

# The Recognition and Enforcement of International Arbitral awards in Nigeria: The Issue of Time Limitation

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## Abstract

Enforcement of foreign arbitral award is very important in international arbitration practice. If arbitral award made pursuant to arbitral proceedings cannot be enforced, then the arbitral process is hopeless and of no relevance. The parties who went through arbitration intend that the arbitral award when made shall be enforced against the unsuccessful party. In Nigeria, time limitation is a very serious obstacle in the enforcement of international arbitral awards and neither the courts nor the arbitration legislation have helped matters. The Arbitration and Conciliation Act of Nigeria has not specified the limitation period on the matter. The courts have decided on the issue as if arbitration award is governed by different legal regime and is therefore absolutely autonomous or is floating on an independent legal regime unconnected with the legal regime governing cause of action in civil matters in Nigeria. We have embarked on this mission to identify the position of the law in Nigeria in comparison with the decisions in other jurisdictions of the world.

## 1. Meaning of Recognition and Enforcement

In arbitration practice, after the making of an arbitral award, if the unsuccessful party complies with the terms of the award, the matter is at an end. However, it is not always that the unsuccessful party complies with the terms of the award as some may set out from the onset to impeach the award or refuse to perform the terms of the same and in which case when the successful party takes steps to enforce the award, the unsuccessful party may put up resistance by requesting the court to refuse recognition and enforcement of the arbitral award. The Black's Law Dictionary defines the term "recognition" to mean ratification, confirmation, an acknowledgment that something done by another person in one's name had one's authority<sup>2</sup>. It is the declaration of the validity of the award. For a court to enforce an arbitral award, it must first determine and declare the award valid. Enforcement means, "the act of putting something, such as law, into effect; the execution of a law; the carrying out of a mandate or command."<sup>3</sup> Often people use the terms recognition and enforcement interchangeably as if they mean one and the same thing. The recognition of an award is on its own a defensive process. It usually arises where the unsuccessful party commences an action in respect of the same subject matter or behaves as if no valid arbitral award has been rendered. In such a situation the successful party in whose favour the award was made will apply to the court to recognize the arbitral award and declare it valid and binding on the unsuccessful party in the arbitration.<sup>4</sup> For the application for recognition to succeed, applicant must annex the award to his accompanying affidavit in support to the application.

Where the award covers all the issues raised by the unsuccessful party in his matter in court, the court will declare the award valid and put an end to the new proceedings on the basis of *res judicata* but where the arbitral award dealt with only some of the issue raised in the new action, there will be an order putting an end to the issues already dealt with in the arbitration on the basis of *issue estoppel*. A court invited to recognize an award has a duty to determine only the legal force and effect of the award and not necessarily to ensure that it is carried out.

A court invited to enforce an arbitral award has a duty not only to determine the legal force and effect of the award but also to ensure that it is carried out by using all the legal sanctions at its disposal. A court enforces an award because it recognized that it is valid and binding on the parties. Enforcement is a step further from recognition. Enforcement is a pragmatic step taken to ensure that the unsuccessful party carries out the terms of an arbitral award.

## 2. Venue and Place for Recognition and Enforcement of Foreign Award

The venue where an application can be made for the recognition or enforcement of foreign arbitral award in Nigeria is the Court. The Arbitration and Conciliation Act of Nigeria defined court to mean the High Court of

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<sup>2</sup> *Black Law Dictionary*, 6<sup>th</sup> Ed. 1271

<sup>3</sup> *ibid* 528

<sup>4</sup> Nwakoby G. C., *The Law and Practice of Commercial Arbitration in Nigeria*, 2<sup>nd</sup> Ed. Snaap Press Ltd. Enugu, 2014 215-216

State, the Federal High Court, and the High Court of Federal Capital Territory Abuja.<sup>1</sup> The application has to be made to that very High Court which would have had the jurisdiction to entertain the matter but for the arbitration agreement of the parties.<sup>2</sup> There are some conventions acceded to by Nigeria which provide for enforcement of its award in a court above the High Court. An example of such Conventions is ICSID Convention. ICSID arbitral awards are enforceable at the Supreme Court of Nigeria which is the highest court of the land.<sup>3</sup>

In seeking for the venue for the application for the enforcement of foreign arbitral award, the applicant is advised to undertake forum shopping so as to determine where the unsuccessful party has assets which will meet the demand of the arbitral award. He is also advised to consider the world view and the public policy of the venue. It is not advisable that one applies for enforcement in a venue which is parochial or where the unsuccessful party against whom the award is sought to be enforced has limited assets.

### 3. Enforcement of Foreign Arbitral Awards in Nigeria.

The essence and need for the enforcement of foreign arbitral awards in Nigeria can best be represented in the very words of an eminent scholar as follows: -

*One reason business people enter into arbitration agreement or may insist on inserting arbitration clause in contract is to hope for a binding and an enforceable award should one be rendered. An arbitration agreement or award without an effective enforcement mechanism may, in practice, be valueless. If an agreement or award which is not voluntarily carried out cannot be coercively enforced against a recalcitrant party, then the rationale for arbitration is eroded and confidence in the arbitral process would be shaken.*<sup>4</sup>

What is the essence of arbitration generally if arbitral award rendered by arbitral tribunal is not enforceable in Nigeria? Scholars, writers, and the courts in Nigeria are all in agreement that foreign awards are enforceable in Nigeria.<sup>5</sup> We shall now review the enforcement procedure under the various legislation and conventions applicable to Nigeria.

