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Judicial approach to public policy and its effect on the enforcement of foreign arbitral awards in Nigeria

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## **\*26** Introduction and background

The growth in the number of international commercial transactions between parties from diverse legal backgrounds and jurisdictions necessitate the establishment of an appropriate mechanism to deal with inevitable conflicts arising from such international contractual relationships.<sup>1</sup> International commercial arbitration affords parties the opportunity to settle their disputes in a dispassionate matter. International commercial arbitration has become the most essential alternative means by which transnational commercial differences can be settled. Parties are given the opportunity to select an unbiased arbitrator, an expert in the area of dispute who has a requisite authority to decide the dispute.<sup>2</sup> The advantage of reaching a speedy decision as well as the confidential benefits in the arbitration system have driven the large number of investors to make desirable efforts to give consideration to arbitration by inserting arbitration clauses in their commercial contracts.

Globally, inclusion of arbitration clauses in commercial contracts is now a common practice in transnational businesses. This is because arbitration clauses afford parties the opportunity to settle their disputes through domestic/international arbitration proceedings before an arbitral panel selected by the parties, who will hear the matter amicably without going through a formal process such as a court hearing.<sup>3</sup> The award is therefore rendered at the end of the arbitration proceeding.<sup>4</sup> Impliedly, every award duly reached by the tribunal is presumed binding, enforceable and is expected to be complied with by the parties without delay.<sup>5</sup> This, in effect, means that where the award-debtor voluntarily conforms to the terms of an award, the issue of judicial intervention to enforce the award does not arise. The recalcitrant nature of the award-debtor necessitates the need for judicial intervention through the machinery of the court by the award-creditor. Courts are allowed to enforce awards emanating from international arbitration by using their own procedural rules irrespective of the fact that it is foreign/international.<sup>6</sup>

This is provided for in many international treaties such as UNCITRAL Model Law on International Commercial Arbitration 2006 (UNCITRAL Model Law),<sup>7</sup> and notably in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.<sup>8</sup> In addition, domestic \*27 legislation in most States across the world create provisions for enforcement of both foreign and domestic arbitral awards.<sup>9</sup> The Arbitration and Conciliation Act 2004 (ACA) is the Nigerian legislation that regulates commercial arbitration and practice in Nigeria.<sup>10</sup> Consequently, ACA is the focus of this article. Hence, the New York Convention shall be examined through the provision of s. 54 of the ACA and the Second Schedule in the ACA. Section 54 domesticated the Convention and the Second Schedule contains the provisions of the New York Convention.

Section 51 of the ACA makes provision for enforcement of foreign arbitral awards in Nigeria. It states "with reference to s.32 of the ACA that courts shall recognise and enforce arbitral awards irrespective of the State in which it is given."<sup>11</sup> Hence, the

application for enforcement must be submitted along with the original copy of the award or its certified copy, the arbitration agreement or certified copy and, the English translated copy of these documents where necessary.<sup>12</sup> In *Sundersons Ltd & Milan Nigeria Limited v Cruiser Shipping PTE Ltd & Universal Navigation PTE Ltd*,<sup>13</sup> the court highlighted the danger in importing additional requirements to the grounds stipulated in the ACA. It observed that failure to attach the original agreement or its certified copy along with the application for enforcement did not affect the substance of the enforcement proceedings, nor did it render the application incompetent.<sup>14</sup>

In *Aye-Fenus Enterprises Ltd v Saipem (Nig) Ltd*,<sup>15</sup> the judge stressed on the duty imposed on the courts to enforce the outcome of the arbitration proceedings, particularly where the parties by agreement submitted their dispute to arbitration, and where the decision is reached. According to the trial judge, it is a settled principle of law that must be obeyed. Another court observed thus:<sup>16</sup>

There is a live judicial policy of ascribing priority to the upholding of arbitral awards by the regular courts as a mainstream ADR procedure in the Administration of Justice for resolving disputes, and that there is a narrow compass that attracts the courts to override this policy by setting aside an award.

This clearly shows that courts in Nigeria have a pro-enforcement bias under the ACA, and are thereby willing to enforce foreign arbitral awards provided the award fulfils all righteousness. Thus, enforcement of an award in Nigeria is not wholly instinctive, since it is subject to grounds listed in s.52 of the ACA.

