EXIGENCY FOR COMMERCIAL COURT ESTABLISHMENT TO EASE ENFORCEMENT OF CONTRACT IN NIGERIA

Bolarinwa Levi Pius and Dr. Adetokunbo Ogunfolu

(2020) UNILAG LAW REVIEW VOL. 4, NO. 1

EXIGENCY FOR COMMERCIAL COURT ESTABLISHMENT TO EASE ENFORCEMENT OF CONTRACT IN NIGERIA

Bolarinwa Levi Pius* and Dr. Adetokunbo Ogunfolu*

ABSTRACT

Corporate disputes often exist among the players in the field of business transactions occasioned by high octane scheming, near apocalyptic competitiveness and combustible mix of profiteering emotions. Many corporate organizations operating in Nigeria prefer to go abroad for quick commercial adjudication of litigations that ensue with their clients or contract partners. The Nigerian adjudicatory architecture and procedure is complex and porous allowing litigants to manipulate the wheel of justice to a long and complex route; and so, cannot accommodate the exigency of commercial dispute resolutions.

This article aims at examining the narrative of commercial disputes resolution in Nigeria, factors responsible for delay in commercial dispute resolution, and the consequences of such delay to the Nigerian economic growth. The article suggests urgent legislative piece to establish a specialized commercial court in Nigeria having both civil and criminal jurisdiction with efficient regulatory framework to enhance virile enforcement of civil and criminal contracts.

1.0. INTRODUCTION

Due to its colonial links with Britain, the Nigerian legal system is largely based on the English system. Nigerian law consists basically of Nigerian legislation, the received English law (i.e. common law, English statutes of general application in force in England as at 1 January 1900, and the doctrines of equity) customary law and judicial precedents. Like England, Nigeria also operates an adversarial system. There are three

* Bolarinwa Levi Pius is a currently a doctorate student at the Faculty of Law, Obafemi Awolowo University, Ile-Ife, Osun state, Nigeria. He can be contacted via e-mail: levibolarinwa@gmail.com or call 08182928678.

* Dr. Adetokunbo Ogunfolu Ph.D. is the Head of Department of Business Law, Faculty of Law
Obafemi Awolowo University, Ile-Ife, Osun state, Nigeria. He can be contacted through 08055478397.

main methods for resolving commercial disputes: through litigation, arbitration and mediation/conciliation.

Major commercial disputes are brought before the State High Courts or the High Court of the Federal Capital Territory Abuja, which have unlimited jurisdiction to hear all matters other than those that are within the exclusive jurisdiction of the Federal High Court. The State High Courts and the High Court of the Federal Capital Territory, Abuja have jurisdiction to determine civil proceedings where the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue. Section 251(1) of the Constitution of the Federal Republic of Nigeria[1] gives the Federal High Court exclusive jurisdiction over matters of: revenue; company taxation; customs and excise; banking; aviation; securities market and shipping. Appeals lie from the High Courts (Federal, State and Federal Capital Territory) to the Court of Appeal and thereafter to the Supreme Court, which is the apex court in Nigeria.

Many State High Courts have recently amended their Civil Procedure Rules (CPR) to provide for a frontloaded case filing system, as well as the option of trying alternative dispute resolution mechanisms before actual trial commences. The Lagos State High Court has implemented a fast-track route for certain cases and other State High Courts are considering similar measures. Many of the State High Courts have created commercial divisions for the speedy resolution of commercial disputes, and particular judges may be assigned to hear specific types of commercial matters.

There are also specialized courts, which hear disputes arising in connection with the operations or administration of specific laws. For example, the Federal Inland Revenue Service (Establishment) Act [2] provides for the framework for the resolution of disputes between tax payers and the Federal Inland Revenue Service (FIRS). The Act provides that any person aggrieved by a decision of the FIRS may appeal to the Tax Appeal Tribunal within 30 days of the decision being

[1] No. 24 of 1999.
[2] No. 13 of 2007.

made. Similarly, the Investment and Securities Act[3] also creates the Investment and Securities Tribunal to hear matters relating to the operations of the capital market. The newly established National Industrial Court that has exclusive jurisdiction over labour and employment matters has also been quite busy.

The functional institution of government is supervised by utopian constitutional framework wherein all the architectures of government harmonize for service delivery. It is a truism that the wealth of a nation is the fountain of its strength and such wealth would not come except there is a pool of both local and foreign investments in Nigeria to continue growing the economy. Advanced economies of the world started by growing their institutions to attract both foreign and domestic investors in growing their economy.

It is a truism that one of the institutions strengthened to build the economy is the judiciary. Strong judicial administration of civil and commercial justice system is *sine qua non* to quick enforcement of commercial transactions and all manner of contracts so related. However, delay in the adjudication of commercial litigations caused by overloaded jurisdiction of the Federal High Court, frivolous injunctions, and lack of deep knowledge of commercial fundamentals by the judges, corruption and tedious administrative oversight over judges on commercial matters, remains albatross to ease of enforcement of contract.

The foregoing challenges led to the administrative activism of heads of High Courts in Nigeria to create special unit/division in their courts to adjudicate on commercial matters aiming at freeing the commercial matters tied down in the court dockets. However, this administrative policy to quicken adjudication of commercial litigation was short lived as the same problem of delay has persisted. This is so because the same judges, same procedures, same lawyers, same high court (only with a special building dedicated for hearing commercial litigation), as the subject matter jurisdiction of the Federal High Court still adjudicate commercial litigation. Nothing new: nothing different.

[3] Cap. 124, Laws of the Federation of Nigeria, 2007.

Also, efforts were made to redress the delay in commercial litigation through imported arbitration, conciliation and mediation methods but to no avail. Therefore, investors persist in repatriating their investments from Nigeria to advanced economies that guarantee ease of enforcement of contract. Hence, this article aims at examining all those challenges and advocates for urgent legislative piece establishing commercial court with distinct architectures and administrative pattern.

1.1. Conceptual Definition and Clarification of Terms

Clarification of some fundamental terms is necessary for critical appreciation of the subject matter. The concepts such as "exigency", "commercial court", "enforcement of contract" need foundational light. The word "exigency" denotes a state of affairs that needs urgent demand[4]. The phrase "commercial court" is a judicial institution that hear actions in the commercial list arising out of the ordinary transactions of merchants and traders; among others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency and mercantile usages[5]. "Enforcement of contract" is the time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial processes index, evaluating whether each economy has adopted a series of good practices that promote quality and efficient in the court system[6].

