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**TEMPLARS ThoughtLab**

# Limitation Laws for Arbitral Award Enforcement in Nigeria: The Arbitration and Mediation Act 2023 Plugs A Major Loophole

## Introduction

Over the years, one question that has been of considerable concern for both practitioners and litigants alike is whether a wronged contractual counterparty has lost the right of action in relation to its claim by reason of the application of the relevant limitation law whose effect is to extinguish the party's right of action while leaving the cause of action intact.

In the context of arbitration conducted under the Arbitration and Conciliation Act 1988 ("the ACA"), the controversy surrounding the limitation period for the enforcement of arbitral awards was worsened by the effect of the Supreme Court decision in ***City Engineering Nig. Ltd v. Federal Housing Authority*** (the ***City Engineering*** case).[1]

In a continuation of the series that spotlight some of the less heralded but transformative provisions of the Arbitration and Mediation Act 2023 (the "AMA") this article sheds light on the commendable provision of the AMA that has seemingly cured the mischief occasioned by the ACA and case law.

## Limitation of Action

One of the fundamental features of the Nigerian adjectival legal system is that the right of a litigant to enforce his cause of action does not enure in perpetuity. In other words, although the Constitution of the Federal Republic of Nigeria 1999, as altered ("the Constitution") guarantees every person the fundamental right of access to a court or tribunal for the determination of their rights and obligations, where such a person fails to take steps to enforce its cause of action within a stipulated timeframe, the right of action shall be "statute barred" by reason of the applicable statute of limitation.

[1] (1997) 9 NWLR (Pt. 520) 224.

In the case of ***Elebanjo v. Dawodu***[2] the Supreme Court restated the law to the effect that where the law provides for the bringing of action within a prescribed period in respect of a cause of action accruing to a plaintiff, proceeding shall not be brought after the time prescribed by the statute had expired. Therefore, an action brought outside the prescribed period offends the provision of the statute and does not give rise to a cause of action and the plaintiff who might have had a cause of action loses the right to enforce the cause of action.

This is, however, not unique to Nigeria. As the ICSID Tribunal in **Interocean Oil Development Company & Anor v. Federal Republic of Nigeria**[3] correctly noted, "no tribunal would look positively on a claim filed after the Claimant had waited unduly, sitting on its rights for an inordinate amount of time. Statutes of 'limitation' and of 'repose,' which cut off certain legal rights if they are not acted on by a certain deadline, are common to many legal systems."

The law in Nigeria has always been clear regarding the nature and essence of statutes of limitation. In ***Adeniyi v. Governing Council, Yaba College of Technology***[4] the Court of Appeal stated as follows:

*"A statute of limitation in a narrower sense of the term, is an enactment of which the primary purpose is to set a time limit - a limitation period on the bringing of legal proceedings in respect of a right of action accruing to a person by virtue of the common law or some statute other than the limitation statute itself. As a corollary, it must define the point of time from which the limitation period is to run, and it may in addition, contain provision for suspending the currency of the period on various grounds".*

In a similar vein, the Supreme Court stated without equivocation in ***INEC v. Ogbadibo Local Government & Ors***[5] that the essence of a statute of limitation is to encourage diligent pursuit of claims and to discourage the litigation of obsolete causes. The Supreme Court captured it in explicit terms when it held per Galadima, JSC that: *"In all actions, suits and other proceedings at law and in equity, the diligent and careful actor or suitor is favoured to the prejudice of him who is careless and slothful, who sleeps over his rights. The law may therefore deny relief to a party who by his conduct has acquiesced or assented to the infraction of his rights or has led the opposite party responsible for or guilty of such infringement to believe that he has lived (sic) or abandoned his right." It was Abbott C.J in Battley v. Faulkner 106 ER, 668 at 670 who had this to say: "The statute of limitation was intended for the relief and quiet of the defendants and to prevent persons from being harassed at a distant period of time after the committing of the injury complained of." In the case of Board of Trade v. Layser Irvine & Co. Ltd (1927) A.C. 610 at 628, Lord Atkinson said: "The whole purpose of the Limitation Act is to apply to persons who have good causes of action which they could if so disposed, enforce and to deprive them of power of enforcing them after they have lain by for a number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use."*

By reason of the enumerated legislative system applicable in Nigeria on account of our federal structure, limitation of action is a matter within the exclusive legislative competence of the various constituent States in Nigeria except in the case of the Federal Capital Territory, Abuja, for which the National Assembly serves as the legislative body. Consequently, each State has its Limitation Law. Using the illustrative example of Lagos State, by virtue of Section 8(1)(d) of the Limitation Law of Lagos State, an action to enforce an arbitral award where the arbitration agreement is not under seal or where the arbitration is under any other enactment other than the Arbitration and Conciliation

Act shall not be brought after the expiration of 6 (six) years from the date on which the cause of action accrued.