Section 52 of the ACA stipulates grounds upon which the enforcement of an award may be refused. Similar provision can be found in Article V of the New York Convention. Both ACA and the New York Convention contain some exceptional grounds in which an application for recognition and enforcement of foreign arbitral awards can be refused/rejected. These two regimes are considered as the most significant provisions because it deals with the legitimacy of an arbitral award and puts the burden of proving otherwise on the person refusing enforcement. The grounds for refusal of enforcement of award as contain in s.52 of the ACA, and can be classified into two sets.<sup>17</sup> The first authorises the enforcing court to refuse enforcement where there is; incapacity of the parties or; invalid arbitration agreement or; lack of due process or; jurisdictional issues or; absence of relation between issue(s) submitted and award rendered or; agreement or relevant law was not obeyed in selection of procedure or arbitral panel or; the award cannot be upheld or binding for legal reason or; the competent \*28 court had set such an award aside or suspend it.<sup>18</sup> Inarbitrability of the subject matter and violation of public policy constitute the second set of grounds for refusal of award in the ACA.<sup>19</sup> The first set as contained in s.52(2)(a) (i)-(vii), can be raised by the aggrieved party an area aimed at protecting the parties against private injustice, while the second set in s.52(2)(a and b) are meant to protect the interest of the enforcing State. These specified grounds are of great importance as they signify a globally recognised standard that is identical to the provisions of Article V New York Convention.<sup>20</sup> The burden of proof remains with the party resisting the application for enforcement.<sup>21</sup>

The focus of this article is to examine the effects of public policy grounds on the enforcement of foreign arbitral award in Nigeria. It examines the concept of the public policy exception as grounds in which the enforcing court can, on its own volition, refuse enforcement application of awards before it. To achieve this, it is apposite to assess the judicial attitudes of the courts in this perspective while examining in detail the impacts of public policy ground as stipulated in s.52 and the Second Schedule. The article proceeds in five parts.

The first part introduced the reader to the principles of arbitration, and part two examines the concept of public policy within the intended objectives of this article. The purpose of this is to understand the significance of this concept in the enforcement proceeding of awards. It examines different approaches and stages in which the enforcing courts are bound to follow, particularly where the objection is raise on ground of public policy. The third part examines the judicial approach to the public policy exception from a global perspective. This is achieved by analysing the relevant laws on arbitration and judicial interpretations

on the established rules in which the award may be refused for the reason that it violates public policy. The fourth part examines the public policy exception in Nigeria, before the article moves to concluding remarks.

## The concept of public policy

By s.52(b)(ii) of the ACA, Nigerian courts may decline to grant an application brought by the award-creditor for an enforcement of an award on the ground that execution of such an award will encroach on public policy or policies of the State.<sup>22</sup> The meaning of public policy shall be considered in this section, which also discusses the two approaches to public policy, the stages applicable to the public policy exception and other related grounds within public policy.

### *Meaning of public policy*

It is demanding to proffer a definite description of the public policy exception because ACA and its Second Schedule fail to provide it.<sup>23</sup> Equally, these laws overlook a probable strategy on how the public policy exception should operate as a measure to safeguard the interest of the enforcing State by way of raising this exception in an application to oppose the enforcement.<sup>24</sup> The lack of definition of the public policy exception in the ACA may therefore be intentional, since the concept is well known with its multi-faceted, open-textured scope. Hence, the concept is flexible with various guises.<sup>25</sup> The drafters \*29 of the ACA must have realised that public policy touches virtually all areas of law and as such, its qualitative content varies from time to time.<sup>26</sup>

Sadly, there is also no universal definition of the public policy exception, meaning that public policy varies from country to country.<sup>27</sup> Possibly, the omission by the drafters of the relevant international laws (such as New York Convention), that left the meaning of the exception hanging in the existing arbitration law, is deliberate. This is because public policy is not necessarily static and over time may continue to evolve. Besides, public policy is an exception that is intended to serve as a safety valve, with the aim to thwart undesirable interference on state sovereignty, particularly where a foreign award is incompatible with the enforcing state's legal structure. This explains why there are several eccentric decisions of the courts where foreign arbitral awards were not enforced because of local rules.<sup>28</sup>

For instance, in the United Kingdom the court while interpreting s.103(3) of the UK Arbitration Act 1996 describe a breach of public policy exception to mean breach of natural justice, lack of impartiality, lack of reasons in the awards, manifest disregard of the law, manifest disregard of the facts, annulment at place of arbitration, breach of mandatory rules, and actions contrary to good morals and national interest/foreign relations.<sup>29</sup> In the United States, courts, while interpreting provision of Federal Arbitration Act on public policy observed that awards will be held in violation of public policy if they go against any US laws, stem from fundamental unfair procedures, promote corruption/criminal activity, ignores US court orders regarding dispute, or duplicate US court judgments on the same disputes.<sup>30</sup>

Section 48(2) of the Indian Arbitration and Conciliation (Amendment) Act 2015 states that conflict of public policy will occur if there is established proof of violation of fundamental policy of Indian law or, where the award is tainted by fraud or corruption, or where there is evidence of violation of s. 75 or s. 81 of the English Evidence Act 1872, or is in conflict with the most rudimentary notions of morality or justice.<sup>31</sup> The legislation in Swedish provides that enforcement of a foreign award may be refused on ground of public policy if the court finds that it is clearly incompatible with the basic notions of the Swedish legal system in recognising and enforcing such awards.<sup>32</sup> The Zimbabwe Arbitration Act 2002 states that violation of public policy will occur if the award was induced or affected by fraud or corruption, or where there is a breach of the rules of natural justice in connection with the making of the award.<sup>33</sup>