From the foregoing, it is unequivocal to say that the Nigerian ease of enforcing commercial justice and contract is indexed on this universal principle. However, the scale of justice remains weak and its wheel is also slow. Worse still, commercial crimes and torts are litigated at different courts and this causes jurisdiction crisis, avoidable bureaucratic bottlenecks, and distortion in the Nigerian commercial

[4] "Exigency", available at https://www.merriam-webster.com/dictionary/exigency (accessed 19 August 2018).
[5] L.B. Curzon, *Dictionary of Law*, 5th ed. (Financial Times & Pitman Publishing: London, 1998), p. 65.
[6] "Enforcing Contract", available at https://www.doingbusiness.org/data/exploretopic/enforcing-contracts (accessed 19 August 2018).

jurisprudence. Commercial cases drag for years on the court dockets as the specialized division of commercial court created by the High Court to avert this challenge has rather worsen the case. This article is exigent in looking for acceptable solution to the Nigerian peculiar problem of ease of enforcing commercial contracts having both species of torts and crimes, which is universally adorable.

2.0. JUSTIFICATION OF THIS RESEARCH

Commercial case management system in Nigeria continues to elude the acclaimed standard of enforcing contract. Series of efforts made at ensuring that commercial litigations are adjudicated within time frame in line with the commercial customs and usages have yielded little results. Universally speaking, major advanced economies of the world have adopted alternative to dispute resolution (ADR) as the best option to resolving commercial disputes. This option has been appreciably adopted by various jurisdictions of the world. However, in the Nigerian commercial dispute resolution narrative reverse is the case. In Nigeria, administrative creation of commercial court as a division of the Federal High Court and non-adjudicatory ADR, unlike in advanced jurisdictions, has not phased out delays in enforcing commercial contract.

Arbitration has been incorporated into the nation's *corpus juris* and the courts have encouraged this option as the best. But for the adversarial imperative of the Nigerian courts' tradition, the intrigues and horse trading of the so-called parties to commercial litigations have always manipulated arbitral processes and decisions back to the regular court for the matters to start *de novo.* The arbitration is now a pawn in the hands of the scheming players and investors' money and assets are trapped down till they lose their commercial values. This is creating a huge loss of investments to the Nigerian economy caused by its peculiarity.

Hence, the objective of this article is to advocate for a statutorily backed, proactive and independent commercial court having both criminal and tort jurisdiction to redress this challenge due to the circumvention of the acclaimed arbitration window and bureaucratic frustration of High Court Division on commercial matters without

legislative imprimatur to give the court structural and functional architectures in line with international best practice.

3.0. STATEMENT OF PROBLEM

The advanced jurisdictions usually create commercial courts as divisions of the High Court with expert judges in commercial laws to enhance quick and sound dispensation of commercial justice. The same administrative convenience has been replicated in the Nigerian commercial justice system, but for the usual delay in administration of commercial litigations. The alternative dispute resolution reliefs are also cornered by tripartite conspiracy theory involving litigation judges, counsel, commercial litigants, arbitration losers and court procedures. This often results in capital flight of investments from Nigeria and poor enforcement of commercial contract. The twin problems of conspiracy theory and capital flight of investments from Nigeria are identified in this article.

4.0. LITERATURE REVIEW ON THE SUBJECT

Various authors, scholars and experts in the world have supported creation of commercial courts as divisions of the High Courts. The evidence of their workings to enhance administrative convenience is positively felt around the world. However, Nigeria is a peculiar clime with little or no result. Possibly there are few literatures that have researched into the Nigerian peculiar problems in the light of advocating for a statutorily established commercial court in line with international best practices. A commercial law expert, Professor of economics, and former Governor of the Nigerian Central Bank, Charles Soludo[7] pontificates on necessity for a constitutional imprimatur and statutorily multivariate commercial court when he said Nigeria needs "introduction of commercial courts for speedy resolution of commercial disputes …."[8] However, he did not explain

[7] C. Soludo, "The Political Economy of Restructuring the Nigerian Federation", an Inaugural lecture delivered at Ndigbo Lagos Foundation on Wednesday, 2 August 2018 in Lagos, available at https://www.premiumtimesng.com/news/top-news/278742-nigerias-constitution-does-not-guaranty-economic-prosperity-soludo.html (accessed 27 August 2018).

[8] *Ibid.*

the structural elements needed to achieve it. This article aims at explaining the structural elements and also canvassing for a legislative piece having both civil and criminal jurisdictions on commercial matters and enhancing its architectural and administrative functions.

5.0. EPISTEMOLOGY OF ENFORCING COMMERCIAL CONTRACT IN NIGERIA

Doing business includes measuring the time, cost and procedural complexity of resolving a commercial lawsuit either between domestic bodies or with mix of foreign bodies. The court hears arguments on merits and that an expert provides an opinion on the quality of the commercial issues. The time, cost and procedures are measured from the perspective of commercial litigants pursuing the standardized case through domestic jurisdictions. Effective commercial dispute resolution has many benefits. Courts are essential for entrepreneurs because they interpret the rules of the market and protect economic rights. Efficient and transparent courts encourage new business relationships because businesses know they can rely on the courts if new customer fails to pay. Speedy trials are essential for small business economies like Nigeria, which may lack the resources to stay in business while awaiting the outcome of a long court dispute.

The narrative of enforcing commercial contract in Nigeria is proverbial and paradoxical in that as the Ease of Enforcing Contract Index moved Nigeria up the rung of the ladder, little or nothing is seen to complement the proof. It is a gory state for the Nigerian administration of civil justice procedure that commercial cases running up to 20 years and more are still in the docket of the Nigerian high court. A survey, conducted by the Lagos State Ministry of Justice between 2002 and 2005, revealed that it takes an average of five years for a commercial case to journey from the stage of filing to the stage of judgment delivery at the high court. This figure is believed to be very conservative. Lagos is the Nigerian commercial nerve centre and a benchmark in measuring administration of contract enforcement. Delay in commercial dispute litigations frightens investors and investments are repatriated to clinically reformed economies that enhance ease of enforcing commercial contracts such as South Africa, Ghana and other better jurisdictions in the province of Africa.

6.0. SOME STATISTICAL NARRATIVES OF DELAY IN ENFORCING COMMERCIAL DISPUTES IN NIGERIA

On 3 March 1999, the then National Maritime Authority now Nigerian Maritime Administration and Safety Agency, gave a loan facility to the tune of $2m to East West Services Limited to purchase a motor vessel named ECOWAS Trade II, the loan was part of the Federal Government's Ship Acquisition and Ship Building Fund, an initiative to encourage indigenous vessel owners. East West Services Limited defaulted; a situation which forced NMA to file a debt recovery suit marked *National Maritime Authority* v *East West Coast Ser. Ltd*[9]. It ran for 17 years before the His Lordship Justice Ibrahim Buba who inherited the case delivered the judgment on 14 October 2016 in favour of NIMASA which succeeded the NMA. However, the judgment has become nugatory and has no commercial value as the judgment debtor; East West Services Limited was no longer in existence as at the time the judgment was delivered. The judgment reads:

> The evidence of PW1 is not challenged, contracted or denied. Exhibits P1-17 remains unchallenged. A court of law is not challenged or contradicted and that it is capable of believing. Consequently, and in the light of Exhibits P1-17, this 1999 suit has been in the trial court for 17 years, must and shall come to an end. Accordingly, judgment be and is hereby entered for the plaintiff against the defendant as per paragraphs 27(a)-(e) of the statement of claim dated 1999.

