



## Procedure for the enforcement of domestic arbitral awards in Nigeria

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**Abstract:** The use of arbitration in commercial transactions is a vital and important aspect of every commercial agreement. This is due to the advantages of arbitration over the regular court adjudicatory process. The problem is no matter how good and impeccable the arbitral process is the law still requires that arbitral award be recognized for enforcement by the court. This paper assessed the procedure for the enforcement of arbitral domestic awards in Nigerian High Courts, examined the different forms as provided in the rules, particularly the use of Motion on Notice and Originating Summons for enforcement of arbitral award, whether these procedural forms of application are adapted or suitable for enforcement of arbitral awards or whether there should be a more flexible mode of enforcing an award and concluded that the procedures are not adequate, and totally at variance with current international standards. The paper also makes recommendation for reforms.

**Keywords:** Enforcement of arbitral award. Originating summons. Motion on notice.

### 1. Introduction

It is now becoming obvious that more parties are discovering that binding arbitration is an efficient, cost effective, and flexible alternative to litigation.<sup>1</sup> In terms of cost, the cost of litigation is very high; litigation in Nigeria is now notorious to be extremely time consuming as

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<sup>1</sup> The Supreme Court of United States of America recognised the importance of arbitration in the case of *Circuit City Stores Inc. v Adams*, 532. U.S. 105, 122 – 123 (2001).



cases takes an average of about five years to conclude. The fact that arbitration also allows the parties to choose the arbitrator and venue of its sitting makes it flexible and convenient. Most importantly, arbitration is now mostly applied to commercial transactions, trade and investments which are important factors in National Development. The use of arbitration in settling commercial disputes will have tremendous impact on Foreign Direct Investment as well as foreigner's active participation in economic activities in the country.<sup>2</sup>

Nigeria relies mainly on foreign investors in the exploitation and development of its vast mineral resources and consequent commercial activities that will follow those investments will require a good, reliable, fast and efficient system of dispute resolution which only arbitration can offer and totally not available under the usual Court adjudication<sup>3</sup> system. Arbitration allows for neutrality and the award is easily enforced, with reasonable speed, flexibility and confidentiality<sup>4</sup>. Therefore, for many businesses, institutions and Governments arbitration is becoming more attractive as a preferred way to resolve commercial and other types of disputes<sup>5</sup>.

Because an arbitration award becomes enforceable as a civil judgment in the regular court through the process of recognition in Nigeria, the parties who had avoided the regular court system and its attendant problems and challenges are now back to enforce their award in the same forum. The system is not bound to change because of the award, but the parties must also again pass through the rigours of the court system and the long winded procedure for the enforcement of judgments. This paper takes a critical look at the procedure for the enforcement of domestic arbitral awards in the Nigerian Courts, identify the problems and proffer solutions.

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<sup>2</sup> Asouza, A. 2011. *International Commercial Arbitration and African States practice, participation and institutional development*. London: Cambridge University Press. 456 . 457

<sup>3</sup> Adaralegbe A. 2006. Challenges in enforcement of arbitral awards in capital Importing States. *The Nigerian Experience*. *Journal of International Arbitration*. 23. 401. 403.

<sup>4</sup> Idornigie P. 2005. The role of arbitration and alternative dispute resolution (ADR) in attracting Foreign Investment in Africa. in *Arbitration and Alternative Dispute Resolution in Africa*, Amasike C.J. Ed. 155.

<sup>5</sup> Chukwuemeka A. 2006. Arbitration and the ADRs as panacea for the ills in administration of Justice in third world countries. *Modern practice Journal of Finance and Investment Law*. 10. 3 – 4. 315.



## 2. Historical Overview of the Legal Instruments Affecting Arbitral Awards

Nigeria is a federation of thirty States with a Federal Capital territory. The Constitution<sup>6</sup> makes provisions for three tiers of governments; these are the Federal, State and Local Governments. There are two main sources of Nigerian Arbitration Law; these are Common Law and Doctrines of Equity, legislations and trade practice<sup>7</sup>. The English Common law and Doctrines of Equity are applicable in Nigeria so long as they have not been modified or overruled by the Nigerian court decisions or Statutes. The first statute regulating arbitration in Nigeria was the Arbitration Ordinance of 1914 which re-enacted the English Arbitration Act of 1839 for a proper regulation of arbitration in Nigeria.<sup>8</sup> This Law was in force in Nigeria until the Federal Constitutions of 1954, 1957 and 1963 which created the regions. Each Region (later States) adopted the arbitration Ordinance as their law on arbitration. The 1963 Constitution changed the ordinance to Act of the Legislature but only regulates domestic arbitration.<sup>9</sup>

On the 17th March, 1970, Nigeria acceded to the United Nations Convention for the Recognition and Enforcement of Foreign Awards, 1958. Nigeria entered the reciprocity and commerciality reservations under the convention. This means that only the contracting parties to the convention with reciprocal legislation that recognise and enforce Nigerian awards will be recognised in Nigeria. In 1988 the Arbitration Ordinance (Act) was repealed and replaced by the Arbitration and Conciliation Act of the same year. The law governs the regulation of both domestic and foreign arbitral awards. The Act is modeled after the United Nations Commission on International Trade Law (UNCITRAL) model law and the convention on the Recognition and

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<sup>6</sup> The current constitution is the Constitution of the Federal Republic of Nigeria, 1999. (hereinafter called 1999 Constitution).

<sup>7</sup> See The Nigerian Arbitration and Conciliation and Arbitration Act, Cap A18, Laws of the Federation 2004. Sections 33(3) and 22 (4) which empowers Arbitral tribunals to make their decisions based on trade practices.

<sup>8</sup> Chukwuemeka A. 2006. Arbitration and the ADRs as panacea for the ills in administration of Justice in third world countries. *Modern Practice Journal of Finance and Investment Law*. 10. 3 – 4. 320..

