SOME LEGAL ISSUES INVOLVED IN INTERNATIONAL ARBITRAL AWARD IN THE CASE OF *PROCESS AND INDUSTRIAL DEVELOPMENT LIMITED v THE FEDERAL REPUBLIC OF NIGERIA*

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ABSTRACT

The case of Process and Industrial Development v The Federal Republic of Nigeria has generated a lot of controversies in the government circle as well as in the academic world. The controversies centred on the near punitive award against the Nigerian government in favour of Process and Industrial Development Limited. The typology of this type of damage which forms a common feature of International Arbitral Award is difficult to fix into the existing and well-known typologies of damages. In this situation, nations wallow in a dilemma when their officials entered into an international contractual agreement with forum selection clause and without the knowledge of the executive or with the knowledge of the executive head that lacks the adequate knowledge of the legal implications of such agreement.

It is against these backgrounds that this paper addresses the legal implications of the United Kingdom's Arbitral Tribunal's award in the case of Process and Industrial Development v Federal Republic of Nigeria. Legal issues forming the focal points of the paper among others are the deployment of the Dcf model which is a damage reduction mechanism to grant a more than the punitive award and the impropriety or otherwise of refusal of public policy argument by the enforcing court to grant Nigeria's relief for a stay of enforcement; the fact that the Tribunal and the enforcing court lacked jurisdiction to grant and enforce the award; that the Tribunal and the court adopted the narrow view of public policy and the inability of the court and the Tribunal to distinguish between factual causation and legal causation among others. It is therefore against these backgrounds that we are going to address in the second part of this paper the recent relief granted Nigeria by the English court.

***Keywords**: Legal, Issues, Arbitral, Awards.*

1.0 LITERATURE REVIEW

At common law, damages are the form of the monetary award paid to a claimant as compensation for loss or injury suffered as a result of the defendant's wrongdoing or dereliction of duties under an agreement. Damages might be nominal most especially where the motive is not to prevent officials of government from effectively performing their duties. For damages under this situation is not to cause disincentive to work most especially when it is punitive. However, punitive damage serves both the punishment and deterrent functions to prevent the future wrongful acts of the wrongdoer himself and similar wrongdoers with the intention to commit a future similar act.

Damages under the Law of Contract could, however, be conceptualized differently as the sum of compensation for a breach of contract. The interest the innocent party had in the contract lies in the protection of his interest under the contract. According to Sagay[i], under the Law of Contract, the general rule is to restore the innocent party to the position he would have been had the wrong not been committed. The underlying principle is *restitutio in integrum* i.e. restoration to the original position.

The author of the Law Teacher elicits[ii] six factors to be considered when the courts are considering whether to award damages or not:

i. Has the claimant suffered any loss?
ii. Is that loss suffered actionable?
iii. Did the breach of agreement resulted in a loss?
iv. Did the claimant contribute to the loss?
v. Did the parties agree on the damages clause? This last point should be weighed against the principle that the penalty clause would not be enforced by the court.

It is on the last point that this paper addressed an important feature in the P & ID's case that the Arbitral award against Nigeria is a penalty and abysmally punitive as awarded by the Arbitral Tribunal which needs a serious reconsideration in International Law. The award that is common in most Arbitral Tribunal failed the yardsticks of legitimate protection of interests, it is exorbitant, more than punitive in comparison to other typologies of damages award and disproportional to the interest sought to be protected. Some of the interesting focal points addressed in this paper are: that this agreement was designed to fail and fraudulently packaged

by parties to defraud the target institution, that is, Nigeria; the dcf model which is a damage reduction mechanism was arbitrarily applied to impose severe damages on Nigeria; that what amounts to public policy in Nigeria is on the equation of balance differs from that of the United Kingdom; that it is inconceivable that the Federal Republic of Nigeria could be vicariously held liable for a contract entered into and fraudulently packaged and designed to fail and the fact that the principle of estoppel which has traversed its traditionalist conception would have done the magic of promoting justice if properly applied by the Arbitration Tribunal.

2.0 INTRODUCTION

The case of *Process & Industrial Developments Ltd. v The Federal Republic of Nigeria*[iii] represents another important landmark in the application of the principle of estoppel in International Commercial Law or International Contract. The arbitration matter which finally was a subject matter of litigation before the High Court of Justice, Business and Property Court of England and Wales Commercial Court (QBD), raised a lot of serious interesting legal issues. This study addressed the legal issues raised in this case and the possible inadequacies of the decisions of the courts with special regard to the seat of the Arbitration Tribunal and the final arbitral award. For a proper appreciation of the complex legal issues engendered by this case, this study addressed comprehensively the following issues; the facts of this case, the terms of the contract, the appraisal of the complex legal issues raised in this case vis-à-vis the jurisdiction of the Tribunal, unanimous part final judgment on some preliminary issues, the three stages of the legal battle by the Federal Republic of Nigeria hereinafter referred to as the FRN, the drawing of Lord Hoffman's dragon net, the final pronouncement by the English Court and issues and legal framework on the seat of the arbitration. Further, the study appraises other complex legal issues relating to the seat of the arbitration, argument relating to the application of the principle of issue estoppel, contentions by FRN that the English court should not enforce the Final Award by the arbitration as its judgment, the prayer that the award should be refused for awarding pre-award interest, the irregularity of granting the penal award, the public policy contention and the impropriety of its rejection by the court. In the final analysis, this paper after proper consideration of the matters highlighted discussed the deficiency in the DCF model by canvassing the argument that a model designed to be used by the Tribunal as a damage reduction mechanism was employed to award cut-throat and punitive damage, this

paper examined other non-speculative principles that ought to be used by the Arbitral Tribunal. In the final analysis, the paper expounded that the application of the principle of estoppel if properly explored would have done the problem-solving magic. However, the contrary is the case. The explanation for the harsh judgment being that the approach adopted by the court was non-liberal, zero activists one. The paper conclusively revealed some legal routes to help this case on appeal by the FRN while suggesting executive, legislative and legal precautions to pre-empting the recurring decimal of subsequent cases like the P&ID's case.

3.0 THE FACTS OF THIS CASE

On the factual situations of this case, Process and Industrial Developments, Engineering and Project Management Company in Britain with a Nigerian office in Maitama, Abuja, the capital of the Federal Republic of Nigeria, is the claimant. The respondent is the Ministry of Petroleum Resources of the Federal Republic of Nigeria. On the 11th day of January 2010, the claimant and respondent entered into a written contractual agreement known as Gas Supply and Processing Agreement (GSPA) where the parties purportedly agreed on the terms below[ivv]:

3.1 TERMS OF THE CONTRACTS

i. The Federal Republic of Nigeria was to supply natural gas, otherwise Gas, at zero cost to Process and Industrial Development through government pipeline to Process and Industrial Developments site of the production facility. Process and Industrial Developments was inconsequent to construct and put into operation the necessary facility required to process the 'wet gas' liquids ("NGLs") content contained within the Wet Gas and return same to the Federal Republic of Nigeria as 'lean gas' which is suitable for use in power generation and other allied purposes, also at zero cost to the FRN.

ii. Process and Industrial Development was to be entitled to the Natural Gas-liquid contents retrieved from the Wet Gas.

iii. The Gas Supply and Processing Agreement was to run for 20years periodicity commencing from the first regular supply of the Wet Gas by the Federal Republic of Nigeria.

iv. Meanwhile, clause 20 of the Gas Supply and Processing Agreement provided inter-alia as follows[vi]:

a. The Agreement shall be governed by and construed following the laws of the Federal Republic of Nigeria.

b. That if any difference or dispute arises between the P & ID and FRN concerning the interpretation or performance of the GSPA and in case of failure to resolve such difference or dispute amicably, then a party may serve on the other a notice of arbitration under the rules of Nigeria Arbitration and Conciliation Act (Cap A 18 LFN 2004) which except as otherwise provided in this agreement, shall apply to any dispute between

c. That within thirty (30) days of the notice of arbitration being issued by the initiating party, the parties shall each appoint one arbitrator and the arbitrator so appointed shall appoint a third arbitrator within 15 days.

d. The arbitrator's award shall be final and binding upon the parties.

e. The award by the arbitrators shall be delivered within two months after the appointment of the third arbitrator or within such time as might be agreed by the parties.

f. That the venue of arbitration shall be London, England or as otherwise agreed by the parties.

g. That the arbitration proceedings and record shall be in the English language.

h. The parties shall agree to appropriate arbitration terms (of reference) to exclusively resolve any disputes between them from these Agreements.

3.2 APPRAISAL OF THE COMPLEX LEGAL ISSUES VIS-A-VIS THE JURISDICTION BY THE ARBITRAL TRIBUNAL

For a proper appraisal of the complex legal issues, in this case, it should be noted from the onset that the above agreement set out certain conditions precedent for the assumption of jurisdiction by the arbitral tribunal[vii];

i. Differences or dispute must have arisen between the P & ID and FRN.

ii. The dispute or differences must of necessity concern the interpretation of or performance of this agreement.

iii. The parties must have attempted and failed to settle such differences amicably among themselves.

iv. After the failure to settle or resolve such differences among themselves, then a notice of arbitration under the rules of the Nigerian Arbitration and Conciliation Act (Cap A18 LFN 2004) might be served on the other party.

v. Within thirty (30) days of the issuance of that notice being issued by the initiating party, each of the parties shall appoint one arbitrator each.

vi. Then the two arbitrators appointed by the parties shall appoint by consensus the third arbitrator to complete the tribunal.

vii. Also, both parties shall agree to the appropriate arbitration terms (of reference) to exclusively resolve any disputes arising between them from their agreements.

viii. That the venue of the arbitration shall be London, England or otherwise as agreed by the parties.

It is against the above conditions precedent for arbitrating the differences and dispute between the two parties that the Tribunal is to assume jurisdiction, that we appraised the rightness or otherwise of the arbitral award by the Arbitration Tribunal. Meanwhile, barely two years, into the agreement, i.e. by 2012, a dispute arose between the parties concerning the Gas Supply Processing Agreements. P & ID contended that the FRN had failed to make the Wet Gas available as agreed. The step taken to verify whether the parties conform to the terms of the conditions for the commencement of arbitral proceedings are;

a - On 22nd August 2012, P & ID served its notice of Arbitration.

b - On 19th September 2012, P & ID appointed Sir Anthony Evans to act as an arbitrator.

c - On 30th November 2012, the FRN appointed Chief Rayon Ojo SAN as its arbitrator.

d - The two arbitrators invited Lord Hoffman to become the third arbitrator and the chairman of the arbitral tribunal.

P & ID, through its statement of the case, claimed that the Federal Republic of Nigeria was in repudiatory breach of the Gas Supply and Processing Agreement by its failure to supply the Wet Gas. P &ID also asserted that they had accepted the repudiation by the Federal Republic of Nigeria. In consequent, P & ID claimed damages quantified at this stage as US $5,960,226, 233 plus interest[viii].