In another sad commercial case *Ibrahim I. Bello-Olupo* v *Reliance Bank Ltd*[10] which bordered on alleged unpaid bank loan and recovery of landed property title document, the defendant, Reliance Bank Limited, had become defunct, while the plaintiff's engineering company, Up-to-Date Engineering Company, with offices in Lagos, Abuja and Ilorin, had become distressed, leading to direct and indirect loss of jobs. The distress of Up-to-Date Engineering Company was not unconnected

[9] FHC/L/CS/311/99.
[10] (2018) 8 CLRN 99.

with the withholding of the title document of a landed property, which the company's alter ego, Alhaji Bello-Olupo, deposited with Reliance Bank in 2001 while seeking an Advanced Payment Bond of ₦6,252,065.06, to execute a ₦25m rural electrification contract awarded to him by the Kwara State Government in 2001. The hope that this contract would take his business to the next level had fizzled out while his inability to recover his title document, withheld by the bank, had foreclosed his chances of tendering same as a collateral to obtain other bank loans to execute other contracts.

On the other hand, Reliance Bank, which went under the weather and merger with four other banks in 2006 to become Skye Bank Plc, claimed that Bello-Olupo still owed it ₦7m as of 2003. It would have sold Bello-Olupo's landed property at Coker Village, Orile-Iganmu, Lagos, to recoup the alleged debt but for this lawsuit, which had now dragged for 12 years.

In another sad commercial matter, *Dike Geo Motors Ltd* v *Allied Signal Inc.*[11], the plaintiff, a manufacturer of an automobile brake and clutch fluid under the trade mark Allied & Device, had filed the suit on, May 29, 1995 accusing the defendant, a Nigerian company, of adulterating product or infringing on its trade mark. The case ran for 26 years after being tied down by series of frivolous injunctions and procedural scheming. Even if the Supreme Court decides to give judgment on the matter, it is of no commercial value again because the company has since fizzled out of Nigeria.

It is sad to note that while a commercial case is journeying through the labyrinth of the congested court dockets, what the parties are disputing over or the subject matter of the lawsuit would have been destroyed before the court's judgment would eventually come. Though at the end of the day, the court would declare one of the parties in the commercial suit a winner, such a party might really have nothing to benefit from the victory – a case of justice delayed is justice denied. Since commercial transactions and enforcement of same is directly proportionate to time, any judicial forum that fails to consider

[11] FHC/L/CS/591/95.

this universal principle of timeliness in adjudicating commercial cases destroys the economy.

The World Bank Ease of Enforcing Contract is mainly premised on timing and cost of litigation of commercial disputes through the courts. Nigeria's current ranking on ease of business as 131 out 190 jurisdictions, is not good enough for an economy that is desirous of attracting investments like Nigeria. With an inefficient and unpredictable justice system, only investors, who had no better market elsewhere, would attempt to venture into the Nigerian market.

Sad still, commercial litigants out of frustration in the Nigerian civil and criminal courts, move their grievances to advanced jurisdiction for settlements. Also, the Nigerian commercial jurisprudence is distorted as it is scattered in different books, documents on different fields of law. There is no comprehensive and synchronized commercial law reports to house both criminal and civil commercial cases for easy reference and research development to build the Nigerian commercial jurisprudence[12]. This has been creating huge commercial and capital flight from Nigeria ranging from cost of employing lawyers, housing them in foreign hotels, paying litigation fees and boosting foreign courts image as having the best commercial litigation architectures.

7.0. ARBITRATION LACUNAE IN RESOLVING COMMERCIAL LITIGATION IN NIGERIA

It is obvious that disputants are now discovering that Arbitration is a more efficient, flexible and cost-efficient alternative to litigation and in the very words of Lord Langdate, M.R,

> Many cases occur, in which it is perfectly clear, that by means of a reference to arbitration, the real interests of the parties will be much better satisfied than they could be by any litigation.

[12] Kanyinsola Ajayi SAN "The Nigerian Securities Market and Regulation: Industry Challenges and Expectation from the Judiciary", a 2016 Judges Workshop delivered at the National Judicial Institute on the Nigerian Capital Market Dispute Resolution.

The resolution of commercial disputes is obviously a very crucial aspect of the operation of the national economy and of the judicial system[13]. Commercial arbitration in Nigeria is governed by the Arbitration and Conciliation Act[14]. Arbitration is simply defined in the Act as "commercial arbitration, whether or not administered by a permanent arbitral institution". On the other hand, "commercial" is defined as:

> …all relationship of a commercial nature including any trade transaction for the supply of goods and services, distribution agreement, commercial representation or agency, factoring, leasing, investment, financing, banking insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road.

From the foregoing, we can then say that commercial arbitration is the voluntary submission of disputes arising from any form of business or commercial transaction to a third party other than the courts, for a binding decision[15]. However, this article identifies the substantial challenges frustrating the finality and enforcement of commercial arbitral decisions; examines unpleasant judicial attitude in enforcement of arbitral awards, and effects of these substantial challenges on enforcement of contracts in Nigeria. This becomes a problem since parties must, however, adhere to the *lex arbitri*. The *lex arbitri* contains mandatory rules that cannot be deviated from, such as grounds for challenge of awards. Also, it contains non-mandatory rules of procedural matter such as composition of the tribunal, conduct of the proceeding and features of the award. The challenges facing arbitral award enforcement are statutory and judicial challenges:

7.1. Statutory Challenges

There are lacunae in the Arbitration and Conciliation Act which are albatross to a seamless enforcement of arbitral awards. These

[13] J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates Nigeria: Lagos, 1999).
[14] Cap. A18, Laws of the Federation of Nigeria, 2004.
[15] Arbitration and Conciliation Act (ACA), s. 32.

lacunae are fundamentally pathological as investments are being repatriated to better enforcement jurisdictions due to uncertainty in the enforcement of contract in Nigeria, being one of the basic indices used by World Bank to analyse ease of doing business in all jurisdictions of the world.