<sup>9</sup> Abdul Y. 2002. Arbitration in Nigeria. Problems, Challenges and Prospects. *Nigerian Bar Association, Ilorin Branch Journal*. 1. 7.



Enforcement of Foreign Arbitral Awards (New York Convention). The Arbitration and Conciliation Act applies throughout the country<sup>10</sup>.

Nigeria also enacted the International Center for Settlement of Investment (Enforcement of Awards) Act 1967 which domesticated and enforced the Convention on the Settlement of Investment Disputes between states and Nationals of other states<sup>11</sup>. Nigeria also enacted the Foreign Judgments (Reciprocal Enforcement) Act<sup>12</sup>, The objective of the law is -

To make provision for the enforcement in Nigeria of judgments given in foreign countries which accord reciprocal treatment to judgment(s) given in Nigeria for facilitating the enforcement in foreign countries of judgments given in Nigeria.

The Act defines judgments to include awards in arbitration.<sup>13</sup>

### 3. High Court Civil Procedure Rules

The 1999 constitution created the States<sup>14</sup> and the Federal High<sup>15</sup> Courts as part of one single tier of courts in Nigeria. The High Courts includes the High Court of Federal Capital Territory, Abuja<sup>16</sup>. Also by virtue of the third amendment to the 1999 constitution, the National industrial court<sup>17</sup> was recognized as a court of coordinate jurisdiction with the High Courts with

<sup>10</sup> Some States like Lagos and Rivers States also enacted their own Arbitration laws. For a discussion on the constitutional legality of the State laws see Akintoye A. 2002. The Doctrine of covering the field and the pencil rule in Legislative enactments – A judicial re-visitation. *Nigerian Bar Association Ilorin Branch Journal*. 189. 192 – 194; *Compaignie Generale De Geophysique v Etuk*, (2004) FWLR (Pt 235) 86 at 87, Asouzu A. 2000. Arbitration and Judicial powers 3. M.I.L.B.Q. 19.35: Idornigie P. 2000. The doctrine of covering the field and Arbitration laws in Nigeria. *Arbitration international Journal*. 66. 3. 193.

<sup>11</sup> The ICSID Convention or otherwise known as Washington Convention which came into force on October 14, 1966. The law allows judgments/awards of the settlement center when registered in the Supreme Court of Nigeria as a judgment of the Supreme Court.

<sup>12</sup> Cap F. 35, Laws of the Federation (LFN) 2004.

<sup>13</sup> See section 2 of Foreign Judgments (Reciprocal enforcement) Act.

<sup>14</sup> Section 270 of 1999 Constitution established the High Court for each State of the federation.

<sup>15</sup> Section 249 of 1999 Constitution established the Federal High Court which now has judicial division in each State of the Federation with jurisdiction restricted to the items listed in section 201 of the 1999 constitution.

<sup>16</sup> Section 255 of the 1999 constitution established the High Court of the Federal Capital Territory, Abuja.

<sup>17</sup> Established under the third Amendment to the 1999 constitution.



exclusive jurisdiction for issues of labour, and other employment matters. Each High Court has powers to make rules for procedure under its Act.<sup>18</sup>

#### 4. Recognition of Award

Before an arbitral award can be enforced in Nigeria, it must first be recognised. Section 31 (1) of the Arbitration and Conciliation Act provides,

An arbitral award shall be recognized as binding and subject to the section 33 of this Act, shall upon application in writing to the court, be enforced by the court.

The law, we must note did not specify any particular mode for the recognition and enforcement of an award, this has been left for the High Court Rules; as only the High Court has jurisdiction to entertain an application for the recognition and enforcement of arbitral awards<sup>19</sup>. The Supreme Court was called upon to decide on whether the Federal High Court has jurisdiction to entertain an arbitration matter in the case of *Magbagbeola V Sanni*<sup>20</sup>, the court held, relying on section 57 (1) of the Arbitration and Conciliation Act that the Federal High Court has jurisdiction to entertain Arbitration matters notwithstanding its exclusive jurisdiction<sup>21</sup>

As we noted above, the Arbitration and Conciliation Act did not make any provisions for the recognition and enforcement of the Arbitral Award, only the civil procedure Rules of the

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<sup>18</sup> For instance in exercise of the powers conferred on the State Chief Judge under section 89 (1) of the High Court Law, Cap. H3 Laws of Lagos State 2003 as amended by the High Court (Amendment Law) 2012, the Chief Judge of Lagos State made the current High Court of Lagos State (Civil Procedure) Rules 2012 which repealed the earlier Rules of Court made in 2004. We may note that one of the major reasons for the current Rule was for 'amicable resolution of disputes by use of Alternative Dispute Resolution (ADR) mechanism'. Also to mandate ... the parties to use (ADR) mechanism where the court considers it appropriate and facilitating the use of such procedure'.

<sup>19</sup> See section 57 (1) of Arbitration and Conciliation Act which defines High Court to include High Court of a State, the High Court of a Federal Capital Territory, Abuja or the Federal High Court.

<sup>20</sup> (2005) 11 NWLR (Pt. 936) 239.

<sup>21</sup> Section 207 of 1999 Constitution.



High Courts can make such rules and as the Court of Appeal stated in the case of *Medical and Health Workers Union of Nigeria v Ministerial Labour and Productivity*<sup>22</sup> that:

The rules of court are to be obeyed, they were made to help the cause of justice and not to defeat justice ... they are subsidiary legislations but equally ... possess the potent force of ... principal legislation when validly made.<sup>23</sup>

The rules thus have constitutional force and are the only reference point to determine the competence of the court, its jurisdiction and the proper procedure to adopt in the enforcement of an arbitral award.

