

**IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON MONDAY THE 27TH DAY OF JUNE 2016
BEFORE THE HONOURABLE JUSTICE (PROF)
CHUKA AUSTINE OBIOZOR
JUDGE**

SUIT NO: FHC/L/CS/1886/2015

BETWEEN

AUGUSTA OFFSHORE S.p.a

-

APPLICANT

AND

SEABULK OFFSHORE OPERATORS NIGERIA
LIMITED

-

DEFENDANT

JUDGMENT

By Originating Motion dated the 11th day of December 2015, the Applicant brought an action pursuant to section 54(1) of the Arbitration and conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004 and Article III of the Second Schedule thereto (The New York Convention) for an Order of this court recognising and enforcing the Amended Third Partial Final Arbitral Award dated 24th June 2015 and delivered in London, England, United Kingdom by Stephen Hofmeyr QC, sole arbitrator in the above-mentioned arbitration in the same manner as a

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Judgment or order of this court. The Applicant also prayed for such further order as the Court may deem fit to make in the circumstances.

The application of the Applicant is supported by a 13-paragraph Affidavit in Support, deposed to by one Idoko Ochai on the 14th of December 2015 with Exhibits "A", "B" and "C" accompanying it. The Applicant relied on all the paragraphs of the Affidavit and Exhibits. Learned counsel for the Applicant adopted the Written Address in Support of the Originating Motion dated the 11th of December 2015 as the submissions for the Applicant. Additionally, the Applicant relied on the 7-paragraph Further Affidavit, sworn to by one Ademola Ogungbemile on the 20th of April 2016, for which leave was duly granted by the Court and learned Applicant counsel adopted the Reply of the Applicant dated the 20th of April 2016 as further arguments of the Applicant.

Upon the grant of an Order for extension of time to the Respondent, and in response to the Applicant's Originating Motion, the Respondent relied on an 11-paragraph Counter Affidavit deposed to by one Bhadmus Samiat on the 15th of April 2016. The learned counsel for the Respondent adopted the Written Address of the Respondent dated the 15th of April 2016 as the argument of the Respondent in this proceeding.

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I have carefully read and considered the processes filed in this action. Unfortunately, learned counsel for the Applicant had not formulated any issue(s) distinctly for determination. However, upon a holistic consideration of the prayer in the Originating Motion and the issues formulated by the learned Respondent counsel, I find that three issues fall for determination in this suit. These are:

1. Whether this court can recognize and enforce a Convention Award made in England, United Kingdom in Nigeria.
2. Whether the Defences of improper notice of the appointment of arbitrators and the arbitral proceedings avail the Respondent.
3. Whether the composition of the arbitral tribunal was in accordance with the agreements of the parties.

I shall now take these issues seriatim beginning with the first issue. One of the mechanisms for enforcement of foreign awards in Nigeria is captured in Section 54 of the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004. The provisions, which deal with the mechanism for the recognition and enforcement of awards made under the New York Convention of 1958 (otherwise called Convention Awards) provides thus:

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54 (1) Without prejudice to sections 51 and 52 of this Act, where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the Convention on the Recognition and Enforcement of Foreign Awards (hereafter referred to as "the Convention") set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any contracting state.

(a) Provided that, such contracting state has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention;



(b) That the Convention shall apply only to differences arising out of a legal relationship which is contractual.

Article III of the New York Convention provides thus:

Each contracting state shall recognize awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied

upon, under the conditions laid down in the following articles. There shall not be imposed substantially, more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

The Convention avails the contracting states a great degree of latitude. It allows each contracting state, while ratifying or acceding to the convention to make a declaration to the effect that the contracting state would only apply the provisions of the Convention to the recognition or enforcement of awards made in the territory of another contracting state based on mutuality of recognition and enforcement between the states or that the convention provisions are to apply to commercial legal relationships within the definition of the national law of the state concerned, irrespective of whether it is contractual or not. See Article 1.3 of the Convention. The first of these conditions is recognized as the concept of reciprocity while the latter is the notion of commercial reservation.

The facts of the matter before me relates to an arbitral process conducted in London, England (UK) and arising under a charter party

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contract between the Applicant and the Respondent. The question therefore is to determine the prospects for recognition and enforcement of this award in Nigeria as a Convention Award.

It is apposite therefore to determine whether the United Kingdom and Nigeria are contracting States to the New York Convention. Firstly, Nigeria acceded or ratified the New York Convention on the 17th of March 1970 although it entered into force in Nigeria on the 15th of June 1970. The Supreme Court had held in **M.S.S.L. V. Kano Oil Millers (1956-84) 3 SCN (Digest of the Supreme Court Cases) at 452 – 453** that in order to sue on a foreign arbitral award, it must be shown that there is a law binding the Nigerian Court to entertain the claim. In this regard, Nigeria had followed up on established principle and enacted the Arbitration and Conciliation Decree No. 11 of 1988, now the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004, which in Section 54 provides for a mechanism for recognition and enforcement of Convention awards in Nigeria.