7.1.1. Uncertainty in Time Limitation for Recognition of Enforcement of Arbitral Award

Time Limitation for recognition and enforcement of arbitral awards in Nigeria is governed by statutes. Generally, Statute of Limitation is the law which sets out time within which an aggrieved person can present or file his matter for determination by the court or any other body established for that purpose.

The Limitation Act[16] has placed the time limitation period for bringing an action including arbitration to six years. The question is, when does the six years start to run? In *M.S.S Line* v *Kano Oil Millers Ltd*[17], The Supreme Court decided that:

> The period of limitation runs from the date on which the cause of arbitration occurred, that is to say, from the date when the claimants first acquired either a right of action or a right to require that arbitration takes place upon the dispute.

Respectfully, this article disagrees with this decision of the Supreme Court of Nigeria as it is incorrect and not in tandem with international standards. Arbitration agreement has two main undertakings, the first being an undertaking to submit to arbitration when the dispute occurs, and the second being an undertaking to comply with the arbitral award when made. These two undertakings constitute two distinct contracts. It follows therefore that the time limitation for reference to arbitration runs from the date of the breach giving rise to arbitration *whereas the second limitation period for enforcement starts to run from the date the defendant refused to comply with the terms of the award*. This is because the same Supreme Court had in *K.S.U.D.B* v *Fanz Construction*

[16] Cap. 522, Vol. 88, Laws of the Federation of Nigeria, 2004.
[17] (1974) NNLR 1.

Co. Ltd.,[18] stated that an award once published extinguished any right of action in respect of the substantive matter in dispute and gives rise to a new cause of action based on the agreement between the parties to perform the award implied in every arbitration agreement.

However, in the Nigerian jurisdictional space, the Supreme Court decision quoted above remains valid till date until the Court overrule itself or set aside its own judgment. The current implication of the Supreme Court judgment is that arbitral award is being frustrated by the guilty who continue to refuse honouring the arbitral judgment. However, the Nigerian courts continue to follow the Supreme Court decision whereas effluxion of time extinguishes/terminates the arbitral award mid-way at the High Court.

7.1.2. Pathological Defects in Stay of Arbitral Proceedings

It is antithetical that arbitration that is supposed to dispense issues between parties quickly is being cornered by a scheming party who goes to court to stop the arbitral proceedings. There is nowhere in the Arbitration and Conciliation Act where court is empowered to grant injunction against arbitral proceedings. It often amounts to a "rape" of justice when a court stops arbitral tribunal from performing its statutory function by granting an injunction to a party that wants to prevent the continuation of arbitral proceedings even though that party had entered into an agreement to resolve all disputes through arbitration. The Arbitration and Conciliation only provides for judicial imprimatur in the following areas: stay of court proceedings, the removal of an arbitrator for misconduct, the setting aside of arbitral award and enforcement of an award. The Act does not provide for the intervention of the court to restrain arbitration by injunction from performing its statutory duties.

A judicial auxesis captures an exemplified case of *Nigerian National Petroleum Corporation* v *Statoil (Nigeria) Ltd and Ors*[19]. The Nigerian National Petroleum Corporation and Stateoil (Nigeria) Limited and Texaco Nigeria Outer Shelf Limited had entered into a production

[18] (1990) 4 NWLR (Pt.142)1 at 37.
[19] CA/L/758/2012.

sharing contract. That contract provided that disputes would be resolved through arbitration. A dispute arose from the contract but the Nigerian National Petroleum Corporation (NNPC) sought and obtained an injunction at the Federal High Court to prevent the continuation of arbitration. It argued that the subject matter of the claims in the arbitration involved taxation, and that by law, only a tax tribunal could hear the matter. The simple doctrine of contractual *consensus ad idem* was sacrificed on the judicial altar for commercial injustice to thrive.

Although the Court of Appeal set aside the black market and protégé injunction granted by the Federal High Court, the shock of the High Court decision has created uncertainty in the "hearts" of investors. Investors now lack confidence in the Nigerian judicial system. The Court of Appeal in Nigeria held in this case that a lower court was wrong to grant an injunction to a party that wanted to filibuster the continuation of arbitration proceedings even though that party had entered into arbitration agreement to resolve all disputes by arbitration. The Federal High Court decision to grant an injunction in the first place was part of a growing trend by lower courts to stop arbitrations commenced by international oil companies against NNPC. In the cited case, the central issue has been whether section 34 of the Arbitration and Conciliation Act that states that, "*a Court shall not intervene in any matter governed by this except where so provided by this Act,* means that the only basis on which a court can intervene to prevent the commencement or continuation of arbitration must be expressly provided for in the Act".

It seems to this article that the cited provision is omnibus in spirit and letter regarding granting of application to clog arbitral proceedings. Hence, doctrine of Implied Construction or Interpretation is necessitated. However, in the cited case above, the Nigerian Judiciary took the doctrine of Implied Construction to corner and conspire against the growth of arbitration.

In the opinion of this writer, the Arbitration and Conciliation Act created a consequential lacuna by not being categorical through insertion of a clause restraining the meddlesome interloper, the High Court or any court from entertaining any application to defraud a just

party whose belief is in the arbitration clause entered into from arbitral justice. Natural justice is a fundamental constitutional matter captured in Chapter IV of the Nigerian Constitution. Any attempt to impeach or subjugate this constitutional provision is and remains a nullity. Until there is a legislative activism to establish independent Commercial Court to immolate the conspiracy and rascality, all effort to make Nigeria an attractive business hub in Africa will continue to be an illusion.

7.1.3. Use of Archaic and Complicated Procedures to Commence Enforcement Proceedings

The procedures used in the Nigerian courts to enforce arbitral award is cumbersome, archaic and complicated. It is processed by filling Originating motions or Originating summons which are in themselves not created for or suitable for arbitral proceedings under Nigerian law. This continues to burden investors who desire direct and simple enforcement procedures.

In England, the Arbitration Act[20] regulates the Arbitration matters, as well as the Supreme Court of England and Wales Country Courts Civil Procedure Rules[21] 1998, and amply makes provisions for the enforcement of arbitral awards in England. Section 66 (1) of the Arbitration Act 1996 (UK), which is in *pair materia* with section 31(3)[22] of the Act, provides that an arbitration award may, by leave of the court, be enforced in the same manner as a judgment or order of the court. Where leave is granted, judgment may be entered in terms of the award. Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make award.[23]

The procedure is to simply file an Arbitration claim form which will include a concise statement of the remedy claimed and any questions on which the claimant seeks the decision of the court and give details

[20] Chapter 23, 1996.
[21] No. 3132 (L.17) 1998.
[22] Order 26 Rule 8 Federal High Court (Civil Procedure) Rules 2009.
[23] Order 26 Rule 12(1).

of any arbitral award challenged by the claimants, identifying which parts of the award are challenged and specifying the grounds for the challenge. The rules make provisions on issues such as service outside jurisdiction; how notice may be served and on who;[24] case management hearings; and the enforcement of the arbitral awards. The application is simply made in the arbitration claim form to enforce the award in the same manner as a judgment or order of court.[25] All parties are expected to be served and the hearing will proceed notwithstanding that the defendant did not appear. The procedure in England is simple, direct and uncomplicated. There is no use of archaic procedure like motions or Originating summons like the Nigerian provisions which are in themselves not created for or suitable for arbitral proceedings under Nigerian law.