The bone of contention in relation to the above referenced provision historically revolved around the question of when time began to run for the purpose of reckoning the six-year period of limitation. In actions commenced before national courts, the issue was comparatively less problematic. As the Court of Appeal stated per Ogakwu, J.C.A. in ***Airtel Networks Ltd. v. Plus Ltd***[6]***:***

*"In order to ascertain whether an action is statute barred, the court looks at the date when the action was instituted and the date when the cause of action arose. Now, a cause of action is the operative fact or facts (the factual situation) which give rise to a right of action. In simple terms, a cause of action arises the moment a wrong is done to the claimant by the defendant."*

The controversy was more pronounced in the context of actions to enforce arbitral awards. Did the cause of action arise when the arbitral award was published? Or when the award debtor refused to comply with the arbitral award? Or did the time start to count right from when the original cause of action accrued such that the entire period when the arbitration proceedings were conducted were not taken into account? These were the questions put to the Supreme Court in the ***City Engineering*** case**.**

In that case, City Engineering Nig Ltd and the Federal Housing Authority ("FHA") entered into an agreement on 17 December 1974, for the construction of housing units at Festac Town, Badagry Road, Lagos. Clause 30 of the contract contained an agreement to submit any dispute that arose under the contract to arbitration. A dispute subsequently arose between the parties which culminated in the purported termination of the contract on 12 December 1980. In compliance with the arbitration agreement, City Engineering Nig Ltd commenced arbitration on 11 December 1981 which proceedings ended with an award in its favour in November 1985 in the sum of NGN3,722,118.75.

When the FHA failed to pay the award sum, City Engineering Nig Ltd brought an application – sometime in 1988 – to enforce the arbitral award. This application was greeted with an objection to the effect that more than 6 years had elapsed between the period when the original cause of action arose in December 1980 and when the enforcement application was brought in 1988, therefore the enforcement had become statute barred. Both the High Court and the Court of Appeal agreed with FHA and dismissed the application, resulting in an ultimate appeal to the Supreme Court.

In a judgment delivered on 17 July 1997, a seven-man panel of the Supreme Court astonishingly agreed with both FHA and the courts below and held that the time began to run from the date of the original cause of action. The apex Court rejected the "breach of implied term to perform the award" theory propounded in **Agromet Motoimport Ltd. v. Maulden Engineering Co (Beds) Ltd**[7] where Otton J. held that under English Law, the time begins to run from the date of the breach of the implied term to perform the arbitral award which thereby creates a new cause of action.

[2] (2003) 15 NWLR (Pt. 1001) 76.
[3] **Interocean Oil Development Company & Anor v. Federal Republic of Nigeria** ICSID Case No. ARB/13/20 Tribunal's Decision on Nigeria's Preliminary Objections issued on 29 October 2014 para 125.
[4] (2012) LPELR-8434(CA).
[5] (2015) LPELR-24839(SC). See also **Atunrase v. Sunmola** (1985) 1 NWLR (Pt.1) 105 at 120.
[6] (2020) 15 NWLR (Pt. 1747) 235 at page 300, paras E-F.
[7] [1985] 2 All ER 436.

In effect, the Supreme Court discounted the four-year period during which the arbitration proceedings were conducted and the fact that the arbitration was commenced while the appellant was still within time to bring its claim.

It should perhaps be noted, for the sake of completeness, that the ***City Engineering*** case was not the first time that the Supreme Court was invited to consider this complex question.

The first reported case on this point in Nigeria was the decision of the Supreme Court in ***Murmansk State Steamship Line v. Kano State Oil Millers***[8] where the Supreme Court also held that, for the purpose of enforcing an arbitral award, the time begins to run from the date of the accrual of the original cause of action.

However, the Supreme Court took a different approach in two subsequent cases after ***Murmansk***; ***Obembe v Wemabod Estates Limited***[9] and ***Kano State Urban Development Board v. Fanz Construction.***[10] In the latter case, the Supreme Court per Agbaje JSC cited with approval the views of the learned authors of Halsbury's Laws of England[11] to the effect that an arbitral award extinguishes a right of action in respect of the former matters in difference but gives rise to a new and distinct cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement.

Against this background, the **City Engineering** case therefore presented an opportunity for the Supreme Court to settle the controversy and announce Nigeria as an arbitration-friendly jurisdiction by leaning favourably towards ***Obembe*** and ***KSUDB***. Regrettably, the opportunity was not taken, with the resultant effect being that for a quarter of a century, the ***City Engineering Nig. Ltd*** case hung like the sword of Damocles over Nigerian practitioners who had the misfortune of having to inform their clients that they had lost their right of action to enforce their arbitral awards [often obtained at great cost] due to no fault of theirs.