3.3 UNANIMOUS PART FINAL JUDGMENT ON PRELIMINARY ISSUES

The Arbitration Tribunal made a unanimous Part Final Judgment on the 3rd day of July 2014, dealing with certain preliminary issues that arose. The tribunal held that[ix];

i. The tribunal had jurisdiction to rule on its jurisdiction.
ii. The Ministry and the government of the Federal Republic of Nigeria were the same,
iii. The Ministry entered into the Gas Supply Processing Agreement on behalf of the Government of Nigeria.
iv. The Federal Republic of Nigeria had involved itself in a repudiatory breach of the Gas Supply and Processing Agreement by its failure to perform its obligation thereto.
v. The P & ID was entitled to accept the repudiation of the GSPA, and accordingly accepted the repudiation.
vi. The P & ID is entitled to damages for the repudiatory breach of the Gas Supply and Proceeding Agreement by the Federal Republic of Nigeria

3.4 DISCUSSION ON LEGAL ISSUE: THE THREE STAGES OF LEGAL CONFRONTATIONS WITH THE TRIBUNAL'S PRELIMINARY JUDGMENT

1ST: Battle at the English Commercial Court with Phillip J. Presiding

The FRN confronted the decisions of the Arbitral Tribunal from three angles[x]. In the first phase of the legal tussle, the Federal Republic of Nigeria engaged the services of Stephenson Harwood LLP, who issued an Arbitration claim form in the English Commercial Court, seeking the following reliefs; first, an order for extension of time to apply under S. 68 of the Arbitration Act 1996, as Ms Adelore has stated that the processed claim was brought four-month eight days out of time which delay was not deliberate but occasioned by the election and the political situation in Nigeria that led to the defeat of President Goodluck Jonathan. This caused a long time before another minister was sworn in by the new government, and thus, the inability to file the processes in time. Second, an order setting aside the liability Award and or remitting it for further consideration under the Arbitration Act, 1996 on the ground that there had been a serious irregularity, based on internal inconsistency in the liability award; third, that the tribunal had not dealt with the Ministry's case that it lacked factual authority and also legally incapable to enter into the GSPA; Fourth, there had been no reason on the issue of whether the ministry's conduct was repudiatory. Fifth, Adelore, stated further in her witness statement while challenging the jurisdiction of the court that the seat of the Arbitral Tribunal is also questionable. Based on the above, the application by the Federal Republic of Nigeria was slated before the England Commercial court with Philip J. presiding. In dismissing the application for extension of time brought by the Federal Republic of Nigeria, his lordship reasoned that there was an inadequate explanation for the delay and further held that;

i. the grounds of appeal lacked merit;
ii. there were no internal inconsistencies from the findings of the Arbitration Tribunal;
iii. the Tribunal addressed thoroughly the actual authority of the ministry to enter and perform the Gas supply and Processing Agreement;
iv. the Arbitration Tribunal was at no time involved itself in any ambiguity or confusion in its finding between the concepts of authority and capacity and
v. There was a very lucid finding that the breach of article 6 (b) of the contract resulted in impossibility of performance of article 6(a), the breaches which occasioned the repudiatory breach and in consequent, the contention that separate consideration ought to be given to the breach of article 6(b) alone is ill-conceived.

3.5 THE 2ND PHASE OF LEGAL TUSSLE AT THE FEDERAL HIGH COURT OF LAGOS

Sequel to the decisions of Philip J, above, the Ministry of Petroleum Resources of Nigeria, brought an originating motion dated the 24th day of February 2016 and commenced proceedings at the Lagos Division of the Federal High Court of Nigeria. Essentially, the Federal Republic of Nigeria brought the same relief which was previously impressed upon the English Court presided over by Philip J[xi] those reliefs are as follows:

i. An extension of time to file its application,
ii. The setting aside and/or remissions of the liability Award,
iii. That both parties have agreed that the seat of Arbitration is Nigeria,
iv. That the Nigeria law is the applicable law
v. That the GSPA was more closely and intimately connected to Nigeria than England and
vi. The previous application to the English court was in consequent inadvertence. The originating motion together with the affidavit in support sent by email to P & ID's representatives and members of the Tribunal on the 4th day of March 2016 and a letter written by the FRN legal representatives to the Tribunal requested an extension of time to serve its statement on damages and intimated the Tribunal of its dissatisfaction with and consequent challenge of the award on liability which they are contesting in a court of law[xii].

In response to the above, SCA Ontier responded on behalf of P & ID on the 8th day of March 2016 as follows;

i. That P & ID strongly opposed the extension of time
ii. That the contest of the liability award in a contest of law was made without due regard to the FRN's prior application to the English court.
iii. That the prior application to the English court by FRN amounted to consent that the English court was the seat of the Tribunal and contradicted this latter application as to the issue of the location of the seat by FRN's legal team and
iv. P & ID regards the proceedings in Nigeria as an abusive and unattractive attempt to forum shopping.

In response to the above, the FRN legal representatives responded on the 9th day of March 2016 as follows;

i. That it cannot be contested that the parties have agreed to any other alternative curial law than the law governing arbitration proceedings in Nigeria, i.e. Nigeria Arbitration and Conciliation Act 1988 and all other Rules made pursuant thereto.
ii. That the issue of the seat of the Arbitration Tribunal has never been determined by any court.
iii. That the arbitration clause did not designate England as the seat of the Arbitration Tribunal and that it merely made mention of the venue of the arbitration.

In reaction to the above SCA Ontier stated in reply the P & ID positions thus[xiii];

i. That the parties had agreed via the arbitration clause in the Gas Supply and Processing Agreement that London was the seat of the arbitration.
ii. That alternatively, the Tribunal itself without any objection from FRN had stated that the "place of Arbitration" was London.
iii. That the English court presided over by Philip J, assumed jurisdiction on the invitation of the FRN, presuming that FRN had accepted without question that the place and seat of Arbitration are in London.

From the above, the FRN, further, maintained the position that, contrary to the claimant's assertion, the arbitration clause of the GSPA did not designate England, to be the seat of the Arbitration Tribunal, but, rather, it merely made mention of the venue[xiv].

4.0 THE COMMENCEMENT OF LEGAL INTRIGUES

The commencement of legal intrigues[xv] started with Lord Hoffman's determination to prompt the Tribunal to deliver its ruling on the seat of the Arbitration Tribunal, having been acquainted with the correspondence between the parties on the semantic controversy on the usage of the words 'seat and venue'. Consequently, on the 14th of April 2016, Lord Hoffman sent an email to the legal representatives of both Claimant and Respondent intimating them of the Tribunal's readiness to shortly give a ruling on the seat controversy, without inviting further submission on the issue from the party.

In a bid to circumvent the above move, Mr Shasore, SAN, sent an email with quick dispatch to the Tribunal on same date stating that the Respondent, FRN had never made an application to the Arbitration Tribunal for a determination as to its seat, but rather that FRN merely requested for extension of time. On 11th day of March 2016, the Tribunal granted the Federal Republic of Nigeria an extension of time to file its statement and evidence on quantum, till the 8th April 2016. Nevertheless, SCA Ontier wrote the Ministry Legal representative and copying the Tribunal that the controversy surrounding the determination of the seat of Nigeria ought to be resolved and decided upon. Ontier, stated the reason for the resolution of this issue as follows. (i) to provide necessary clarity on the issue (ii) to rule on it before the proceedings in Nigeria, (iii) that the application for injunctive relief against the Tribunal is an illegitimate attempt to circumvent the proceedings in London, (iv) that the injunctive relief sought in the Nigeria court constituted a breach of the obligation to participate in the London arbitral proceedings in good faith.

In reaction to SCA Ontier's prompting[xvi], within the standoff, the Nigeria Ministry issued a Motion on Notice in the action it commences in the Federal High Court of Nigeria seeking an order restraining the parties in this suit either by themselves or through their agents, servants, privies, assigns, representatives or anybody whatsoever from seeking and or continuing with any step, action and or participate directly or indirectly in the arbitral proceedings between the parties. Copy of this Motion was sent through email to SCA Ontier and the Tribunal.

In response, SCA Ontier stated that P & ID would not partake in the Nigeria proceedings for the reason, that London is the seat of the arbitration. Meanwhile, Lord Hoffman's reaction while acknowledging SCA Ontiers email calling for the tribunal's pronouncement on the seat of the Tribunal before the hearing of Nigeria's proceeding could be summarized thus:

i. That the Tribunal has not considered it necessary to make a pronouncement as to the seat of arbitration proceedings since the tribunal has not yet considered that there was an issue arising in the arbitration requiring such pronouncement.
ii. That the Nigeria court has not done anything requiring the arbitrators to make the pronouncement.

iii. That if the Nigerian Court grants an injunction affecting the arbitration, the tribunal would have to rule on the question of the seat before deciding what effect should be given to such relief.

iv. That the Tribunal would consult whether it would be appropriate to rule on the seat in advance of any decision by the Nigerian court.

4.1 ORDER OF THE FEDERAL HIGH COURT OF NIGERIA

Eventually, on the 20th day of April 2016, the Lagos Division of the Federal High Court of Nigeria, per Justice Buba, made the following order[xvii]:

An order granting the Applicant, in this respect, the Nigeria Minister of Petroleum Resources, retraining the parties to this suit, whether by themselves or their agents, servants, privies, assigns from seeking or continue with any step, action or participate directly or indirectly in the arbitral proceedings between the parties.

4.2 ROLLING OUT OF PROCEDURAL ORDER 12, BY THE ARBITRAL TRIBUNAL

The aftermath of the notification to both SCA Ontier and the Tribunal resulted in the Rolling out of Procedural Order 12 by the Tribunal. The Procedural Order 12 issued by the Tribunal is to the following effect[xviii].

i. In the light of the commencement of a proceeding by the Ministry at the Nigeria court, it is apparent that there was a dispute between the parties as to whether the Nigerian courts were entitled to exercise supervisory or curial jurisdiction over the arbitration.

ii. That whether the Nigerian courts could exercise such supervisory or curial jurisdiction would depend largely on whether Nigeria or England was the seat or place of the arbitration.

iii. The determination of the place or seat of the arbitration is also crucial to determine the jurisdiction to supervise the proceedings and the award for the enforceability of the award.

iv. That the Tribunal has the power to determine its jurisdiction.

v. However, since the parties had agreed on the place of the arbitral proceedings, the Tribunal's power to determine that place was displaced.
vi. That the parties and the Tribunal have consistently acted upon the assumption that London was the seat of the arbitration and
vii. The Tribunal considered that the Government must be taken to have consented that this is the true construction of the Gas Supply and Proceeding Agreement.

Sequel to the issuance of the procedural Order 12, by the Tribunal, the Respondent Federal Republic of Nigeria approached the Federal High Court and issued an Originating motion seeking to set aside the Procedural Order 12 and to remove the arbitrators, contending that;

i. The tribunal misconducts itself by not allowing the respondent to present itself on the issue of the seat;
ii. That the tribunal had violated its obligation by not providing the respondent with the enabling opportunity for a fair hearing;
iii. That the Procedural Order 12, was a partial award and therefore contrary to Nigerian public policy.