Despite this lack of universal definition in the relevant laws, courts in Nigeria have been able to offer hints on what public policy amounts to. In *Okonkwo v Okagbue*,<sup>34</sup> the Apex Court in Nigeria described the public policy exception "as a concept which for the time being prevails in a community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is regarded as injurious to the public interest". This description given by the Supreme Court in *Okonkwo* case was used by the presiding judges in both the *Statoil Nigeria Limited v Inducon Nigeria Limited*<sup>35</sup> \*30 and *Conoil Plc v. Vitol S.A*<sup>36</sup> cases. Thus, the relevant question is, on what basis would the court consider an award as "injurious to the public interest"? No judicial case yet seems to answer this important question. Nevertheless, the description of the exception as proffered by the courts has given some insight on the nature of public policy exception in Nigeria. Hence, public policy can mean breaking essential mandatory rules that the parties cannot derogate from. In addition, it can mean fundamental rules of every State that operate as the basis upon which courts are permitted to decline the enforcement application before it.<sup>37</sup> Thus, courts are provided with discretionary power to refuse an enforcement application if the execution of such an award would infringe the mandatory or fundamental rules or, basic morality and justice of the enforcing State.<sup>38</sup>

Public policy can be classified into three spheres: namely, domestic, international and transnational.<sup>39</sup> Domestic public policy involves policies of a particular State because parties come from the same country of residency, or where the contractual relationships between parties starts and ends in that particular State. In that case, fundamental or mandatory rules of that State alone will be considered as the applicable rules of public policy.<sup>40</sup> International public policy comes into play where the performance of the business/contract between parties involves two or more States, and the parties are from different States or adopt another State's law to govern their arbitration proceedings.<sup>41</sup> It thus comprises of the fundamental or mandatory rules of the States involved.<sup>42</sup> International policy adopts a liberal approach, because it allows application of the States' domestic public policy in a global context. By this, the enforcing court can weigh these States' domestic public policies with the needs to meet international commerce.<sup>43</sup>

Transnational public policy arises when States come together to devise a unified legal principle. It involves universal business practices, norms and customs that are recognised and applied by the global community.<sup>44</sup> What differentiates international public policy from transnational public policy is that international public policy considers the domestic policies of two or more States, while transnational public policy reflects basic norms and standard that are universally recognised within the business practices.<sup>45</sup> However, because it is open-ended in nature, the public policy exception is often use as a ground to raise frivolous applications in order to oppose enforcement and simply to cause substantial delay or to disobey the terms of awards.<sup>46</sup> Hence, what is invoked nowadays is the trend towards a more international and even transnational understanding of the proper application of the public policy exception.<sup>47</sup>

To maintain some consistency within the framework of this article, public policy is seen as those fundamental rules within the exclusive judicial jurisdiction of each State that operate as impediments to the arbitration and enforcement proceedings. This article, therefore, identifies certain basic notions such as morality, justice and natural justice as those fundamental rules constituting public policy. To achieve this objective, two important principles relevant to the scope of natural justice are impartiality of the adjudicator, and the right to fair hearing. ACA is structured in such a way that breach of natural \*31 justice *ipso facto* is contrary to the country's public policy.<sup>48</sup> It will be recalled that, s.52 of the ACA and Article V (1)(b) of its Second Schedule demand that where a party was not given notice of the arbitration, or was otherwise unable to present its case, or where due procedure is ignored by the arbitrator, the court may refuse to enforce the outcome of such proceedings. This is enough to establish that a strong nexus exists between the concept of procedural fairness and the concept of public policy. Hence, the public policy exception aims to balance the interest in maintaining autonomy and efficiency of arbitration and at the same time safeguard fundamental principles of justice

### *Approaches to the public policy exception*

Approaches to the public policy exception as it relates to foreign awards can be discussed under two headings. One is pro-enforcement policy approach (also known as narrow approach), and the other is the expansive policy approach. The 'pro-enforcement policy' narrowly maintains and attaches much importance to the finality of awards, encouraging compliance with the outcome of the proceedings and ensuring enforcement.<sup>49</sup> This policy is derived from the primary objectives of the New York Convention. Hence, arbitral awards are presumed to be final, conclusive and enforceable subject only to specified grounds stipulated in the law that resist enforcement. The pro-enforcement approach emphasises the narrow interpretation of these grounds for refusal, so as to allow as many enforcements of awards as possible.<sup>50</sup> In effect, an enforcing court is expected to narrow itself when faced with determining public policy exceptions, so as to safeguard the aims that the New York Convention set out to achieve.<sup>51</sup>

The expansive approach confers on each enforcing State the discretionary power to regulate the measures for determining public policy exception within their States that will serve as a ground to resist enforcement.<sup>52</sup> For some courts, the public policy exception can be invoked simply where there is a violation of morality and justice.<sup>53</sup> While other courts (in jurisdictions such as United Kingdom and India) will determine the public policy exception based on the State's mandatory/fundamental rules, together with the idea of morality and justice.<sup>54</sup> However, when courts are invoked to refuse enforcement of an award based on the public policy exception, there are stages the courts must follow in order to reach a justifiable decision - whether to uphold the alleged violation of public policy and thus constitute a ground to refusal of enforcement or to hold otherwise.