Conversely, the United Kingdom acceded to the New York Convention on the 24th of September 1975 and it entered into force on the 23rd of December 1975. (See on these hypothesis, the Web page of the UNCITRAL Commission Session). This was followed up by legislation in the United Kingdom. As such, Part III of the Arbitration Act, 1996

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(UK), gives effect to the New York Convention and incorporates into English law, provisions on enforcement of awards covered by the New York Convention. Section 100 (1) of the Arbitration Act 1996 (UK) defines a "New York Convention" awards as:

... an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention. See David St John Sutton et al, Russell on Arbitration (3rd edition, London: Sweet and Maxwell, 2007).

It is clear that there is mutuality of or reciprocity on recognition and enforcement of Convention Awards between Nigeria and the United Kingdom. In the case of Nigeria however, Nigeria did not provide for commercial reservations. As such, the only specie of convention awards which can be recognized and enforced are those which arise from "legal relationship which is contractual". I have carefully perused Exhibit "A" to the Applicant's Affidavit in support of this application and find that the reference to arbitration and the award sought to be recognized and enforced emanate from the charter party contract between the Applicant and the Respondent. The award therefore arose from a "legal relationship which is contractual". See Section 54 (1) (b) of the

Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004. Consequently, I find that the arbitral award, the subject of this suit, is a Convention Award. I therefore hold that this Court can recognize and enforce a Convention Award made in England, United Kingdom in Nigeria

I now turn to the second and third issues. I shall take the two issues together.

The case of the Respondent is that the award sought to be recognized and enforced does not merit recognition and enforcement by order of this court. Sections 52 (2) (a) (III) and (VI) of the Arbitration and Conciliation Act, 2004, relied upon by the Respondent provide thus:

52 (2). The court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought, may, irrespective of the country in which the award is made, refuse to recognise or enforce an award –

(a) If the party against whom it is invoked furnishes the court proof –

(III) that he was not given proper notice of the appointment of an arbitrator or of the



arbitral proceedings or was otherwise not able to present his case; or

(VI) that the composition of the arbitral tribunal, or the arbitral procedure was not in accordance with the agreement of the parties.

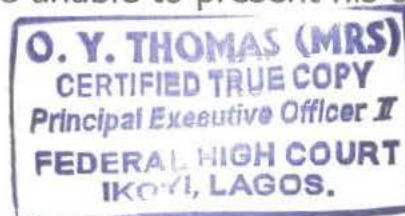
These provisions are on all fours with Article V (1) (b) and (d) of the New York Convention which provide that

V(1). Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that -

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case; or

...

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- (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place.

Counsel for the Applicant had argued that although the Respondent had urged the Court not to recognize and enforce the award in this matter on the grounds that it was not given proper notice of the appointment of the arbitrator the arbitral proceedings or was otherwise unable to present its case; and that the composition of the arbitral procedure was not in accordance with the agreement of the parties, the Respondent by coming under Section 52(2) of the Arbitration and Conciliation Act, 2004 had not invoked any of the grounds listed in Article V (1) (b) and (d) of the New York Convention in view of the exclusivity of the latter provisions. It is the view of the court that the contention of the learned Applicant counsel seems fallacious. In the first place, the provisions of the New York Convention, without more, remain what they are – namely, a set of international uniform rules of convention on the recognition and enforcement of foreign awards. As a convention, the courts in Nigeria cannot simply recognize and enforce awards made pursuant to the New York Convention in the absence of any law in

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Nigeria authorizing it so to do. **See M.S.S.L. V. Kano Oil Millers,** supra. Like a treaty, conventions do not have force of law unless domesticated. Let it be said, without further ado, that a convention is a multilateral treaty. **See Bryan A. Garner, Editor-in-Chief, Black's Law Dictionary (8th edition, St. Paul Minnesota: Thompson West, 2004) 355.**

The New York Convention is a multilateral agreement reached by contracting States under the aegis of the United Nations. It is a species of multilateral treaty. In Nigeria, the Constitution of the Federal Republic of Nigeria, 1999 (as amended) makes very clear provisions on the legal effect of a treaty. Section 12(1) of the Constitution provides thus:

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

No doubt, as an enactment in force before the coming into force of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the Arbitration and Conciliation Act became an existing law deemed to be an Act of the National Assembly by virtue of Section 315 (1) (a) of the Constitution.