4.3 THIRD PHASE OF LEGAL STRUGGLE BY FRN AT THE LAGOS HIGH COURTS

Meanwhile, in an action commenced in the Lagos High Court on the 24th day of February 2016, the Court made an order on the 24th of May 2016 as follows[xix];

i. An order enlarging the time within which the FRN may apply to set aside the arbitration award of the tribunal on liability
ii. An order to set aside and/or remitting the arbitral award for further consideration of all or part of the award

4.4 DRAWING THE DRAGON NET, AN INVITATION TO FRN TO SHOW IF THEY ARE WILLING TO PARTICIPATE IN THE FINAL PHASE OF ARBITRAL PROCEEDINGS

As the Tribunal was notified about this order, the immediate response was that on the 27th of May, 2016, Lord Hoffman emailed FRN and P & ID's as follows[xx];

i. That from Procedural Order 12, the Tribunal had decided that the seat of the arbitration is England
ii. That the Federal Court of Nigeria had no jurisdiction in consequent to set aside the arbitral award
iii. That the proceedings at the Tribunal continue and would be grateful if the FRN would indicate whether it intends to take part in the proceedings.

In response to the above, the Ministry wrote to the Tribunal about its intention to participate in the damages phase of the arbitration proceedings[xxi]. Thus, the arbitration proceedings continued and an oral hearing was heard on the quantum of the award between 30 to 31st days of August 2016. The Tribunal issued its Final Award on the 31st day of January 2017 touching on the understated pronouncements[xxii]:

i. The majority finding revealed that provided the FRN did not repudiate its obligation under the GSPA, P & ID would have performed the part of its obligation.
ii. That the non-performance of FRN's obligation led to the loss suffered by P & ID which translated to a loss in the amount of income that would have accrued to it over the periodicity of 20years.
iii. That consequently, there must be a once and for all assessment of damages and to estimate the value of that stream of profit i.e. over that 20years period.
iv. That the value of the profit was assessed as being US & 6,657,000.00 which represents the present value of income that ought to accrue to P & ID over that long period.
v. That FRN is also to pay interest at 7% per annum on that sum from 20th March 2013, to the dates of the Final Award and spanning to the date of final payment.

Eventually, the respondent, FRN did not attempt to pay any part of the final Award, and neither did it apply to set the award aside.

4.5 P & ID MOVE TO ENFORCE THE FINAL AWARD IN THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES

In a bid to enforce the final Award by the Arbitration Tribunal arising from what the Tribunal termed repudiatory breach by FRN, P & ID commenced a fresh proceeding in the High Court of Justice, Business and Property Court of England and Wales on the 16th day of March 2018. The Arbitration claim paper was served on the FRN on the 28th of May 2018. The FRN did not file an acknowledgement until the 28th day of October 2018. FRN filed relief from sanction which was heard later and in upon which Bryan J. granted relief from sanctions. From the positional standpoint of P & ID, Mr Mill contended on the belief of P & ID thus[xxiii];

i. That the Tribunal was entitled to rule on Procedural Order 12 on the seat of the arbitration and it is no longer open to FRN to challenge the ruling
ii. That the order of the High Court of Lagos made on the 24th day of May 2016, which purportedly set aside, or remitting the liability Award was void and of no effect.
iii. That there could be no doubt about it that the seat of the arbitration was England and any challenge against the liability Award could only be made in England where the court has the inherent jurisdiction over the same.
iv. That Procedural Order No. 12, created issue estoppel concerning the seat of the arbitration
v. That the conclusions of the Tribunal in Procedural Order No 12 were correct.
vi. That the Federal Republic of Nigeria had made a previous application to the English court under S. 6 of Arbitration Act 1996, and that had created issue estoppel which precluded Nigeria as the juridical seat of the arbitration.
vii. That the twin contentions of the FRN that the award of damages in the final Award being excessive and penal, and that the tribunal lacked the requisite jurisdiction to order pre-award lacked merit.

In contrast, to the contention of P & ID, Mr Matovu, Queen Counsel, submitted on behalf of the Federal Republic of Nigeria as follows;

i. That issue relating to the juridical seat of the arbitration Tribunal was to be determined following the law governing the arbitration law of the Gas Supply and Processing Agreement.
ii. That the Nigeria Arbitration Law remains the law governing the GSPA.
iii. That as a matter of fact and law, the seat of the arbitration was Nigeria.
iv. That the order emanating from the Nigeria Court on the 20th day of April 2016, to restrain the further conduct of the arbitration and that of the 24th day of May 2016, to set aside or remit the liability Award, respectively were highly relevant and significant, given that the Nigeria court was the supervisory court.
v. That the Procedural Order 12 made by the Tribunal was issued on flagrant breach of a supervisory court.
vi. That the Procedural Order 12 was arrived at in a procedurally unfair manner.
vii. That the supervisory court having set aside the liability Award, the final Award which was made dependent on it was inconsequent, a nullity.
viii. That the earlier application made before the English court under S. 68 of the Arbitration Act 1996, by the FRN, was made by mistake and had not created issue estoppel; and therefore, there is no preclusion on FRN to argue that the seat of the arbitration was Nigeria.
ix. That contrary to the proposition that Nigeria was the seat of the arbitration and granted that England was the seat of the arbitration, then, as a matter of discretion, the final award should not be enforced for the reasons that:
    a- The final Award was manifestly excessive and contrary to English public policy, and (ii) the Nigerian Law which governs GSPA, makes no provision for pre-award interest.

From the above submissions of P & ID, on the first hand and FRN, on the other hand, Butcher J, formulates issues for determination[xxiv]. The first centred on the seat of the Arbitration and the second relates to whether the Tribunal's decision concerning seat created issue estoppels, and the third, whether the decision of the Tribunal in Procedural Order 12, was correct and fourth, whether there are reasonable grounds for non-enforcement of the final Award on the ground of public policy, granted that the seat of the arbitration was England, and finally, whether the final award should be discountenanced to the extent that it offended the

Nigerian legal regime on arbitration law of zero awards of pre-award interest. This paper examined and appraised the judgment of the court relating to the above issues.

4.6 ISSUES ON LEGAL FRAMEWORK ON THE SEAT OF THE ARBITRATION

The first debate centres on the issue relating to the seat of the arbitration. P &ID contended that the seat of the arbitration was England, whilst FRN insisted on the positional standpoint that the seat of the arbitration was Nigeria and not England. It is upon this that the enforcement of the final award by the Arbitration Tribunal rest. On this, Butcher J stated thus[xxv];

> There was no dispute that the concept of the legal and juridical seat of an arbitration indicates a link between the arbitration and a system of law nor was it in issue that the courts of the seat of the arbitration alone will have supervisory jurisdiction over challenges to award in the arbitration.

From the above dictum, Butcher J, established by a preliminary pronouncement that[xxvi]:

i. The legal or juridical seat of an arbitration must indicate a link between the arbitration and a system of law and
ii. Only the courts of the seat of arbitration have supervisory jurisdiction over any challenges to awards in the arbitration.

His Lordship referred to sections 3 of the Arbitration Act 1996, section 15 (122), 26 (1, 2 &3), inter-alia and held on the issue relating to the seat of the arbitration tribunal that

i. The place of the arbitral proceeding meant the same as the judicial seat
ii. That since the arbitration law in Nigeria incorporates the ACA and arbitral rules, the parties thus agreed that, to the extent that they had not effectively provided for the seats, the Tribunal could decide on where it should be.

iii. That given the conceptual nature of arbitration and the importance accorded to respecting the integrity of contractual terms freely entered into by parties, the Tribunal has made a ruling on the seat, which has not been successfully challenged in any court, thus, it is not an order that could be revisited.

iv. That, assuming the Nigerian courts had supervisory jurisdiction over the arbitral proceedings, the implication would then be that the call by P&ID to the Tribunal on the seat, might have been a flagrant breach of the Order 20, however, this view is rebutted by the fact that the FRN failed to name the arbitrators as respondents to the application for an injunction. Consequently, when the Tribunal proceeded to a ruling on the seat, no injunctive order restrained it from so doing.

v. That the Tribunal was therefore entitled to make a ruling on the seat

vi. That in conclusion, the terms of Procedural Order 12 determines the location of the seat of the Tribunal as being London, England having not being set aside by this court or any court, whatsoever.

4.7 ARGUMENT RELATING TO ISSUE ESTOPPEL

P&ID put the argument forward that the Tribunal's decision concerning the seat in Procedural Order No 12 created issue estoppel[xxvii]. According to Butcher J., the doctrine of *res judicata* has two aspects of potential relevance in the context of this case. The first relates to the cause of action estoppel. In deciding that a cause of action estoppel arose in this case, His Lordship quoted the dictum of Sumpton JSC with approval in the case of *Virgin Atlantic Airways Ltd v. Zodiac Seats U.K. Ltd*[xxviii] to the effect that once a cause of action has been held to exist or not to exist, the outcome may not be challenged by either party in a subsequent proceeding.

On the second aspect, his Lordship further stated that in addition to the cause of action estoppel, there could also arise the second strand of *res judicata* namely 'issue estoppel'. His Lordship stated that the nature of issue estoppel was well articulated by Lord Keith of Kinkel in the case of *Arnold v. NatWest Bank Plc*[xxix] as follows:

i. A particular issue that forms a necessary ingredient in a cause of action must have been litigated

ii. The decision on such issue forming the ingredient of such a cause of action must have been made
iii. One of the parties must seek to reopen the issue in subsequent proceedings

In addition to the above, Butcher J stated that issue estoppel has been extended to cover situations where an issue that ought to be raised and delivered on the earlier proceedings but not raised is sought to be raised in subsequent proceedings. Meanwhile, his Lordship recognized that the conditions precedent which must be satisfied to establish this doctrine of issue of estoppel have been considered by many authorities. But his Lordship found more applicable to this International Commercial Law matter, the summary requirements on issue estoppel stated by Clarke L.J in the case of *Challenger Navegante S.A v. Metalexport Import S.A (The Good Challenger)* thus[xxx]:

i. That judgment must be given on the issue[xxxi] by a foreign court of competent jurisdiction
ii. The judgment must be final and conclusive and on the merit of the case
iii. That the parties in the earlier and subsequent proceedings must be identical
iv. That the subject-matter i.e. the issue decided in the previous case and the issue raised in the subsequent case must be the same that arises in the English proceedings.

On the first condition that the judgment or decision must be delivered by a foreign court, Butcher J stated that the condition found fulfilment in that undoubtedly, it was not contested before his Lordship that an issue estoppel could not be created by the decision of an Arbitration Tribunal. Expressing his view on the second condition that the judgment must be final and conclusive, his Lordship stated that if Procedural Order 12 was a Procedural Order, then it is at best subject to review by the Tribunal itself and if this is the case, then it would not be final and conclusive. Conversely, if such Procedural Order should be regarded as final and conclusive at the very stage when it could not be reviewed by the Tribunal and at the exact stage of the conclusion of the arbitration, his Lordship expressed the view that even if arguably Procedural Order 12 was an award which finally determined the issue before the tribunal, but yet subject to the appellate jurisdiction, it should be regarded as final and conclusive on the issue of the seat of the Tribunal itself. Therefore, his Lordship argued, it is a satisfaction of the

second requirement. Further, his Lordship stated concerning the third and fourth conditions that undoubtedly there are identical of parties and issue in satisfaction of both conditions[xxxii].