7.1.4. Unnecessary Burden of Clothing the High Court with Power to Enforce Arbitral Award

An award which cannot be enforced at the end of the day is useless. The successful party in arbitration expects the award to be performed without delay. That is a reasonable expectation. As stated earlier once award has been rendered, the arbitral tribunal usually has nothing to do with the dispute unless on exceptional grounds. The Nigerian Arbitration and Conciliation Act empower the losing party with some options:

- He may simply carry out the award voluntarily,
- He may use the award as a basis for negotiating a settlement
- He may challenge the award through application to set aside
- He may resist any attempt by the winning party to obtain recognition or enforcement of award

Where a court is asked to enforce an award, it is asked not only to recognize the legal force and effect of the award, but also to ensure that it is carried out by using such legal sanctions as are available. In Nigeria, once an award is registered in the court, it becomes

[24] In line with the ACA.
[25] S. 66(3) Arbitration Act, 1996 (UK).

enforceable as a judgment of that court. Thus Section 31 of Arbitration and Conciliation provides:

> 31. (1) an arbitral award shall be recognized as binding and subject to this section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.
>
> (2) The party relying on an award or applying for its enforcement shall supply-
>
> (a) The duly authenticated original award or duly certified copy thereof;
>
> (b) The original arbitration agreement or a duly certified copy thereof.
>
> (3) An award may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.

Looking at the statutory requirements that the beneficiary of arbitral award must certify and dockets of the High Court coupled with industrial strikes, the award documents are not worth the papers they are written. The bureaucratic provision of the Act in enforcing arbitral award in the Nigeria Court is needless as the arbitral judgment may become academic by Statute of Limitation as the court may not enforce the award on time in the face of docket of case files before it as well as industrial disharmony which may suspend the court activities for a long period of time. Also, political exigencies may warrant such delay in enforcement. Hence, effluxion of time renders such arbitral award academic or useless. This is very inimical to wheel of arbitral justice. This frustration is called Arbitral Filibuster.

The compulsory provision in the Arbitration and Conciliation Act for bureaucratic submission of arbitral award to the High Court for enforcement is a disservice to the frenetic efforts exerted at the arbitration. The incessant question often asked by the stakeholders, particularly the investors, is why can the arbitration judgment not be enforced like the judgment of the High Court without any recourse to the High Court? Various advanced economies have removed this enforcement clog from their domestic statute. That is, those advanced

economies have empowered the arbitrations to enforce their judgment. Hence, investors' confidence and certainty are gained by them. The implication of this in the Nigerian adjudicatory forum is that uncertainty pervades enforcement of arbitral award until the bureaucratic High Court enforcement of arbitral award is removed.

7.1.5. Setting Aside of Arbitral Award

The finality of arbitral award has met mixed reactions among the stakeholders in arbitration. For the import of clarity, it is expedient to note that the provisions of the Arbitration and Conciliation Act on this subject empower the High Court with power to review the award of arbitration tribunal. This amounts to a double trial as it wastes time, money and businesses are grossly affected. This is so because upon the establishment of grounds to set aside the arbitral award by the aggrieved party, the beneficiary would also be asked to make his/her own submission. What a double trial!

It therefore becomes vexatious, knotty and monotonous to investors who will rather opt for exodus transfer of their businesses to viable and seamless climes for enforcement of contract. Other jurisdictions have removed the provision of judicial review of their arbitral tribunals by making the arbitral awards enforceable without recourse to judicial review of their courts. The Brazilian Arbitration law abolished the requirement for judicial ratification of arbitral awards. This law equated an arbitral award with other judicial decisions or judgment[26] and expressly provides that the arbitrator is equivalent to a judge for the purposes of the arbitration proceeding.[27]

What other advanced jurisdictions like Brazil cited above do is to provide for appeal being the only option available to aggrieved party at the Court of Appeal. The implication is that the judgment of arbitral tribunal is equivalent to that of a High Court. Until a replica provision by way of amendment to Arbitration Act, investors' confidence will continue to decline and Nigeria continues to lose wealth due to transfer of investors' capitals.

[26] In cases where the claimant is challenging the arbitral award see s. 62.4.
[27] S. 62.6.

7.2. Judicial Challenges

"Independence and Impartiality" is an alliterative pairing found in every fibre of judicial imprimatur and human rights treaty, despite, in fact, being disparate concepts with different legal histories. Judicial independence is fundamental to every democracy, both as a guarantor of the separation of powers in the state and of the rule of law. There is an unstated assumption that the role of courts in arbitration is, or should be, different from their everyday role. However, in the case of enforcement of arbitral award, the Nigerian judiciary is fraught with some challenges predicated on judicial impartiality and non-independence. These challenges are serially captured as investors continue to ponder on the uncertainty of the enforcement of arbitral awards in Nigeria:

7.2.1. Impartiality and Neutrality Challenges of Seamless and Quick Dispensation of Commercial Litigations

The results from the 2015 Queen Mary International Arbitration Survey's[28] reflect this sentiment. Respondents to the survey were asked to specify their preferred seats or adjudicatory fora/climes. The five most preferred and widely used seats are London, Paris, Hong Kong, Singapore and Geneva. When asked the reasons why they prefer certain seats to others, the three paramount factors relate to the formal legal infrastructure of the seat-namely:

- impartiality and neutrality of the local legal system
- national arbitration law; and
- track record of enforcing agreement to arbitrate and arbitral awards

It is obvious that following the foregoing survey, the Nigerian judiciary is not listed among the arbitration viable fora/jurisdictions in the

[28] Queen Mary University of London, "2015 International Arbitration Survey Improvements and Innovations in International Arbitration", retrieved from http://www.arbitration.qmul.ac.uk/docs/164761.pdf (accessed 12 April 2018).

world. Some cases to justify the challenges are captured under headings:

7.2.2. Indifference in Upholding Arbitration Agreement and Supporting Arbitral Process

The Nigerian judiciary, which includes judges, is very reluctant in supporting and upholding arbitration because it is believed to be a usurpation of judicial tradition and wrong step in rendering judges "adjudicatory roles". This is demonstrated by a number of cases narrated shortly. In the case of *Imoukhuede* v *Mekwunye & 2 Ors*,[29] a dispute arose out of a tenancy agreement between the parties, which contained an arbitration clause to the effect that disputes were to be referred to a Sole Arbitrator to be appointed by the resident of the "Chartered Institute of Arbitration (London) Nigerian Chapter". "M" issued a notice of arbitration and wrote to the Nigerian Branch of the Chartered Institute of Arbitrators (CIArb) requesting the appointment of a sole arbitrator. CIArb complied with the request. The arbitral proceedings continued, and a final award was made.