## 5. Nature and Constituent of an Award

The Arbitration and Conciliation Act made provisions on the constituents of a valid award which is submitted here must be properly considered and examined by the court seised of an application for recognition and enforcement of an award. Section 26 (1) of Arbitration and Conciliation Act provides as follows:

(1) Any award made by the arbitral tribunal shall be in writing and signed by the arbitrator or arbitrators.

(2) Where the arbitral tribunal comprises of more than one arbitrator the signatures of a majority of all the members of the arbitral tribunal shall suffice if the reason for the absence of any signatory is stated.

(3) The arbitral tribunal shall state on the award:

(i) the reasons upon which it is based, unless the parties have agreed that no reason are to be given or the award is an award on agreed terms under section 25 of the Act;

(ii) the date it was made; and

<sup>22</sup> (2005) 17. NWLR (Pt. 953) 90.

<sup>23</sup> (2005) 17 NWLR (Pt. 953) 90 at 147 – 148.



(iii) the place of the arbitration as agreed or determined under section 16 (1) of this Act which place shall be deemed to be the place where the award was made.

## 6. Writing and Signature

Oral award is not acceptable, whether it is partly oral and partly written award, it is not recognised under the law. The award must also be signed by all the arbitrators. There is no provision for dissenting speech, however, we may conclude that where there is a dissenting opinion, the dissenter should not sign the award, in which case the award is still enforceable where the majority of the arbitrators have signed the award. The dissenting opinion does not form part of the award. In the English case of *Corgill International S.A v Socieda Iberico de Moltura cion S.A.*<sup>24</sup> the Court of Appeal in England held that an arbitrator who disagreed with the majority of the tribunal could not insist on his reason for his dissenting view being inserted into the award. The dissenting opinion may, however be annexed to the award if the other arbitrators agree, or it may be delivered to the parties separately for their information only<sup>25</sup>. The place of signing the award must also be stated on the award. Though section 26 (1) of the Act addressed the problem by providing that the place of the arbitration shall be the place where the award was made. The reason or reasons for the award must also be clearly stated<sup>26</sup>. The date and time of making the award must also be stated on the face of the award. The award must be adjudication on the dispute, not merely an expression of an expectation, hope or opinion. The position has been explained thus:

By far the best course is for the arbitrator to express money awards in the form of an order that one party shall pay the specified sum to the other, and to express declaratory awards in the form of a bold statement of the position as the arbitrator considers to be. Thus, the award should say “I award that the

<sup>24</sup> The Times Dec. 26, 1997.

<sup>25</sup> Asozu A. 2001. *International Commercial Arbitration and African State Practice, Participation and Institutional Development*. Cambridge: Cambridge University Press. 23.

<sup>26</sup> Section 26 (3) (a) Arbitration and Conciliation Act.



buyer is entitled to reject the goods” not “I consider that the seller ought to accept the return of the goods.”<sup>27</sup>

The award must be complete, certain and final and not provisional and must finally dispose of all the issues without leaving any of the issues for another arbitrator or court to determine. Since, the arbitral award was not a judgement of the court, the court must first properly recognise the award and also adopt it for enforcement by the court.<sup>28</sup> We submit that in considering the recognition and enforcement of arbitral award the High Court must assess the validity of the award in the light of the requirements of the law as discussed above.

#### **7. Procedure for the enforcement of Award.**

Section 31 (2) of the Arbitration and Conciliation Act provides as follows:

The party relying on an award or applying for its enforcement shall supply:

- (a) the duly authenticated original award or duly certified copy thereof,
- (b) the original arbitration agreement or a duly certified copy thereof.

Sub-section 3 thereof states that the award may by leave of the court or a Judge, be enforced in the same manner as a judgment or order of the High Court. The procedure to be adopted is not stated here, we must therefore look at the provisions of the rules of court to determine the proper procedure to follow.

#### **8. High Court Rules**

The High Court of Lagos State (Civil Procedure) Rules 2012 provides in Order 39 rule 4 as follows:

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<sup>27</sup> Lord Mustill and Boyd S. 1989. *Mustill and Boyd Commercial Arbitration*. 2nd ed. London: Lexis Nexis Butterworths. 311.

<sup>28</sup> Section 31 (1) Arbitration and Conciliation Act.



(1) Every motion on notice to set aside, remit or enforce an arbitral award shall state in general terms the grounds of the application and where any such motion is founded on evidence by affidavit, a copy of any Affidavit intended to be used shall be served with the notice of motion.

The Rule also adopted the conditions stated in Section 31 (2) of the Arbitration and Conciliation Act that the application must be supported with duly authenticated original award or the duly certified copy thereof and the original arbitration agreement or duly certified copy thereof. However, Order 3 of the Lagos State High Court Rules provided for the modes of commencing an action in the High Court. These are, by Writ of Summons<sup>29</sup> and Originating Summons<sup>30</sup>. Proceedings may also be commenced in the High Courts by Petition<sup>31</sup> except where the particular order of court so directs, motions are not generally permitted in the commencement of proceedings in the High Court. Motions are only authorized for interlocutory applications which are specifically allowed under the rules of court<sup>32</sup>. However, order 39 rule 4 of the same Lagos State Rules provided for Motion on Notice to set aside remit or enforce an arbitral award. Could this translate to permitting the use of Motion on Notice to commence an application to recognise and enforce an arbitral award?<sup>33</sup> Order 3 rule 1 provides that the provisions of order 3 on commencement of actions in the High Court is subject to the Rules itself and any other law requiring any proceedings to be begun otherwise than by Writ of Summons<sup>34</sup>

## 9. Is motion on notice or originating Summons appropriate?

If we concede that the rules actually permit the use of motion on notice or originating summons for the enforcement of an arbitral award, the pertinent question is to probe whether

<sup>29</sup> Order 3 rule 1, High Court of Lagos State (Civil Procedure) Rules 2012.

<sup>30</sup> Order 3 rules 5, 6, 7 and 8 of the Lagos State Rules. See also, order 3 rules 6 and 7 of the Federal High Court (Civil Procedure) Rules 2009 (Federal High Court Rules).