### *The court's approach to the public policy exception*

There are three significant stages courts are bound to apply, particularly where public policy exceptions are invoked to oppose an enforcement application before the court. The first stage deals with the relevant applicable public policy to be applied by the courts. At this stage the most vital question is to whose State's public policy is applicable for determining the exception. A useful guide published by the United Nation Commission on the New York Convention provisions establishes a strong bent on the public \*32 policy of the enforcing State.<sup>55</sup> The Commission emphasised that the intention of the drafters can be grasped from the wordings used in Article V (2)(b): that is 'the public policy of that country.' These wordings according to the Commission is an indication that public policies of the enforcing States are expected to be applied by the courts.<sup>56</sup> In essence, applicable public policy is restricted to the violation of the fundamental or mandatory rule, or basic ideas of morality and justice, of the enforcing State.<sup>57</sup> Thus, as observed above, this largely depends on whether it is domestic, international or, transnational public policies, as the circumstances of each case dictates.

At the second stage, the enforcing court is faced with the question: if the court gives an enforcement order on the award, will such enforcement violate public policy or otherwise? If the court answers this in the affirmative, then the next question is, what is the prerequisite degree of violation required to constitute a violation? Scholars contend that such a violation must be fundamental to the extent that if an enforcement application is granted it would impact negatively on the public at large, and is severe in an unbearable way.<sup>58</sup> In other words, the purported public policy violation must be sufficiently severe in order to justify the refusal of enforcement.

The third and last stage weighs the importance of the finality of award as against the exception. At this stage, the courts determine if there are more benefits with the enforcement of such award notwithstanding conspicuous violation of the State's public policy.<sup>59</sup> This is the stage where the approaches discussed above come into play. The enforcing court may adopt either the narrow approach or the expansive approach. The expression 'may be refused' in Article V, Second Schedule of the ACA confers

discretionary powers on the enforcing court. As regard the narrow approach, the court has the power to interpret the public policy exception restrictively, therefore enforcing the award, even if it means upholding such of an award infringe public policy of the enforcing State. This is provided the importance of implementing the award outweighs that particular fundamental/mandatory rule.<sup>60</sup>

The court could construe and interpret the public policy exception narrowly as they wish if the impact of such a violation on public policy is minimal to the society at large. However, where an expansive approach is adopted, the court could use the discretionary power expansively to decline the enforcement application. This is usually where court gives a wider interpretation to it. Theoretically, public policy overlaps with other grounds stipulated in the ACA and its Second Schedule for resisting an enforcement of awards.<sup>61</sup>

## Public policy and related grounds

The public policy exception is interrelated with due process and the concept of arbitrability. This will now be discussed fully.

### *Public policy and due process*

The public policy exception overlaps with the notion of due process. Due process is provided in the ACA, s.52 (2) (a) (iii) and Second Schedule, and Article V (1) (b) as a ground to challenge an award at \*33 the stage of enforcement. Due process demands absolute compliance with the procedure adopted by the parties in relation to the arbitrator appointment, composition of the arbitral panel, arbitration proceedings, and the evidential rules.<sup>62</sup> Hence, failure to comply with these issues as agreed by the parties constitutes violation of due process.<sup>63</sup> The pertinent concern is the danger in intertwining these two grounds of due process and public policy exception, particularly at the enforcement stage of award. Often the relevant question is what level of violations of due process is required to constitute infringement on the public policy exception? Moreover, does waiver of due process violation also amount to waiver of public policy therefore, precluding both exceptions to enforcement?

With regard to the first question, the most common perception is that severe due process violation may not amount to a refusal of enforcement, unless the procedural abnormality had significant impact on the award.<sup>64</sup> There are some fundamentals principles of procedural law that are interrelated with the public policy,<sup>65</sup> hence, any form of defects in the procedure of this nature may prompt the court to decline enforcement based on the public policy defence. Thus, the party must establish that the alleged violated due process also violates the public policy exception.<sup>66</sup> In other words, not all due process violations are grave and fundamental.

