

NIGERIA

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**PUBLIC POLICY AS A GROUND FOR SETTING ASIDE OR FOR THE
REFUSAL OF ENFORCEMENT OR RECOGNITION OF AWARDS
UNDER THE NEW YORK CONVENTION.**

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Public policy has been described as the principles under which freedom of contract and private dealings are restricted by law for the good of the community.¹ The words public policy have been held to be that policy of the law of not Sanctioning an act which is against the public interest in the sense that it is injurious to the public welfare or public good.² The Lagos Court of Appeal also held public policy to mean community sense and common conscience extended and applied throughout the state to matters of public morals, health, safety, welfare and the like.³

The violation of public policy is one of the grounds for the refusal of recognition and enforcement of an arbitral award under the New York Convention 1958.

Article V(2)(b) of the New York Convention provides that:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

Nigeria is a signatory to the New York Convention 1958 having acceded to the Convention on 17th March, 1970.

In acceding to the convention, the Nigerian Government specifically stated that:

In accordance with paragraph 3 of Article 1 of the Convention, the Federal Military Government of the Federal Republic of Nigeria declares that it will apply the Convention on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of a state which is a party to this Convention, and to differences

¹ Agro-Allied Development ENT. LTD Vs. United Shipping Trading Co. Inc. (2011) 9 N.W.L.R. (Part 1252) 258 @ pp.268 Paras. G-H., Macaulay Vs. R.Z.B. of Austria (1999)4 N.W.L.R. (Part 600) 599 @ pp. 611 Paras. G-H.

² Conoil PLC Vs. Vitol S.A (2012)2 N.W.L.R. (Part 1283) 50 @ pp. 92 Paras. A-F and pp. 93 Paras. A-C.

³ Dale Power Systems PLC Vs. Witt & Busch LTD (2001) 8 N.W.L.R. (Part 716) 699 @ pp. 714 – 715 Paras. H-A and 715 Paras. D-E.

arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of the Federal Republic of Nigeria.

Nigeria has not only acceded to the New York Convention, the convention has been domesticated in Nigeria and it forms part of the Nigerian Arbitration and Conciliation Act ('ACA'), 1988, Cap. A18, Laws of the Federation of Nigeria, 2004.

The public policy provision of the New York convention relating to the grounds for setting aside an arbitral award or for refusing recognition and enforcement of an arbitral award is also provided for in the ACA.

The Court may set aside an arbitral award, if the Court finds that the award is against public policy of Nigeria.⁴ Conversely, the Court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse to recognize or enforce the award, if the court finds that the recognition or enforcement of the award is against public policy of Nigeria.⁵

Although this report seeks to explain the Court's definition of the notion of public policy in relation to the setting aside or the recognition or enforcement of arbitral awards, the report will also deal with the notion of public policy as defined by the Courts in the enforcement of foreign judgments. To this end, **Judgment** is defined in the Foreign Judgments (Reciprocal Enforcement) Act to mean a "judgment or order given or made by a Court in any civil proceedings and shall include an award in proceedings on an arbitration, if the award has in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a Court in the place...".⁶

In the same vein, the Nigerian Supreme Court has held that under the relevant applicable laws, every arbitration embarked upon in a submission shall have the same effect as if it is a reference by a Court.⁷

⁴ Section 48 (b) (ii) Arbitration and Conciliation Act (ACA) Cap. A18, Laws of the Federation of Nigeria, 2004.

⁵ Section 52 (2) (b) (ii) ACA, L.F.N., 2004.

⁶ Section 2, Foreign Judgments (Reciprocal Enforcement) Act, Cap F35, Laws of the Federation of Nigeria, 2004.

⁷ Home Development LTD Vs. Scancila Contracting Co. LTD (1994) 8 N.W.L.R. (Part 363) 252 @ pp. 262 Paras. F-H.

