



Enforcement of ICSID Convention Arbitral Awards and National Courts in Nigeria

Prof Greg. C. Nwakoby FCIArb^{1*}; Dr. Charles Emenogha Aduaka^{}
& Chiamaka Orabueze Esq^{***}**

***Email Address: Gregnwakoby2@yahoo.com**

ABSTRACT

In Nigeria, the national courts recognize and enforce arbitral award rendered by domestic and international arbitral tribunals and institutions. The same principles which influence the courts to enforce arbitration agreement also influence and motivate the domestic courts to recognize and enforce arbitral awards. The courts in Nigeria consistently uphold the arbitral process because it offers many attractive advantages and features which are not available in litigation through the court system. Arbitration is less rancheros, less expensive, more efficient, promotes confidentiality, and also promotes appointment of experts to handle disputes and matters. The domestic or national courts have jurisdiction to recognize and enforce domestic and international arbitral award including New York Conventional award. The Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004 pursuant to section 31 made copious provisions for enforcement of domestic arbitral awards by application to court and by leave of judge or court. The common law made provisions for enforcement of arbitral award by action at law. Section 51 of the aforesaid Act made provision for the enforcement of International arbitral awards whereas Article 3 of the New York Convention made provisions for the recognition and enforcement of arbitral awards made pursuant to the New York Convention. This paper will in the main address the limit of interference and roles of the national courts in the recognition and enforcement of ICSID arbitral award. Do national courts have the jurisdiction to refuse recognition, enforcement, and execution of ICSID convention arbitral award? This will be address in this paper.

Keywords: Investment Dispute, ICSID arbitration, national court system

1. INTRODUCTION

International Centre for the Settlement of Investment Dispute (ICSID) is an international organization and a member of the World Bank Group that was established pursuant to the convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) in 1966² to administer arbitration and conciliation between parties to the Convention (Contracting States) and foreign Investors.³ ICSID arbitration which is denationalized arbitration is governed exclusively by the provisions of ICSID Convention. Once parties agree to arbitration pursuant to ICSID, the implication is that they have agreed

¹***Prof Greg. C.Nwakoby** is a Professor of Commercial & Property Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria and Fellow Chartered Institute of Arbitrators of Nigeria. Gregnwakoby2@yahoo.com

^{**}**Dr. Charles Emenogha Aduaka** is a lecturer in the Faculty of Law, Enugu State University of Science & Technology.

^{***}**Chiamaka Orabueze Esq,** is a legal practitioner and a higher degree student specializing in arbitration in the Faculty of Law, Nnamdi Azikiwe University, Awka.

² Abby Cohen Smutny, Anne D Smith, & McCoy Pitt, Enforcement of ICSID Convention Arbitral Awards in U.S Courts” *Pepperdine Law Review*, Vol. 4, 2016, p. 650.

³ Convention on the Settlement of Investment Disputes Between States and Nationals of Other Contracting States of 18th March 1965.

to ICSID rules to the exclusion of other rules on arbitration and are exempted from the application of the arbitration laws and the control of national courts.

ICSID proceedings are specialized as they are limited to investment disputes between member states and nationals of member states. At the time ICSID was formed, the term investment was not defined but was rather left to the interpretation of the ICSID arbitrators. This certainly may create problem of definition and interpretation from the onset. However an unsatisfactory attempt at interpretation was made in *Amco Asia Corp. et al v. The Republic of Indonesia*.⁴ Due to globalization and the ever changing nature of commerce, there is the need to properly define investment with respect to ICSID as this will create certainty of jurisdiction in ICSID arbitration. To leave the definition open for interpretation by ICSID arbitrators may not be satisfactory. However, it could be that the reason for the present position is to avoid limiting the jurisdiction ICSID knowing full well that the meaning of investment and commerce are widening every day.

For a dispute to be capable of settlement by ICSID, the parties must be Members State of ICSID Convention, and a national of another contracting state. The dispute must certainly be one of investment and most importantly and of paramount consideration is that the parties must agree to submit their investment dispute to the ICSID.

2. PROCEDURE

ICSID centre is run by a Secretary- General who is the administrative head who oversees the daily activities of the centre. The contracting members upon the occurrence of any investment dispute pursuant to their agreement shall send a documentary request to the Secretary-General for registration. The documentary request shall be accompanied by the necessary filing fee. Upon the receipt of the request the Secretary General shall send an acknowledgement of the document of request and filing fee receipt to the party requesting for ICSID arbitration.