#### i Enforcement Under the Foreign Judgment (Reciprocal Enforcement) Act.

Pursuant to the provisions of the Foreign Judgment (Reciprocal Enforcement) Act, a judgment or an award rendered in a foreign country may be enforced in Nigeria within six years of the judgment or award. For such foreign award to be enforceable in Nigeria, it must have been capable of enforcement in the country of its origin.<sup>6</sup> For arbitral award to merit enforcement under this Act, such arbitral award must have acquired the character of a judgment in the foreign country where it was made.

For a foreign award to be enforced pursuant to this Act, there must be evidence of reciprocity showing that the country from where the award originated treats Nigerian judgments and arbitral awards favourably.<sup>7</sup> Reciprocity is very important in determining whether to enforce any foreign award under this Act. The method of enforcement of award under this Act is by application to court for registration of the award and immediately this is achieved, the successful applicant can then use the ordinary writ of execution to execute the award. The application for the registration of the award shall be served on the respondent as the order to be made shall affect his interest. The application shall be made by originating summons within six years of making of the award or where there have been proceedings by way of appeal against the judgment, after date of the last judgment given in those appeal.<sup>8</sup>

The superior court in Nigeria will not enforce the award if at the time of the application for its enforcement there exists an appeal in any court on the award for purposes of setting it aside or if it has wholly been satisfied or it could not be enforced by execution in the country of the original court. The enforcement of foreign award under this Act shall not be made if the court is satisfied that the arbitral tribunal had no jurisdiction in the circumstances of the case to deal with the matter, if the successful party or the arbitral tribunal failed to serve notice of its proceedings to the defendant, if the award was obtained by fraud, and if the

<sup>1</sup> Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004, Section 57(2)

<sup>2</sup> *Afcon Nigeria Ltd. v. Registered Trustees of Ikoyi Club* (1996) FHCLR 371

<sup>3</sup> International Centre for the Settlement of Investment Disputes Act I 20, Laws of the Federation of Nigeria 2004, section 1(1).

<sup>4</sup> Amazu A. Asouzu, "The Adoption of the UNCITRAL Model Law in Nigeria, Implication of the Recognition and Enforcement of Arbitral Awards," *Journal of Business Law*, 1999, 185.

<sup>5</sup> *M.S.S. Line v. Kano Oil Millers* (1974) NNLR 1. *A.C. Toeper Inc. of New York v. John Edokpolor* (1965) ALL NLR 292. Ezejiolor Gaius, *The Law of Arbitration in Nigeria*, Longman Nig. Plc, 1997, 173-174. Orojo J. O. & Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, Mbeyi & Ass. Nig. Ltd, Lagos, 1999, 304-305.

<sup>6</sup> Foreign Judgment (Reciprocal Enforcement) Act Cap F35 Laws of the Federation of Nigeria 2004, Section 2.

<sup>7</sup> Section 3(1) of the Act (Cap F 35 L.F.N. 2004).

<sup>8</sup> Section 4(1) of the Act (Cap F35 L.F.N. 2004).

enforcement of the award will be contrary to the public policy of Nigeria.<sup>1</sup>

## ii. Enforcement Under S.51 of the Arbitration & Conciliation Act.

An international arbitral award may be enforced pursuant to the provisions of section 51 of the Act which provides inter alia that “an arbitral award shall, irrespective of the country in which it is made, be recognized as binding and subject to this section and section 32 of this Act shall, upon application in writing to the court, be enforced by the court.”<sup>2</sup> The party relying on an award or applying for its enforcement pursuant to this Act shall supply the following:-

- a) the duly authenticated original award or a duly certified copy thereof;
- b) the original arbitration agreement or duly certified copy thereof; and
- c) where the award or arbitration agreement is not made in the English Language, a duly certified translation thereof into the English Language.<sup>3</sup>

We must at this stage state that the use of the term “irrespective of the country where the award was made” gives the impression that the requirement of reciprocity as in the provisions of Cap F 35 (Foreign Judgment Reciprocal Enforcement Act) had been waived and hence is not a requirement for enforcement of foreign awards pursuant to section 51 of Arbitration and Conciliation Act of Nigeria. Knowing the attitude of Nigerian courts as expressed in *M.S.S v. Kano Oil Millers*<sup>4</sup> and *A.C. Toepter Inc of New York v John Edokpolor*,<sup>5</sup> reciprocity of treatment is required in the enforcement of foreign award in Nigeria pursuant to section 51 of the Act. The Supreme Court of Nigeria which is the highest court of the land had decided in the two cases aforesaid that “reciprocity of treatment” is material in the enforcement of foreign arbitral awards in Nigeria. This is an acceptable practice recognized internationally.