In contrast, Mr Matovu, Q.C contended on behalf of the Federal Republic of Nigeria that a ruling which an Arbitral Tribunal is not entitled to make could not create issue estoppel. He contended that the Tribunal has no jurisdictional capability to make the ruling contained in Procedural Order No 12. He premised his contention on the fact that the court had injuncted the Tribunal from taking further steps in the proceedings.

While canvassing the above argument, Mr Matovu advanced four reasons why Procedural Order NO 12 could not create issue estoppel. First is the argument that the FRN was not given enough opportunity to submit to the Tribunal about the seat of the Tribunal. For this reason, he formed the conclusion that giving a ruling under these circumstances offended the notions of fairness and due process which forms the very foundation for establishing the principle of issue estoppel. He also referred to the fact that the FRN's application for extension of time prompted P&ID to persuade the Tribunal to proceed to rule on the issue of the seat. The ruling which the Tribunal handed down without hearing from the FRN, the learned PC tagged 'a rush to judgment'[xxxiii]. Butcher J., in reaction to this first objection, stated that FRN had remedies against this procedural unfairness which it did not pursue[xxxiv]. According to his Lordship;

i. If procedural order No 12 was said to be a Procedural Order, the FRN ought to attack the final Award according to S.68 of the Arbitration Act 1996, but FRN failed to avail itself of the opportunity within the statutory time limit.
ii. However, Butcher J further stated that the FRN would have been able to avail itself of the above opportunity, only by recognizing England as the seat of the arbitration and that positional standpoint the FRN disputed.
iii. That the FRN did not take the equivalent steps consistent with its positional standpoint that the courts in Nigeria were the supervisory court by its failure to pursue the proceedings at the Federal High Court and allowed the application to be struck out. The application which includes setting aside the Procedural Order and removal of the arbitrators for misconduct under S. 30(2) of the A.C.A.

iv. FRN also failed to apply that the Final award should be set aside in any jurisdiction and the statutory limit within which to apply also lapsed.

The second argument canvassed by Mr Matovu Q.C on behalf of FRN is that an issue estoppel could not be invoked against a party who has been injuncted from making submissions by a court of competent jurisdiction[xxxv]. The crux of this argument is that Nigeria could not participate in making submissions on the seats of the arbitration having being restrained by the Nigerian courts. Against this argument, Butcher J blamed the FRN for its woe in that by its agreement with P&ID, they were both *ad idem* in recognizing England as the seat of the arbitration and by recognizing the Tribunal as the sole harbinger of disputes on the seat of the arbitration. Consequently, his Lordship drew the inference that Nigeria had no good reason to prevent the enforcement of its agreement. Thus, the existent of an injunctive order in this regard could not constitute a good reason for not recognizing an issue estoppel.

Further, Mr Matovu canvassed the argument that once liability Award had been set aside or remitted by the Nigerian court via its order of the 24th day of May 2016, the FRN has got no reason to challenge the tribunal ruling on the seat of the arbitration. Meanwhile, his Lordship while rejecting this argument stated that:

i. Procedural Order No 12 was issued before the purported order made by the Nigerian court to set it aside or remit the liability award for consideration.
ii. That since Nigeria court is not the supervisory court under the Agreement of these parties, and then the order made on the 24th day of May 2016 is ineffective.

Butcher J., expressed the view that this third argument could not provide a good reason to displace the fact that an issue estoppel on the issue of the seat of the arbitration had been created. On the fourth argument, Mr Matovu argued that on the authority of the case of *Zenith Global Merchant Ltd v. Zhongfu International Investment FZE,*[xxxvi] delivered by the Ogun State High Court of Nigeria, no issue estoppel could be raised on Procedural Order No 12 against the FRN or the determination of the seat. Still on the fourth argument, Mr Matovu on the authority of the case of *Arnold v. National Westminster Bank Plc*[xxxvii], also argued that where

it would create injustice to recognize an issue estoppel. However, Butcher J punctured this fourth argument by stating that:

i. The case of *Arnold v. National Westminster Bank Plc*[xxxviii]recognized that the existence of special circumstances such as a subsequent change in the law could be a cogent reason that could activate injustice and therefore an exception to the recognition of the doctrine of issue estoppel.
ii. The decision in *Zenith Global*[xxxix] did not constitute special circumstances of such a nature sufficient enough to displace the recognition of issue estoppel.
iii. That *Zenith Global*[xl] does not involve a change in any law in Nigeria and that the case concerned the construction of an arbitration clause which is quite distinct from that of clause 20 of the GSPA.
iv. That *Zenith Global*[xli] clause did not contain the term 'venue' and it was not a decision that the venue of arbitration could not be the juridical seat.

Consequently, Butcher J., held that Procedural Order 12 creates an issue estoppel which precludes further argument in this case on the seat of the arbitration.

In this case, Butcher J., further held that the GSPA is written in English Law[xlii]

i. That it was not in issue that the question of its construction is governed by Nigerian Law.
ii. It was also undisputed that the same principle of constructions in England and Nigeria should be taken to be the same.
iii. Applying the reality of this construction, it is apparent that the GSPA provides for the seat of the arbitration to be England.

That clause 20 of the provisions of the agreement provides England as the seat of the arbitration.

4.8 FRN URGE THE COURT NOT TO ENFORCE THE AWARD AS ITS JUDGMENT

The FRN urged the court not to enforce the Arbitral Award as its judgment by canvassing the argument that:[xliii]

i. It would offend English Public Policy to enforce the Final Award.
ii. The Award for damages is not compensatory but rather hugely inflated and penal.

While canvassing the arguments, the FRN relied first on cases like *JSC VTB Bank v Skurikhin*[xliv]and *Midtown Acquisitions LP v Essar Global Fund Ltd*[xlv] to support its contention that English public policy is against enforcement of awards which were not compensatory but hugely inflated and penal. Second, the FRN also relied on the evidence of Mark Hardley[xlvi] to the effect that the Award was manifestly excessive and far above the level required to be compensatory but punitive. Third, the FRN also placed reliance on the expert report of Professor Louis Wells[xlvii] who expressed in his report that the award of damages reached by the Tribunal was as a result of an erroneous approach to the Discount Rate and the result was that the Award was manifestly excessive, exorbitant and does not represent a reasonable assessment of P&ID's actual loss and it was punitive.

In reaction to the above, the court per Butcher J. stated the law thus[xlviii]:

i. If the enforcement of an award would be contrary to public policy, that would not be a good ground for refusal of enforcement
ii. The ground on which the enforcement of an Award could be refused on the ground of public policy is narrowly circumscribed. In this regard, the court cited Donaldson (M.R) in the case of *Deutsche Schachtbau-und Teifbohrgesellschaftmolt v Ras Al-Khaimah National Oil co*[xlix]where his Lordship stated that; 'considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution'.
iii. Relying on the above case, the court stated the conditions upon which a court might refuse an award on grounds of public policy to include the followings[l]:
    a. Where some element of illegality could be shown
    b. Where the enforcement of the award would be injurious to public good or
    c. Where the enforcement would be wholly offensive to the ordinary reasonable and well or fully informed members of the public on whose behalf the powers of the state are exercised.

iv. The overall consideration is that in considering the refusal of Award on the ground of public policy, it is necessary to have regard to and take into account the strong public policy in favour of enforcing arbitral awards.

Based on the above position, Butcher J stated in discarding the public policy argument that[li];

i. The enforcement of such an award would not be 'clearly injurious to the public good' or 'wholly offensive to the ordinary reasonable and fully informed members of the public'.
ii. Furthermore, the policy in favour of enforcing arbitral awards is a strong one.
iii. If a balancing exercise is required in refusing enforcement, outweighs any public policy in favour of enforcement, the christened of the enforcement as excessive compensation or the labelling of such as punitive or penal, as the FRN seeks to label it in this case, does not alter the conclusion in favour of enforcement.

4.9 CONTENTION THAT THE AWARD SHOULD BE REFUSED FOR GIVING PRE-AWARD INTEREST

On a final note, the FRN contended that the enforcement of the Final award should be refused in that the Arbitration Tribunal awarded pre-award interest[lii]. This contention is based on the premise that under the Nigerian Law, the circumstances under which a pre-award interest in arbitral award could be made are as follows[liii]:

i. Where the parties expressly provided for the pre-award interest
ii. When the contract includes an implied term for such award, based on trade usage or mercantile conduct.
iii. When there is statutory competence to grant such award

The FRN argued that none of the above situations existed here. Even it was contended that the final award contained a decision absolutely beyond the scope of the submissions to the arbitration[liv]. In reaction to FRN's submission, the court per Butcher J stated that though the arbitrators did not have jurisdiction to award pre-award interest since it was not advanced

during the proceedings, the fact that P&ID claimed in its pre-entitlement claim, while FRN failed to join issue in that regard, the court hereby ordered the enforcement of the final award in the same effect as the judgment of the court. Despite this order, it is submitted that the decisions of the court were tainted with irregularities and this paper addressed these frontally.

5.0 THE APPRAISAL OF THE AWARD MADE BY THE ARBITRATION TRIBUNAL AND THE SUBSEQUENT PRONOUNCEMENTS OF THE COURT.

In appraising the award and the final judgment handed down by Butcher J emphasis would be centred on four major issues:

i. The identified flaws committed by the FRN
ii. Fundamental errors in the Pronouncements of the Tribunal and the Court
iii. The Attitudes of the Court
iv. The Lessons for Nigeria and the need for the appropriate legal regime to guide against similar future occurrences

Butcher J stressed in his pronouncements some fundamental errors made by the FRN that his Lordship considered very fatal to its case[lv]:

i. That in the application before Phillip J where FRN had applied for an extension of time, which the learned judge refused on the ground that the grounds of appeal lacked merit; in that application, some of the grounds of appeal inter alia were that the Claimant was in breach of art that there was internal inconsistency in the Tribunal's reason and that the actual authority for the Claimant to enter into the GSPA was questionable.
ii. That when P&ID claimed interest in its Notice of Arbitration and its statement of Claim, the FRN refuses to join issue with P&ID and did not argue on the issue[lvi].
iii. That when the FRN applied for an order of injunction to restrain the Tribunal from the decision which led to its ruling on Procedural Order No 12, the arbitrators were not named as respondents to the application and in essence they could not be injuncted or be restrained by the order of injunction by the Nigerian Court[lvii].

iv. That the FRN could have applied to the Tribunal to review and amend Procedural Order No 12 but it did not do so. Further, Butler J opined that if Procedural Order 12 constituted an award, FRN could have made it a subject of a challenge[lviii] according to section 56 of the Arbitration Act 1966, alleging serious irregularities affecting the Tribunal, the proceedings or the award.

v. That the FRN was inconsistent to its legal approach adopted in that instead of remaining consistent to the legal step it had taken which was consistent with its position that the courts in Nigeria were the supervisory court, it neglected and refused to pursue the action it started at the Federal High Court wherein it sought to set aside Procedural Order No 12 for misconduct under S 30(1) ACA and removal of the arbitrators for misconduct under S.30 of ACA, it allowed the suit to be struck out.