The Secretary General shall thereof inquire properly into the document and evaluate same with intent to determine whether the centre has jurisdiction to hear the matter, whether the parties are the proper parties who should submit such dispute, and whether the parties expressly agreed to submit their dispute to ICSID for determination.⁵ The Secretary General must satisfy himself that the dispute is a legal controversy directly based on investment, that the parties agreed to ICSID, and that the dispute is between a state member of the convention before he can register it and then notify the other party.⁶ The Secretary-General has the right to refuse to register the request where any of these three requirements is lacking. If there is any ambiguity in the matter, the Secretary-General has the right to direct the requesting party to clarify it. Where the Secretary-General refuses to register any request, his decision on the matter is final. The refusal to register the request means that the requesting party will not have access to the ICSID. Mention must be made that even when the Secretary-General has registered a request, any of the parties or the parties may still raise the issue of jurisdiction upon the composition of the tribunal.⁷

Upon the notification of the registration of the request by the Secretary General, the parties shall, with possible dispatch, proceed to constitute a tribunal with due regard to section 2 of chapter 10 of the Convention. In accordance with Rule 1 (2), unless such information is provided in the request, the parties shall communicate to the Secretary General as soon as possible any provision agreed by them regarding the number of the arbitrators and the method of their appointment. No Person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the tribunal.⁸ The convention made copious provisions for the right of the parties to appoint

⁴*Amco Asia Corp. et al v. The Republic of Indonesia* ARB/81/8.

⁵Article 36 of ICSID Convention.

⁶Article 25 of ICSID Convention.

⁷*Klockner Industrie Anlagen GmbH v. United Republic of Cameroun* (1984)CLUNET 409

⁸Rule 1(4) of ICSID Chapter 1.

their own arbitrators⁹. However, it does state certain conditions which the parties must observe regardless of any agreement between them, namely;

- a) The number of arbitrators must be uneven¹⁰
- b) The majority of the arbitrators must be nationals of states other than the contracting state party to the dispute and the states whose national is a party to it, unless each and every arbitrator is appointed by agreement of both parties.¹¹
- c) Arbitrators appointed from outside the panel of arbitrators must possess the qualities required for those serving on that panel. The parties may decide to appoint a sole arbitrator if their dispute and issues involved are narrow.

The parties may decide to appoint a sole arbitrator if their dispute and issues involved are narrow. The parties are free to appoint the arbitrators themselves or delegate the task to a third party who may be, Administrative Council or to the arbitrators they themselves have appointed.¹²

From the forgoing, the parties enjoy complete freedom in choosing the arbitrators who will constitute the arbitral tribunal. They need not restrict their selection to the Panel of Arbitrators list with ICSID's secretariat. Upon the appointment of the arbitrator(s), the party or parties concerned shall notify the Secretary General of the appointment of each arbitrator and indicate the method of his appointment. Upon the receipt of information of the appointment of an arbitrator, the Secretary General shall seek an acceptance from the appointee. The appointee is given 15 days within which to accept the appointment. It is not always that an appointee will accept to serve. There are situations where a person appointed to serve as an arbitrator may be unwilling to serve and this explains why it is very important to notify and inform the prospective appointee informally before making the appointment. Where the appointee refuses to accept the appointment, the authority that made the original appointment shall be give another opportunity of selecting another arbitrator. The arbitral tribunal shall be deemed to have been constituted on the date the Secretary-General notified the parties that all the arbitrators have accepted their appointment. Before or at the first session of the tribunal, each arbitrator shall sign a declaration in the following form:

To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal Constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between ----- and ----- I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the content of any award made by the tribunal. I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided by the Convention on the Settlement of Investment Disputes and in the Regulations and Rules made pursuant thereto.¹³

\Any arbitrator who fails to sign the declaration by the end of the first session of the Tribunal shall be deemed to have resigned his appointment. The tribunal shall meet for its first session within 60 days after its constitution or such other period as the parties may agree. The date of that first session shall be fixed by president but where no president has been appointed, the Secretary-General shall fix the date and upon the deliberation of the arbitrators, they will choose their president. The president is expected to consult the members and the parties before the fixture of the session. The Tribunal shall meet at the seat of the centre at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. Where the president fixed a date for the session and for the business of the Tribunal and one

⁹ Rule 1 (3) of ICSID of Chapter 1 but see particularly Rule 2(1)(a)(b) (c) (2)(3) & Rule 3.