However, the court would enforce an award, where there is an indication that the arbitral tribunal would have reached a similar decision in the absence of irregularity in the procedure.<sup>67</sup> Lack of due process is the most invoked ground by the parties to resist enforcement since it is easy to prove. Moreover, because due process derives its roots from the principles of fairness and natural justice, this makes it an essential doctrine to be observed in the arbitration system. The objective of the due process ground is to ensure that each and every contracting parties are given the opportunity to put forward his or her own case and be heard by the court/tribunal without deviating from the fundamental terms in the parties' agreement to resolve their dispute through arbitration. Thus, a party who desires to resist enforcement must show and establish links between these grounds. Hence, the enforcing State on its part must have equated lack of due process with violation of public policy before the two intertwined grounds can be utilised.<sup>68</sup>

As to the second question: can waiver of due process amounts to waiver of public policy. It is a general principle of law that any objection based on lack of due process must be raised during the arbitration proceedings,<sup>69</sup> otherwise, an enforcing court

could interpret the failure to act to mean that they have waived his right to resist the enforcement application.<sup>70</sup> This is to afford the tribunal the opportunity to address the issue before it gives its final award on the subject.<sup>71</sup> If the defence of due process is raised \*34 for the first time at the enforcement stage, this will doubt slow down the system and can be perceived as way to obstruct the enforcement proceedings of award.<sup>72</sup> Ordinarily, where a party waived his right to object at the appropriate time, such would be interpreted to mean a renunciation of his right to challenge an award on the grounds as stipulated in the ACA, including the public policy exception. However, the case will be different where it could be established that the party had no knowledge of the violation during the arbitration proceedings. Despite the link between the public policy exception and due process, the enforcing court should refrain from applying the two as a single ground, except they are premised on the same foundations. This will enable the enforcing courts to avoid gross contraventions of due process on their own volition.

### *Public policy and arbitrability*

Public policy and the concept of arbitrability are intertwined. Some scholars observed that the provisions for the concept of arbitrability in the ACA, s.52(2) (b) (i) and Second Schedule, Article V (2) (a) may not necessarily be required as a separate ground, because arbitrability forms the essential ingredients of public policy.<sup>73</sup> Contrary to this view is, though arbitrability is the most essential requirements under most States' arbitration laws, they do not always reflect essential national policies.<sup>74</sup> The subject matter of arbitrability is relevant particularly at the enforcement stage since an award cannot be enforced unless the nature of the disputes can be resolved through the means of arbitration. The arbitrability issue is determined by reference to the existing arbitration law of the enforcing States. However, where it is being invoked at the proceedings before the arbitral panel, the preferred arbitration law adopted in the arbitration agreement regulates the issue of the subject matter of arbitrability.<sup>75</sup> Ordinarily, the concept is habitually detached from public policy and as such, the two intertwine, but are treated distinctly in this article. Hence, it may not easy to segregate between the public policy exception and other interrelated grounds stipulated in the ACA and in its Second Schedule available to the parties to resist the enforcement in Nigeria.

The sphere of public policy is so extensive that it could be considered the only relevant ground for resisting an award, since the other grounds listed in ACA s.52(1) and (2) (i) and its Second Schedule, Articles V (1) and V (2) (a) could be regarded as essential components through which the public policy exception is created.<sup>76</sup> Therefore it is not difficult to see why some scholars advocate limiting the public policy exception to substantive issues.<sup>77</sup> However, as this article has shown, it is necessary for courts to distinguish these grounds and avoid conflating or confusing them.

### Judicial approaches to public policy exception from a global perspective

The public policy exception empowers courts with the right to exercise control over arbitral awards. Courts do this by safeguarding the mandatory/fundamental rules of the enforcing States.<sup>78</sup> However, the public policy exception has been seen and perceived as a barrier to the smooth running of the arbitration system, particularly to the outcome of the arbitration proceedings.<sup>79</sup> This may not be correct, \*35 because the public policy idea strives to encourage and build, rather than weaken, public trust in arbitration. For this reason, some courts around the globe refused enforcement on the ground of public policy unless the underlying contract is tainted with illegality and where there is evidence or acts of corruption etc.

### *Illegality*

A contract may be statutorily void by its nature or void because of refusal to fulfil the statutory requirements.<sup>80</sup> Hence, there is a direct link between illegality,<sup>81</sup> and public policy. An illegal act, contract or activity that is prohibited under a statutory or

existing law automatically infringes the public policy exception. In this situation, an objection against an award based on the public policy exception need not to be raised because the nature of the act, the contract, is illegal itself. That alone is sufficient to establish that the contract is void, hence, the question of public policy exception may not be required.<sup>82</sup> Equally, where the relevant statute declares the contract illegal and thus void because it failed to obey the stated requirements, the issue of unenforceability of award on public policy ground may not even arise.<sup>83</sup> However, where the illegality arises from the breach of statutory stipulations or requirements, it is the seriousness of the illegality that will determine whether the contract or an award arising therefrom should be enforced, as the court is not expected to condone illegal acts.<sup>84</sup>

In an Australian case, the court determined the enforceability of contracts by considering the gravity of the illegality and then whether the illegality was intentional or not.<sup>85</sup> In *Fitzgerald v Leonhardt*,<sup>86</sup> the Court enforced the contract to dig a borehole, because the contract by itself was not illegal, only its performance was illegal for failure to seek approval. It was observed that the societal benefits in the contractual agreement outweighed the gravity of the unauthorized behaviour in issue. Nevertheless, Kirby J remarked that enforcement of such contractual rights would have been declined for violating the public policy exception had the parties intentionally agreed to break the law.<sup>87</sup> Thus, if the parties had deliberately ignored to seek the approval as authorised by the statute, the case would have been different.