<sup>31</sup> Order 5 Federal High Court Rules.

<sup>32</sup> Order 39 rule 1 Lagos State Rules.

<sup>33</sup> See also order 39 rule 4 of Oyo State High Court (Civil Procedure) Rules, 2012.

<sup>34</sup> High court of Lagos State Rules.



the procedure is the appropriate procedure even under the rules that may have permitted it by implication.

### 9.1. Motion on Notice

Motion on Notice or Notice of Motion has been defined as, 'A formal notice to participants in litigation of intent to seek specific relief in an action. An advisory in writing, usually in a prescribed form, to all parties in litigation, of intent at some specified or future time, of asking the court to order specified relief. The notice of motion is written in the form of a request to the court to order something, often *Interlocutory* relief<sup>35</sup>. Motion either ex -parte or on notice are basically suitable for interlocutory matters and not for commencing fresh actions. It is filed by simply supporting the motion with affidavit detailing all facts relied upon in the application. The Respondent is allowed to oppose the application by also filing a counter – affidavit, and where there are irreconcilable conflicts, the judge may order oral evidence in support of the motion<sup>36</sup>.

The main essence of the whole procedure for the enforcement of arbitral award is expected to be summary proceedings and it is not supposed to be protracted. The practice is however different. Parties submit to arbitration because they want to resolve their differences by private arrangements rather than by the normal judicial court process. By that token, they are presumed to intend to abide by the decision of the arbitral tribunal constituted by them, or on their behalf. It is, therefore an implied term of every arbitration agreement that the parties will abide by the outcome of the arbitration process. It is often expressly provided in arbitration agreements that the parties are to be bound by the award of an arbitral tribunal. Similarly, the Act provides that the award of an arbitral tribunal is final and binding on the parties who undertake to carry out the same without delay<sup>37</sup>.

<sup>35</sup> Duhaime, Org. Legal Dictionary. Available at [www.duhaime.org/legalDictionary/N/Noticeofmotion.aspx](http://www.duhaime.org/legalDictionary/N/Noticeofmotion.aspx). accessed on 16 – 07 – 2014, see also. Blacks Law Dictionary which define Motion on Notice as 'a written or oral application requesting a court to make specified ruling or order". 9<sup>th</sup> ed. p. 106.

<sup>36</sup> *Falobi v Falobi*. (1976) 9-10 S.C 1.

<sup>37</sup> Article 32 (2) Arbitration Rules, First Schedule to the Arbitration and Conciliation Act.



An award is final in the sense that the matters settled by the arbitrators cannot be litigated again, either in the courts, or in another arbitration (unless probably remitted back by court for retrial), by either party or any person claiming through or by him. The matter is classified as *res judicata* consequently, if any action or proceedings are subsequently commenced in respect of such matters, the defendant can plead that the award is *res judicata*, and any party to the proceedings can plead *estoppel per rem judicatem*<sup>38</sup>. In this respect, the arbitral award is not entirely different from the court judgment. There should be an end to litigation. The court seized of the application for recognition and enforcement of arbitral award is not sitting as Appellate Court over the arbitral award but simply to recognise and adopt the award as, not as judgment of the High Court, but simply one to be enforced by the court. The Supreme Court of Nigeria clearly stated, per Katsina-Alu JSC<sup>39</sup> that, ‘... nowhere in the Act is the High Court given the power to convert an arbitration award into its own judgment.’<sup>40</sup> The learned justice of the Supreme Court was of the view that an award is at par with a judgment of the court. It is in the light of this that a court cannot make the arbitration award its own judgment. The only jurisdiction the court has in regard to an award is to enforce it upon an application if the validity of the award is not in doubt<sup>41</sup>.

We must also not lose sight of the fact that the High Court is not sitting as an appellate court over the decision of the arbitration award.<sup>42</sup> The only reason why the award creditor will take this step is because the award debtor is not prepared to comply with the award. In which case, he is likely going to oppose the enforcement of the award. We submit that in a disputed application of this nature which was not initiated or tried before a court, the issue cannot be properly settled by a Motion on Notice or other similar interlocutory applications not being fully seized of the matter, and not sitting on appeal over the matter.

<sup>38</sup> *Chief Kweku Assanpong v Kweku Ammaku & ors* (1932) 1 W. A.C.A 192, *Nruamah v Ebuzeome* (2013) 1 S.C 31 at 67, *Abiola and Sons Bottling Co. Ltd v Seven-up Bottling Co. Ltd.* (2012) 7 SC. (Pt.11) 83.

<sup>39</sup> *Ras Pal Gazi Construction Co. Ltd v F.C.D.A.* (2001) 5 S.C. (Pt. II) 16 at 26.

<sup>40</sup> *Commerce Assurance Ltd v Alhaji Buraimoh Alli* (1992) 3 NWLR (Pt 232) 710, *KSUDB v Fanz Construction Co. Ltd* (1990) 3 NWLR (Pt. 142) 1.

<sup>41</sup> per Katsina – Alu JSC in *Ras Pal Gazi Construction Co. Ltd v F.C.D.A.* (2001) 5 S.C. (Pt II) 16 at 26.

<sup>42</sup> *Commerce Assurance Ltd v Alli* (1992) 3 NWLR (Pt. 232) 710.



## 9.2. Originating Summons

An Originating Summons has been described as ‘an originating process in;

The High Court to determine an issue of law or the interpretation of document by means of submitting affidavit as evidence. Apart from providing sufficient particulars to identify the cause of action, the originating summons must include statement of the question to enable the court to determine or statement of remedy to which the court can declare.<sup>43</sup>

The Supreme Court of Nigeria, per Eso JSC in the case of *Alegbe, Speaker Bendel State House\_of Assembly v M.O. Oloyo*<sup>44</sup> declared the position of the law when he said that;

Originating summons is reserved for issues like the determination of short questions of construction and not matters of such controversy that the justice of the case would demand the settling of pleadings.