The method of enforcement under S.51 of the Act is by application to court which is by motion on notice. However, the application for enforcement may be refused if the respondent against whom enforcement is sought furnishes proof of the following facts;

- a) that a party to the arbitration agreement was under some incapacity.
- b) that the arbitration agreement is not valid under the law in which the parties have indicated should be applied.
- c) that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings.
- d) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.
- e) that the award contains decisions on matters which are beyond the scope of the submission to arbitration.<sup>6</sup>

## iii Enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards June 10 ,1958 ( New York Convention )

New York Convention applies to Nigeria by virtue of section 54 of the Arbitration and Conciliation Act which provides that,

*Without prejudice to sections 51 and 52 of this Act, where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the convention on the Recognition and Enforcement of Foreign Award (hereafter referred to as “the Convention” set out in the second schedule to this Act shall apply to any award made in Nigeria or in any contracting State.*

Nigeria acceded to the Convention on 17<sup>th</sup> March, 1970 but no serious efforts were made to domesticate the Convention in Nigeria until the promulgation of the Decree in 1988. Today the Convention has been given right place of existence by incorporating it in section 54 of the Act and second schedule to the Arbitration and Conciliation Act. The New York Convention is one of the many, perhaps, one of the most important of the attainments of the United Nations in promoting a more effective and universal rule of law. It promotes the peaceful settlement of international disputes, not the sort of disputes between states with which the United Nations Charter is concerned, but commercial disputes which are inherent in international trade and transactions. For Rt. Hon. Sir Michael Kerr, the Convention is the bed rock of modern international arbitration, the foundation on which the whole edifice of international commercial arbitration rests.<sup>7</sup>

<sup>1</sup> Section 6(1) of the Act.

<sup>2</sup> Arbitration and Conciliation Act Cap A18 L.F.N. 2004, Section 51(1).

<sup>3</sup> Section 51(2) of the Act (Cap F35 L.F.N.2004).

<sup>4</sup> (1974)NNLR 1.

<sup>5</sup> (1965) All NLR 292.

<sup>6</sup> Section 52(2) of the Act (Cap A18 L.F.N. 2004).

<sup>7</sup> Michael Kerr, “Concord and Conflict in International Arbitration,” *Arbitration International LCIA*, 1997, 121 at 122.

The Convention applies to two sets of awards, namely:

- i Arbitral awards made in the territory of a state other than where the recognition and enforcement of such awards are sought and arising out of differences between persons whether physical or legal.
- ii Arbitral awards not considered domestic awards in the State where their recognition and enforcement are sought.

Foreign arbitral awards made in Nigeria or in any other contracting State may be enforced under the Convention provided always that the award arose from an agreement in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. Article 111 of the Convention provides inter alia:

*Each contracting State shall recognize arbitral award as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following Articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed in the recognition and enforcement of domestic arbitral awards.*

From the foregoing, it is obvious that the recognition and enforcement of arbitral awards pursuant to the Convention are required to be in accordance with the rules of procedure of the country where recognition and enforcement are sought. It then means that in Nigeria, recognition and enforcement of foreign arbitral awards under New York Convention are enforceable by leave of the judge or court, and by application to court.<sup>1</sup> A party seeking to enforce his arbitral award pursuant to the Convention shall at the time of filing his application supply the appropriate court with the duly authenticated original award or a duly certified copy thereof and the original agreement referred to in Article II of the Convention or a duly certified copy of it. Where the arbitral award sought to be enforced or the agreement is not in an official language of the country in which the award is sought to be enforced, the party seeking for the enforcement shall obtain translation of the arbitral award or the arbitration agreement in the official language of that country.<sup>2</sup> The party against whom the recognition and enforcement is sought may request the court to refuse recognition and enforcement of the award pursuant to the grounds set out in Article V of the Convention.

It needs be mentioned specifically that for an arbitral award to be enforced in Nigeria under the New York Convention, it must be shown that such a contracting state has a reciprocal legislation authorizing the recognition and enforcement of arbitral awards made in Nigeria. This is because Nigeria has made the reciprocity reservation and so only awards made in contracting states that undertake to recognize and enforce awards made in other contracting states and Nigeria will be recognized and enforced in Nigeria. The implication of this position is that arbitral awards made in a country which is not a party to the Convention or giving reciprocal treatment to Nigerian arbitral awards cannot enjoy in Nigeria the recognition or enforcement provided under the Convention.

#### **iv. The Recognition or Enforcement of ICSID Awards**

ICSID has a limited jurisdiction and scope both as to parties and subject matters. One of the parties in any proceedings made pursuant to ICSID must be a contracting State or any constituent sub-division or agency thereof designated to the Centre by the State and the other party must be a national of another contracting party. The subject matter in the proceedings must be investment matter.<sup>3</sup> For arbitration proceedings to be conducted pursuant to ICSID, the parties must have consented and agreed that ICSID Convention shall apply for the settlement of their dispute. Once the parties agreed as to ICSID Convention, the provisions of the Convention shall apply to the exclusion of all other laws.<sup>4</sup>

By Article 26 of the Convention, consent of the parties to arbitration under ICSID Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. By agreeing to arbitrate pursuant to ICSID Convention, parties have the assurance that they will take full benefit of the procedural rules specifically adapted to their needs and equally important, that the administration of these rules will be exempted from the scrutiny or control of the domestic courts in the state that are parties to the Convention.<sup>5</sup> The implication of this fact is that the national courts of contracting States are restrained from interfering with the autonomous character of ICSID. Once a court within the contracting State becomes aware that a matter before it is subject to ICSID arbitration agreement, the court shall as a matter of law refrain from

<sup>1</sup> Arbitration and Conciliation Act Cap A18 L.F.N. 2004, Sections 31 & 51.