Section 6(i)(a)(v) of the Foreign Judgments (Reciprocal Enforcement) Act provides that:

On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment shall be set aside if the registering Court is satisfied that the enforcement of the judgment would be contrary to public policy in Nigeria.⁸

Nigerian Courts have had the opportunity of applying public policy rules in applications for setting aside or for recognition or enforcement of arbitral awards, as well as the enforcement of Court judgments.

CASE REVIEW ON THE PUBLIC POLICY DEFENCE TO ENFORCEMENT OF ARBITRAL AWARDS.

1. In **Agro-Allied Development ENT. Limited Vs. United Shipping Trading Co. INC.**⁹, the main issue was whether the arbitral award was against public policy in Nigeria as to trigger the application of section 52(2)(b) of the Arbitration and Conciliation Act, 1990 (Now 2004).

The appellant and the respondent entered into a charter party agreement, pursuant to which the respondent chartered its vessel “M/V Parnomos” to the appellant. Clause 37 of the charter party provided for the resolution of any dispute between the parties by arbitration in London under English Law. A dispute subsequently arose under the charter party for demurrage and stevedoring damage, in respect of which the respondent initiated arbitration proceedings in London against the appellant. Both parties were represented at the arbitration proceedings, at the conclusion of which an award was made in favour of the respondent.

⁸ Section 6 (i) (a) (v) of the Foreign Judgments Act Op. cit.

⁹ (2011) 9 N.W.L.R. (Part 1252) 258.

The appellant paid only part of the award sum and thereafter made an unsuccessful attempt to appeal against the arbitral award in London by an originating motion. However, the motion was dismissed and there was no appeal against the order of the London High Court dismissing the motion and no action was taken to set aside the award. As there were no assets in England, the award could not be enforced thereat.

The respondent filed an originating summons at the Federal High Court, Lagos for enforcement and recognition of the arbitral award made on 28th April, 1997 against the appellant pursuant to the Arbitration and Conciliation Act, Cap. 19 LFN, 1990 (Now 2004).

The Appellant objected to the Respondent's application for recognition and enforcement of the arbitral award on grounds that the arbitral award is a violation of Nigerian Public Policy, among other reasons.

The appellant's contention that the award violated Nigerian public policy was predicated on the allegation that the arbitrators relied on the speculative opinion of the Respondent's expert witness that it was unlikely that a Court order placing a lien on government Cargo would be granted by Nigerian Courts.

It was argued by the Appellant that the arbitrators' finding that: "...We considered that it would be most unlikely that government would permit a Cargo destined for its own steel works to be delayed by the exercise of a lien", was contrary to Nigerian public policy and a violation of the provisions of Section 52(2)(b)(ii) of the ACA.

The Appellant cited other instances where the Supreme Court upheld the award of demurrage against the Federal Government of Nigeria and submitted that recognition and enforcement of the award should be refused on the Grounds of violation of public policy.

In a considered Ruling delivered on 19th June, 2003 the learned trial judge granted the application for recognition and enforcement of the arbitral award, but refused the claim for interest which was not part of

the award. The trial Judge held that the arbitral award is not contrary to public policy.

Dissatisfied with the Ruling, the Appellant filed its Notice of Appeal premised on four grounds among which were that:

- i. The learned trial judge erred in law and misdirected himself in considering the arbitral award when he held that the award was not contrary to public policy in Nigeria.
- ii. The learned trial judge erred in law and acted contrary to the Arbitration and Conciliation Act in recognizing and enforcing an arbitral award which considered Nigerian Courts as incapable of ordering the exercise of a lien on Government Cargo.

In dismissing the Appeal, the Court of Appeal held, that public policy is the principle under which freedom of contract and private dealings is restricted by law for the good of the community.

The Court further held that the learned trial judge rightly applied the provisions of Sections 51 and 52 of the Arbitration and Conciliation Act in recognizing and enforcing the arbitral award, which as he rightly observed, is not contrary to public policy in Nigeria.