Order 3 rule 6 of the Federal High Court (Civil Procedure) Rules, 2009 which makes provisions for the originating summons procedure, provides as follows:

Any person claiming to be interested under a deed, will, enactment or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of rights of the person interested.

Order 3 rule 7 of the Federal high Court Rules went on to provide that any person claiming any legal or equitable right in a case where the determination of the question whether such a person is entitled to the right depends upon a question of construction of an enactment

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<sup>43</sup> Advanced Law Lexicon, 3rd Edition, Reprint 2009 at 3391.

<sup>44</sup> (1983) 7 S.C. 85.



may apply by Originating Summons for the determination of such question of construction and for a declaration as to the right claimed.<sup>45</sup>

There is no gainsaying the fact that the hallmark of an originating summons is the determination of questions of construction arising under a deed, will, enactment or other written instrument.<sup>46</sup> The originating summons is the procedure for declaration of the rights claimed by the plaintiff in a proceeding and is only predicated upon or desirable for the determination of the questions arising for construction under an enactment or a written instrument.<sup>47</sup> The arbitral award is not a written enactment or instrument.<sup>48</sup>

Procedurally, all originating summons must be accompanied by<sup>49</sup>,

- (a) an affidavit setting out the facts relied upon;
- (b) all the exhibits to be relied upon;
- (c) a written address in support of the application;
- (d) pre-action protocol Form 01<sup>50</sup>.

We must note that the Federal High Court Rules do not require the Pre-Action Notice Form 01 to be attached to the originating summons. We may state that if the originating summons is actually designed for the enforcement of arbitral awards, the compulsory attachment of pre-action form 01 which is to attest to ADR steps taken on a dispute, will not be

<sup>45</sup> See also Order 3 rules 5, 6, 7 and 8 of the Lagos State High Court (Civil Procedure) Rules 2012; Order 3 rule 5, 6, 7 and 8 of Oyo State High Court (Civil Procedure) Rules. 2010. This is the position in all the states Civil Procedure Rules.

<sup>46</sup> *Atolagbe v Awani* (1999) 9 NWLR (Pt. 422) 536.

<sup>47</sup> *Dapianlone v Dariye* (2007) 4. S.C. (Pt. II) 118.

<sup>48</sup> Enactment is defined by Blacks Law Dictionary, 9<sup>th</sup> ed. Garner B. Ed. p. 606. as, 'The action or process of making into Law, enactment of a Legislative bill 2. A statute.'

<sup>49</sup> See Order 3 rule 8 (1) and (2) of the Lagos State (Civil Procedure) Rules, Order 3 rule 9 Federal High Court (Civil Procedure) Rules 2009.

<sup>50</sup> Order 3 rule 8 (2) (d) High Court Lagos State (Civil Procedure) Rules 2012. The pre-action protocol Form 01 is filed with originating summons to acknowledge that the parties have explored ADR as alternative to settle the matter before filling the action. The pre-action protocol form 01 states:

1. I/we have complied with the directions of the Pre-Action protocol as set out in under 1 rule (4) (ii) (e) of the High Court Rules.
2. I/we have made attempts to have this matter settled out of court with the Defendant and attempts were unsuccessful (Claimant must state what attempts he has made to have the matter settled (attach evidence of same)).
3. I/we have by a written memorandum to the Defendant set out my / our claim and options for settlement.



applicable here, because the application itself is for the enforcement of arbitral award. Looking at the nature of originating summons itself, we should ask whether it was designed for the enforcement, remitting or setting aside of arbitral award. We acknowledge that the courts have tacitly allowed the use of originating summons in these proceedings.<sup>51</sup> Could originating summons be the proper procedure in the circumstances? We must examine the legal nature of the procedure.

In the case of *Olley v Hon. Tunji & ors*,<sup>52</sup> the Supreme Court of Nigeria had the opportunity to examine the proper use of the originating summons in civil proceedings, Ngwuta JSC while delivering the lead judgment of the court quoted the learned authors of '*Odgers Principles of Pleading and Practice*'<sup>53</sup> with approval when the said,

Where the main point, in issue is one of construction of a document or statute or is one of pure law, then this is the appropriate procedure. It is not, however, appropriate where there is likely to be any substantial dispute of fact.

Eso JSC in the case of *Alegbe, Speaker Bendel State House of Assembly v Oloyo*<sup>54</sup> was of the views that, 'Originating summons is reserved for issues like the determination of short questions of construction and not matters of such controversy that the justice of the case would demand the settling of pleadings'.

The Supreme Court even explained that as a matter of procedure, the applicant in an originating summons need to 'formulate and present question or questions for the court to determine based on interpretation of statutes, Will or Instruments. The grant of the reliefs' sought in the originating summons is preceded by, and predicated upon, the court's answer to the question or questions for determination.<sup>55</sup> The formulation of a question or statement of

<sup>51</sup> *Kuforiji v Nigerian Railway Corporation* (1972) U.I.L.R. 29; *NNPC v KLIF, Co. Nig Ltd.* (2011) 4 S.C. (Pt 1) 108.

<sup>52</sup> (2013) 4-5 S.C (Pt 1) 6

<sup>53</sup> *Odgers Principles of Pleading and Practice in the Civil Actions in the High Court of Justice.* 21st ed. At p 314.

<sup>54</sup> (1983) 7 S.C. 85 at 90.

<sup>55</sup> (1983) 7 S.C. 85 at 90.



remedy to which the court can declare<sup>56</sup> is a fundamental requirement of the application.<sup>57</sup> Looking at the rules again, Order 3 rule 6 of the Federal High Court Rules<sup>58</sup>, requires two main components, these are; (1) Questions for construction and (2) Declaration of rights It follows that the application by originating summons must contain question or questions of construction of a will, instrument or enactment as the case may be, and a declaration of rights depends on the answers to the questions formulated for determination in the application by way of originating summons.