<sup>2</sup> New York Convention, Article iv.

<sup>3</sup> Amazu A. Azouzu, "ICSID Report" cited in *Lloyd's Maritime and Commercial Law Quarterly*, 1998, 299-303. Nwakoby Greg C, ICSID Arbitration Practice – Plea of Sovereign Immunity" *MPJFIL*, Vol.6, No.1-2, 2002, 27.

<sup>4</sup> ICSID Convention, Article 44.

<sup>5</sup> ICSID Convention, Article 42.

continuing with the matter and refer the parties to ICSID unless in the event of contrary or adverse decision by ICSID, which may entail for example, that ICSID Secretary General refused to registered the applicant's request or that the ICSID tribunal declined jurisdiction in the matter. This noble provision in the Convention is commendable and is provided for in Article 62 of the Convention.

As stated hereinbefore, only disputes between a contracting State or under certain conditions, one of its sub-divisions or agencies or a national of another contracting State may be referred to ICSID arbitration.<sup>1</sup> The dispute which the parties agreed to refer to ICSID must relate to investment. However, neither the legislative history of ICSID nor Article 25 of the Convention defined the meaning of the term investment even when the term is of very high importance in the application of the Convention. It must of necessity be stated that the Convention was drafted in an era and time when most investments took the form of concessions, joint ventures, or loans made by private financial institutions to foreign public entities and, of arrangements concerning industrial property rights. Since after drafting of this Convention, new forms of investments have emerged, such as profit sharing, service and management contracts, contracts for the sale and erection of industrial plants, turn-key contracts, international leasing arrangements and agreements for the transfer of knowhow and technology. Pursuant to this fact, parties are advised that it will serve their purpose better if in their arbitration agreement, it is specifically stated that the agreement relates to investment.

ICSID has a special and autonomous mechanism for the recognition and enforcement of their award and this explains why ICSID award is said to be a special form of award.<sup>2</sup> Each of the Contracting States to the Convention has only one duty to perform with respect to the award and that is, to recognize and enforce the award as if it is a final judgment of the court within their State. The applicant for the recognition or enforcement is only required to furnish the court with a certified true copy of the award certified by the Secretary General. In Nigeria, the appropriate authority or court for the registration, recognition and enforcement of ICSID award is the Supreme Court of Nigeria which is the highest court of the land. In accordance with the provisions of section 12 of the Constitution of Nigeria on domestication of Conventions and Article 69 of the Convention which expects each contracting State to take such legislative or other measures that may be necessary for making the provisions of the Convention effective in the contracting State territory, the Federal Republic of Nigeria enacted the International Centre for the Settlement of Investment Disputes (Enforcement of Awards) Act Cap i20 Laws of the Federation of Nigeria, 2004. The Act which has only two sections provided in its section 1 that,

*Where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for the Settlement of Investment Disputes, a copy of the award duly certified by the Secretary General of the Centre aforesaid, if filed in the Supreme Court, by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgment of the Supreme Court, and the award shall be enforced accordingly.*

The provision set out above, which provides for the enforcement of ICSID awards in Nigeria, is a clear intention and commitment on the part of the Nigerian government to execute their international arbitration obligations under the Convention. The Nigerian Act cited above did not make any provision for the recognition and enforcement of ICSID awards in Nigeria rather it states in section 1(2) that the Chief Justice of Nigeria shall make such provisions for the enforcement of ICSID awards in Nigeria. Unfortunately, the Chief Justice of Nigeria has not made or adopted any rule of procedure for the enforcement of ICSID awards at the Supreme Court of Nigeria as at today. Once the ICSID award is registered at the Supreme Court, it ranks on the same equal level as a final judgment of Supreme Court of Nigeria and this has the support of Article 54(1) of ICSID which provides that,

*Each contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligation imposed by the award within its territories as if it were a final judgment of a court in that state. A contracting state with a Federal Constitution may enforce such an award in or through its Federal Court and may provide that such courts shall treat the award as if it were a final judgment of the court of a constituent state.*

It is important to mention herein that whereas Article 54 of the Convention enjoined all the contracting State parties to enforce ICSID awards without any interference, there is a very big obstacle also imposed on the award at the time of execution, and that is, the issue of sovereign state immunity which a State party can raise at the stage of execution. Where an application is filed for the enforcement of ICSID award, the national or domestic court has only one duty to perform and that is to ensure that the award is enforced. The issue of sovereign state

<sup>1</sup> ICSID Convention, Article 25(1).

<sup>2</sup> George R. Delaume, "ICSID Arbitration and the Courts," *The American Journal of International Law*, Vol. 77, 1983, 785-786.

immunity comes up at the stage of the execution which is the second stage in the exercise.<sup>1</sup> Though the plea of state sovereign immunity is a serious obstacle in the execution of ICSID awards pursuant to Article 55 of the Convention, a State party going into ICSID arbitration agreement with another has a right to waive the plea of sovereign immunity so as to show good faith. Once the parties waived their right to plea of state sovereign immunity, any award made shall be expressly executed without more.<sup>2</sup>

#### v. Enforcement by Action at Law

International arbitral awards are enforceable by action at law like the domestic arbitral awards. This is because international commercial arbitration agreement like any other agreement is enforceable and the breach of the same will be a ground for action at law. The agreement to arbitrate is an actual promise to perform the award when made. In every arbitration agreement, there is an implied undertaking that the award when made shall be complied with and if for any reason the unsuccessful party fails to comply with the terms of the award, the aggrieved party has the right to sue for the enforcement of the agreement.

