ADDRESS BY G.O. SODIPO & CO AT THE FEBRUARY 16 2024 ICC NIGERIAN ADR COMMISSION MEETING AT THE LA MAISON HOTEL, VICTORIA ISLAND, LAGOS

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Conflicts between the AMA and the Rules of Court:

1. **Whether Awards still be set aside on the grounds of misconduct by the arbitrator**
2. **Whether foreign awards must comply with Foreign Judgments Reciprocal Enforcement Award Act or the Arbitration and Mediation Act, 2023**

1.0.Introduction

Africans tell it in proverbs. IGI GAN GAN RAN MA GUN MI LOJU, OKERE LA TIN NWO, a Yoruba proverb, meaning *when you are on a walk and you see a man carelessly carrying a log of wood approaching you, you must warn from afar that he should be careful and ensure the wood does not poke in your eye*. There are probably African proverbs or axioms in your language. Perhaps you can all help me by telling me.

The ICC Nigeria Commission on Arbitration and ADR is part of the foremost arbitration institution in the world that hosts the ICC Court of Arbitration. Section 1(4) of the Arbitration and Mediation Act, 2023 mandates us as it does all arbitration institutions, "shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings".

Arbitration is driven by agreements but governed by statutes and rules, our institution must ensure that the Rules under the AMA are consistent with the rules of court. This is the subject matter of my short address today. I intend to demonstrate that there are gaps between the court rules and the AMA rules that we must engage the heads of courts with suggested court rules or court directions if we are to fulfill the mandate under the AMA that arbitration institutions like the ICC Court of Arbitration and ADR must ensure there is proper and expeditious conduct of arbitral proceedings in Nigeria. If we fail to conduct this exercise, we may experience the same thing as other Nigerian specialist Bar & sectors who fail to urge the carrier of the log of woods until they are hurt. Folks whose clients do not want to comply with arbitration agreements or arbitral awards will rely on technicalities that the gaps present to cause undue delays.

Given that the time allotted is insufficient to do justice to these issues reflecting the disparities between court rules and the AMA that must be immediately streamlined, I will raise only two of such issues. The first is controversial and should be the subject of fuller discussion and possibly another paper whilst the second can be accommodated within the time allotted to us as hosts of today's meeting. The first is whether awards can still be set aside under the AMA on the grounds of misconduct by the arbitrator despite the non-mention of misconduct in the AMA because the rules of court lists misconduct as one of the grounds for setting aside. The second issue addressed in this short piece is the procedure for the enforcement of foreign arbitral awards in Nigeria.

2.0. Whether Awards can still be set aside on the grounds of misconduct by the arbitrator

Under Order 19 rule 12 (h) of the High Court of the Federal Capital Territory Rules, 2018, except to subpoena a witness to attend under Section 23 of the Arbitration and Conciliation Act which shall be by motion ex-parte, every application in this rule to the court under the Act – 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 proceeding was arbitrary or that the award has been improperly procured under section 30 thereof shall be made by motion.

Similarly, under Order 52 rule 15(h) of the Federal High Civil Procedure rules, an application in this rule to the Court under the Arbitration and Conciliation Act for a 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 under section 30 shall be made by originating motion.

Again, under Order 19 (11)(g) of the FCT High Court Rules**, no award shall be liable to be set aside except for the misconduct of the arbitrator.** Finally, under Order 52 rule 13 (1) of the Federal High Court Civil Procedure Rules, 2019, **an award shall not be liable to be set aside except on the grounds of perverseness or misconduct of the arbitrator or umpire**.

There are two schools of thought, those who argue that the non-inclusion of misconduct demonstrates legislative intention that courts should no longer consider the body of misconduct line of cases as the basis for setting aside unless the act falls under those mentioned in the AMA. The other school posits that the courts retain the inherent power to set aside awards on the grounds of misconduct even though the term is missing in the AMA. Like I stated earlier, this demands scrutiny beyond a lunchtime or welcome address. I am certain that raising this issue in this context will ignite debates that will continue for a long time.

3.0. Whether foreign awards must comply with Foreign Judgments Reciprocal Enforcement Award Act or the Arbitration and Mediation Act, 2023

The AMA like the ACA has outlined the procedure for the enforcement of foreign arbitral awards. The ACA and the AMA stipulate that applications are to be made to the High Courts relying on the New York Convention. However, the Rules of some courts such as the Federal High Court, the Federal Capital Territory, and others make reference to the Foreign Judgments (Reciprocal Enforcement) Act. This conflict between the Arbitration statute and the Rules of Court has caused problems as the Court rules do not reflect the NYC.