Meanwhile, with due respect, there are some fundamental inadequacies in both the decisions reached by the Arbitral Tribunal and the judgment of Butcher J[lix].

First, on the nature of arbitration proceedings, worldwide, an arbitration proceeding is primarily conceived as an alternative dispute resolution mechanism quite distinct from the accusatorial and penal procedure of the court. Thus, it is fundamentally established to resolve peacefully the dispute between conflictual parties. It is therefore against this background that we opined in this paper that the decision of both the arbitration Tribunal and that of Butcher J as very unfortunate. The imposition of damages, more than punitive and penal negate the fundamental purpose of resorting to an alternative dispute resolution mechanism like arbitration proceedings. The question is; two years into the contract that ought to span twenty (20) years, one would have expected the Tribunal to revive that contract for all intent and purposes. One would have expected the Tribunal to go into the nitty-gritty of the agreement and ensure it works for the benefits of the contracting parties.

This is possible considering the terms of reference of the Tribunal. It is hereby submitted that both the Tribunal and the Courts have gone beyond those terms of reference. Granted that the Tribunal abides by its purpose and terms of reference, the enforcement of the award ought to be estopped and the consequent judgment would have been arrested.

Second, flowing from the basic thrust of the terms of reference before the Tribunal that both parties shall agree to the terms that appropriate arbitrator should exclusively resolve any dispute arising between them from their agreement, the question is; how on earth can one

conceive the imposition of damages very punitive and penal as a way to amicably resolve the dispute, 'amicable resolution' being the guiding phrase.

Third, from the above is the fact that, granted that the arbitral Tribunal had gone far away from the fundamentals of its terms of reference, the implication is that the arbitral tribunal lacked jurisdiction to impose that kind of Award. From the onset, what determines the jurisdiction of the arbitration Tribunal is the agreement between the parties. The truth of the matter is that there is no inherent jurisdiction in an arbitral tribunal. The fundamental principle that forms the very basis for the jurisdiction of an arbitral Tribunal is 'party's autonomy'. The implication is that the arbitral Tribunal fundamentally takes its jurisdiction to determine the dispute before it from the agreement between the conflictual parties. Consequently, Casey[lx] states the fundamentals of the jurisdiction of the arbitral tribunal as follows:

i. The Arbitral Tribunal's jurisdiction is not derived from any legislation
ii. The scope of the Tribunal jurisdiction would be determined essentially by the scope of the arbitration agreement between the parties
iii. The scope of the agreement of the parties is, however, subject only to the mandatory legislative enactments governing the arbitration agreement
iv. That fundamentally, the two parties have the right to settle the matter or dispute between themselves. However, the arrangement is simply to give jurisdiction to the third party to settle the conflictual situation for them[lxi].

From the above, the fundamental principle is that the parties needed no state legislation to decide the issue or craft appropriate remedies from the blues. Simply put, the power to settle the dispute in effect is derived from the agreement between the conflictual parties. Casey meanwhile, stated that a broad arbitration agreement permits reference to appropriate remedies both in Commercial Law and Law of Equity. It is essential to note that the arbitral Tribunal has gone beyond the mandate given to it in the parties' agreement by imposing pre-award interest on the Federal Republic of Nigeria. The FRN contended that the enforcement of that final Award should be refused on the ground that under the Nigerian law, the pre-award interest could be available in three circumstances; First, where the parties expressly granted it in their agreements, second, where the contract includes an implied term to that effect, based on trade usage or mercantile custom and third, where there exists the power to grant it by statute. FRN contended that none of those condition exists and therefore, the final award contained a

decision beyond the scope of the submission to the arbitration. With due respect, the reply by Butcher J to this contention is less than satisfactory. According to Butcher J,[lxii] the suggestion that the arbitrators did not have jurisdiction to award pre-award interest was not advanced during the arbitration proceedings".

This view expressed by his Lordship is unfortunate. How could FRN advance argument on a matter, not before the court? it is like putting something on nothing and expecting it to stay there. It will automatically collapse without any much ado. Adding to the above, his Lordship stated further[lxiii];

> *Instead, P&ID had claimed interest in its notice of Arbitration and its statement of the case; the FRN had not joined issue, in its statement of defence, with P&ID's entitlement to claim interest; P&ID had maintained its pleaded interest claiming its statement of case on quantum and FRN, in its responsive written submissions on quantum, had noted that P&ID was claiming pre-award interest and had not argued that this was not in issue*

With due respect to his Lordship, it is out of place to express the view that the jurisdiction of an arbitral Tribunal is conferred by the unilateral claims in the statement of claim and Notice of arbitration of the Claimant. This is contrary to the well-established principle that jurisdiction of an arbitral tribunal is conferred by the terms to which the parties were *ad idem* in their contractual agreement and in this respect the Gas Supply and Production Agreement.

In addendum, with due respect, the rejection of the public policy argument put forth by the FRN by the Court, per Butcher J, is unsatisfactory. First, it is agreed by the parties under GSPA, that the Nigerian law should apply, and then it implies that the parameter to determine the public policy defence must be one that is germane to the Nigerian law. In this particular case, we submitted that the reliance that Butcher J placed on the decision of Gross J in *IPCO (Nigeria) v. Nigerian National Petroleum Corporation*[lxiv] led him to conclude that[lxv]…

i. there is no public policy which requires the refusal of enforcement to an arbitral award which states and is intended to avoid compensatory damages
ii. where even if the damages awarded are higher than this court would consider correct (as to which I express my view), that arises only as a result of errors of fact

or law on the part of the arbitrators. The enforcement of such an award would not be injurious to the public good or wholly offensive to the ordinary reasonable and well-informed member of the public policy in favour of enforcing arbitral award is a strong one

iii. The labelling of such excessive compensation as 'punitive or penal' as the FRN seeks to do in this case does not alter this conclusion.

The above decisions of Butcher J was in response to an initial public policy argument made on behalf of FRN to the effect that, peradventure the seat of arbitration was England; the court should refuse the award as its judgment, on the ground that it would constitute an offence to English public policy to enforce it. This contention was premised on the grounds that[lxvi];

i. the award for the damages is not compensatory but hugely inflated and penal
ii. the English public policy is against the award of damages which is hugely inflated and none compensatory in nature
iii. the Tribunal had applied an incorrect and unduly low Discount Rate to the assessment of future cash flows from the project
iv. the Tribunal flagrantly ignored the fact that the GSPA required P&ID to grant the FRN a 10% carrier (carried) interest on the project
v. the report by Prof. Well to the effect that the award of damages derived was as a result of an erroneous approach to the Discount Rate which makes the award unreasonable, manifestly excessive and exorbitant
vi. The amount or quantum of the award was not a reasonable assessment of P&ID's loss as it was punitive.

The effects of Butler J's argument against the above contention of the FRN are that:[lxvii]

i. There is no public policy that requires a refusal to give an arbitral award the effect of a judgment of a High Court even where the Tribunal ruled such Award to be compensatory and the court found otherwise it was punitive
ii. That the same is also the case that the enforcement of the award would not be refused even where the court considered such award to arise as a result of an error of fact or law on the part of the arbitrator

iii. The mere fact that the arbitral award is far from being compensatory but punitive and the fact that the arbitrators were engulfed in an error of fact or that of law does not make the award injurious to the public good or wholly offensive to the ordinary reasonable and well-informed members of the public, public policy in favour of enforcement of an arbitral award is on the scale of balance higher even where it was delivered through the indexes of erroneous approaches to the Discount Rate and the Award was found to be clearly excessive and manifestly exorbitant.

The inference that could be drawn from the decisions of the court is that, once an Arbitration Tribunal has decided on the matters between the conflictual parties, no matter what right the respondents might have, there can be no remedies. This is contrary to the well-known foundation principle of law that 'where there is a right, there must be a remedy'. The underlying maxim is '*ubi jus, ibi remedium'*.

However, this view expressed by Butcher J represents the narrow or restricted view school of public policy whilst the FRN position represents the broad view school of public policy[lxviii].The narrow view school represents the positional standpoints of the courts that it is unnecessary to create new heads of public policies, that public policies should not be used as a subterfuge to invalidate a contract freely entered into by contracting parties and unless a particular ground of calling public policies into the scene had been firmly established by the courts, the courts should not intervene[lxix]. The rationales for the narrow view school of public policy are that:

i. It is against the principle of freedom of contract to employ the instrumentality of public policy to negative contractual agreements by contracting parties.
ii. Expanding the operational armpits of public policy as a ground for setting aside arbitral awards is a negation of the primary purpose of Arbitration and Conciliation which is; giving finality to Arbitration decisions and 'clearing the way for second-guessing arbitration decision'.
iii. It is a violation of the none interventionist stance of the courts as established by judicial authorities

The 'Broad View School' is supportive of the law-making function of the court in this area. According to this view, the court should intervene in this area of the Arbitral Award since the public policy does not and cannot remain static in any community[lxx]. This positional standpoint represents the view that it would be useless if public policy is to remain in fixed moulds for all epochs. The rationale for this second view could be itemized thus;

i. When contracting parties are in disagreement on the interpretation of the terms of their contract, it implies that an issue arose for determination
ii. Where the arbitration Tribunal failed to reconcile those parties, it implies that the arbitration work is unyielding to a positive result. This calls for the intervention of the court.
iii. That no parties by their agreement can oust the jurisdiction of the courts when called on to resolve disputes left unresolved
iv. Where the validity of an award is called into question, the courts can intervene
v. When a provision of a statute concerning arbitration is narrow in meaning and in effect nugatory, the court can employ a wider meaning to curtail a patently illegal award by the arbitrators,
vi. When an arbitral decision and award violates the notion of justice, the courts could intervene.

Meanwhile, it is apt to state here that the narrow view school on public policy represents the non-activist and passivist posture of the court, whilst the 'Broad view School' represents the activist posture of the courts. Nevertheless, given the rejection of public policy exception by Butcher J, it is necessary to dwell on the vexed issue, whether his Lordship is right to take such a decision. Starting from the view expressed by Donaldson, M.R in the case of *Deutsche Schachthau and Tiefbohrgerellschaft Inbolt v Ras Al – Khaimah Nationa;l Oil Co*[lxxi]where his Lordship stated that public policy exception could be invoked though under extreme caution on grounds of the perceived extreme element of illegality where enforcement of the award would be manifestly injurious to public good and offensive to the ordinary well-informed members of the public. Needless to say, the enforcement of such punitive award in the present case would be injurious to the public good as far as the Nigerian economic climate and the precarious citizen's social condition are concerned. Here is a nation, already bedevilling with endemic corruption; an ugly economic climate that was evident with colossal indebtedness

profile both to International Financial Institutions and Private investors with the consequent unfulfilled expectations of political promises and to say the least, youth unemployment to the unimaginable highest degree. To impose on such a nation, such unwarranted punitive award would do more than havoc to the social and economic conditions of the common man in Nigeria. Then, besides, the Tribunal ought to consider such possibilities that with the way the Ministry handled this matter, there is the likelihood of connivance between Process and Industrial Development and Nigerian Officials to share this money. This suspicion arose from the way and manner in which the ministry responded to this case and the careless manner of out of time filling of processes. The fact remains that this award is excessively punitive and ought to be considered as wholly offensive to the ordinary reasonable and fully informed members of the public.