Admittedly, the originating summons procedure is a summary and time saving procedure, but it is restricted to issues of construction or interpretation of will, enactments and instruments, and not for contentious matters. In this respect a declaration of rights based on question for declaration before the Court. Ngwuta JSC concluded the matter when he said,

It will be a mere academic exercise for the court to determine the questions without a prayer for declaration of rights, and declaratory rights without question for determination should be brought by writ of summons.<sup>59</sup> (underline mine)

The procedure of originating summons is not designed to deal with resolution of disputed facts, but where the questions in controversy calling for determination are simple question or issues of construction of a deed, will, legal instruments or enactments or written instrument.

Belgore JSC (as to then was) further explained the position of the law in the case of *Famfa Oil Limited v A.G. of the Federation*<sup>60</sup> where he said,

The very nature of an originating summons is to make things simpler for hearing. It is available to any person claiming interest under a deed, will or other written instrument whereby he will

<sup>56</sup> *Olley v Hon Tunji & ors* (2013) 4 – 5 S.C. (Pt 1) 6.

<sup>57</sup> *Olley v Hon Tunji & ors* (2013) 4 – 5 S.C. (Pt 1) 6 .

<sup>58</sup> Reproduced above.

<sup>59</sup> Per Ngwuta JSC in *Olley v Hon Tunji & ors* (2013) 4 – 5 S.C. (Pt 1) 6 at 43.

<sup>60</sup> (2003) 9 – 10 S.C 31.



apply by originating summons for the determination of any question of construction arising under the instrument for a declaration of his interest... It is a procedure where the evidence in the main is by way of documents and there is no serious dispute as to their existence in the pleadings of the parties to the suit in such a situation, there is no serious dispute as to facts, but what the plaintiff is claiming is the declaration of his right.<sup>61</sup>

I submit that it is a notorious fact that there is hardly any application for the enforcement of arbitral awards in Nigeria that has not been disputed mostly up to the Supreme Court. The use of summary procedure like originating summons is most unsuitable. In the words of Tobi JSC<sup>62</sup>, 'originating summons will not lie in favour of a plaintiff where the proceedings are hostile in the sense of violent dispute'.<sup>63</sup>

## 10. Special Procedure for Arbitral Proceedings in the Federal High Court (Civil Procedure)

### Rules

Unlike the other High Court Rules which made scanty provisions on the enforcement, or setting aside of arbitral awards<sup>64</sup>, the Federal High Court Rules dedicated Order 52 of its Rules to Arbitration issues. Order 52 rules 1 to 14 regulates the power of the court to refer matters to Arbitration under the Arbitration and Conciliation Act. The Court may appoint Arbitrators for the parties.<sup>65</sup> The Rules provides for attendance of witnesses, making of award and extension of time when the Arbitrators are unable to complete the arbitration within a stipulated time.<sup>66</sup> The arbitrators may also refer matters to the court for its opinion<sup>67</sup>. The Court

<sup>61</sup> (2003) 18 NWLR (Pt. 852) 453 at 467.

<sup>62</sup> *Inakoju & 17 ors v Adeleke & ors.* (2007) 1 S.C. (Pt. 1) 1.

<sup>63</sup> *Inakoju & 17 ors v Adeleke & ors* (2007) 1 S.C. (Pt 1) 1 at 44.

<sup>64</sup> See for example Order 39 rule 4 of the High Court of Lagos State (Civil Procedure) Rules 2012.

<sup>65</sup> Order 52 rule 2.

<sup>66</sup> Order 52 rule 6.

<sup>67</sup> Order 52 rule 9.



may also modify or correct an award.<sup>68</sup> The Rules also empowered the Court to remit award for reconsideration by the Arbitrators upon such terms as it thinks proper-

- (a) if the award has left undetermined some of the matters referred to arbitration;
- (b) if it had determined matters not referred to arbitration;
- (c) if the awards is so indefinite as to be incapable of execution;
- (d) if an objection to the legality of the award is apparent upon the face of the award<sup>69</sup>.

The only ground an award may be set aside is on the ground of perverseness or misconduct of the Arbitrators or umpire. Any application to set aside an award shall be made within three months after the publication thereof.<sup>70</sup> Where there is no application to set aside the award, order 52 rule 14 provides that either party may 'file the award in court, and the award shall there upon have the same force and effect for all purposes as a judgment. This clearly shows that arbitral award under the order 52 rules does not need any other special order of court to enforce same. We must note that this part of the rules is restricted only to where the court refers a matter before it to arbitration. Though the rule refers to the Arbitration and Conciliation Act, it may only mean that the Act is binding on the Arbitrators, but the Arbitration itself is strictly supervised by the Federal High Court; and its award need only be registered in court to be enforced as the judgment of court. This part of the rules is closely related to the Court connected arbitration such as the Lagos State Multidoor Court House<sup>71</sup>. This is in contrast to awards of domestic arbitral awards which must be recognised before it can be enforced through a court proceeding and order of court recognizing and enforcing the award, which will entail filing of the original award and the arbitration agreement and may be opposed by the award debtor.

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<sup>68</sup> Order 52 rule 10.

<sup>69</sup> Order 52 rule 12.

<sup>70</sup> Order 52 rule 13.

<sup>71</sup> Order 52 rule 13 (2.).