¹⁰ Article 37 of ICSID.

¹¹ Article 39 of ICSID

¹² Article 40(2) of ICSID

¹³ Rules 3 & 4 of ICSID

of the parties fails to cooperate and does not appear or present its case, the provisions of Article 45 and Rule 42 of the convention shall apply.

In the sittings of the Tribunal, the President of the Tribunal shall conduct its hearings and preside at its deliberations. Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sitting.¹⁴ The deliberations of the Tribunal shall be private and confidential. Only the members of the Tribunal shall take part in its deliberation. The essence of this practice is to ensure the independence of the arbitrators. The Tribunal has the discretion to admit other persons which it might do in deserving situations like in situations where interpreter or translator or secretarial staff may be admitted for reasons of the role he is to serve. During the proceedings, each party may be represented or assisted by agents, counsel, or advocates whose names and authority shall be notified by the party to the Secretary-General who shall promptly inform the Tribunal and the other party.¹⁵ The parties are expected to file and serve their pleadings. In accordance with Rule 29, as soon as the Tribunal is constituted, the Secretary General shall transmit to each member a copy of the request by which the proceedings was initiated, of the supporting documentation, of the notice of the registration and of any communication received from either party in response thereto. In addition to the request for arbitrator, the written procedure shall consist of the pleadings, filed within time limits, set by the Tribunal. The pleadings shall among other things include the following:

- a memorial by the requesting party;
- a counter memorial by the other party;
- a reply by the requesting party;
- a rejoinder by the other party.

A memorial shall contain a statement of the relevant facts, a statement of law, and the submission. A counter memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleadings, any additional facts, if necessary, observations concerning the statement of law in the last previous pleading, a statement of law in answer thereto, and the submissions. These shall closely be followed by the oral statements and testimonies of witnesses and the parties. Where need be, experts may also be invited.¹⁶ The hearing takes place at the sitting of the Tribunal. The Tribunal shall be the judge in determination of admissibility of any evidence and of its probative value. The Tribunal may also request the parties to present any document which is material in the matter. Witnesses and experts shall be examined before the Tribunal by the parties. Each witness shall make a solemn declaration before his testimony. The experts are also expected to make a solemn declaration before giving evidence or testifying on any report made by them.¹⁷ When the presentation by the parties is completed, the proceedings shall be declared closed. However, the proceedings may be re-opened before the award is rendered on the ground that new evidence is forthcoming of such a nature to constitute decisive factor, or that there is a vital need for clarification on certain specific points as provided in Rule 38(2) of the convention. The Tribunal shall at the closure of its proceedings declare and make its award which shall be supported by majority votes of the members of the Tribunal.

3. The Award

The tribunal shall within 60days after the closure of the proceedings or its extended period by a further 30days draw up the award. The decision of the tribunal on every issue referred to it must be taken by a majority of the votes of all its members. Note must be taken of the fact that the award must not necessarily always be drawn up and signed at a sitting of the Tribunal.¹⁸ Whether or not the decisions

¹⁴This list has two parts. The first part includes the arbitrators designated by the chairman of the Administrative Council of ICSID and the second part includes reproduced list of arbitrators nominated by the Contracting States. See Article 3(2)of ICSID.

¹⁵ Rule 6(2) of ICSID.

¹⁶ Rule 14(2)&(3) of ICSID.

¹⁷ Rule 18(1) of ICSID.

