is a statute of the National Assembly enacted to regulate arbitration. Although the Act does not expressly provide for maritime arbitration, section 57, the definition section, is sufficiently expansive to include it in its definition of commercial arbitration. The section provides:

> All relationship of a Commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road.[50]

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[45] C A Obiozor,, "Does an Alteration Clause or Agreement Oust the Jurisdiction of the Courts? A Review of The Case of The M.V. Panormos Bay v Olam (Nig) Plc' (2010) 6 No *1 Nigerian Bar Journal*, 171.

[46] [2000] 4NWLR (pt653)494; City Eng(Mg) Ltd v F.H.A [1997J 9 NWLR (pt 520) 224.

[47] [2003] 15 NWLR (pt. 844)469.

[48] [2010] 2NWLR (pt. 1179)530.

[49] *J S F Inv Ltd v Brawal Line Ltd* |2010] 18 NWLR (pt. 1225) 495; *Nissan (Nig) Ltd v Yoyanathan* [2010] 4 NWLR (pt. 1183)142.

[50] Arbitration and Conciliation Act 2004 op cit. s. 57..

From the above definition of the term 'commercial arbitration', the mention of transaction for the "carriage of goods or passengers by air and sea" refers to cabotage and shipping which are all parts of maritime reality. When arbitration is applied in the resolution of disputes emanating from such activities it is called maritime arbitration. Maritime arbitration is within the purview of commercial arbitration; therefore, maritime arbitration is under the regulation of the Arbitration and Conciliation Act.

The Act in its Arbitration Rules gives the parties the freedom to choose the place of arbitration, either in the arbitration agreement or after a dispute has arisen. Where they have not chosen or agreed on the place of arbitration, such a place shall be determined by the arbitral tribunal.[51] The rules reflect the principle of party autonomy and most of the provisions are mandatory only to the extent that the parties do not otherwise agree. Parties to an international arbitration under the Act are free to adopt the procedural rules they choose to apply to their arbitration proceedings. It provides that notwithstanding the provisions of the Arbitration Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to the Act, or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties.[52] Maritime arbitration having fallen within the ambit of international commercial arbitration therefore, its arbitral proceedings shall be regulated as provided in the Act.

The Act provides for the enforcement of arbitration agreements.[53] Once the parties to a maritime contract containing a clause on arbitration, put their agreement in writing it will be governed by the Act. If upon the occurrence of a dispute, one of the parties to such agreement rushes to court, the court will stay proceedings and refer the parties back to arbitral tribunal once it satisfies itself that there was an agreement to arbitrate which the parties entered voluntarily. The Act takes cognizance of this and in a bid to prevent parties from abandoning their arbitration agreement and ensuring also that such agreement is enforced once the parties voluntarily agree to arbitrate provides for stay of proceedings.[54] It provides:

> a court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the patties to arbitration.[55]

It also provides for the stay of proceedings in the subsequent section.[56] The difference in the two sections is that section 5 confers on the court the discretion to either grant or refuse an application for stay of proceedings and goes further in its subsection (2) to state the issues which the court may consider before either granting or refusing such application. Unfortunately, section 4 failed to recognize the inherent discretion of the court or judge to either grant or refuse an application made before it. Section 4 makes it mandatory that once an application of that nature is made by a party, the court shall order a stay of proceedings and refer the parties to arbitration. The provision of section 4 gives the impression that once an application for stay is made before the court, the court must grant the order for stay of proceedings. This provision on domestic arbitration applies to international arbitration also by virtue of section 43 cited earlier,

A very pertinent question is why the drafters of the Act included two conflicting sections on the same subject issue within the same piece of legislation. Section 4 is a repetition of the provision of section 5. This paper sees it as an aberration. It gives rise to a call for amendment or review of the Act.[57] As two consecutive sections of the Act provided for the same stay of proceedings, it is humbly submitted that it is an oversight on the part of the legislature. In further submission, it is pointed out, that the issue of the stay