The position under English law is more explicit. In England, not all illegal contracts would not be enforced on ground of public policy.<sup>88</sup> Likewise, it is not every award seeking to enforce illegal contracts that would not be enforced under the public policy exception.<sup>89</sup> The English judges appear to differentiate between severe illegality capable of being enforceable despite its violation against English public policy, and illegality that is not sufficient to rationalise refusal for enforcement on public policy grounds.<sup>90</sup> This position could further be broken down into two categories. First, where the alleged policy is of greater significance than is widely recognised in several jurisdictions, the English Court \*36 will not enforce such a contract and any award arising therefrom, whether or not England is the place of performance and irrespective of the applicable law.<sup>91</sup> This category of public policy falls under international or transnational public policy. Second, England would enforce any contract or an award except, where the parties are to perform the contract in England and the performance of such contract breaches its domestic public policy. England will also enforce any contract or award except where the contract breaches the domestic policy of the State chosen for the performance of that contract, if the place is not England.<sup>92</sup> Hence, the English courts may look into the fundamental policies of other countries in order to determine whether to enforce the awards. The courts in England are more particular with the domestic policies of the choosing State for the performance of contract, or States whose law parties choose as an applicable law to govern the contract between them.<sup>93</sup>

In 2016, this position was re-emphasised by the UK Supreme Court in *Patel v. Mirza*,<sup>94</sup> The court identified certain policy factors that must be considered whenever the issue of illegality is raised and where it decides whether to enforce a claim/contract/agreement/award arising out of such a relationship. One of the factors is to consider the fundamental drive behind the prohibition that has been transgressed, and whether that purpose will be enhanced if enforcement is denied. Thus, is there any other relevant public policy rule on which the refusal of enforcement would have an impact? In addition, whether refusal of the enforcement would be a proportionate response to the issue of illegality raised. *Patel v. Mirza* thereby established the precedent that an English court would refuse enforcement in the following circumstances:

- i. where the gravity of the illegality is harsh on the general public;
- ii. if the party seeking enforcement knew of, or intended, the conduct that led to the illegal act;
- iii. if the underlying contract is illegal under the existing law in the State where the contract is to be performed, or where the contract violates the law chosen to regulate the contract;

- iv. if the best sanction is to deny the party seeking enforcement;
- v. if denying enforcement will further the purpose of the rule which the conduct has infringed;
- vi. if denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy;
- vii. if refusal of enforcement will ensure that the party seeking enforcement does not profit from the conduct;
- viii. if denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system.

The justification for this decision is premised on the fact that any award seeking to enforce an illegal contract is ultimately enforcing such illegal contracts, and hence infringing on the veracity of the legal system. The court observed that "a person should not be allowed to profit from his own wrongdoing, and that the law should be coherent and not self-defeating, by condoning illegality by giving with the left hand what it takes with the right hand."<sup>95</sup>

### *Corruption*

The public policy exception can be raised to resist enforcement on the ground that the main contract is tainted with corruption. A commentary guide by the United Nations has recognised that bribery, <sup>37</sup> corruption, fraud and other related severe instances could be a basis for resisting an award.<sup>96</sup> In *Westacre*,<sup>97</sup> the defendant contended that the contract was obtained by corruption and, therefore, it violated public policy. The court declined the application to resist the award on the ground that the defendant is estopped from raising the issue as it had been decided earlier by the tribunal. In this case, the court attached importance to the option of preserving the finality of the award as against re-hearing of the same issue. Thus, the enforcing court can only look into the issue of whether or not it falls within the kinds of policies that can operate as a ground to resist the award.

### Application of the public policy exception in Nigeria

Without reproducing the relevant sections, a careful examination of s.52 shows that it encompasses all the conditions stipulated in Article V (1) and (2), Second Schedule of the ACA. This shows that the two legislations are identical in nature. However, each State seems to come up with fundamental or mandatory rules that guide the court when deciding the public policy exception, particularly at the enforcement proceedings of awards. In Nigeria, courts are usually quick to conclude on the violation of public policy at the root of the defense of illegality and breach of Nigerian law or State policies.<sup>98</sup> In *Nwosu v APP*,<sup>99</sup> the apex Court in Nigeria affirmed the interconnectedness between illegality and public policy. The vital question is how do the courts in Nigeria determine when the awards contradict the public policy exception under s.52(2)(b)(ii)? In answering this, an analysis of the judicial cases in Nigeria is desirable.