¹⁸ Rules 28, 29, 30 & 31 of ICSID.

were taken at a sitting of the Tribunal or by correspondence, it is required that each member who voted for it should sign it.¹⁹ The signature must be dated and the signing has to be completed within the time limited of 60days or its extended period of 90days. The award shall be in writing and shall of necessity contain the following:

- a) a precise designation of each party’;
- b) a statement that the tribunal was established under the convention, and a description of the method of its constitution;
- c) the name of each member of the tribunal, and the identification of the appointing authority of each;
- d) the names of the agents, counsel and advocates of the parties;
- e) the dates and place of sitting of the Tribunal;
- f) a summary of the proceedings;
- g) a statement of the facts as found by the Tribunal;
- h) the submissions of the parties;
- i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
- j) any decision of the Tribunal regarding the cost of the proceeding.²⁰

The award shall upon the signature of the last arbitrator be promptly authenticated by the Secretary-General and a certified copy of the award including the individual opinions and statement of dissent shall be dispatched to each party. The award is deemed to have been rendered on the date on which the certified copies were dispatched. The Secretary-General has the right to make available to party additional copies of the certified true copies of the award but the centre shall not publish or report the award without the consent of the parties. The consent of the parties is required before publishing or reporting the award to the public because of the issue of confidentiality attached to arbitration generally.

There may be need or request for the Tribunal to make a supplementary decision(s) and/or rectification. Where there is need for supplementary decision or rectification, the requesting party shall submit his request in writing accompanied with the necessary fee as required by law within 45days after the award was rendered. The request shall contain all the necessary facts as provided in Rule 49 of ICSID to wit:

- a) the identity of the award to which its relates;
- b) indicate the date of the request;
- c) state in detail:
any question which in the opinion of the requesting party, the Tribunal omitted to decide in the award; and
- d) any error in the award which the requesting party seeks to have rectified; and be accompanied by the fee for lodging the request as required by Administrative and Financial Regulations 15(2).

The Secretary-General upon registering the request shall notify both parties of the registration and transmit to the parties and the member of the Tribunal a copy of the registration, together with a copy of the request and of any accompanying document. The president of the Tribunal shall after due consultation with the other members fix a time limit for the parties to file their observations on the request and shall determine the further procedure for the consideration of the request. The supplementary decision and rectification when made shall comply with the requirements of Rules 46 – 48 of ICSID. During the proceedings for the consideration of the supplementary decision and rectification, a party may apply for stay of the enforcement of the award to which the request applies.²¹

¹⁹ Rule 34 of ICSID

²⁰Article 48 (1) & Rule 16(1) of ICSID.

²¹Rule 54 of ICSID.

4. The Enforcement ICSID Arbitral Award & National Courts

The ICSID convention established a treaty-based framework for the conduct of arbitration that is entirely self contained removed from national court system as could be seen from our discussion so far. ICSID proceedings including the recognition and enforcement of its award are exempted from the application of national arbitration laws and the control of national courts. ICSID has a self contained enforcement regime that is binding on the Contracting States to the Convention.²²

For detail discussion on the recognition and enforcement of ICSID award and the limited roles of the national courts, we shall reproduce the provisions of Articles 53 – 54 of the Convention herein. Article 53 provides that:

- 1) *The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided in this convention. Each party shall abide and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this convention.*
- 2) *For the purposes of this section, “award” shall include any decision interpreting, revising or annulling of such award pursuant to Articles 50, 51 or 52.*

Article 54 of ICSID Convention provides:

- 1) *Each contracting state shall recognize an award rendered pursuant to this convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court of that state. A contracting state with a federal Constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*
- 2) *A party seeking recognition or enforcement in the territories of a contracting state shall furnish to a component court or other authority which such state shall have designated for this purpose a copy of the award certified by the Secretary-General. Each contracting state shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.*
- 3) *Execution of the award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought.*²³

Article 55 of ICSID which by implication has set the limit of the obligation imposed in Article 54 provides that “Nothing in Article 54 shall be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution.”²⁴

Article 53 has made it rather very clear that ICSID conventional award is binding in the parties to the dispute and that the award is not subject to any remedies other than those provided by the ICSID Convention. In unmistakable terms an ICSID Convention arbitral award is not subject, for example, to actions to set aside or vacate the award in any national court. According to Abby Cohen Smutting and others²⁵, Article 53 arguably creates an imbalance between the parties to the dispute because the parties in ICSID arbitration will always be a state on the one side and an investor usually a private party on the other. The provisions of the ICSID Convention – including Article 53 may be enforced directly as an international obligation of the state party, but without more, Article 53 does not provide a means of enforcement against the non-state party to the dispute. However, Article 54 establishes the means through

²² Articles 53 – 54 of ICSID.. See also *Berkely Journal of International Law* Vol. 4, 1986, p. 408, also cited in *International Tax & Business Lawyer*, Vol.:362

²³ Articles 53-54 of ICSID.