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[51] Arbitration Rules First Schedule to the Arbitration and Conciliation Act, art 16.
[52] Arbitration and Conciliation Act 2004, s. 53.
[53] Arbitration and Conciliation Act 2004, s. 2.
[54] Ibid, ss. 4 and 5.
[55] Ibid, s. 4.
[56] Ibid, s. 5.
[57] G C Nwakoby, 'Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004- Call for Amendment' , (2010) *1 UNIZIKJILJ, 2.*

of proceedings is a way of promoting and projecting arbitration. It also emphasizes the sanctity of arbitration agreement. Assuming there is no such provision at all, it will lead to parties making nonsense of the arbitration agreement and proceedings knowing full well that they can resile from such agreement and rush to court. The provision for stay of proceedings is necessary as it *estopes* the parties from abandoning the proceedings half-way or the agreement entirely to rush to court. The only thing complained of is the repetition of it in two consecutive sections of the Act.

e) Foreign Judgement Reciprocal Enforcement Act[58]

This Act makes provision for the enforcement in Nigeria of judgments given in foreign countries which accord reciprocal treatment to judgments given in Nigeria. It therefore, facilitates the enforcement in foreign countries of judgments given in Nigeria. The enforcement of such foreign judgments is to be sought at the High Court .of a state or the Federal Capital Territory, Abuja or the Federal High Court.[59] In as much as the Act refers to judgement it has in its interpretation section defined judgement to mean thus:

> A judgment or order given or made by a court in any civil proceedings and shall include an award in proceedings on an arbitration if the award has in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place,…[60]

The provision above brings arbitral award within the purview of the Act. Under this Act, a party may apply to a superior court in Nigeria at any time within six years after the date of the award, to have the award registered in such court, and when such application is made, the court shall order the award to be registered.[61] However, the courts in Nigeria will only enforce foreign awards made in any other country if that other country accords substantial reciprocity of treatment to awards made in Nigeria. Maritime arbitral awards are enforceable under this Act.

f) Rules of Small Claims Arbitration Scheme of the Maritime Arbitrators Association of Nigeria 2006

The Rules are the creation of the Maritime Arbitrators Association of Nigeria and have eight constitutive rules. This innovative scheme has been developed to resolve small claims disputes within the maritime industry.[62] For any claim to come under the Rules it must fulfill certain conditions as stipulated in the Rules. These conditions are as follows-

i. Claims for compensation must be made in Nigerian currency which is the Naira. If the claim is in any other currency other than Naira the Rules will not apply[63]

ii. The claim must be in writing.[64]

iii. The claim must not exceed $N2_n$ 000, 000 (Two Million Naira only)[65]

iv. The parties must agree to settle their disputes in accordance with the scheme. Such agreement could be made at any time, either before or after the dispute has arisen.

The Rules deviated a lot from the provisions of the Act.[66] The Rules provide that the arbitration procedure will be on documents only.[67] This is contrary to the provision of the Act which allows both oral and documentary evidence in its proceedings. Another discrepancy in the provisions of the Rules is on the issue of appointment of the arbitrators. The Rules reserve the appointment of the arbitrators to settle disputes under the scheme for the association's exclusive and unfettered control. This is not the case with

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[58] CapF35 Laws of Federation of Nigeria 2004.
[59] Foreign Judgment (Reciprocal Enforcement) Act 2004 op cit, s. 2 (1).
[60] Foreign Judgment (Reciprocal Enforcement) Act 2004 op cit, s. 2 (1).
[61] Ibid, s. 4 (1)
[62] Rules of the Small Claims Arbitration Scheme of Maritime Arbitrators Association of Nigeria 2006 art 11.
[63] Rules of the Small Claims Arbitration Scheme op cit, art 1.3.
[64] Rules of the Small Claims Arbitration Scheme op cit, art 1.4.
[65] Ibid art 1.5.
[66] Arbitration and Conciliation Act 2004 op cit.
[67] Rules of the Small Claims Arbitration Scheme op cit, art 2.10.

the Arbitration and Conciliation Act which gives the parties the autonomy to appoint their arbitrators and where the parties cannot agree on the appointment the court will intervene.[68] With these differences one would ask whether the Rules are not in conflict with the Act. The answer will be in the affirmative. It is trite that where a rule or a law is in conflict with any Act the provisions of the Act will override. Aside this envisaged conflict it is equally submitted 'that the provisions of the Rules seem to erode the autonomy of parties which is one of the reasons for choosing arbitration over litigation. Another issue with the Rules is that, it is only applied by the Maritime Arbitrators Association that created it and seems not to be available to all arbitrators. Again the Rules give more powers to the arbitrators in the matters of the arbitral proceedings. The Rules seem not allow parties to expressly agree on matters of the arbitral proceedings.