Moreover, the fact that the award ought to be reviewed could be seen against the background of some important decisions of the courts. In the case of *Richardson v. Mellish*, Burrough J puts it that; 'public policy is a very unruly horse and when you get astride, you never know where it carries you'.[lxxii] Lord Denning advanced the public policy exception more forcefully and elaborately in the case of *Enderly Town Football Club Ltd v. The Football Association Ltd*[lxxiii] where his Lordship stated that;

> *Has the court any power to go behind the wording of the rule and consider its validity? On this point, Sir Elwyn Jones made an important concession. He agreed that if the rule was contrary to natural justice, it would be invalid. I think this decision was rightly made and I desire to emphasize it. The rules of a body like this are often said to be a contract. So, they are in legal theory. But it is a fiction- a fiction created by the lawyers to give the courts jurisdiction….such regulations, though said to be a contract, are subject to the control of the courts. This is no new thing. There are many precedents for it from the time of John Doe onwards. If they are in unreasonable restraint of trade, they are invalid; see Dickson v Pharmaceutical Society of Great Britain (1967) ch. 708; (1870) Ac 403. If they seek to oust the jurisdiction of the court, they are invalid: see Scott v Avery (1856) 5.H L case 811. If they unreasonably shut out a man from*

> *his right to work, they are invalid; see Nagle v Fieldon (1966)2, Q.D p.633; Edwards v. Society of Graphical and Allied Trades (1971) ch.354. if they lay down a procedure which is contrary to the principles of natural justice they are invalid; see Faramus v Film Artistes' Association (1964) A.C p.925-947, per Lord Pearle. All these are cases, where the judges have decided avowedly or not, according to what is best for the public good.* \

Still, on public policy, the Lord Justice stated further:

> *I know that over 300 years ago, Hobert C.J said the public policy is an unruly horse: it has often been repeated since. So unruly is the horse, it is said, per Burrough J in Richardson v Mellish (1824) 2 Bing 229,252) that no judge should ever try to mount it lest it runs away with him. I disagree. With a good man in the saddle, the unruly horse can still be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice, as indeed was done in Nagle v Feliden (1966) 2 Q.B. 633. It can hold a rule to be invalid even though it is contained in a contract.*

This view expressed by Lord Denning is to the effect that public policy should not be limited or confined within a particular spectrum. It should be reviewed and controlled by the courts where the justice of the case demands. It should not be contained by contractual agreements and it should be invoked to surmount any obstacles or obstructions to the attainment of justice. The Indian example exemplified this position in the case of *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd*[lxxiv] where the Indian Court expanded the ambit of public policy as one of the important grounds for setting aside arbitral award contrary to the archaic principle that gives finality to arbitration decisions and 'non-interventionist' stance adopted by the courts in some recent cases. After reviewing so many cases, the court, while setting aside the arbitral award took the position in public policy exception indices that[lxxv];

i. Wrong must not be left by the courts unredeemed and right not left unenforced

ii. If the Arbitral Tribunal failed to follow the prescribed mandatory procedure under the Act, it would mean that it has acted beyond its jurisdiction
iii. Where the tribunal had acted beyond its jurisdiction, the award would be patently illegal and it could be set aside
iv. The English Arbitration Act1996 gives power to the court to ameliorate errors of law in the arbitral award
v. If the arbitral award does not dispense justice it cannot truly be reflective of an alternative dispute resolution mechanism as designed
vi. The courts should be well disposed of in upholding the challenge to the arbitral award because it conflicts with public policy
vii. An arbitral award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court
viii. It must be apparent that the parties must have agreed that recovery of damages for breach of contract must not be by way of penalty but by a genuine pre-estimate of damages
ix. The arbitral Tribunal must decide this dispute following this term of the contract
x. When the decision of the Tribunal goes against this term of the contract, it would be set aside
xi. When a contract has been broken, the party adversely affected can claim compensation for any loss he may receive as a result of that breach, but such damages or loss must be proved.

There was nowhere in the GSPA that the parties agreed to the award of punitive damage in respect of a breach by either of the parties. It is also apparent that the Arbitral Tribunal in the P&ID's case went beyond the scope of its mandate. Consequently, it is submitted in this study that the arbitral tribunal lacked the jurisdiction in regards to the award and thereby making the award illegal. It is hereby submitted that recent arbitration proceedings are regarded as a necessary first stage in the process of successive appeal. It is apparent of the fact that intentionally or unintentionally, willfully or otherwise, the ministry involved the country in calamitous indebtedness. In a contract of this nature and owing to the endemic officials' corruption in Nigeria, the Tribunal and the court ought to be aware of the possibility of complicity. Hence, the further question ought to be asked in relation to P&ID relates to its

pedigree, the integrity of its directors and the fulfillment of all statutory obligations it ought to comply with, in Nigeria. Such as the Nigerian Enterprise Promotion Act, the Nigerian Investment Acts, the Companies and Allied Matters Act, etc. Before P&ID could enter into such contract it must satisfy the statutory mandatory requirements imposed on it by those statutes. It is against the above background that we are going to examine the competence of the ministry to bind the country to such a contract, the regularity or irregularity of granting such excessively sky-rocketed punitive award and the possibility of solving all the problem nature in the case through the application of the principle of estoppel.

5.1 THE IRREGULARITY OF GRANTING EXCESSIVE AND PUNITIVE AWARD AND THE PRINCIPLES FOR REDUCING THE AWARD

According to Miles and Weiss[lxxvi], International Arbitral Tribunal operating under both International Laws and Municipal Laws usually applies well-recognized principles of law to limit arbitral Awards for a breach of the agreement by respondents. These principles are listed and discussed as follows[lxxvii]:

5.1.1 CAUSATION

It is one of the recognized principles of law that a respondent's liability is limited to damages resulting from or arising from its conduct. However, the onus lies on the claimant to establish that the respondents' breach of agreement caused the damages experienced by him. To proof the elements of causation, it is necessary to establish a nexus between the respondent's breach and the resulting damages to the claimants. Without this cause and effect, it would be difficult to link the act of the respondents to the claimant's predicament. In essence, the onus lies on the claimant's to proof the constituents of such damages in detail.

Meanwhile, Miles and Weiss distinguished between factual causation and legal causation. Factual causation entails the proof that the act of breach by the respondent caused the damages to the claimant. However, in international law, there is a distinction between

factual causation and proximate causation. Thus, where many hands were involved, it behoves on the respondent to establish that his act is not the proximate cause of the resulting damage. In P&ID's case, this is what the Nigeria Ministry of Petroleum Resources was trying to establish. They asserted that the period of the contract fell within the transition period between the end of President Jonathan's administration and the incoming administration of President Muhammadu Buhari culminating in a long period of delay. The long period spanning through the periods of preparation for the election, the election proper, the transition period, the period the government is formed, settled down and screening and appointment of Ministers. With this, the argument is that the act of the Ministry *per-se* was not the proximate cause of the breach. This is exactly where legal causation comes in. Legal causation involves the underlying policies that tend to limit the respondent's liability even if factual causation could be established. It should be noted that the interaction between factual and proximate causation could be so decisive to the extent that the Tribunal might award zero compensation. In *Lauder v. Czech Republic*[lxxviii], the Arbitral Tribunal held that one or the other non-state contributing causes were the main cause for the damages that were occasioned and that the Czechoslovakia Republic conducts in the breach was not the proximate cause of the investors' damage. In consequent, the Tribunal awarded zero awards.

5.1.2 BAR AGAINST SPECULATIVE DAMAGES

Miles and Weiss[lxxix] further stated that all legal systems including International Law reject damages that are by nature speculative. So, when there is insufficient evidence to prove that the breach caused the resultant damages, any award in face of insufficient evidence is at best speculative. It is trite law that a claimant must prove facts in support of his case. But the problem in the judicial award of damages is that often, most claimants find it a herculean task proving facts in support of their case. Thus, it resulted in claimants proving contra-factual. This is more of a fiction than real. This is imaginative and not proving what happened. It is tantamount to proving what would have happened had the respondent not breached a legal obligation. This is far from real but mere speculative. That is very common in arbitral Awards. The principle against speculative award does not require the claimant to prove damages to certainty. The standard in both municipal and international law is one of 'reasonable certainty' or 'reasonable degree of certainty'.

Meanwhile, in many legal systems, according to Miles and Weiss[lxxx], several nuances limit the extent to which this fictitious allegedly speculative damages award could be prevented. The first of the nuances is 'doubt'. The rule is that 'doubt' should be resolved against the respondent who was in fact, the party that breached the agreement. The rationale being that a party who caused a significant breach resulting in the loss to the claimant should not be allowed to profit from that breach. However, this particular rationale could only find application where the respondent's illegal conduct was intentional, substantial such that could be discernable in the willful destruction of pieces of evidence that ought to allow the claimant to prove its damage to certainty. It is submitted that for the claimant to succeed under this first nuance, four cumulative elements must be satisfied to wit…

i. Respondents significant breach of agreement
ii. The significant breach must have resulted in damages to the claimant
iii. The respondent conduct or breach must be intentional
iv. The intentional breach must be evidenced by the willful destruction of evidence.

Applying the above requirement to the P&ID's case, if the tribunal accepted that FRN committed the significant breach that resulted in damages to the claimant, the breach cannot be intentional when the implementation of the contract suffered a severe frustration from the fact that the baton of government is about to change hand in a transition program that saw President Goodluck Jonathan with members of his cabinet, (the Minister of Petroleum Resources inclusive) out with another government of President Muhammadu Buhari in. With this situation, when it is apparent all projects and project implementations would be stopped, when auditing is in the process when it could be judicially noticed that the **CBN** had introduced a new revenue collection and financial regime called Single Treasury Account resulting in multiple inflows of all revenue collection into CBN's account and minimal outflow of the fund, it is apparent that the likely incidence of policy summersault is possible. This period on transition ought to be taken into consideration by the Tribunal and the court, to show that the FRN had not willfully breached the contract. Truly, there is no evidence that FRN willfully destroyed any document, written or unwritten, electronic or inscribed, to warrant such an abysmal award in the resolution of the first nuance in P&ID's favour.

The second nuance is the distinction between (i) the proof of the fact of damages and (ii) proof as to the number of damages. For proof of damages, the requirement is that of

reasonable certainty. Once this fact of damages is established with some degree of reasonable certainty, then proof as to the number of damages might be and is often an estimation very uncertain and inexact. It has become arbitral fraternity that the requirement of proving a high degree of certainty placed unfair burdens on the injured party and graciously benefits the breaching party. Hence, where the amount of damages could not be established with a reasonable degree of certainty, the assessment of damages is at the discretion of the Tribunal. It is also submitted that if it is an arbitral fraternity that the proof of damages to certainty burdens the injured party, and benefits the respondent that breaches the agreement, why not consider the fact that there must also be arbitral and judicial cultism to the effect that where damages are merely speculative and could not be proved to reasonable degrees of certainty, that to award damages both penal and punitive would place a heavy burden on the party that was adjudged or arbitrated to have committed the breach, and a windfall to the Claimants as seen in the P & ID's case? That is what is called justice. Fairness, without perceived favouritism.