In *Mutual Life and General Insurance Ltd v Kodi Iheme*,<sup>100</sup> the respondent was a director of the appellant's company. He was suspended from his duty upon failure to tender his certificates within a given time. The matter was referred to arbitration and an award was given which favoured the respondent. He thereafter approached the court to seek judicial enforcement of the award. The appellant resisted the enforcement application on the contention that it violated public policy. The appellant contented that the respondent had altered his age and that the validity of his first degree was in issue. Hence, implementing such an award that was the product of an illegal contract of employment would contradict public policy in Nigeria. Unfortunately, the Court of Appeal ruled that the public policy exception was not pertinent to the case at hand, and thus the court ignored the submissions of the appellant as regard the public policy exception without stressing further. At time of writing, it appears there is little judicial case law relating to arbitral awards on the public policy exception in Nigeria.<sup>101</sup>

A consideration of the relevant provisions of the Foreign Judgment (Reciprocal Enforcement) Act<sup>102</sup> may be helpful in assessing the court's approach toward the public policy exception in Nigeria. This is significant because s. 2(1) of the Act extends the definition to the judgments to cover arbitral award.<sup>103</sup> Thus, provisions of this Act are also applicable to arbitral award as well. Section 6 of the Act comprises the grounds on which the award may be refused for enforcement, including the public policy \*38 exception.<sup>104</sup> Judicial cases under the Foreign Judgment (Reciprocal Enforcement) Act has provided guiding principles to courts to determine public policy exception in proceedings to enforce an award in Nigeria. In *Macaulay v R.Z.B. of Austria*,<sup>105</sup> the appellant contended that the purported agreement to which he had agreed to stand as a guarantor to a loan facility in England was illegal, and as such its enforcement would infringe public policy. The appellant relied on s.8(1) of the Exchange Control Act that:

any contract to which any person residing in Nigeria agreed to make any payment, or to guarantee any bank loan in favour of any person or corporation outside Nigeria shall be null and void except where the Minister gives his approval.<sup>106</sup>

The Court of Appeal rejected the appellant's argument and held that since an illegal contract violates public policy, to allow a debtor to excuse his obligation under the fruits of a valid judgment will also go against the Nigerian public policy. To justify its pronouncement, the court weighed the implications of not enforcing the contract on ground of illegality as against discharging the party of his obligation under the law. This is a case of measuring a lesser and a greater evil. In this case, it would be a greater evil to permit the appellant to rely on a specific law as an escape route to excuse his obligation under a valid contract. In effect, the Nigerian court will neither recognise nor enforce an agreement/award where the contract is illegal notwithstanding that the contract in this case is not illegal in the place of performance.

A similar decision was given in *Dale Power Systems Plc. v Witt & Busch Ltd*,<sup>107</sup> where the award-debtor relied on the public policy ground to resist the enforcement application. The Court, while rejecting the contention of the award-debtor, observed that parties are to honour their contractual obligations and it is not against public policy in Nigeria to enforce such a contract against a Nigerian company who obtained goods on credit and failed to honour its obligation to pay. This suggests that public policy in Nigeria favours honouring obligations and agreements, particularly where such an agreement is lawful in the State where it is to be performed.

As commendable as these cases seem, courts have not been able to formulate in clear terms circumstances that will constitute or likely to qualify as an abuse of public policy so as to provide a guide to both the courts and prospective investors in Nigeria. However, it is certainly not in doubt that the public policy exception for resisting the enforcement of an awards and judgments exists and is recognised in Nigeria. Therefore, the jurisprudence is still growing in this area and with time it is hoped that Nigerian courts will be able to devise exhaustive rules of public policy in this regard.

## Conclusions

This article examined the concept of the public policy exception under both the ACA and its Second Schedule. It discussed the public policy exception in its global perspective by highlighting the attitudes of courts in various States to the exception. It also discovered that neither the New York Convention nor the ACA provides a description of the concept, or offers direction as to how it should operate as a ground for refusing enforcement. The article contended that public policy touches virtually all areas of law, and as such its qualitative content varies from jurisdiction to jurisdiction and from time to time. It further highlighted the two approaches to public policy, namely, the pro-enforcement policy approach (narrow approach,) and the expansive policy approach and identified three stages of public policy: the first stage is the issue of the applicable law to public policy; the second stage is the issue of whether the enforcement of the award itself would violate public policy; and the third concerns the question as to \*39 whether the award should be enforced irrespective of the public policy exception. In addition, public policy and other related grounds were examined. It was discovered that public policy interrelates with other grounds stipulated in the ACA and its Second Schedule for resisting the enforcement application. The analysis showed that it might be difficult to differentiate

between public policy and interrelated grounds. Finally, this article has demonstrated the effects of public policy exception in Nigeria, and analysed the manner in which the Nigeria courts apply and interpret this exception.