3.1. See below, the provisions of the Foreign Judgments Act and the ACA.

Section 2 (1) of the Reciprocal Enforcement of Judgment Ordinance, Cap 175, Laws of the Federation of Nigeria, 1958 (referred to in this judgment as the ordinance of 1958) states:

> "In this Act. unless the context otherwise requires "judgment" means 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 that place, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party."

The FHC Rules 2019 and its precursors have the same provision in the Rules and the 2012 Rules reflected in Order 52 Rule 17 of the Rules and Order 2 rule 18, of the 2000 Rules of the FHC. These provisions are identical to those of **Order 19 rule 14 of the FCT High Court Rules.**

3.2. **Awards made in proceedings in foreign territory.**

O.52 R17.

Where an award is made in proceedings on an arbitration in a foreign territory to which the Foreign Judgment (Reciprocal Enforcement) Act extends, if the award was in pursuance of the law in force in the place where it was made; it shall become enforceable in the same manner as a Judgment given by a court in the place and the proceedings of the Foreign Judgments (Reciprocal Enforcement) Act shall apply in relation to the award as it applies in relation to a Judgment given by that court.

Sections 31(1) and 51(1) of the Arbitration and Conciliation Act provide:

"31(1) An arbitral award shall 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."

"51(1) 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."

3.3. **Examination of the Tenor of the Cases**

The following 6 Court of Appeal cases arose from attempts to register foreign arbitral awards and the confusion arising from the applicability of the Foreign Judgments Act reflected in the Rules of Court or the ACA. It is certain that even though the AMA has provisions similar to the ACA making the NYC the route for the enforcement of foreign arbitral awards, Counsel and Courts have made a heavy weather of the conflict and the confusion is not completely cleared. It is my submission that confusion can be cleared if the Rules of Court are amended to jettison any reference to the Foreign Judgments Act, rather, the reference should be to the NYC.

1. ***Ogbuneke Sons And Company Ltd. v. ED & F Man Nigeria Ltd. & Ors*. (2010) LPELR-4688 (CA)**

The appeal emanated from the judgment of the Tshoho J (as he then was, now the Chief Judge of the Federal High Court) Federal High Court, Umuahia Judicial Division under the 2000 Rules. It involved a commodity supply dispute (Cocoa) between Nigerian suppliers and English buyers. The buyers obtained four arbitral awards against the supplier. The applicant sought to set the

awards on the ground that there was no enforceable arbitration and there was no evidence that the award had been registered in Nigeria. Tshoho J (as he then was, now the Chief Judge of the Court) held that

"There is no mention in Exhibit "L" that the awards have been registered in Nigeria before being sought to be enforced against the applicant. Such evidence has not been furnished in this suit, even by the applicant. But it follows that if the awards are not registered, they cannot be enforced and hence there is no basis for the institution of this action. The applicant's action in the circumstances is anticipatory and cannot stand. On this premise, the applicant's Originating Motion on Notice is hereby struck out."

Fortunately, the Court of Appeal reversed the judgment of the trial court and Prof. Justice Owoade JCA held that a foreign arbitral award does not need to be registered under the Foreign Judgments (Reciprocal Enforcement) Act before it can be enforced under the ACA. The court endorsed the view of Orojo and Ajomo in their book *Practice of Arbitration and Conciliation in Nigeria* at page 304 that: "Before the Arbitration and Conciliation Decree 1988, the two methods of enforcing foreign awards were by registration under the Foreign Judgments (Reciprocal Enforcement) Act, and under the New York Convention, 1958. Section 2 and 4 of the Foreign Judgments (Reciprocal Enforcement) Act provide, in effect, that a foreign award may be registered in the High Court at any time within six years after the date of the award if it has not been wholly satisfied and if at the date of the application for registration, it could be enforced by execution in the country of the award. With the Decree, there is no need for registration, for Section 51 makes it clear that such an award shall be recognized as binding and shall be enforced by the Court on application."

2. ***Tulip Nig. Ltd. v. N.T.M.S.A.S.* (2011) 4 NWLR (Pt. 1237) 254 per Mshelia JCA**

The appeal arose from the judgment of Olomojobi J. The respondents filed an originating summons dated 20th November 2003 under the **2000 Federal High Court Rules,** to enforce a UK arbitration award of 3rd June 1998. The appellant objected arguing that the action was statute-barred given the limitation period. On 23rd November 2006, the trial held that the respondent's action was not statute-barred and enforced the award. The Court of Appeal dismissed the appeal and held;

1. Judgments include arbitral awards under section 2(1) of the Foreign Judgment (Reciprocal Enforcement) Act.
2. Arbitral Awards issued in England can only be regarded as judgments of English courts if they are registered in the English court and this will make the Reciprocal Enforcement of Judgments Ordinance, Cap. 175, Laws of the Federation of Nigeria, 1958 and Foreign Judgments (Reciprocal Enforcement) Act Cap. 152, Laws of the Federation of Nigeria, 1990 apply. These statutes are irrelevant because the arbitral award had not been registered in England.
3. A foreign arbitration award is enforceable in Nigeria under the ACA directly pursuant to the New York Convention to which Nigeria is a signatory.
4. Section 51(1) of the Arbitration and Conciliation Act, makes an arbitral award shall irrespective of the country in which it was made, be recognised as binding subject to the provisions of the Act, and shall upon application in writing to the court, be enforced by the court.