The basic elements in the successful enforcement of an international arbitral award in Nigeria are, that the parties submitted to arbitration, that the arbitration was conducted in accordance with the submission, and that the award was both final and valid by the law of the country in which it was made. Where the parties agreed to submit any dispute to arbitration, the validity of the arbitration agreement is determined by the law specified as the governing law by the parties or the law specified by the arbitral tribunal in the absence of any specification of the applicable law by the parties.<sup>3</sup> It follows that for the court to enforce an arbitral award by action at law, the successful party has the duty to prove that there exists a written agreement between them to arbitrate, that a dispute arose within the terms of the arbitration agreement, that an award was properly made by arbitrators appointed in accordance with the agreement of the parties, and that the award was final and conclusive with respect to all the issues referred to the arbitrators. It is important to state that the procedure for the enforcement of international arbitral award by action at law is by issuance of ordinary writ of summons. This method of enforcement of arbitral award (domestic or international) is not recommended as it is very slow and cumbersome.

#### 4. Refusal of Recognition and Enforcement of International Arbitral Awards

While treating the issue of refusal of recognition and enforcement of international arbitral awards in Nigeria, mention must be made of the fact that the domestic or national courts in contracting states have no right to refuse the recognition or enforcement of ICSID awards as there is a treaty obligation imposed on all state parties to ensure the recognition and enforcement of ICSID awards within their respective States. This sub topic on refusal of recognition and enforcement of international arbitral awards relate to all other foreign arbitral awards with exception of ICSID awards. The court, before which there is an application or action to recognize and enforce an award, may refuse recognition and enforcement of the same if the aggrieved party furnishes proof of credible defense to the application.<sup>4</sup> Section 52 of the Arbitration and Conciliation Act of Nigeria and Article V of the New York Convention set out the issues which the aggrieved party may be required to prove. The issues include among others:

- I. That a party to the arbitration agreement is under some incapacity.<sup>5</sup> Arbitration agreement is a contract and it is governed by all the legal principles governing contract. If a party to the arbitration agreement is a minor and the contract relates to matters which are not for his benefit, welfare, and supply of necessities, he can void the agreement and challenge the arbitral award resulting there from.
- II. That the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made. The parties have the right to specify the applicable law to their arbitration but where they failed to do so, the arbitral tribunal has the task to do so.<sup>6</sup> It is the law as chosen by the parties or determined by the arbitral tribunal shall be the basis of determining the validity of the arbitration agreement as provided in section 47 of the Act.

<sup>1</sup> *Benvenuti & Bonfant SRL (BB) v. The Government of the Peoples Republic of Congo* (1993) ICSID Rep 368. Amazu A. Azouzu, "African State and the Enforcement of Arbitral Awards: Some Key Issues", *Arbitration International LCIA*, Vol.15, 1999, 34. *Senegal v. SOABI* (1994)2 ICSID Rep 164. ICSID Convention, Article 55. *Benvenuti & Bonfant SRL v. Banque Commercial Congolaise BCC & Ors* (1993)1 ICSID 373.

<sup>2</sup> *Liberian Eastern Timber Corporation v. The Government of the Republic of Liberia*, (1994)2 ICSID Rep 383. Nwakoby Greg. C., *The Law and Practice of Commercial Arbitration in Nigeria*, Snaap Press Ltd, 2014, 250-251.

<sup>3</sup> *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan* (1978)2 Lloyd's Rep 233. *Hamlyn Co. v. Talisker Distillery* (1978)AC 202. *Tzorkzis v. Monark Line A/B* (1968) All ER 949. *Norke Atlas Ins. Co. Ltd. v. London General Ins. Co. Ltd* (1927)43 TLR 541

<sup>4</sup> Arbitration and Conciliation Act, section 52(1). New York Convention, Article v. UNCITRAL Model Law, Article 36.

<sup>5</sup> Section 52 (2) (a) (i) of the Act.

<sup>6</sup> Section 47(1) & (2) of the Act.