²⁴ Article 55 of ICSID.

²⁵ *ibidp.* 649. Jack J. Coe JR, *International Commercial Arbitration: American Principles and Practice in a Global Context*, 1997, p. 297.

which ICSID awards may be enforced against the non-state party to the dispute as well as against a state party.²⁶

Article 54 has made it that all contracting states to the ICSID Convention are obliged to enforce the pecuniary obligation imposed by an arbitral award as if it were a final judgment of a court in that state. By implication, there is no basis for a contracting state party to decline to enforce pecuniary obligation imposed by an ICSID arbitral award. The provisions of Article 55 of ICSID clarifies that the obligation in Article 54 is subject to the laws regarding foreign sovereign immunity. In other words, the national laws applicable to the execution of final judgment against foreign states and their assets generally apply also in relation to the execution of ICSID award. The report of the Executive Directors of the World Bank, upon the presentation of the text of the ICSID Convention to the Banks' members of government describes the provisions of Article 53 to 55 of the Convention as follows:

*Subject to any stay of enforcement in accordance with the provisions of the Convention, the parties are obliged to abide by and comply with the award and Article 54 requires every contracting state to recognize the award as binding if it were a final decision of a domestic court. Because of the different legal techniques followed in common law and civil law jurisdictions and the different judicial system found in unitary and federal or other non-unitary states, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each contracting state to meet the requirements of the Article in accordance with its own legal system. The doctrine of sovereign immunity may prevent the forced execution in a state of judgments obtained against foreign states or against the state in which execution is sought. Article 54 requires contracting states to equate an award rendered pursuant to the convention with final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the convention in case in which final judgment could not be executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that state or of any foreign state from execution.*²⁷

In Nigeria, the Supreme Court is the court designated for the recognition, enforcement and registration of the award. The Supreme Court of Nigeria is the highest court of the land. Pursuant to Article 69 of ICSID and section 12 of the 1999 Constitution which requires the domestication of the convention, the Federal Republic of Nigeria enacted the International Centre for Settlement of Investment Dispute Act Cap 120 Laws of the Federation of Nigeria 2004. The commencement date of this Act is 29th November 1967.

The International Centre for Settlement of Investment Dispute Act Cap 120 Laws of the Federation of Nigeria 2004, section 1 provides that:

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

²⁶ *ibid.*

²⁷ ICSID Report of the Executive Directors of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, in ICSID Regulations and Rules 23, 47-48 (2003) cited in Abby Cohen Smutny, Anne D. Smith and McCoy Pitt, "Enforcement of ICSID, Convention Arbitral Awards", *Pepperdine Law Review*, Vol. 43, 2016, p. 652.

Section 1(2) of Cap 120 provides that the Chief Justice of Nigerian (CJN) shall make or may adopt any rule of court necessary for the enforcement and registration of ICSID award at the Supreme Court. It seems that the Chief Justice of Nigeria has as at today not made any procedure for the same. One may be tempted to ask, why ICSID award should be registered as a final judgment of the Supreme Court when in reality ICSID award is not a judgment of court. The “Spirit” and purpose of the Act which is to bolster up investors confidence and to reassure the investor of equal treatment in respect of any award made pursuant to the convention seems to explain why the Nigerian Act is made in this form. The only way to assure investors of equal treatment is to provide for the registration and enforcement of award made by the centre in the Supreme Court of Nigeria.²⁸ Upon the registration of the award at the Supreme Court, the ICSID arbitral award assumes the status of a final judgment of the Supreme Court. For the application for registration of the award, a copy of the award as certified by the Secretary General of ICSID shall be accompanied by a Sworn Statement. The limitation period applicable for the enforcement of award also applies to ICSID award.

The idea of making ICSID award a final judgment of Supreme Court upon its registration is also supported by the provisions of Article 54 of ICSID which provides that:

Each contracting state shall recognize an award rendered pursuant to this convention as binding and enforce the pecuniary obligation imposed by the award within its territories as if it were a final judgment of a court in that state....