In an illuminating critique, Akoni, SAN argued that although the ***City Engineering*** case represented the position of the law in Nigeria, it did not accord with the current international judicial opinion and it "portends palpable difficulties not only for the contracting parties, but also for [the] future of arbitration". [12]

The ***City Engineering*** case represented a significant drawback to the growth and development of arbitration in Nigeria because parties were disincentivised from referring their disputes to arbitration. Prospective claimants were often caught in a Catch-22 situation and had to choose between approaching the national courts for the determination of their dispute [and facing an objection that the dispute should be referred to arbitration] on one hand and referring their dispute to arbitration [and facing the real risk that the cause of action to enforce the award would have expired by the time the arbitration proceedings were concluded and an award rendered] on the other hand.

[8] (1974) 12 SC 1.
[9] (1977) 5 SC 115.
[10] (1990) 4 NWLR (Pt. 142) 1.
[11] Halsbury's Laws of England (4th Ed, 1973) paragraph 611 page 323.
[12] Olawale Akoni, "Limitation Period for the Enforcement of Arbitration Awards in Nigeria – City Engineering Nig. Ltd v. Federal Housing Authority" available at LIMITATION PERIOD FOR THE ENFORCEMENT OF ARBITRATION AWARDS IN NIGERIA - CITY ENGINEERING NIG (nigerianlawguru.com).

## Innovations of the AMA

In recent publications, the Templars Dispute Resolution team highlighted some of the innovative provisions of the AMA including the provisions on third-party funding; the introduction of the mechanism of award review; the abolition of the error of law on the face of the award defence etc. This time around, this publication focuses on how the AMA resolved the controversy over the computation of time for the purpose of determining whether a successful claimant was still able to validly apply to the courts to recognise and enforce his arbitral award.

Section 34 of the AMA contains the provisions on the application of statutes of limitation to arbitral proceedings. Subsection (4) of the Section frontally addresses the ***City Engineering*** principle by providing that:

> (4) In computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded.

Thus, in one stroke, the AMA has laid the controversy to rest.[13]

## The Supreme Court Walks Back

It is also instructive to add that prior to the enactment of the AMA, and more than twenty years after its decision in the ***City Engineering*** case, the Supreme Court delivered a judgment in ***Sifax (Nig.) Ltd. v. Migfo (Nig.) Ltd***[14] which albeit unconnected with enforcement of arbitral awards brought some relief to litigants.

In a judgment delivered on 16th February 2018, the Supreme Court per Augie JSC held that when a party timeously files action in court, time (reckoned to be from when the proceedings was commenced until judgment was handed down) will cease to run against that party until the matter is resolved.

Although the question whether a party has lost its right to enforce an arbitral award did not arise in ***Sifax***, and while not purporting to expressly overrule ***City Engineering***, by parity of reasoning however, the clear implication of the ***Sifax*** decision was that, unlike the effect of the ***City Engineering Nig. Ltd*** case, the period between the commencement of arbitration proceedings and the date of publication of the arbitration award was not reckoned for the purpose of determining whether a party's action to enforce an arbitral award was statute barred.

In ***Messrs U. Maduka Ent. (Nig.) Ltd. v. B.P.E.***[15] the Court of Appeal relied on the ***Sifax*** case and rejected a contention that the appellant's application for the enforcement of its arbitral award was statute-barred.

[13] It should however be noted that the Arbitration Law of Lagos State No. 18 2009 in section 35(5) contains a similar provision to the effect that in computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded.
[14] (2018) 9 NWLR (Pt. 1623) 13.
[15] (2019) 12 NWLR (Pt. 1687) 429 at 446-447 paras. C-C & 448 paras. A-D.

## Conclusion

It appears that for the foreseeable future, we will continue to appreciate the innovative provisions of the AMA including generational changes like Section 34(4) of the Act.

While the Supreme Court deserves credit for its decision in ***Sifax*** which brought succour to litigants and saved countless arbitral awards that were potentially unenforceable, the well-documented limitations to judge-made law and the potential for a different panel of the Supreme Court reversing itself and returning to the ***City Engineering*** era meant that legislative intervention was what was required to finally lay this controversy to rest. It is in this light that we welcome the enactment of the AMA.

In conclusion, whatever mode of statutory interpretation is applied in the interpretation of section 34(4) of the AMA, there is, in our view, no doubt that the effect of section 34(4) of the AMA is that the period between the commencement of an arbitration and the date of publication of an arbitral award is no more included in determining whether an application to recognise and enforce an award is statute barred.

With the enactment of the AMA, the quest of elevating Nigeria to a veritable arbitration hub in sub-Saharan Africa and an arbitration friendly jurisdiction has received a huge shot in the arm.

In particular, both practitioners and litigants alike can proceed to refer disputes to arbitration without the fear that the entire proceedings would turn out an exercise in futility with the arbitral awards emanating from such proceedings being unenforceable.