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The mechanism for recognition or enforcement of Convention Awards in Nigeria is the procedure on recognition and enforcement found in section 54 (1) of the Arbitration and Conciliation Act. A close reading of Section 54 (1) of the Act shows that it applies "without prejudice to Section 51 and 52" of the Arbitration and Conciliation Act. It must be remembered that Part III of the Arbitration and Conciliation Act, which runs from Sections 43 to 55 (and therefore include Sections 51, 52 and 54) shall, apply solely to cases relating to International commercial arbitration and conciliation, in addition to other provisions of the Act. There is therefore no reason not to apply the defences formulated by Section 52 (2) of the Act to applications seeking the recognition and enforcement of Convention Awards in Nigeria.

Assuming but without conceding that learned Applicant counsel was right, this court shall not shut its eyes to the defences formulated by the Respondent which are on all fours with the defences set out in Article V (1) (b) and (d) of the New York Convention simply because they have been advanced from the Arbitration and Conciliation Act but not specifically under the New York Convention. I shall examine those defences to see if they avail the Respondent in this matter and I so hold.

I have looked at the Amended Third Partial Final Award which is Exhibit "B" to the Affidavit of the Applicant, carefully, and upon a perusal



of its contents to see for myself whether the objections marshalled against it by the Respondent hold substance, I very easily find that the plank of the Respondent's complaint before the arbitral panel was that no dispute had arisen between the Respondent and Applicant to justify a reference to arbitration. I tried, searched but failed to find any objection by the Respondent before the arbitral tribunal that:

- (i) The Respondent was not given proper notice of the appointment of the arbitrator or arbitral proceedings; or
- (ii) That the composition of the arbitral tribunal, or the arbitral procedure was not in accordance with the agreement of the parties.

Looking at the records of the arbitral process, I immediately come to terms with the impression that the purported tendencies sought to be canvassed before me by the Respondent are patently flimsy and inexorably pretentious. I shall now proceed to assess the objections of the Respondent further in the context of the records of the arbitral proceedings culminating in the award for which recognition and enforcement are sought, to decipher their true import and validity. In the process, I shall also make references to the Charter party contract between the parties.

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I see from Exhibit "A" to the Applicant's Affidavit in Support of this application as well as the arbitral proceedings and award which is Exhibit "B" before me, that by a Charter dated the 28th day of May 2010 on BIMCO Supply time 89 terms, the Applicant let the vessel PSV "ASSO VENTUNO" at a daily rate of hire of US\$12,000.00 (Twelve Thousand) for a period of 6 months, with the option to extend for a further 6 months, on terms and conditions set out in the charterparty contract between the parties. The Charterparty was subsequently extended and the hire rate increased by a series of addenda by the parties.

From the Charterparty, the names and addresses for notices and other communications required to be given by the owners, the Applicant are **AUGUSTA OFFSHORE S.P.A, VIA RIVIERA DI CHIALA, 287 80121 – NAPOLI ITALY** while that of the charterer, the Respondent are: **SEABULK OFFSHORE OPERATORS NIGERIA LIMITED, 327B CORPORATION DRIVE, DOLPHIN ESTATE, IKOYI, LAGOS.**

The Charterparty provided for recourse to arbitration. More specifically, Part II, Clause 31 provided thus:

This Charterparty shall be governed by English Law and any dispute arising out of this Charter Party shall be referred to arbitration in London, one arbitrator being appointed by each

party, in accordance with the Arbitration Acts 1950 and 1979 or

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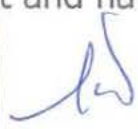
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any statutory modification or re-enactment thereof for the time being in force. On receipt by one party of the nomination in writing of the other party's arbitrator that party shall appoint their arbitrator within 14 days, failing which the arbitrator already appointed shall act as sole arbitrator. If two arbitrators properly appointed shall not agree they shall appoint an umpire whose decision shall be final.

The Applicant alleged that disputes had arisen under the Charterparty. It then nominated the sole arbitrator in this matter, and referred the alleged dispute to arbitration. Thereafter, Notices of Arbitration delivered by hand on the 4th of August 2014 were sent to the Respondent at their registered office address at 35, Moloney Street, Lagos State, Nigeria and its principal place of business at 11A Grace Anjous Drive, Lekki Phase I, Lagos State, Nigeria.

In paragraph 3 and 5 of the Further Affidavit of the Applicant, the Applicant alleged that a copy of the Notice of Arbitration was left at 327B Corporation Drive, Dolphin Estate, Ikoyi, Lagos – this is the address of the Respondent for notices under the Charter Party as pointed out earlier. I have carefully studied the records of arbitral proceedings, giving rise to the award for which recognition and enforcement are sought and have not found this piece of information

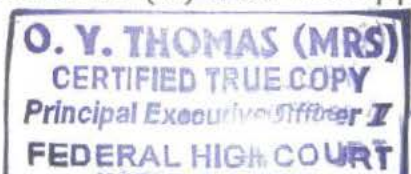

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from the Applicant. In the context of paragraphs 5,6 and 7 of the Counter Affidavit of the Respondent, I find myself unable to place much premium on paragraphs 3 and 5 of the Applicant's Further Affidavit on place of service.