- III. The court will refuse recognition and enforcement of an arbitral award in Nigeria if the party against whom it is sought to be enforced was not given notice of the appointment of the arbitrator or the arbitral proceedings pursuant to which the award was made.<sup>1</sup> In this respect, the defense of the party against whom enforcement is sought is that he was not given fair hearing in the matter. All the parties in arbitration agreement are entitled to notice of the appointment of the arbitrator and commencement of the arbitral proceedings. They have the right to be heard fully by the arbitral tribunal. It is a breach of constitutional right to fair hearing to hear and determine a matter against a person without hearing him fully.<sup>2</sup> Though arbitral proceedings may commence and be taken in the absence of a party but there must be credible and convincing evidence that he was given notice of the same but he decided to absent himself
- IV. Recognition and enforcement of an arbitral award will be refused by the court if arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration (that is, lack of or in excess of jurisdiction). The defense in this matter touches on the jurisdiction of the arbitral tribunal to arbitrate the dispute wherein the arbitral tribunal goes beyond the scope of the submission made to it. The law is that the award could be saved if it is possible to sever the offensive aspect of the arbitral award from the excess but where this is not possible, the arbitral award will not be recognized or enforced as it is done without jurisdiction.<sup>3</sup> It is important to state that the defense in this regard is one of jurisdiction and as is the position in all civil matter; jurisdictional defense can be raised at any time during the arbitral proceedings, after making of an award, or during the application for recognition or enforcement of the arbitral award.
- V. The recognition and enforcement of a foreign award will be refused if it is proved by a party that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. By the principles of party autonomy, the parties have the right to determine the qualification of the arbitrators, the number of the arbitrators, the procedure for the appointment, and the applicable procedure to their arbitration.<sup>4</sup> Where the parties to the arbitration agreement have failed to specify the applicable procedure to the arbitral tribunal proceedings or the appointment of the arbitrator, the provision of the governing law shall determine the procedure for the appointment of the arbitrator and for the proceedings. In section 52 (2)(a)(viii) of the Act, it is provided that where the appointment or composition of the arbitral tribunal or the arbitral proceedings were not specified by the parties in their agreement, the recognition and enforcement of the award will be refused if the composition of the arbitral tribunal was not in accordance with the law of the country where the award was made. This is a serious indication that the law of the country where an award was made has strong roles to play in this matter.
- VI. It will be a ground for the refusal of recognition and enforcement of a foreign arbitral award in Nigeria if it is proved that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which or under the law of which, the award was made.<sup>5</sup> An arbitral award would be said not to be yet binding if there is a pending application for setting it aside in the country where the award was made or in any other court by the parties. Where it has been annulled in any court, the arbitral award ceases to have any legal force or effect.
- VII. An arbitral award will be refused recognition and enforcement if the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria.<sup>6</sup> It is not all matters that can be referred to arbitration in Nigeria. For example, Criminal matters, and divorce matters cannot be referred to arbitration as the law established the courts with the requisite jurisdiction to hear them. It is also important to state that criminal matters are triable by competent courts for the benefit of the public. In *K.S.U.D.B. v. Fanz Const. Co. Ltd.*,<sup>7</sup> the Supreme Court of Nigeria held that certain matters are not subject to arbitration in Nigeria, for example, an indictment for an offence of a public nature, disputes arising from illegal contract, gaming and wagering, disputes leading to a change of status proceedings, and winding up of a company.
- VIII. The court will refuse the recognition and enforcement of foreign arbitral award if that is against the

<sup>1</sup> Section 52(2)(a)(iii) of the Act. New York Convention, Article V (1)(b).

<sup>2</sup> The Constitution of the Federal Republic of Nigeria, 1999, section 36(1). *Lagos State Development and Property Corporation v. Adold Stamm International Nig. Ltd.* (1994)7 NWLR (Pt. 358)545.

<sup>3</sup> Section 52(2)(a)(iv) of the Act. New York Convention, Article V(1)(c). *IPCO v. NNPC* (2008) EWCA, CIV. 1157.

<sup>4</sup> Sections 6 & 52(2)(a)(vi) of the Act. New York Convention, Article V(1)(d).

<sup>5</sup> Section 52(2)(a)(viii) of the Act. New York Convention, Article V(1)(e).

<sup>6</sup> Section 52 (2)(b)(i) of the Act. New York Convention, Article V(2)(1).

<sup>7</sup> (1990)4NWLR (Pt. 142)1. See also *FIRS v. NNPC & 4 ors* (2012)6TLRN 1 at 12 where the court decided that tax is a statutory matter and that a specified court has been given jurisdiction to try it and not arbitration.

public policy of Nigeria.<sup>1</sup> Unfortunately, the Act and the New York Convention failed to define the meaning of public policy for purposes of this sub-section. However, the Black's Law Dictionary define public policy to mean:

Community common conscience extended and applied throughout the state to matter of public morals, health, safety welfare and the like, it is that general and well settled public policy opinion relating to man's plain palpable duty to his fellow, having due regard to all circumstances of each particular relation and situation.<sup>2</sup>

The term, public policy, as it is used in the common law sense is so abstract, indeterminate or malleable as to defy a standard definition that will yield the same result in all applications. The term has been variously referred to in issues which have also been labeled as issues and matters of justice, fairness, and public interest.<sup>3</sup>

In arbitration practice, public policy reason is constructed narrowly and in which case the court will enforce the award unless the party alleging public policy reasons based his objection on either the national or international laws, and conventions.<sup>4</sup> In construing the provisions of the New York Convention on Public Policy, Finberg C.J., had this to say in *Waterside Ocean Navigation Co. Inc v International Navigation Ltd*,<sup>5</sup>

It... must be construed in the light of the overriding purpose of the convention, which is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standard by which agreements to arbitrate are observed ... thus this court has unequivocally stated that the public policy defence should be construed narrowly. It should apply only where enforcement would violate our most basic notion of morality and justice.