2. In **Dale Power systems PLC Vs. Witt & Busch LTD.**¹⁰ The appellant obtained judgment in the sum of £160, 534.79, with interest at the rate of 8% until payment, against the Respondent at the Queen's Bench Division of the High Court of Justice in England on 6th June, 1997. The suit was instituted in England in respect of goods exported from England and sold by the appellant, a company incorporated in England to the respondent. In order to enforce the judgment, the Appellant had the judgment registered at the High Court of Lagos State, Ikeja Division on 13th October, 1997. However, on 23rd of June, 1998, the respondent filed an application at the High Court for an order setting aside the registration of the judgment.

¹⁰ (2001) 8 N.W.L.R. (Part 716) 699.

At the conclusion of arguments on the application, the High Court in its Ruling made an order setting aside the registration of the judgment on the ground that the English Court has no jurisdiction to entertain the Suit and that the registration is against public policy. Being dissatisfied with the Ruling, the Appellant appealed to the Court of Appeal.

Relying on Section 6(2)(a) of the Foreign Judgments (Reciprocal Enforcement) Act, the Court of Appeal held that the English High Court of Justice had jurisdiction to hear and determine the matter in respect of which the Judgment sought to be enforced was registered.

On the defence of the violation of Nigerian public policy raised by the respondent on the basis of the allegation that the English High Court lacked the jurisdiction to hear the case of the Appellant against the respondent, the Court of Appeal, held that:

Public policy means community sense and common conscience extended and applied throughout the State to matters of public morals, health, safety, welfare and the like. In the instant case, it is not contrary to public policy in Nigeria to enforce a foreign judgment against a Nigerian company which had obtained goods on credit from a foreign company but failed to honour its obligation to pay for them and does not deny the existence of the liability to pay same.

The Court also held that public policy in Nigeria supports the fact that parties should be made to honour obligations entered into voluntarily between themselves.

3. The case of **Conoil PLC Vs. Vitol S.A.**¹¹ was in respect of the Registration under the Reciprocal Enforcement of Judgments Act,¹² of a judgment obtained in England.

¹¹ (2012) 2 N.W.L.R. (Part 1283) 50

¹² CAP. 175, Laws of the Federation of Nigeria 1958

The appellant, a Nigerian downstream petroleum distribution company entered into an agreement with the respondent, a foreign company which sells automotive gas oil and other related petroleum products, by virtue of which the respondent was required to supply an agreed quantity of automotive gas oil to the appellant at the designated place offshore Cotonou. The Respondent performed its own part of the contract, but the appellant failed to take delivery of the products from the designated place within the agreed period as a result of which the respondent alleged that it suffered loss.

The parties agreed to submit all disputes or claims in connection with the contract to the exclusive jurisdiction of the High Court of Justice in England. As a result of the loss suffered by the respondent due to the appellant's breach, the respondent terminated the contract with the appellant and instituted an action in the High Court of England against the appellant, for the recovery of damages. All the processes filed in the action were served on the appellant, but it refused to appear before the English Court to defend the action.

The appellant argued that it never submitted to the jurisdiction of the High Court of England owing to the pendency of Suit No. FHC/L/CS/5475/2008 before the Federal High Court, Lagos. Judgment in the action before the English Court was entered in favour of the respondent on 22nd May, 2009.

The respondent applied to the High Court of the Federal Capital Territory, Abuja for the registration of the judgment delivered by the English High Court. In opposition to the respondent's application, the appellant filed a preliminary objection and an answer to the petition. The appellant contended at the High Court that the Court lacked jurisdiction to entertain the application for registration of the judgment and that the judgment could not be registered by virtue of the provisions of Section 3(2)(a)(b)&(f) of the Reciprocal Enforcement of Judgments Act. Cap 175, Laws of the Federation of Nigeria, 1958. Section 3(2)(f) of the Reciprocal Enforcement of

Judgments Act, Cap 175, Laws of the Federation of Nigeria 1958, provides that no foreign judgment can be registered in Nigeria if:

the judgment was in respect of a cause of action which for reasons of public policy or some other similar reason could not have been entertained by the registering Court.

The High Court in its ruling held that it had jurisdiction to entertain the respondent's application and it proceeded to order that the judgment of the English High Court be registered. Being dissatisfied with the ruling the appellant appealed to the Court of Appeal.