Part B of the Order 52 of the Federal High Court Rules made provisions for applications under Arbitration and Conciliation Act. The rule 15 covers all issues that may be referred to the court under the Act, this will include application to revoke an Arbitration agreement,<sup>72</sup> to stay arbitral proceedings,<sup>73</sup> to remove an Arbitrator or umpire<sup>74</sup>, to direct an Arbitrator or Umpire to state reasons for an award<sup>75</sup>, to ask that a case on trial which is the subject of an arbitration agreement be referred to an arbitration<sup>76</sup> to set aside an award<sup>77</sup>, to subpoena a witness to attend arbitration proceeding<sup>78</sup> for declaration that an award is not binding on a party to the award on the ground that it was made without jurisdiction or because the Arbitrator misconducted himself or that the proceedings was arbitrary or that the award has been improperly procured.<sup>79</sup> The rule specifically provides that the applications shall be made by originating summons. While, it is possible to make orders as to subpoena of witnesses, appoint Arbitrator, direct an Arbitrator to state reasons for an award or even stay proceedings pending certain issues being determined by the court without much conflict or opposition, the issues concerning setting aside of award, that an award is not binding or that the Arbitrator misconducted himself are likely to be violently opposed. The likelihood of opposition and deep conflicts may render the procedure of originating summons most unsuitable for the application.

A most unusual and inconsistent provision is order 52 rule 16 for the enforcement of arbitral awards. The rule provides that;

An application to enforce an award on an arbitration agreement in the same manner as a judgement or order may be made ex-parte, but the court hearing the application may order it to be made on notice.

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<sup>72</sup> Order 3 rule 11 and order 39 rule 3 of the High Court of Lagos State (Civil Procedure) Rules 2012.

<sup>73</sup> Section 2 of Arbitration and Conciliation Act.

<sup>74</sup> Section 7 of Arbitration and Conciliation Act.

<sup>75</sup> Section 5 of Arbitration and Conciliation Act.

<sup>76</sup> Section 30 of Arbitration and Conciliation Act.

<sup>77</sup> Section 6 of Arbitration and Conciliation Act.

<sup>78</sup> Section 4 of Arbitration and Conciliation Act.

<sup>79</sup> Section 29 of Arbitration and Conciliation Act.



The rule is silent on the form of application that may be made ex-parte or should we assume that the order 14 rule 15 which expressly requires the use of originating summons may be applicable. We submit that this cannot be the position. In as much as the rule failed to make any provision for any particular procedure, except to state that the application may be made ex-parte, a motion or originating summons may also be made ex-parte. This rule needs immediate amendment.

Order 26 rule 8 – 12 made provision for ex-parte applications, while order 26 regulates interlocutory applications generally. It is noteworthy that all ex-parte applications must be supported by affidavit which shall state sufficient grounds why delay in granting the order sought would entail irreparable damage or serious mischief to the party moving.<sup>80</sup> The rule also provides that any order made on motion ex-parte shall not be more than fourteen days, and the other party against whom the order was made may apply that the order be varied or discharged<sup>81</sup>. The application for enforcement of arbitral award is not a temporary order but an order that is permanent in nature, the order for enforcement cannot be set aside unless by the Appeal Court, obviously therefore, ex-parte application is not applicable here.

Clearly, the rule as it is, is defective, ambiguous and totally at variance with the general provisions of the Rules itself. Though the Court had always proceeded from the level of acceptance of the use of originating summons in the Federal High Court for the enforcement of arbitral awards we submit that the provisions are imprecise and unsupportable.

### 11. Lessons from Other Jurisdictions

In England, the Arbitration Act 1996 regulates the Arbitration matters, as well as the Supreme Court of England and Wales Country Courts Civil Procedure Rules 1998, amply made provisions for the enforcement of arbitral awards in England. Section 66 (1) of the Arbitration Act 1996 (UK) which is in *pari material* with section 31(3)<sup>82</sup> of the Act, that an arbitration award

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<sup>80</sup> Section 23 of Arbitration and Conciliation Act.

<sup>81</sup> Section 30 of Arbitration and Conciliation Act.

<sup>82</sup> Order 26 rule 8 Federal High Court (Civil Procedure) Rules 2009.



may, by leave of the court be enforced in the same manner as a judgment or order of the court, where leave is granted, judgment may be entered in terms of the award. Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make award<sup>83</sup> Part 62 of the Rules on Arbitration claims, provides that a claim under the rule means, a claim to determine.

- (i) whether an arbitration tribunal is properly constituted; or what matters have been submitted to arbitration in accordance with an arbitration agreement;
- (ii) whether there is a valid arbitration agreement;
- (iii) a claim to declare that an award by a arbitral tribunal is not binding on a party; and
- (iv) any other application affecting (i) arbitration proceedings ( whether started or not); or (ii) an arbitration agreement.

The procedure is to simply file an Arbitration claim form which will include a concise statement of the remedy claimed and any questions on which the claimant seeks the decision of the court and give details of any arbitral award challenged by the claimants, identifying which parts of the award are challenged and specifying the grounds for the challenge. The rules makes provisions on issues such as service outside jurisdiction, how notice may be served and on who.<sup>84</sup> Case management hearings and the enforcement of the arbitral awards. The application is simply made in the arbitration claim form to enforce the award in the same manner as a judgment or order of court.<sup>85</sup> All parties are expected to be served and the hearing will proceed notwithstanding that the defendant did not appear. The procedure in England is simple, direct and uncomplicated. There is no use of archaic procedure like motions or originating summons like the Nigerian provisions which are in themselves not created for or suitable for arbitral proceedings under Nigerian law.

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<sup>83</sup> Order 26 rule 12 (1).

<sup>84</sup> Of Arbitration and conciliation Act.

<sup>85</sup> Section 66 (3) Arbitration Act 1996 (UK).