It must be stated herein that we have both domestic and international public policy. A foreign award which is refused recognition and enforcement in a country because of domestic public policy can be recognized and enforced in another country where their domestic public policy is not against the arbitral award recognition and enforcement. For example, an international arbitration award which is refused recognition and enforcement in purely Islamic state merely because the subject matter of the agreement relates to alcohol can be enforced in Nigeria where there is no prohibition in dealing in alcoholic substance. Where the public policy violated is one of international nature, the award will generally not be recognized and enforced.

## 5. Time limitation for Recognition and Enforcement.

Time Limitation for recognition and enforcement of foreign arbitral awards in Nigeria is governed by statutes. Generally, statute of Limitation is the law which sets out time within which an aggrieved person can present or file his matter for determination by the court or any other body established for that purpose. The origin of statute of limitation in Nigeria dates back to the introduction of English Law into Nigeria by Ordinance No. 3 of 1863. The English Limitation Act which is a statute of general application was the first statute of limitation in Nigeria though same was later repealed by the provisions of section 70 of the Limitation Act 1966.

An arbitration agreement is not in any way different from any other contract entered into by the parties. The Limitation Act 1966 in section 59 defined arbitration and arbitral award for purposes of the Act. It also declared that the provisions of the Act and any other limitation enactment apply to arbitration as they apply to action in the court.<sup>6</sup> It has to be mentioned that the Arbitration and Conciliation Act of Nigeria, and the New York Convention did not specify any time for the enforcement of its award. The Foreign Judgment (Reciprocal Enforcement) Act Cap F35 prescribed six years within which to enforce foreign award. It is because of the absence of time limitation provisions in the New York Convention and the Arbitration and Conciliation Act of Nigeria that emphasis will be placed on the Limitation Act of Nigeria and the Limitation Laws of the various States of Nigeria. Limitation Law or Act is very important in both arbitration and litigation. This is because any right which is statute barred is an imperfect right which cannot be enforced. The operation of time Limitation is importation as long dormant claims are more of cruelty than of justice. Where a party is allowed to bring his action at any time against the defendant, it is envisaged that an action could be filed years after the defendant must have believed that everything had ended and may have lost all the material evidence for his defense in the suit. It is expected that parties with good causes of action should pursue them diligently and without delay.

<sup>1</sup> Section 52(2)(b)(ii) of the Act. New York Convention, Article V (2)(2).

<sup>2</sup> *Black's Law Dictionary*, 6<sup>th</sup> ed. Centennial Edition 1891-1991, 1231.

<sup>3</sup> Duncan Miller, "Public Policy in International Commercial Arbitration in Australia," *Arbitration International LCIA*, Vol. 9, No. 2, 1993, 167 at 172.

<sup>4</sup> *Parsons & Whittemore Overseas co. v. Societe Generale de L'Industrie du Papier* (1974 2<sup>nd</sup> Cir) 508F. 2d 969 at 974.

<sup>5</sup> *ibid* cited in Greg C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria*, 2014, 322.

<sup>6</sup> Limitation Act of 1966 otherwise known as Decree No. 88 of 31<sup>st</sup> December, 1966, sections 59 & 61.



The Limitation Act has placed the time limitation period for bringing an action including arbitration to six years. The question which is of concern to us is, when does the six years start to run? In *M.S.S Line v Kano Oil Millers Ltd.*,<sup>1</sup> the plaintiff brought his action on the award less than six years from the date the defendant breached the charter party. On appeal, the plaintiff argued that time ran from the date of the award in 1966 but the defendant argued that time ran from the date of the breach of the charter party in 1964. The Supreme Court decided that the period of limitation runs from the date on which the cause of arbitration occurred, that is to say, from the date when the claimants first acquired either a right of action or a right to require that arbitration takes place upon the dispute.

With respect, we seek to disagree with this decision of the Supreme Court of Nigeria as it is not right in law. This is because arbitration agreement has two main undertakings, the first being an undertaking to submit to arbitration when the dispute occurs, and the second being an undertaking to comply with the arbitral award when made. These two undertakings constitute two distinct contracts. It follows therefore that the time limitation for reference to arbitration runs from the date of the breach giving rise to arbitration whereas the second limitation period for enforcement starts to run from the date the defendant refused to comply with the terms of the award. This is because the same Supreme Court had in *K.S.U.D.B v. Fanz construction Co. Ltd.*,<sup>2</sup> stated that an award once published extinguished any right of action in respect of the substantive matter in dispute and gives rise to a new cause of action based on the agreement between the parties to perform the award implied in every arbitration agreement.

In *City Engineering Nig. Ltd v F.H.A.*,<sup>3</sup> the Supreme Court decided that the limitation period for the enforcement of an arbitral award is six years and that time starts to run from the date of the accrual of the cause of action in the arbitration agreement and not from the date of making the arbitration award except where the arbitration is one under Scott v Avery provision in which case right of action is suspended until after the making of an award and in which case time shall run from the making of an award.