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#### Footnotes

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- 3 Asouzu A.A., *International Commercial Arbitration and Africa States Practice, Participation and Institutional Development*, 458-560.
- 4 Abdullah A., *Arbitration in the GCC States, Arbitration General Framework in the GCC in accordance with the latest amendments including new Saudi Arbitration System* (Arab Renaissance House, U.S 2013) 368-393.
- 5 *Ras Pal Gazi Const. Co v FCDA* [2001]10 NWLR (Pt.722)574, paras F-H.
- 6 New York Convention on Recognition and Enforcement of Foreign Arbitral Award 1958, 330 U.N.T.S. 38(1959), Article III.
- 7 UNCITRAL Model Law 2006 (United Nation documents A/40/17, annex I and A/61/17, annex), Article 36 and New York Convention 1958, 330 U.N.T.S. 38(1959), Article III.
- 8 Herein after referred to as New York Convention.
- 9 See Arbitration and Conciliation Act of Nigeria CapA18 LFN 2004; English Arbitration Act, Chap.23, 1996.
- 10 The law was made applicable throughout the Federation. Decree expressly repealed the 1914 Act.
- 11 ACA CapA.18 LFN 2004, Section 52(1). *Tulip (Nig) Ltd v N.T.M.S.A.S* [2011]4 NWLR (Pt. 1237), 274-275, paras H-A.
- 12 ACA CapA18 LFN, 2004, Section 51(2).
- 13 [2015] 17 NWLR (Pt. 1488) 357 C.A.
- 14 Ibid.
- 15 [2009] 2 NWLR (Pt. 1126) 483, 521.
- 16 *Guinness Nig Plc v. Nibol Properties Ltd* [2015] 5 CLRN 65, 71.
- 17 ACA CapA.18 LFN 2004, Ss.52; Second Schedule of the ACA, Article V.
- 18 ACA CapA.18 LFN 2004, Section 52(2)(a)(i)-(vii).
- 19 ACA CapA.18 LFN 2004, Section 52 (2) (b) (i)-(ii).
- 20 Second Schedule contains provision of New York Convention. See also UNCITRAL Model Law 2006, (United Nation documents A/40/17, annex I and A/61/17, annex), Article 36.
- 21 See introductory sentence in Section 52 that afford party opportunity to request the court to refuse enforcement if party furnishes proof of the grounds listed therein.
- 22 ACA CapA.18 LFN 2004, Section 52(2)(b)(ii); Second Schedule of the ACA, Article V(2)(b).
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- 24 Second Schedule of the ACA, Articles V (1) (a), V (2) (a) and VII.
- 25 Emelonye U.P., & Emelonye U., "Public Policy Exception in the Enforcement of Arbitral Awards in Nigeria."
- 26 Ojibara I.M., *Judicial Approach to Public Policy and its Effects on the Enforcement of Foreign Arbitral Awards in Nigeria* (Ph.D. thesis, University of Ilorin, 2017)145.
- 27 Dar W.A., "Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral awards: A South-Asian Perspective" (2015) 2(4), *European Journal of Comparative Law & Governance*, 316-350, 320.
- 28 *Tampico Beverages Inc. v. Productos Naturales de la Sabans S.Z. Alqueria*, SC9909-2017; *Hardy Exploration & Production (India), Inc. v. Government of India* (314 F Supp 3d 95, 109,114(DDC 2018)
- 29 *Soleimany v. Soleimany* [1998] APP. L.R. 02/19.
- 30 *Hardy Exploration & Production (India), Inc. v. Government of India* (314 F Supp 3d 95, 109,114(DDC 2018)

- 31 *National Agricultural Cooperative Marketing Federation of India v. Alimetal S.A* [2020] SCC Online SC 381.
- 32 Sweden Arbitration Act 1999, Section 55(2).
- 33 Zimbabwe Arbitration Act of 2002, Article 32(1)(b)(ii).
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- 49 Jang J., "The Public Policy Exception under the New 2019 HCCH Judgements Convention' (2020) 67, *Netherland Int'l Law Rev*, 97.
- 50 Ibid.
- 51 Kenny Chng, "A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws' (2018) 14(1), *J Priv Int'l Law*, 130-145.
- 52 Naithani Daanish., "A Rational Approach towards Application of Public Policy Exception under Draft Part Z of the ILC Report 2018' (2022) <<https://ssrn.com/abstract=4178787>> accessed on 14 August 2023.
- 53 *Statoil Nigeria Limited v. Inducon Nigeria Limited* [2021] 7 NWLR 1 S.C; *Conoil Plc v. Vitol S.A.* [2012] 2 NWLR 50 C.A.
- 54 English Arbitration Act 1996, Section 103(3); Indian Arbitration and Conciliation (Amendment) Act of 2015, Section 48(2) of the; *Soleimany v. Soleimany* [1998] APP. L.R. 02/19.
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- 62 Second Schedule of the ACA, Article V(1)(d); ACA CapA.18 LFN 2004, Section 52(2)(a)(vi).
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- 65 Junita F., "Public Policy Exception in International Commercial Arbitration-Promoting Uniform Model Norms."
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- 79 Ibid.
- 80 *R.M.A & F.C v U.E.S Ltd* [2011] 9 NWLR (Pt. 1252), 415-416, paras H-B.
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- 82 Where a specific contractual relationship or, performance of such contract is prohibited under relevant law, in effect such contract is illegal therefore null and void.
- 83 However, void contract may not be illegal unless otherwise stated by status.
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105 [1999] 4 NWLR 599.  
106 Emphasis added  
107 [2001]8 NWLR 705.

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