5.1.3 THE DCF MODEL AS A DAMAGE-REDUCING MECHANISM RATHER THAN AWARDING ABYSMAL DAMAGES.

The Discounted Cash Flow as the name suggests ought to be deployed to reduce substantially the amount of speculative inexact cash flow that the company expects to generate over the years. However, it is being deployed by most arbitral Tribunals as we found in the P & ID's case to award penal and punitive damages against the breaching party. Miles and Weiss[lxxxi] observed in their work that International Arbitral Tribunals often reject the deployment of Discount Cash Flow model on grounds that it is too speculative and inexact. Three instances need to be distinguished; first where the project was not ongoing or a going concern. Miles and Weiss cited an instance of US-Iran claims that the Tribunal, in that case, rejected damages based on DCF model when the project in issue was not built nor completed. The second concerns the companies that are yet to put on or build a project but yet faces numerous risks[lxxxii] e.g.

i. Construction
ii. False Majeure
iii. Business climate

iv. Currency risks and
v. The creditworthiness of a long-term purchaser, etc.

Such a company might have routinely traded on the stock exchange. This illustrates that they have a value which could be measured to a certain reasonable degree of certainty. Miles and Weiss cited the case of *Gold Reserve v. Venezuela*[lxxxiii] where the claimant obtained a significant award in term of compensation based on DCF model for injury resulting from a breach in the early life of a mine that never exploited minerals. The third situation concerns where there is no reasonable evidence that the project would be profitable. In this situation, refusal to award damages based on the DCF model is appropriate. However, Miles and Weiss opined that it would be more appropriate to account for elevated levels of uncertainty by a systematic adjustment of the variables within the DCF model to effect a drastic reduction of the quantum of the award[lxxxiv] by:

i. Increasing the Discount Rate to account for the uncertainty of the future revenue stream
ii. The resultant effect is to reduce or decrease the net value of the revenue stream and the consequent compensation to be awarded.

The Arbitral Tribunal ought to have the awareness of the indices complexities and be sensitive to the DCF mode not as a catalyst to award damages that are penal, highly astronomical and punitive but rather as a damage reduction mechanism. According to Miles and Weiss[lxxxv],

i. The DCF model measures the value of a business by adding the free cash flows that the company expect to generate in the future
ii. This expected free cash flows that the company expected to generate in the future from lenders and shareholders must be reduced or discounted at a rate that reflects the company's cost of missing capital.
iii. The term 'free cash flows mean the flow of cash that is generated by the company and which is available to be distributed to its shareholders and lenders.

iv. The free cash flow for any given year equates the cash left over to the company after it has met all its operating expenses and taxes, but before making its debt and other financial payments

v. Widely accepted is the fact that the most acceptable discount factor is the Weighted Average Cost of Capital

vi. The Weighted Average Cost of Capital (WACC) represents the average cost of missing funds from shareholders and lenders operating in the same industry as the claimant company

vii. This cost of raising funds from both shareholders and lenders is measured by the interest rate at which they are willing to advance loans to the claimant company, otherwise called the cost of procuring debt

viii. The cost of raising fund from shareholders is measured by the expected rate of returns in the form of dividends on shareholders equity contributions to the company

ix. Hence, it boils down to state that the Weighted Average Cost of Capital estimates the implicit risk existing in cash flow, taking the rate of returns expected by the two financial providers into consideration.

x. A key factor in the discount rate is the country risk premium. This risk premium quantified low investing equity in a particular country. It is riskier to invest in a country with low investing equity than investing equity in a safe country. The higher the spread in interest rate, the higher the country's risk premium. The higher the discount rate, the lower the damages.

From the above, the complex indices in this model which involves serious consideration of fictitious speculative variables as well as complex and incorrect calculations of non-existent risk ultimately give the arbitrators a wide discretionary power to accept or reject assumptions in the DCF model which could result in injustice to the respondent based on the rigid fraternal posture to favour the claimant. P&ID's case involving Nigeria is one example. In situations where neither the Arbitral Tribunal nor the courts did not bother to inquire whether the project has taken off, or is a going concern, unprofitable, likely to be affected by the activities of terrorists or kidnappers in a volatile region, it would be unjustifiable using the speculative non-exact parameter to unleash such a gargantuan frustrating punitive penal damages on the Federal

Republic of Nigeria. Even where the DCF involves the calculation of the structure put in place by P&ID to facilitate the processing and supply, to whom will such capital intensive industrial structures be forfeited? Would P&ID still own it or forfeited same to FRN? Where nothing had been done in the form of processing plant installations, what yardstick did the Tribunal use to arrive at such penal award? Who are the lenders and the imaginative shareholders? These are the questions to be asked in P&ID's case. The result from such a mechanism which derives from speculative cyclonic adventure would produce nothing but injustice since the attitude of both the Tribunal and the Court was to introduce a twist in that instead of using the DCF model as a damage-reducing mechanism, it is being deployed as a fraudulent instrument to design and impose non-existing damages that lie in the realms of imagination and fictions. It is submitted that the dragon chain represented by the arbitrary Award ought to be eschewed.

Common in investment jurisprudence, according to Miles and Weiss are alternative models which Arbitral Tribunal adopts in the determination of the award to the Claimant. These include:[lxxxvi]

5.1.3.1 Money Invested: One of the alternative models common in investment jurisprudence is for the Tribunal to award the claimant the monies it invested instead of the complex speculative DCF model, most especially when the project is yet to commence or when such project is not a going concern. The only defect in this model is that it sometimes under-compensates the Claimant in face of proof or evidence of damage.

5.1.3.2 The Chorzow Factory Principle: This principle is that which is highly recognized in contractual relation at common law. It is to this effect that the basic principle underlying award of damages being that the plaintiff should be restored as far as money can do to the position it would have been had the breach not occurred. In essence, under International law, the Chorzow Factory principle[304] is now the primary rule for compensating the claimant. It is in this effect that the claimant should be placed as near his position, to its previous financial position, equivalent to its outlays but for the breach under this model. In essence, Claimant would only get what it invested, and simplicita.

5.1.3.3 Compensation for Lost Opportunity: Another approach put forth by Miles and Weiss as being an alternative to the DCF in a bid to redress damages to the claimant's compensation for claimant's lost opportunity. For example, where the plaintiff would

have bided for an investment in another lucrative investment but failed to do so as a result of the present contract that had failed, such a claimant could claim compensation on the benefit such an alternative investment opportunity would have produced. In this situation, the claimant must prove by evidence:

i. The existence of alternative opportunity
ii. That he would have bided for the alternative opportunity but for the present contractual arrangement that had failed
iii. That he would have been the successful bidder by offering more than the winning bid
iv. That the company that won the bid would not have been willing to bid more than considered necessary.

Meanwhile, after going through the above, it is submitted with due respect that the Arbitral Tribunal would have done substantial justice in this matter if the arbitrators had cared to realize the relevance of the equitable principle of estoppel in this case. The relevance of the principle would have been more germane on three issues; first, on the seat of arbitration and second, on the applicable law and third, on the final award. Hence despite the position by the FRN, it is clear that in the GSPA, the parties agreed that the United Kingdom would be the seat of the arbitration and also that the applicable law would be the Nigerian law. In International Law, estoppel is created by a choice of forum in the arbitration agreement. Thus, where parties have agreed to submit to the jurisdiction of a forum or court and one of the parties like the FRN had taken an unequivocal step, demonstrating that he accepted and submitted to the jurisdiction of that forum, such country that had taken a step, under that agreement would be estopped from denying that forum. Thus, under this situation, no doubt about it that London or the United Kingdom was the seat of the arbitration as agreed and as further atoned by FRN when it appeared in the High Court of England and Wales. However, the matter quite differs when considering the final Award. Ovchar listed certain requirements for the application of the principle of estoppel[lxxxvii] in International law or International Commercial Transaction which we submitted could apply in the case of arbitral proceedings involving P&ID and a country like FRN. This is to determine the extent of the respondent's culpability concerning the breach of the agreement and the obligation to pay the final Award. The three conditions as distilled by Ouchar in the jurisprudence of the International Court of Justice are;

i. That the country must have made a representation
ii. The representation must be authorized and unconditional
iii. That there must be detrimental reliance on the part of the Claimant.

On the first requirement, there is nowhere in the GSPA agreement and in the term of reference submitted to the Arbitral Tribunal where Nigeria has represented to the claimant that in case of a breach, an award which is both penal and punitive should be given to the Claiming party. And even when the Award was made, the FRN both by express declaration and conduct objected to the grant of the Award. In the case of *Honduras v. Nicaragua*[lxxxviii] where Nicaragua had by express declaration and by conduct recognized the prior award by the King of Spain which it later objected. The I.C.J., estopped Nicaragua from questioning the validity of the award, having recognized the Award before. In P&ID's case, it was out of place that the agreement contained wordings suggestive of acceptance of the punitive and penal awarding in the GSPA.

Second, the other requirement is that to bind a particular country, the representation must be authorized and unconditional. The question is whether the Ministry of Petroleum Resources in Nigeria is competent to enter into the GSPA with P&ID. The question is who signed the agreement on behalf of FRN. The prevailing rule under International law in a contract of this nature is that the person who signed on behalf of the nation must be the minister who has the authority to bind the state. In *The Legal Status of Eastern Greenland's case*[lxxxix], the ICJ held that the representation given by the Minister for Foreign Affairs on behalf of his government is valid in as much as the representation fell within his province. In line with this authority which we consider persuasive enough, it is submitted that if the Minister of Petroleum Resources was the one that signed on behalf of the country, then the representations in GSPA agreement is authorized. However, it was contended on behalf of Nigeria that the contract could not be implemented as a result of the long period between power transition from President Goodluck Jonathan to President Buhari and the fact that the appointment of a new Minister took a longer time than envisaged. If this is the case, since the Arbitrators are versed in the knowledge of law and equity, it is submitted that the streams of equity are never closed, and they ought to have considered the interregnum between the periods of transiting from one government to another as a frustrating period or a moratorium period within which nothing could have been done for implementation. The contract implementation could not be done in

record time as the pivotal of that implementation was not behind the wheel. Meanwhile, the status of the person who signed the GSPA for the FRN was not indicated in the judgment. However, it is submitted that any official of the FRN lesser that the Minister for Petroleum Resources could not have the requisite authority to sign such a high profile contract. It is also submitted that any Minister whatsoever whose schedule of power or portfolio does not cover that ministry with vested power to engage the Federation internationally would be incompetent to bind the country[xc]. Meanwhile, the second aspect of this second element is that representation must be unconditional. The requirement of representation being unconditional means that the representation must not be made outside negotiation. Put differently, a representation is unconditional if it is made outside the negotiation.