"I" challenged the award at the High Court of Lagos State on the ground, among others, that there was no valid arbitration agreement between the parties. The contention was that

There is no body/organization known as THE CHARTERED INSTITUTE OF ARBITRATION (LONDON) NIGERIAN CHAPTER and as such, there cannot be a referral for arbitration to a non-existent body.

The High Court dismissed the challenge. It found that the parties' intention was to refer their disputes to arbitration and that the intended appointing authority was the Chairman of the Chartered Institute of Arbitrators, Nigerian Branch.

However, it is so pathetic and mind boggling that the Court of Appeal reversed the sound and judicial activism of the High Court. The Appeal Court disagreed, it held:

[29] (2015) 1 CLRN 30.

> There is nothing from the processes before the lower court to support the conclusion reached by the lower court that the Chairman of the Chartered Institute of Arbitrators (United Kingdom) Nigerian Branch is the same person as the president of chartered institute of arbitrator London-Nigerian Chapter when the words used, in the agreement are clear and do not in my view admit of any ambiguity. The duty of the courts inclusive of the lower court where the language of an agreement is clear and unambiguous agreement and concurs with same….
>
> If the Parties in this Appeal really intended that any other person other than the President of the Chartered Institute of Arbitrators (London) Nigerian Chapter should be the appointing authority as canvassed by learned counsel for the 1st respondent, surely same would have been explicitly stated in Exhibit B.
>
> It follows therefore that since there is in effect no body/organization known as the Chartered Institute of Arbitration (London) Nigerian Chapter, the clause itself is unenforceable.

With due respect, their Lordships' decision does not demonstrate nor pontificate an understanding of the arbitral process – specifically, the interpretation of pathological arbitration clauses. The decision is quixotic and questionable because of a number of reasons:

First, while Nigerian law enjoins the courts to re-write a contract for the parties, where a term of a contract is open to more than one interpretation, it is appropriate to adopt the interpretation that is most consistent with business common sense[30].

Secondly, the commercial intention of the parties was to submit any dispute arising out of the tenancy agreement to binding arbitration. A mistake in the name of an appointing authority does not derogate from that intention. The clause should have been interpreted to give congruent application to this intention. In any event, Nigerian Courts

[30] *Texaco Oversea (Nig) Pet. Co Unltd* v *Rangk Ltd* (2009) All FWLR (Pt. 494) 1520.

have applied the "blue pencil" rule to invalidate only the offending portion of a contractual provision.[31]

Thirdly, Nigerian Courts recognize that arbitration clauses are to be respected and should be read, and thus construed, as liberally as possible. In *Fidelity Bank Plc* v *Jimmy Rose Co. Limited*, the same Division of the Court of Appeal (though presided over by a different panel of Justices) held:

> The position of the law is that whether or not the arbitration agreement is a document signed by the parties as envisaged by Section 1(1) (a) of the Arbitration and Conciliation Act … or discoverable from their correspondences as per Section 1(1) (b) thereof, the essential prerequisite is that it must be precise and unequivocal. The court will hold such an agreement to be unequivocal if the word used is neither permissive nor discretionary. (Emphasis added)
>
> Courts of law have inherent jurisdiction to decide disputes between parties, but where the parties by their own agreement opt for arbitration the courts will always respect such agreements and decline jurisdiction. (Emphasis added)
>
> For courts to accept and recognize an agreement as an arbitration agreement it must be precise and mandatory… The agreement will be held to be mandatory and unequivocal if it contains the mandatory word "shall" and not the permissive and discretionary "may". (Emphasis added)

I commend the rationale of the respective Courts in *Fidelity Bank* v *Frontier Oil*. The primary focus of the Courts should be to determine whether the parties have a real intention to submit their dispute to arbitration. That intention crystallizes where the reference to arbitration is mandatory.

To paraphrase the UK House of Lords (as it was then known) in *Premium Nafta Products Limited and others* v *Fili Shipping Company Limited and others* ("Fiona Trust"), where the parties make provision for an

[31] *Idika* v *Uzoukwu* (2008) 9 NWLR (Pt. 1091) 34.

arbitration clause, the interpretation of the said clause should begin with the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their contractual relationship to be decided by an arbitral tribunal.

7.2.3. Judges' Exercise of Restraint of Knowledge and Skills during Activism in Arbitral Award

The Judges are referred to as Law Lords expected to be clothed with knowledge and cognate skills to decide matters in the interest of justice and in accordance to law. However, the Nigerian Judges are not yet there with respect to arbitration flow of telepathy. There is a case that bordered on allowing third parties to intervene in arbitral proceedings:

In the case of *Statoil Nigeria Limited* v *Federal Inland Revenue Service*[32], a dispute arose between Statoil and the Nigerian National Petroleum Corporation (NNPC) as to the interpretation and performance of the Petroleum Sharing Contract (PSC) between the parties. This resulted in arbitration proceedings being instituted by Statoil. The Federal Inland Revenue Service (FIRS) subsequently commenced proceedings against all the parties to the arbitral proceedings seeking to determine whether the Arbitral Tribunal has jurisdiction to determine the subject matter of the arbitration. FIRS' position was that the dispute was based on issues of tax and the interpretation of the Petroleum Profit Tax Act[33] and was not arbitrable as it impacted upon its statutory obligations under the Federal Inland Revenue Act.

Without deciding whether the dispute before the arbitration tribunal was arbitrable, the Court of Appeal held that although FIRS was not a party to arbitration agreement, it could intervene in arbitration proceedings. It held:

> If a party to an arbitral agreement can challenge the jurisdiction of the Arbitral Tribunal, or that the arbitral agreement was ab initio, null and void, what about a person or authority such as the 1st respondent who was not a party to the agreement but complains or that if an

[32] (2014) LPELR 23144 (CA).
[33] Cap. P13, Laws of the Federation of Nigeria, 2004.

> award is eventually made one way or the other is of the view that the proceedings or subsequent award by an arbitral tribunal constitute an infringement of some provisions of the Constitution or the laws of the land or impede her constitutional and statutory functions or powers, would the person be debarred from seeking declaratory remedies or by originating summons? I do not think so. Where there is proved a wrong, there has to be a remedy.