INTERNATIONAL CONVENTION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The New York Convention was adopted in 1958.69 The Convention came into force on the 7th day of June 1959 and has been ratified by 144 countries worldwide. The New York Convention was ratified by Nigeria on the 17th day of March 1970. The New York Convention subsequently became part of Nigerian domestic law in 1988 through the promulgation of the Arbitration and Conciliation Act of 1988.70

The Convention obliges the courts of signatory states to recognize and enforce arbitration agreements and awards in the territory of other states. National courts are thus required to recognize and enforce foreign awards without reviewing the arbitrators' decision except in a few exceptional instances.71 A party desiring assurance that an award will be Enforceable under the Convention must ensure that the arbitration proceedings take place and an award made in a Convention State. Recognition or enforcement may be refused or the award set aside only if at least one of the exceptional grounds stipulated in the convention exists.72 The object and purpose of the New York Convention is to ensure that agreement to arbitrate and the resultant awards (foreign awards) at any rate are recognized and enforced in Nigeria and those awards made in Nigeria are recognized and enforced in contracting states. Maritime arbitral awards are enforceable under this Convention.

CONCLUSION AND RECOMMENDATIONS

Shipping is the life-wire of international trade and Nigeria is positioned to be the commercial hub for Africa. A developed maritime industry implies a boost in international trade, development in port linked flows and all the associated ancillary services. Nigeria has a plethora of stakeholders in the sector that have largely been uncoordinated often working at a tangent in uncontrolled confusion. Nigerian ports are not yielding their full potential and are now being abandoned for ports in Benin Republic and Togo due to the multiplicity and level of various official and private sector port charges. The low volume of traffic at Nigerian ports is of deep economic concern.

A look at the above study and more indicates that legal framework on Maritime issues is not lacking in Nigeria. Yet, a lot more is needed to be done in terms of further legislation and implementation. This is necessary as Nigerian maritime cabotage regime has done little to improve the economy due to weak structures and regulations. Nigeria's ship owners are moribund with no incentive or finance to play in the big league with foreign vessel owners. The result is that they have been excluded from the lucrative

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[68] Arbitration and Conciliation Act 2004 op cit. s. 7.

[69] A Redfern et al. *Law and Practice of International Arbitration (*4th edit London: Sweet & Maxwell Limited, 2004) p. 68.

[70] E Dike, "Facts and Myths on the Enforcement of Arbitral Awards in Nigeria' <http:www.cdr-news-com/categ-ories/Nigeria/facts-arid-myths-on-the-enforcement-of-foreign-arbiral-awards-in-Nigeria-2012>accessed on 21st May, 2014.

[71] New York Convention op cit; art 1(1) (3).

[72] Ibid, art v (1) (a-e). (2) (a-b).

opportunities in Nigeria's oil and gas industry. Over the years the maritime industry has been totally neglected. Nigeria's shipping sector is estimated to be capable of generating N7 Trillion annually.[73] However, in order to tap revenue from this sector there will need to be an overhaul of policy, institutional, regulatory and legal framework. We need to develop a new national shipping policy. Nigeria's shipping policy dates back to 1987 when the Nigerian Shipping Policy Act, No.10 of 1987 was enacted following Nigeria's ratification of the United Nations Code on Trade and Development (UNCTAD).

UNCTAD was to adopt the 40: 40: 20 code which covers ship acquisition, cargo sharing and shipping activities. Under the code 40% of the total volume of cargo traffic and revenue was reserved for indigenous Nigerian carriers, 40% was reserved for carriers of cargo originating in destination countries and 20% for recognized third flag carriers. If implemented this would have gone a long way to correct the imbalance in shipping trade as it affected Nigeria. The purport behind the Nigerian Shipping Policy was to develop a vibrant shipping industry that would generate revenue for Nigeria and Nigerians.[74]

In pursuit of developing national maritime industry, the Nigerian Maritime Authority (NMA) was established to co-ordinate and implement Nigeria's National Shipping Policy. NMA's successor the Nigerian Maritime Administration and Safety Agency (NIMASA) when established in 2007 had no defined purview regarding Nigeria's Shipping Policy, though it was mandated to promote and develop indigenous commercial shipping in international and coastal shipping trade, and regulate and promote maritime safety, security, marine pollution and maritime labour. There exist multiple government agencies in the maritime industry with duplication of functions. There is an urgent call to re-organize these agencies for better function and output.