## 12. Brazil

The Brazilian law as provided in the Arbitration law of 1996 abolished the requirement for judicial ratification of arbitral awards which now equates an arbitral award as any other judicial award or judgment<sup>86</sup> and which expressly provides that the arbitrator is equivalent to a judge for the purposes of the arbitration proceeding.<sup>87</sup> However, any party may apply to set aside an award in Brazil but the applicant must adopt the procedure of any ordinary suit to annul a legal act. Joaquin T. de Paiva Muniz and Anaereza P. Basilo<sup>88</sup> are of the view that this procedure in itself is time consuming process, because it is filed in the first instance court and may be subject to ordinary appeals to the second – tier courts. It is also possible to file a ‘special appeal’ to the superior court of Justice (non-constitutional questions) and/or an ‘extraordinary appeal’ to the Brazilian Supreme Court (Constitutional, questions) under the limited grounds on which those exceptional resources can be admitted.<sup>89</sup> However, the filing of judicial application to set aside does not by itself prevent the arbitral award from fully producing its effects. In the event that the plaintiff wants to suspend the award, he may have to apply for an injunction upon presenting *prima facie* evidence of the party’s collectly right<sup>90</sup> and the need of an urgent remedy under penalty of irreparable injury<sup>91</sup>. There is a great advantage in the Brazilian position which regards the arbitral award as final and enforceable in the regular court without any need for recognition and enforcement.

## 13. Recommendations

This paper is restricted to examining the procedure for the enforcement of domestic arbitral awards in Nigeria. The only possible interpretation of the court Rules is the use of Originating Summons and Motion on Notice, and both procedures are totally inappropriate for

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<sup>86</sup> In cases where the claimant is challenging the arbitral award see section 62.4.

<sup>87</sup> Section 62. 6.

<sup>88</sup> Section 62.18.

<sup>89</sup> Article 31 of Arbitration law of 1996.

<sup>90</sup> Article 18 of the Arbitration law of 1996.

<sup>91</sup> Joaquin T. de Paiva Muniz, and Anaereza Palhares Basila. Arbitration Law of Brazil. Practice and procedure. Junis Publishing Inc. 89.



the enforcement of arbitral awards in Nigeria based on the current position of the Rules. The Rules must be urgently amended, in so far as the legislative intention is to ensure that arbitral awards are quickly and summarily recognized and enforced. The Nigerian law must be amended to recognize that all arbitral awards are regular and competent until the contrary is proved. From this standpoint, the procedure needs to be overhauled in such a way that the arbitral award cannot be set aside unless the applicant shows an extraordinary reasons for the court to do so.

While the special provisions in the Federal High Court Rules is commendable, the Rules are confused and vague, and leaves much room for the defendant in the arbitral proceedings to avoid his obligations under the arbitral agreement and award, we hereby recommend that there should be a special section in the High Court Rules like the Federal High Court Rules on the enforcement of arbitral awards. The use of Originating Summons and Motion on Notice should be stopped and in its place a special procedure should be introduced to be known as “Arbitral Application”. This will avoid compliance with the Rules of Court for interlocutory applications or originating summons which are not suitable for issues that involve arbitral proceedings. The ‘Arbitral Application’ may be designed in line with the English Arbitral claim but less complicated.

We do not agree with Akinmoladun<sup>92</sup> that the Arbitration and Conciliation Act should have a list of grounds under which a domestic arbitral award should be recognized and enforced. The Act need not specify any ground for the refusal like the enforcement of foreign awards, the point is that once the parties have submitted to arbitration,<sup>93</sup> and participated throughout the proceeding<sup>94</sup>, there should not be any other reasons for them to back out of their due obligations, and the law ought not to give or create avenues to escape from complying with the award. The Supreme Court of Nigeria explained the position when the Court said;

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<sup>92</sup> Akinmoladun F. 2010. Enforcement of Arbitral awards in Nigeria: An appraisal of emerging trends available at <http://ssrn.com/abstract=1556607>. accessed on 22 – 07 – 2014.

<sup>93</sup> The Arbitration law 1996, Chaps VI thereof only makes provisions for the enforcement of foreign arbitral awards.

<sup>94</sup> Idorighe P. 2002. The relationship between Arbitral and Court proceedings in Nigeria. *Journal of international Arbitration*. 19. 443.



A valid award on a voluntary reference no doubt operates between the parties as a final and conclusive judgment upon all matters enforced. It should be remembered that when parties decided to take their matter to arbitration, they are simply opting for an alternative mode of dispute resolution. It must be emphasized that the parties have a choice to either go to court and have their dispute determined by the court or refer the matter in dispute to an arbitrator for resolution.<sup>95</sup>

The law<sup>96</sup> recognized as binding an arbitral awards, and shall upon application in writing to the court be enforced by the court.<sup>97</sup> The law therefore is based on the assumption that the Arbitral award is binding and only needs the machinery of the court to enforce same.<sup>98</sup> In this wise, the Rules must be urgently amended to achieve this ideal and not to continue using the outdated court procedures which only encourages delays and are technical in nature.

#### 14. Conclusion

Motion on Notice or Originating Summons though seems to be the only procedure recognized under the rules, are only devised for normal ordinary court trials and interlocutory applications and is totally useless when faced with arbitral proceedings. The best course is to amend the law by creating a new and special procedure for the enforcement of arbitral awards. All the High Court Rules ought to create a special procedure and section of the rules for arbitral proceedings; until this is done, the courts will continue to grapple with the problematic procedures, and the parties to arbitral awards will continue to wait until the slow wheels of court process grounds to a halt before they can enjoy the fruits of their labour.

<sup>95</sup> Akinmoladun F. 2010. Enforcement of Arbitral awards in Nigeria: An appraisal of emerging trends available at <http://ssrn.com/abstract=1556607>. accessed on 22 – 07 – 2014.

<sup>96</sup> *Commerce Assurance Ltd v. Alhaji Buriamoh Alli* (1992) 3 NWLR (Pt. 232) 710.

<sup>97</sup> *Ojibah v Ojibah* (1991) 8 NWLR (pt. 191)

<sup>98</sup> Per Katsina – Alu JSC in *Ras Pal Gazi Construction Co. Ltd v F.C.D.A.* (2001) 5 S.C. (Pt. 11) 16 at 22.