The Court also held that the third party was not required to wait for an award and then seek to set it aside; it could bring independent proceedings to challenge the arbitration proceedings. It held:

> I am of the humble opinion that it will be in the best interest of the 1st respondent not to wait or stand by for the Arbitration Tribunal to complete the proceedings and make an award. 1st respondent has the *locus standi* to act timeously to arrest the situation by a declaratory action or originating summons in a Court of law. Where the claim succeeds, the Court may make a declaration that the arbitral agreement was void ab ignition or that the Arbitral Tribunal lacked the jurisdiction to have entertained the dispute on grounds of constitutional or statutory illegality.

In light of this decision, it appears that a non-party to an arbitration agreement can challenge an award in circumstances where the issue of jurisdiction is raised and where the powers conferred by the Constitution or by statute are contravened or need to be interpreted. This decision highlights the tension between the need for *judicial restraint* under Section 34 of the Arbitration and Conciliation Act and the inclination of the Courts to enforce their constitutional role

The challenges are so fundamental that amendments of the arbitration Act and lacunae of overloading High Court on commercial matter could hardly remove the defects captured:

8.0. LACUNAE OF OVERLOADING HIGH COURT WITH COMMERCIAL MATTERS

Nigerian commercial jurisprudence continues to suffer as slavish appendage of the overloaded jurisdiction of the Federal and State High

Courts. Being the practice in advanced climes, the Nigerian constitution has placed the commercial litigation under a division of the High Court. However, commercial cases have continued to proliferate the High Court dockets for years as captured in the foregone narrative. Due to lack of statutorily independent commercial court in Nigeria, consequences of delay in adjudication of civil and criminal commercial cases are huge and devastating to ease of enforcing contract and doing business in Nigeria. The consequences are captured:

8.1. Loss of Hard-Earned Financial Investments by Investors

Commercial transactions in Nigeria, like every other jurisdiction, are proportionate to time and space. Transactions at the floors of the Nigerian Stock Exchange where financial (service) products involving banking, insurance and securities transactions confluence, react to exigency of time. Foreign exchange trading, equity trading, buying and selling of securities in insurance, and banking are traded with consciousness of time. Future, forward contracts, options and franchise are traded proportionate to timing. Hence, fraudulent trading, insider abuse and other genre of commercial crimes that need urgent investigations and prosecution of erring company or individual on time because of the peculiarity of the market are often remitted in the docket of the Federal High Court to drag for years before they are decided.

The civil litigations involving same keep suffering the same fate. These crimes and commercial torts take months or years before they are finally resolved and the implication is that investors seeking justice are already frustrated and losses procured. This is as a result of complex civil and criminal administrative procedures, frustrations by counsel, deficient cognate knowledge and skills of judges in financial transactions, and unforeseen bureaucratic forces during litigations.

8.2. Lack of Synchronized Commercial Matters Jurisprudence in Nigeria

Jurisprudence is a philosophy or epistemology of law. It is an organic growth or development of each branch of laws with the purpose of using such telepathic experience as guiding principles, promoting knowledge in that branch of law. Unlike every advanced jurisdiction of the world, Nigerian does not have comprehensive and distinct data for decided cases on commercial matters. Nigeria only has terse securities, banking and insurance and other commercial historical narratives without corresponding or sequential law reports specially devoted as Commercial Law Reports. There are lacunae of subject matter commercial law reports to aid facts and evidence in similar/confluence cases. Most of the times, Nigerian lawyers consult foreign and advanced jurisdictions to import their decided cases to support their cases. This is promotion of neo-colonial commercial tort and crime dispensation. Even the few decided commercial cases decided by the Federal High Court are scattered among general law reports and become difficult to locate simply because they are negligible to be separately collated in a distinct law report.

8.3. Further Decline in World Bank Ease of Enforcing Contract in Nigeria

Currently, enforcing commercial contracts of various species in Nigeria is poor and creates uncertainty in the minds of investors because of jurisdiction/forum shopping controversy such as between the Investment and Securities Tribunal and the Federal High Court. It becomes sadder that the there is no statutorily created commercial court let alone of investing same with criminal jurisdiction to quickly adjudicate on all commercial matters. The World Bank Ease of Enforcing Contract continues to see Nigeria as one of the dangerous and insecure jurisdictions for commercial investors to commit their investments. This is because commercial (crime) cases take longer time in the High Court docket and that statutorily specialized court on the commercial subject matter does not exist in Nigeria. It is a business norm/axiom that investors, even countries rely on the World

Bank Index to choose where to commit their portfolios. As it is, Nigeria is a doubt.

8.4. Increase in Financial Crimes and Torts

This is a direct experience anywhere when administration of criminal and civil justice is slow or subject to manipulations by the offenders/felons, and there is indulgence in civil procedural schemes and frivolous injunctions and adjournment. On daily routine in Nigerian commercial markets, crimes and torts are committed with impunity. This is because the wheel of justice is slow, uncoordinated and easily manipulated. Many times, the purpose would have been defeated before the cases were decided. This is because the appropriate court that has subject matter jurisdiction, the Federal High Court does not border about the exigency of the market and thought in the mind of investors.

8.5. Repatriation/Capital Flight of Investment Portfolios from Nigeria

This is becoming obvious as the investors who were already in the market are gradually repatriating their investments to other jurisdictions to continue their business. The release being heard at interval regarding the outflow of investments from the shore of Nigeria is alarming as investors continue to doubt the certainty of enforcing their contracts and getting justice in court against those felons who aim at defrauding them.

9.0. RECOMMENDATION

9.1. Advocacy for Statutorily Independent Commercial Court

A prompt and structured judicial architecture is a pillar and prospect of enforcing commercial contract anywhere in the world. This is necessary particularly in a developing economy like Nigeria where commercial arbitrations are circumvented, and the High Courts' dockets are overloaded with commercial cases, despite the creation of commercial litigation divisions for administrative ease of

commercial cases disposal. Hence, this article advocates for a legislative piece setting up commercial court:

9.2. Epistemology of the Proposed Commercial Court

The word "epistemology" simply connotes theory of knowledge about a particular field or taxonomy of idea on interpretations, analyses or logical schema about a study. The science of epistemology is a way of investigating our human ways of knowing, with particular reference to how words obtain their various species of meanings.

9.3. Constitutional Provision for the Proposed Commercial Court

The need for reasonable commercial certainty about the content of commercial law and jurisprudence is central to the operation of the economic system Nigeria and the world. Without it the outcome of commercial transactions becomes speculative and this is a disincentive to trade. Jurisprudence of independent commercial court which is constitutionally value-chained will introduce level of certainty into aspects of the law of contract and commercial law generally. This would save commercial litigation from the scheme of Arbitration Filibuster, where commercial matter litigants leverage on arbitration weaknesses to frustrate enforcement of arbitral awards that occasion huge commercial loss.