In unanimously dismissing the appeal, the Court of Appeal held that:

“... The words “Public Policy” have been held to be that policy of the law of not sanctioning an act which is against the public interest in the sense that it is injurious to the public welfare or public good. ... The words public policy have to be confined to matters that are injurious to public welfare or public good. In the instant case there was no evidence that FHC/L/CS/5475/08 was instituted in the interest of the public or that a registration of the judgment would adversely affect that interest. The evidence on record is that the Suit was instituted for the recovery of the appellant's personal money and interest, which is a private interest. In the circumstance, the action in England was not injurious to public welfare. Consequent upon the foregoing, the ground of abuse of Court process raised by the appellant is not a public policy issue under Section 3(2)(f) of the 1958 Act, which should hinder the registration of the judgment. Therefore, the trial Court was not in error when it ordered that the judgment of the English Court be registered.”

The above three (3) cases are therefore examples of how Nigerian Courts interpret public policy in the enforcement of foreign arbitral awards and foreign judgments. From the above cases, Nigerian Courts do not make any distinction in applying Public Policy rules. Nigerian Courts adopt a restrictive approach to the application

of public policy in enforcing or setting aside arbitral awards. Only concrete violations of public policy, for example, an award on an arbitration agreement to resolve a difference in a narcotics drug transaction will be clearly illegal and contrary to public policy.

Identification of the decision	Summary of the public policy argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
<p>Agro-Allied Development ENT. Limited Vs. United Shipping Trading Co. INC. (2011) 9 NWLR (Part 1252)</p> <p>Court of Appeal (Lagos Division)</p> <p>23rd July, 2010</p>	<p>The appellant's contention that the award violated Nigerian public policy was predicated on the allegation that the arbitrators relied on the speculative opinion of the Respondent's expert witness that it was unlikely that a Court order placing a lien on government Cargo would be granted by Nigerian Courts.</p> <p>It was argued by the Appellant that the arbitrators' finding that: "...We considered that it would be most unlikely that government would permit a Cargo destined for its own steel works to be delayed by the exercise of a lien", was contrary to Nigerian public policy and a violation of the provisions of Section 52(2)(b)(ii) of the ACA.</p>	<p>It was argued that the reliance by the arbitrators on the speculative opinion of the expert that Nigerian Courts could not make an order of a lien on government property. Placing a lien on government property is contrary to Nigerian public policy. The arbitrators used such opinion as synonymous to public policy in Nigeria.</p>	<p>The recognition and enforcement of the claim for interest which was not included in the award is contrary to public policy.</p>	<p>Enforcement of the claim for interest denied.</p>	<p>Enforcement of the award accepted.</p>
<p>2. Dale Power Systems Plc. Vs. Witt & Busch Ltd. (2001) 8 NWLR (Part 716)</p> <p>Court of Appeal (Lagos Division)</p> <p>30th May, 2000</p>	<p>The appellant argued that the English High Court lacked the jurisdiction to entertain the case. Therefore the registration of the judgment was contrary to public policy.</p>	<p>Lack of jurisdiction to determine original case before the High Court.</p>	<p>Enforcement of a judgment in respect of which the judge had no jurisdiction to entertain.</p>	<p>X</p>	<p>Enforcement accepted.</p>

<p>Conoil Plc. Vs. Vitol S.A (2012) 2NWLR (Part 1283)</p> <p>Court of Appeal (Abuja Division)</p> <p>10th May, 2011</p>	<p>The appellant argued that the English High Court had no jurisdiction to determine the case on grounds of abuse of court process. It further argued that the High Court of the Federal Capital Territory, Abuja lacked the jurisdiction to entertain the application for the registration of the judgment delivered by the English Court. Therefore the registration of the judgment was contrary to public policy.</p>	<p>Lack of jurisdiction to determine the original case before the English High Court.</p>	<p>Enforcement of a judgment in respect of which the English High Court had no jurisdiction to entertain.</p>	<p>X</p>	<p>Enforcement accepted.</p>