Though Article 54 has imposed a duty on the contracting state to recognize and enforce an award rendered pursuant to ICSID convention, there is an obstacle which an arbitral award under ICSID may face but this is at the time of execution. The obstacle is the issue of plea of sovereign state immunity. Where an application is filed for the recognition and enforcement of ICSID arbitral award, the national court before which the application is made has only one function to perform and that is the duty to recognize and enforce the award accordingly. The appropriate authority can only raise the issue of plea of sovereign state immunity at the second stage. These issues were mostly canvassed in *BB v The Government of the People’s Republic of Congo*.²⁹ The application for the enforcement of the award in this matter was granted subject to the applicant obtaining prior consent from the court for any measure of execution or safeguarding measure so as to ensure the immunity of sovereign and public assets. The applicant urged the court to amend its order as it went into the second stage which is on execution and by implication exceeded the extent of the application and the requirements of Article 54 of ICSID. The court refused on the premise that it is not possible to ascertain which assets or funds were immuned from execution. The applicant on 26th June, 1981 appealed against the order on the grounds that the judge at the first instance could only ascertain the authenticity of the award but that the judge had confused two distinct stages, the first relating to the obtaining of an exequatur and the second relating to the actual execution of the award. The judge should not have been involved in the second stage. The Court of Appeal was then urged by the applicant to delete that part of the order relating to Sovereign Immunity Plea. The Court of Appeal accordingly allowed the appeal and amended the order of the court of first instance.³⁰ The Court of Appeal in its ruling decided thus:

Article 54 laid down simplified procedure for obtaining an execution for award rendered within the framework of the convention and limited the function of municipal courts to ensuring that the document before them was a copy of an award properly certified by the Secretary General of ICSID, Article 55 provides that nothing in Article 54 was to be construed as limiting the immunity from

²⁸ Amazu A. Asouzu, “Developing and Using Commercial Arbitration and Conciliation in Nigeria,” *Lawyers’ Biannual – A journal of Nigeria and Comparative Law*, Vol.1, No.1, June 1994, p. 2. Nwakoby Greg Chukwudi, *The Law and practice of Commercial Arbitration in Nigeria*, 2nd Ed., 2014, p. 246.

²⁹ (1993)ICSID Rep 368 cited in Nwakoby Greg Chukwudi, *Law and Practice of Commercial Arbitration in Nigeria*, 2nd Ed, p. 248.

³⁰*ibid*

*execution enjoyed by a foreign state. An order granting exequatur from an arbitral award did not however constitute a measure of execution but simply a preliminary measure prior to measure of execution; the judge at the first instance had therefore exceeded his competence under Article 54 by becoming involved in examining the question of immunity from execution of a foreign state, which was only relevant at the second stage, during actual execution.*³¹

The decision of the Court of Appeal in BB v. GPRC rightly decided the effect and implications of the provisions of Articles 54 & 55. The decision is right in law. In *Senegal v. SOABI*³² the president of the Paris Tribunal de grande instance recognized and in accordance with Article 54 of ICSID Convention, ordered the enforcement of SOABI's award. The Court of Appeal of Paris on appeal quashed the decision of the court of first instance on the ground that recognition and enforcement of the award in France was contrary to public policy because SOABI had not shown that the enforcement of the awards would be made in such a way as not to be in conflict with the immunity from execution of the State of Senegal. With respect, this decision is contrary to the express provisions of Articles 54 and 55 of the ICSID Convention. At the first stage of recognition and enforcement, the court has no right and jurisdiction to consider the issue of immunity. All that the court at first instance is required to do is to verify the authenticity of the award and order for recognition and enforcement. The plea of sovereign state immunity comes up at the second stage which is the stage of execution of the award. It is only the contracting state party that has the right to raise the plea of Sovereign State Immunity to defeat the execution of the award.

The plea of Sovereign State Immunity is an obstacle in the execution of ICSID arbitral award. The plea is only available to a state party. It is for this reason that one way insist on a waiver of Sovereign State Immunity plea at the time of entering into an ICSID arbitration agreement with a state party. Some scholars have argued that the plea of Sovereign State Immunity cannot be waived as it is often back up by statute.³³ With respect, this line of argument seems to be porous and weak. The contracting state has a right to waive its rights to its laws particularly the right to plea of Sovereign State Immunity. The waiver is to demonstrate good faith and good commercial intention and also ensure equality with the private party with whom she is entering into the contract or agreement.³⁴ In *Liberian Eastern Timber Corporation v the Government of the Republic of Liberia*,³⁵ the United State District Court on an *ex parte* motion recognized and enforced an ICSID award made against Liberia. A writ of execution was subsequently issued subject to which the Government of Liberia applied to the court to vacate the judgment or, in the alternative, to vacate the execution on its property located in the United States under the Foreign Sovereign Immunity Act. It was contended that the execution will violate its immunity from execution. The court decided among other things that it had jurisdiction to decide in the subject matter and that since Liberia was a party to the ICSID Convention, it had waived its immunity from enforcement. The judge held that:

*Liberia, as a signatory to the ICSID Convention, waived its Sovereign Immunity in the United States with respect to the enforcement of any arbitral award entered pursuant to the Convention when it entered into the concession contract with LETCO, with its specific provisions that any dispute hereunder the rules of ICSID and its enforcement of provision hereunder.*³⁶

³¹ *ibid* 368 at 371-372

³² (1994)2ICSID Rep. 164.

³³ Amazu A. Asouzu, "African States and the Enforcement of Arbitral Awards: Some Key Issues" *Arbitration International LCIA* Vol. 15, 1999, p. 35.

³⁴ Nwakoby Greg Chukwudi, *The Law and Practice of Commercial Arbitration in Nigeria*, 2nd Ed, p.251-252. George R.Delaume, "ICSID Arbitration Proceedings" *Berkley Journal of International Law*, Vol. 4, 1986, p. 218 at 228. See also *International Tax & Business Lawyer*, Vol.4:218

³⁵ (1994)2 ICSID Rep 383.

³⁶ *Ibid* p. 383 at 387-388.

Hon. Justice Weinfeld in the case of LETCO refused to vacate the order for recognition and enforcement but granted the application to vacate execution with respect to some of the property of Liberian Government and its assets in United States on a successful plea of sovereign immunity from execution. What could be seen from this decision is the fact that every Contracting State waived her plea of sovereign immunity to recognition and enforcement of ICSID arbitral award immediately it exceeded to the Convention. On the other hand, Sovereign State Immunity plea to execution of ICSID arbitral award is also waiveable if the Contracting State party waived it at the time of entering into ICSID arbitration agreement with another party. If the Liberian Government had waived her sovereign immunity right at the time of entering into arbitration agreement in the LETCO case, the decision would have definitely been different.

Following the problem of the plea of foreign sovereign immunity by the award debtor on the basis of Article 55 of the Convention, it is advised that a practitioner acting for a foreign private party should endeavour to insist on the inclusion of an explicit clause waiving the applicability of the plea of foreign sovereign immunity in a contract entered with a Contracting State Party. Part of our main focus in this paper is the limit of the national courts in Nigeria in the recognition, enforcement and execution of ICSID arbitral award. From the provisions of Article 53 to 55, it is intuitively obvious that the national courts have jurisdiction to recognize and enforce ICSID arbitral awards. It is also certain that subject to the limitation placed by the provision of Article 55 of ICSID, the national courts have the right and jurisdiction to issue writ of execution for the purposes of bring the award into effect. This is the limit of the jurisdiction of the national courts in Nigeria for no national court has jurisdiction to vary or impeach ICSID award. ICSID Conventional arbitral award can only be annulled, impeached, set aside, or varied at the Centre pursuant to the provisions of Rules 50 to 53 and Article 52 of ICSID. National courts have no role to play in the interpretation, revision, annulment and impeachment of ICSID arbitral award.

CONCLUSION

ICSID Convention is a very important convention in international arbitration practice. It is only available to nationals of the contracting states and relates to investment matters only. For it to apply in any matter, parties must have expressly agreed to it and any agreement to ICSID implies exemption of the application of any other arbitration law. The national courts as designated to the ICSID secretariat by Contracting State have the jurisdiction to recognize and enforce ICSID arbitral award and subject to the limitation of plea of Foreign Sovereign Immunity provision in Article 55, the courts have the right to issue writ of execution for the execution of ICSID award. The only obstacle to the execution of ICSID arbitral award is the obstacle of plea of Foreign State Sovereign Immunity in Article 55 but this can always be waived by the State party while entering into the agreement. Prudence requires that a practitioner at the time of drafting the agreement for a foreign private party should insist on waiver of the plea of sovereign immunity so as to ensure equity and fairness in the agreement.