5. The enforcement of an award under section 31(3) of the ACA is subordinate to the leave of court which must be obtained before the condition precedent could be satisfied. The absence of such, renders the award short of the standard of a judgment.
6. Section 31(1) of the ACA makes an arbitral award recognizable and binding and shall upon application in writing to the court, be enforced by the court.
7. The Limitation Law of Lagos State which provides that an action shall not be brought after the expiration of six (6) years from the date on which the cause of action accrued, governs awards sought to be enforced in Lagos whether High Court of Lagos State or the Federal High Court for.

3. ***Calais Shipholding Company V. Bronwen Engery Trading Ltd* (2014) LPELR-23122 (CA)**

This appeal emanated from the judgment of Idris J (as he then was), on the enforcement of a London shipping-related arbitral award. On the 18th day of September 2008, the English court granted the appellant's application to make the arbitral award a judgment of the court. The appellant's 13th of August 29 originating petition at the Federal High Court to enforce the judgment of the English court based on the arbitral award, was dismissed on 18th June 2010 for failure to comply with the provision of section 3(2)(c) of the Reciprocal Enforcement of judgment Ordinance. The Court of Appeal reversed the decision of the trial court.

It held that by virtue of sections 32 and 51(2) of the Arbitration and Conciliation Act, an arbitral award obtained anywhere in the world can be registered and recognized by any Court in Nigeria without recourse to a foreign Court to first adopt same as it's judgment. That there was no need to rely on Section 3(2)(c) of the Reciprocal Enforcement of judgment Ordinance.

4. ***Miden Systems Ltd v. BBC Chartering & Logistic GMBH & Co (2019) LPELR-48929(CA)***

This was an appeal against the judgment of Buba J of the FHC who had recognized and enforced the London seated Arbitral Award on March 23 2016. The Appellant claimed he became aware of the arbitral award.

Held: dismissing the Appeal

1. Objections to the jurisdiction of an arbitral tribunal should first be raised timeously before the tribunal and not when the awardee seeks to enforce the award. See section 12 (3) of Arbitration Conciliation Act

"The Courts in Nigeria would not inquire into the merits of the arbitral proceedings upon registration, it would have been proper for an application to set aside the award to have been filed before the registration and not the judgement of the lower Court, these are two different things and are governed by separate rules. Once all conditions set out in Section 4 of the Foreign Judgement (Reciprocal Enforcement) Act for registering an award is complied with, the Court has no reason not to recognize same. See; TELEGLOBE AMERICAN INCORPORATION v 21ST CENTURY TECHNOLOGIES LTD (2008) LPELR - 5006 (CA). In KERIAN IKPARA OBASI v MIKSON

ESTABLISHMENT IND LTD (2016) LPELR - 40704 (SC) AT PG 26-17, NGWUTA JSC held that; "as I indicated earlier under the Act the registration of a foreign judgement can be set aside if the judgements /debtor satisfied the Court that the rights under the judgement are not vested in the applicant for registration. The onus is on the judgements /debtor to satisfy the Court in this regard..." The Appellant in its relief b stated; "An order of this honourable Court setting aside the judgement of this Court ordering the petition herein to pay the respondent..." It's different from an order to set aside the arbitral award where the complaints would have been set out but at the stage the Appellant filed this, the Nigerian Court had no powers to look at the merit of the award as it is not to seat on appeal over the arbitration but to recognize its award. I have read the cases of SHONA-JASON LTD V OMEGA (SUPRA) and HYPPOLITE v EGHAREVBA (SUPRA) and find that they are distinguishable and therefore different *circumstances and do not apply. "*

5. ***Emerald Energy Resources Ltd V. Signet Advisors Ltd (2020) LPELR-51389 (CA)***

This arose from the judgment of Kuewunmi J of the FHC (2012 Rules of the FHC)**,** on the enforcement of a London Court of International Arbitration Award of June 31, 2016, for a financial services dispute. The Respondent filed an originating motion on the 19th of October 2017 for an order recognizing the award as binding and seeking leave to enforce same as a judgment or order of the Federal High Court. The Appellant objected raising three issues: defective affidavit, non-authentication of the award in line with Article 3 (1) of the LCIA Rules, and thirdly, that the application was statute barred. That the enforcement application not brought within 12 months as required by Section 2 of the Reciprocal Enforcement of Judgment Ordinance, Cap 175, Laws of the Federation of Nigeria, 1958.