In *City Engineering Nig. Ltd v F. H. A.*,<sup>4</sup> the parties entered into a written agreement dated 17<sup>th</sup> day of December 1974 whereby the appellant was to build a number of housing units at Festac Town Badagry Road, Lagos. The agreement contained a provision to submit all matters in dispute to arbitration. A dispute arose between the parties in the course of the execution of the contract. The Respondent rather than settle the dispute *inter partes* by a letter of 5<sup>th</sup> December, 1980 threatened to terminate the contract. In its reaction to this threat, the appellant by its letter of 10<sup>th</sup> December, 1980 duly notified the respondent and requested its consent to the appointment of an arbitrator. The parties eventually went before a sole arbitrator. The arbitration proceedings commenced on 11/12/81 and an award was rendered in November 1985 in the sum of ₦=3,722,188.75 in favour of the appellant. On the failure of the respondent to honour payment of the sum, the appellant filed a motion on notice to enforce the award by leave. The High Court dismissed the application for being statute barred. On further appeal to court of Appeal and Supreme Court respectively, the matter was dismissed for the same reason. The Supreme Court of Nigeria decided among others that,

*Where an arbitration agreement is not under seal or made under any other enactment other than the Arbitration Law, the Limitation period applicable to it is six years. The Limitation period for the purposes of an action subject of arbitration agreement begins to run from the date of accrual of the cause of action in the arbitration agreement and not from the date of making of arbitral award ... under the common law, where in an arbitration agreement there is a Scott v Avery clause, ( which is to the effect that arbitration shall be a condition precedent to the commencement of any action at law) the limitation period runs from date of an award.*<sup>5</sup>

The decision of the Supreme Court in this matter is most unsatisfactory for the law does not command impossibility. Time cannot start to run before the making of award. Secondly, an arbitration agreement constitutes two distinct contracts, namely the contract to submit dispute to arbitration when one does occur, and secondly, the contract or agreement to comply with the terms of the award when made. In *K.S.U.D v Fanz Const Co. Ltd.*,<sup>6</sup> Agbaje declared that an award by arbitration constitutes an independent cause of action.

In *Turner v Midland Rly Co.*,<sup>7</sup> the court decided that “when an action is brought upon an award, the six year period of time limitation runs from the date of the award and not from the moment when the claim arose,

<sup>1</sup> (1974)NNLR 1

<sup>2</sup> (1990)4NWLR (Pt.142)1 at 37.

<sup>3</sup> (1997)NWLR (Pt520)224.

<sup>4</sup> *ibid*

<sup>5</sup> *City Engineering Nig. Ltd. v F.H.A.* (1997)NWLR (Pt.520)224 at 226-228.

<sup>6</sup> (*supra*) 1 at 37

<sup>7</sup> (1911)1KB 832

for the award itself gives rise to a new cause of action". A similar view was expressed in the Halsburys' Law of England where it was stated that,

*The effect of award is such as the agreement of reference expressly or by implication prescribes where no contrary intention is expressed and where such a provision is applicable every arbitration agreement is deemed to contain a provision that the award is final and binding on the parties and any person claiming under them respectively ... The publication of the award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement.*<sup>1</sup>

The position in England is one established in *Agromet Moto import Ltd v Maulden Engineering Co (Beds) Ltd*,<sup>2</sup> where the court decided that time begins to run from the date of the breach of the implied term to perform the award and not from the date of the accrual of the original cause of action giving rise to the submission. The Supreme Court of Nigeria in its decision in *M.S.S. Lines v Kano Oil Millers*<sup>3</sup> relied on the express prescription by the learned authors of Russell on Arbitration wherein they stated that,

The period of limitation runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or right to required that an arbitration takes place upon the dispute concerned.<sup>4</sup>

Of note is the fact that the learned authors of Russell on Arbitration have in the 22<sup>nd</sup> edition of their book restated the law by affirming the decision of the court in *Agromet case*. The position of the law in Nigeria is regrettably as stated in the decision of the Supreme Court in *City Engineering Nigeria Ltd v F.H.A*<sup>5</sup>. that limitation period for the recognition and enforcement of arbitral award is six years and that time starts to run from the date of the original cause of action. It is advised that the courts in Nigeria should reconsider their position by stating the law to be in accordance with the English position as expressed in *Agromet case*.

### Conclusion

Arbitration practice will be a meaningless and hopeless exercise if the successful party has no established procedure and instrument for recognizing and enforcing the arbitral award in circumstances wherein the unsuccessful party fails to comply with it. Foreign arbitral award are enforceable in Nigeria pursuant to the provisions of the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria, New York Convention, ICSID Convention, and Foreign Judgment (Reciprocal Enforcement) Act Cap F 35 Laws of the Federation of Nigeria, 2004.

The time limitation period for enforcing an arbitral award in Nigeria is six years for an agreement which is not under seal and time starts to run from the date of the original cause of action and not from the date of making of an arbitral award. The English position is that the making of an arbitral award gives rise to a new cause of action immediately the unsuccessful party fails to comply with the terms of the award. It is expected that the courts in Nigeria will follow the decisions of the English Court in *Agromet and IBSSL* cases which represent the correct position of the law.

<sup>1</sup> *Halsbury's Law of England*, 4<sup>th</sup> Ed. Vol.12 Para 514-515.

<sup>2</sup> (1985)1 WLR762. (1985)2 All ER 436. *IBSSL v. Mineral Trading Corporation* (1996)1All ER

<sup>3</sup> (*supra*)

<sup>4</sup> *Russell on Arbitration* 18<sup>th</sup> Ed. 4-5.

<sup>5</sup> *ibid*

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