In taking the commercial matters from the crisis of delay and enforcement of contract whereby superficial and quixotic divisions of commercial courts are attached to the exclusive jurisdiction of the traditionally over bloated High Courts, constitutional imprimatur is exigent particularly of Sections 6 (5) to include Commercial Court among the list of the superior courts and conferred on it all the rights, functions, privileges and benefits enjoyed by the Federal High Court outlined in Section 81 of the 1999 Constitution. Constitutionalism is a pillar of jurisprudence, judicial functionalism and investment activism. Speed in adjudication of commercial matters is guaranteed under a specialized constitutionally sanctioned commercial court having judges with commercial training and business *cognito.*

9.4. Appointments of the Proposed Commercial Court Judges

Appointments of the proposed Nigerian Commercial Judges should follow the same process as it stands for other superior courts in Nigeria. For example, it should follow the Federal High Court Judges' appointments which are constitutionally provided for under Section 250 (1-5). The person for the Office of the Chief Judge of the Commercial Court is recommended from the National Judicial Council (NJC), being the regulatory body for the nation's Judiciary, to the Presidents for appointment subject to the confirmation of the National Assembly. This procedure is wisely provided for to avoid abuse of powers and stifling of the nation's Judiciary by the Executive. All other Judges of the Commercial Court are recommended by the National Judicial Council (NJC) for appointment by the President with the confirmation of the National Assembly. At the Federating Units, the same procedure is recommended.

9.5. Salaries Structure of the Commercial Court Judges

The salaries of the Commercial Court Judges are paid to the regulatory head of the Judiciary, that is, the National Judicial Council under the Chairmanship of the Chief Justice of Nigeria for onward disbursement to the Federal Judges and the same goes for the State. Judicial funds and salaries are got from the Appropriation Act and are drawn from the Consolidated Revenue Fund. The philosophy behind this is to guarantee the independence of the Judiciary from the Executive as espoused in the context of separation of powers among the three organs of Government. As it is today, the Nigerian Federal Judges are financially and functionally independent from the Executive so as to enhance impartiality, equity and natural justice in dispute resolution. This architectural financial functionality would enhance impartiality and speedy dispensation of commercial litigations.

9.6. Jurisdictional Architecture of the Proposed Commercial Court

Upon capturing the Commercial Courts in detail under the genres of courts as established and alluded to under Section 6 of the 1999

Constitution. Generally, the Commercial Court would have exclusive trial jurisdiction over any action or proceeding for declaration or injunction affecting the validity of any commercial matters. Being a specialized Court on commercial matters, the Commercial Court should, *in extenso,* be clothed with exclusive jurisdiction in civil and criminal causes and matters arising from the operation of various commercial laws, agreements and activities.

9.7. The Statutory, Practical and Functional Architecture for Proposed Specialized Commercial Court (CC) in Nigeria

The legal infrastructure and regulatory deficit confronting efficient and quick dispensation of commercial litigations are hereby architecturally redressed. The Nigerian National Assembly needs as a matter of urgency to enact Commercial Court Act (CCA) as a follow up to the proposed amendments of the Nigerian Constitution to allow commercial court to commence operation according to its mandate. The new legislative piece should confer on the Commercial Court all the powers, functions, duties, privileges and rights being enjoyed by the Federal High Court. One of the hallmarks of independence judiciary is financial autonomy and total adherence to the principle of separation of powers as espoused by Montesquieu.

As an abstract principal, judicial independence ranks high in our constellation of democratic values-right up there with freedom of speech, the sanctity of the home, and the right to counsel. And well it should, since all other rights would be diminished, perhaps even forfeited, in the absence of judges capable of resisting the will of government or the pressure of popular sentiment. It is the independent judge, loyal only to the rule of law, who protects our constitutional liberties, who ensures fairness, and who stands guard against the excesses of those in power.

As Justice Jackson observed at the height of the Cold War and the depth of the McCarthy era:

> Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet

> substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices[34]

In other words, freedom rests upon the application of the law at least as much as it does upon the precise content of the law. In turn, application of the law rests upon the existence of judges who are unconstrained by other forces – who are, as we say, independent. It is so much for the high-minded civics lesson. The concrete story of judicial independence is acted out more in the trenches than in the pages of the law journals or political science texts. Real-life intrusions on judicial independence come in many forms and at every level. Although these intrusions occur most often when a judge does something notably unpopular or controversial, it would be a mistake to believe that judicial independence is threatened only by demagogues or Neanderthals. Rather, the dangers may come from any number of directions, some more subtle than others.

9.8. Exigency for Legislative Proposal of Administration of Civil Justice (Procedure) Act (ACJA)

It is a common legal pontification that justice delayed is justice denied. Nigerian administration of civil justice is too slow that civil litigations drag for years before they are disposed of. Various stakeholders in the administration of justice such as litigants, defendants, their counsel and corrupt judges leverage on the weak justice system to frustrate quick disposal of commercial litigations. Nigeria has continued to decline in the rung of Enforcement of Contract Index being released by the World Bank on yearly basis. Hence, there continues to be exodus repatriation of investment portfolios into other jurisdictions with efficient enforcement of contracts.

However, this can be addressed by fixing the statutory lacunae of frivolous injunctions, judicial industrial actions, justice buying and provocative adjournment of cases. The quick passage of Administration of Civil Justice (Procedure) Act (ACJA) will fix the lacunae. Most importantly, corporate transactions and businesses

[34] *Shaughmessy* v *United States* **ex** *rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

must not be tied down by intrigues being played out by players in the court of justice to frustrate commercial litigations. The proposed Act should block all judicial administrative intrigues, and look into advanced economies to import their viable jurisprudence and replicate them in our laws. This Justice Act would immensely complement efficient and quick mandate of the Commercial Court. The result of the workings will open Nigerian business ecosystem to massive investment portfolios and the economy would grow.

10.0. CONCLUSION

This article has detailed the essence and benefits of establishing commercial court with civil and criminal jurisdictions in Nigeria. The major benefits are that investors' confidence is secured, our criminal and civil commercial jurisprudence becomes synchronized and accessible, ease of doing business in Nigeria becomes guaranteed to the investors, and Nigeria can then have comprehensive Criminal Financial Services Law Reports and Civil Financial Services Law Reports. The essence of subject matter law reports aids easy citation of decided cases to aid evidence. Also, subject matter law reports enhance academic ratiocination, analyses, debates and practical discuss to grow commercial jurisprudence in Nigeria. It is believed that following the proposals suggested commercial investment pools into the Nigerian economy will be massive.