The Appeal court per Tobi JCA held

"the relevant law under which the application is made and will be decided is not Section 2 of the Ordinance but rather Sections 31 and 51 of ACA. … On issues involving arbitration and conciliation in Nigeria, the applicable law is ACA. The provision of ACA regulates everything about arbitration and arbitral awards. Sections 31 (1) and 51 (1) of ACA states that arbitral award shall be recognized as binding and be enforced in Nigeria. ... I agree entirely with the Respondent that the relevant law under which the application is made and will be decided is not Section 2 of the Ordinance but rather Sections 31 and 51 of ACA.

6. ***Law Union & Rock Insurance Plc V. Korea National Insurance Corporation (2021) LPELR-56333(CA)***

The Appellant is an insurance company incorporated in Nigeria and registered to carry out insurance business particularly according to the Insurance Act, 2003, whilst the Respondent is registered outside Nigeria. In 2011, the Respondent reinsured its assets in Korea DPR with the Appellant. A claim was subsequently made by the Respondent on the insurance policies issued by the Appellant, which the Appellant demurred from paying. Subsequently, the parties went for arbitration to determine whether the Appellant was in breach of the insurance contract. Timothy Young, QC the sole arbitrator in London pursuant to the English governing law delivered his final award on 13/4/2015 in favour of the Respondent, and a final award on costs on 23/9/2015. The Respondent sought to enforce the award in Nigeria at the lower Court. The lower Court also

dismissed the Appellant's objection, holding that the parties had agreed that any contractual dispute should be decided according to the Law of England, therefore, any public policy issue arising from the Law in Nigeria was inconsequential.

Held:

On the power of the court to register and enforce foreign arbitral award; whether the Court has to be one that can entertain the subject matter submitted to the foreign arbitrator

Where an arbitral award made upon arbitral proceedings in a foreign country is sought to be enforced in Nigeria, the relevant laws to consider are the Foreign Judgments (Reciprocal Enforcement) Act (FJREA) and the ACA. Where the arbitration award was made abroad, an application can be made for the award to be registered and enforced by a superior Court, as defined in FJREA.

On the time-frame for setting aside an arbitral award; the effect of failure

If the Appellant had any complaint on the validity of the arbitral award, it ought to have been so raised before the application to enforce same and within the statutory timeline.

On whether Section 50(1) of the Insurance Act 2003 is applicable to render an Award in respect of a contract of reinsurance illegal where one of the parties is a foreigner and where the contract is subjected to a foreign law

There is therefore no doubt that Section 50(1) of the Insurance Act 1997, specifically forbids entering into any insurance contract without the premium having first been paid "in advance." Any non-compliance with the express provision of that section as in this case renders the contract of Insurance between the parties illegal and unenforceable.

4 Conclusion

The first issue of whether Awards still be set aside on the grounds of misconduct by the arbitrator must be answered by the arbitration community. If we do not want misconduct to be a ground for setting aside, the Rules of the Courts must be changed such that the term misconduct is removed. We will probably not be ad idem on this, but the Rules should align with the AMA.

To the simple folks, the second point we identified is not an issue. The tenor of the cases is that the Arbitration Act overrides the Court Rules. Despite the provisions of the Court Rules, the *Ogbuneke*, *Tulip, Calais, & Midem* courts held that the ACA (NYC) and not the Foreign Judgments Act, is applicable. But the most recent case, the *Law Union* case appears to depart from the previous cases in its reliance on the Foreign Judgments Act. Suffice it to say that a new rule to replace the Order 52 Rule 17 of the FHC Rules that has been causing problems is what we need. And I so provide and urge the heads of courts to amend their court rules to provide that;

"Where an award is made in proceedings on an arbitration in a foreign territory party to the New York Convention, if the award was in pursuance of the law in force in the place

where it was made; it shall become enforceable in the same manner as a Judgment given by a Nigerian court."

The African adage IGI GAN GAN RAN MA GUN MI LOJU may mean a stich in time saves nine. If the arbitration community fails to heed the calls in the address, those outside this community will take the system to the cleaners through the technicalities of the Rules. For now, on behalf of the law firm of G.O. Sodipo & Co, I say, welcome, enjoy the meeting and the lunch that follows.

[1] Per TOBI, J.C.A. (Pp. 39-52, Paras. B-D).