Nigeria has approximately 60 legislative enactments comprising its maritime and shipping laws. There are also critical Bills before the National Assembly such as the Ports and Harbour Bill, the Petroleum Industry Bill, the Maritime Zones Bill, etc. that if passed will have positive impact on the shipping sector. Of importance also is the need for an Oceans Act for Nigeria to harness the resources due to it as a sovereign coastal state. Now is the time to pass these Bills into law and lay out a strategic plan for reforming the maritime industry in the shortest time possible.[75]

The Nigerian Shippers Council (NSC), the economic regulator for the shipping sector, was established to provide a forum for the protection of the interest of shippers in matters affecting the shipment of imports and exports to and from Nigeria and to advise the Government on sundry matters related thereto. As economic regulator the NSC has the task of dealing with a plethora of stakeholders as its functions include, the structure of freight rates, availability of shipping space, terms of shipment, class and quality of vessels, port charges, entering agreement with Conference and Non-Conference Lines, the Nigerian Ports Authority and other bodies on matters affecting ship owners' interests.

Recently the powers of the NSC were the subject matter of an action instituted against the NSC at the Federal High Court by a group of shipping companies, challenging the NSC's power to issue directives to shipping companies. In response to the suit filed by the shipping companies, the NSC in a counter-claim sought a declaration that the Shipping Line Agency Charge (SLAC) unilaterally imposed by the shipping companies on Nigerian shippers is illegal. The Federal High Court dismissed the case of the shipping companies and held that the NSC has power to issue directives as the economic regulator of the ports. A similar suit filed by the Terminal Operators against the NSC was also dismissed. These decisions stand as a watershed in Nigeria's maritime law and is a clarion call for Government to prioritize its attention towards improving the sector and turning it into a "cash cow'' for the nation.

A reformed Nigerian Shipping Policy will have to review local content and formulate an action plan for shipping reforms that will involve Nigerians. We can learn a lesson from Malaysia. Seaborne

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[73]B. Akodu, 'A Clarion Call to Reform Nigeria's Shipping Sector', *This Day Live,* 29 April 2015. http://www.thisdaylive.com/articles/a-clarion-call-to-reform-nigerias-shipping-sector/201081/. Accessed 29/4/15.

[74] Ibid.

[75]Ibid.

transportation is a key facilitator of Malaysia's trade-oriented economy. This is underlined by the fact that an estimated 95 percent of the country's trade is carried via seaborne means. Malaysia has the world's largest owner-operator of Liquefied Natural Gas tankers. Two of its ports, Port Klang and Tanjung Pelepas are in the list of the world's top 20 container ports by way of throughput volume handled. Malaysia is a country that gained independence the same year as Nigeria. It should be noted Malaysia has exclusive control of its domestic maritime industry.[76]

No doubt, the potential of Nigeria's maritime industry is massive. To tap into this huge revenue source will require a total overhaul of legislation, institutions and regulatory framework. The Nigerian Shipping Act, the pilot law of the maritime industry, must be revised and re-branded to align with global maritime trends. A review of all legislation on maritime law is mandatory if we are to reform this sector to our advantage. The creation of a new ministry that will exclusively handle maritime matters is needed. A Maritime Ministry would unburden the Ministry of Transport and allow for better efficiency in the maritime industry. The NSC, as economic regulator of the shipping sector, has a big role to play in the future of shipping and allied services and can be further empowered by Government to fulfill its mandate in this regard. Nigeria has long depended on oil revenue to the detriment of neglecting other vital sectors of the economy. Dependence on oil has made Nigeria and its leaders blind to economic reality and has given them false hope for Nigeria's future, which is bleak. If Nigeria is to turn around her economy, she must turn around her thinking and explore alternative revenue sources. Nigeria's is an import dependent economy that gives rise to the flight of foreign exchange. Revamping the maritime sector via proactive and pragmatic legal framework that can not only prevent but also aid amicable settlement of inevitable disputes through arbitration can translate into economic success.

[76] Ibid.