Thus, apart from the fact that the representation must be authorized, it must be made unconditional in the sense that it must not be made contra-negotiation or made subject to fulfilment of any express condition. In the P&ID's case, there is zero negotiation on the quantum of damages indicating that the Award by the Tribunal is contra-negotiation and therefore unauthorized. Though the award is subject to the discretion of the Arbitral Tribunal, the refusal by the Tribunal to take into cognizance the authority vacuum in the course of performance is contrary to the jurisprudential thinking that law must always be adjusted by the Tribunal as well as the courts to meet changing circumstances.

The third requirement is that the claimant must have suffered detriment as a result of the representation. Even if the Claimant suffered detriment as a result of the breach of contract, the FRN could not deny the fact that the contract exists. FRN is caught from denying the existence of the contract as well as denying the place of the seat of the Tribunal. However, the bone of contention is on the issue of lack of jurisdiction to make an award which is punitive and penal. In international law, as noted, the DCF model is always being used as damages reduction mechanism. But, the truth of the matter is that both the Tribunal and the courts have been using the DCF model to make punitive award because of their wide discretionary power. If the Tribunal lacked jurisdiction to make such award, the implication is that the award itself is illegal.

Furthermore, in the judgment itself, the particulars of the damage were not evinced in the body of the judgment. Also, the issue of whether the project by P&ID is ongoing is not made manifest. Besides, the details of P&ID's borrowing either from the Stock Exchange Market or other Financial Institutions were not known. The extent of the risks P&ID have taken

in terms of Project and Industrial Structures, financial outlays were not spelt out. Hence, the award is overtly speculative. This is against the principle that he who alleges must prove. Even if P&ID has made certain installations, the amounts of which were imputed in the Award, what would happen to those installations? Are they going to be forfeited to Nigeria? Is P&ID going to take double by retaining those installations and the Award? If so, the law frowns at double Award. If not, the award ought to be reduced to such level that would restore P&ID to the position it would have been had the breach not occurred. The underlying principle is *'restitutio in integrum'* i.e restoration to the original position. Also, apart from the principle against double recovery as a damage reduction mechanism, other issues that a Claimant could only recover damages that the respondent could foresee, the contributory fault principle, which both the Tribunal and the court deployed to examine whether the claimant itself contributed to its woes, the duty to mitigate which imposes an obligation on the claimant to take reasonable steps to limit the detriments to it, which ought to combine to limit the final Awards were untouched by both the Tribunal and the Courts in P&ID's case.

6.0 CONCLUSION

This study addressed some tips for the policymakers in Nigeria involving certain legal routes to forestall this kind of unfortunate situations in the future:

i. First, in making this type of contract, the Ministry ought to have considered the insertion of a 'Moratorium Period' which would have constituted a stop-gap between the period of signing the contract and the period when the contract is to commence or take effect. This is a temporary period that would give the ministry the required time within which to resolve petty related issues, taking the political climate at that time into consideration. The legal implication is that a breach of contract could not be alleged to have occurred within the moratorium period. It could be within six months to a year or more. Once inserted in a contract, it operates as a legally mandated hiatus in investment contract.

ii. Second, the lesson from the South African case of AFRICAST[xci] revealed in comparative a great legal tip while preparing an investment agreement of high profile like the GSPA. In that case, the contract was made subject to a suspensive condition that until the Board of the defendant's company approved the contract,

they are not liable and the contract is of no effect with zero liability. The South African court upheld this position that the contract efflutes for non-fulfilment of the suspensive condition. The tip is that such clause like this contract is subject to the approval of the Federal Executive Council and takes effect with the approval of the President of the Federal Republic of Nigeria would have done the magic and the prior signing by the Minister or whoever would have been a preliminary move in the course of Negotiation. In effect, the contract would have been inchoate, the clause would have created a haven for the nation and the nation would have escaped this legal dragon net involving a colossal sum.

iii. Our legislatures also need to be alive to their responsibilities. Are they unaware that this might be a design by some fraudulent Nigerians, in cohorts with some fraudulent unviable foreign investors to defraud the country in concert? The federal parliament ought to put some legal regime in place such as would forestall this type of unfortunate situations. This could be done by curtailing the power of the Ministers and other designated government officials to unilaterally sign this type of high profile contract without the approval of the Federal Executive Council. Also, other legal instruments prescribing financial limits to the contract that could be approved solo by the Minister, a well-drafted Investment Promotion Act, compelling all foreign investors in Nigeria to register under the Corporate Affairs Commission, provide the details of their pedigree in term of evidence of prior successes of their company in a contract of this nature, giving graphic details of the countries where it had done this kind of contract before and compelling the appointment of at least two-thirds of their directors to be from Nigeria, would have curbed to a certain extent, the kind of mess the country is into under the GSPA in the P&ID's case.

Appreciably, a Court in England was reported to have allowed the FRN to appeal the decision of Butler J. This gave the Arbitration Tribunal Award against Nigeria the effect of judicial pronouncement. This represents a great relief and we hope the Nigerian legal team would articulate their contention and argument very well enough to save the nation already enmeshed in economic quagmire the devastating effect of this rather punitive, penal and cutthroat award that represents a windfall for P&ID. The approach of both the Courts and the

Tribunal in England is absolutely pacifist when it comes to the interpretation of clauses relating to the seat of arbitration, which is undoubtedly England. However, the approaches are none liberal in their refusal to utilize the expert opinion of Mr. Handley in his witness statement as well as the expert report of Professor Louis Wells, even though both were taken in evidence[xcii]. The court, per Butcher J refused to use the reports. The attitude is widely non-activist. The Tribunal and the court made no recourse to all equitable principles that ought to have aided in reaching fair decisions and in doing substantial justice.

ENDNOTES

[i] Sagay, I (2015), *Nigeria Law of Contract*, Sweet and Maxwell, London.
[ii] Retrieved frow www.lawteacher.net on the 12th day of October 2020.
[iii] 2019) ewhc 2241 (Comm).
[iv] *Ibid.* Para. 5.

[vi] *Ibid*. Para. 5.
[vii] *Ibid.* Para.6 Clause 20 of the GSPA, at 2nd and 4th para.
[viii] *Ibid.* Para 8.
[ix] *Ibid*. Para 10.
[x] *Ibid*.
[xi] *Ibid*. Para 17.
[xii] *Ibid*. Para 18.
[xiii] *Ibid.* Para 19.
[xiv] *Ibid*. Para 19.
[xv] *Ibid.* Para 20.
[xvi] *Ibid.* Para 25.
[xvii] *Ibid*. Para 26.
[xviii] *Ibid.* Para 28.
[xix] *Ibid.* Para 29-30.
[xx] *Ibid.* Para 31.
[xxi] *Ibid*. Para 32.
[xxii] *Ibid.* Para 33.
[xxiii] *Ibid.* Para 35-38.
[xxiv] *Ibid.* Para 41.
[xxv] *Ibid.* Para 43.
[xxvi] *Ibid.* Para 45-50.
[xxvii] *Ibid.* Para 50-51.
[xxviii] (2014) A.C. p160 at 117.
[xxix] (1991) 2 AC p.93 at pp105-106.
[xxx] (2004) Lloyds Rep. 67 at p50.
[xxxi] The issue added to make it more meaningful.
[xxxii] *Ibid.* Para 52-55.
[xxxiii] *Ibid.* Para 57-58.
[xxxiv] Pg 73,75-77 of the judgment.
[xxxv] *Ibid*. Pg 63-64 of the judgment.
[xxxvi](2017) All FWLR p.1837.
[xxxvii] (1991) A.C. p93.
[xxxviii] Supra.
[xxxix] Supra.

[xl] *Ibid.*
[xli] *Ibid.*
[xlii] *Op.cit*. Para 85-87.
[xliii] Ibid. Para 89.
[xliv] (2014) EWHC p.271 (comm) esp. para 90-92.
[xlv] (2018) EWHC p. 2545 (comm).
[xlvi] *Op.cit.* Para 91.
[xlvii] *Ibid.* Para 92-93.
[xlviii] *Ibid.* Para 94-97.
[xlix] (1987) 2Lloyds Rep. p.246.
[l] *Op.cit* p.98.
[li] Westacare Investments Inc v. Jugoimport – SPDR Ltd (1999) QB p.740 at Pp 770-773. Per Colman J.
[lii] *Op.cit*. Para 104.
[liii] *Op.cit*. Para 104.
[liv]*Opcit.* Para 109.
[lv] *Ibid.* Para. P 16.
[lvi] *Ibid*. Para. P 106.
[lvii] *Ibid*. Para. P 57-58.
[lviii] *Ibid.* Para. P 58.
[lix] *Ibid.* Para. P 64.
[lx] Casey B. (2017) *The Arbitral Tribunal Jurisdiction* , 3rd ed, Canada Jurislegal
[lxi] Casey B; Ibid
[lxii] *Op. cit*. Para 106.
[lxiii] *Mcfoy* v UAC (1962) AC p.153 Madukolu v Nkemdilim (1962) 2SCNCR p.341.
[lxiv] (2005), EWHC p.726 (comm) (2005) 2 Lloyds Rep. p 326 at p13.
[lxv] *Op.cit.* Paragraph 102.
[lxvi] *Ibid*. Para 90.
[lxvii] *Ibid.* Para 95-103.
[lxviii] The Free Law Study Resources (2018) Unruly Force on a Run, p.5 India (Retrieved in the 10th day of January 2020 from https//www.lawteacher.net).
[lxix] *Ibid.*
[lxx] *Ibid.*
[lxxi] (1987)2 Lloyds Rep p.246-254.
[lxxii] (1824) 2 Bing p.229 at p.252.
[lxxiii] (1971) Ch.591 at p.607.
[lxxiv] Case No: Appeal (civil) 7419 (2001) JT (2003) (4) SC.
[lxxv] *Ibid*.
[lxxvi] Miles C; Weiss, D (2018) Overview of Principles Reducing Damages, Chapter % in Trenor J.A (2018) the Guide to Damages in International Arbitration (ed) *Global Arbitration Review*, Wallington.
[lxxvii] *Ibid.*
[lxxviii] IIC 205 (2001) 3rd September 2001.
[lxxix] Miles and Weiss. Op.cit.
[lxxx] *Ibid.* Miles and Weiss.
[lxxxi] *Ibid.* Miles and Weiss.
[lxxxii] *Ibid.* Miles and Weiss.
[lxxxiii] ICSID Case No. ARB (AF)/09/1 (2014).
[lxxxiv] Miles and Weiss. Opcit.
[lxxxv] *Ibid.*
[lxxxvi] *Ibid*. Miles and Weiss.
[lxxxvii] Ouchar, A (2009) "Estoppel in the Jurisprudence of International Court of Justice; A principle promotion stability threatened to undermine it" *Bond Education Law Review*, wl. 21, 185.
[lxxxviii] (1974) I.C.J. Rep. p.253.
[lxxxix] Denmark v. Norway (1933) P.C.I.J.I.S General list No 43, Jurisprudent No 20 of 5, September 1993.
[xc] Gulf of Maine Area Canada v. The United States of America, (1982) Judgment of International Court of Justice of 20th January 1982.
[xci] (2014) ZASCA p.33.
[xcii] The court while adopting the liberal approach shows willingness to adopt expert opinion to broaden its views in a particular subject area.