The charter party required that notices be served on the Respondent at 327B Corporation Drive, Dolphin Estate, Ikoyi Lagos State, Nigeria. The record of proceedings of the arbitrator showed that the Notice of arbitration and the nominating of the Applicant's arbitrator were served but had not been served at this address. This had prompted the defence of the Respondent that it was not given proper notice of the appointment of the arbitrator or arbitral proceedings and that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

Unfortunately however, for the Respondent, none of these lines of possible defences to the recognition or enforcement of Convention Awards was raised before the arbitrator. The records of the arbitral proceedings show that the Applicant by letter from its solicitor, dated the 9th of September 2014 informed the Respondent that (i) the arbitrator nominated by it was obliged to act as sole arbitrator in the reference (ii) that the Applicant wished to proceed expeditiously with the reference (iii) that the Applicant proposed that the Notice of Arbitration



should stand as its Point of Claim and invited the Respondent to agree to serve Points of Defence within 14 days. In the absence of agreement, the Applicant further invited the arbitrator already nominated by it to make an order for service of Points of Defence within 14 days.

The Respondent did not respond to the letter of 9th September 2014 from the Applicant. In consequence, the arbitrator already nominated by the Applicant then sent a letter dated the 19th of September 2014 to the Respondent and made the following orders:

- (1) The Notice of Arbitration delivered on 4 August 2014 is to stand as Points of Claim in this reference
- (2) The charterers are required to serve Points of Defence in this reference by 5pm (London time) on 15 October 2014
- (3) Costs in reference.

It is intriguing that on the 29th of September 2014, the arbitrator already nominated by the Applicant received a letter from Lanre Olayinka & Co dated 19th September 2014 addressed to the arbitrator together with a copy of a letter from Lanre Olayinka & Co also dated 19th September 2014 addressed to the Applicant's solicitor. In the letter to the arbitrator (already nominated by the Applicant), the Respondent objected to the appointment of the arbitrator on the grounds that no

dispute had arisen between the Applicant and the Respondent. As such, the invocation of the arbitration clause was premature. In no place did the Respondent raise the issue that it was not given proper notice of the appointment of the arbitrator or arbitral proceedings; or that the composition of the arbitral tribunal, or the arbitral procedure was not in accordance with the agreement of the parties.

Indeed, in keeping with section 30 of the extant English Arbitration Act, 1996, the applicable law or *lex arbitri* chosen by the parties under the Charter Party, and which provides that, "unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive Jurisdiction....", the arbitrator ultimately ruled that it had jurisdiction and that a dispute had arisen.

The letter of the Respondent served on the arbitrator on 5th of November 2014 further to the correspondence from the arbitrator of 22nd October 2014 is quite instructive. In that letter, the Respondent stated as follows:

First and foremost, we must state that by our e-mail, with attachments, dated 5th November, 2014, caused to the solicitor to the claimant, of which you were copied, we admitted the sum of \$3,188,340.96 as the extent of the

respondent's indebtedness to the claimant in respect of the

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Charterparty. We have also availed the said solicitor to the claimant all the necessary document establishing our claim...

Whilst our client does not contest hiring the claimant's vessel or the fact that monies are due to the claimant from the said hire, the case of the Respondent is that certain sums have been expended by the respondent and on behalf of the claimant in fulfilment (sic) of some of the claimant's obligations directly related to the Charter party, to wit the said sums should be deducted from the indebtedness of the respondent to the claimant.

This position is confirmed by the fact that whilst the sum of USD6,636, 284.00 was claimed by the Claimant in the notice of arbitration served on the Respondent, the solicitor to the Claimant, on behalf of the Claimant, has both verbally and formally, admitted that the sum of USD 1,555,065.03 is due and payable to the respondent by the Claimant, and that the said sum will be deducted from the claim of the Claimant.

There is nothing before this court challenging the records of the arbitral proceedings by the Respondent. It is equally clear as shown above and particularly from pages 4 to 9 of the records of arbitral proceedings and award that:



1. The Notice of Arbitration was served on the Respondent although at a different address from that indicated in the charter party.
2. The Respondent did not contest or challenge the issue of service of the Notice of Arbitration.
3. The Respondent's only ground on the Jurisdiction of the tribunal was that no dispute had arisen between the Applicant and Respondent. As such the invocation of the arbitration clause was premature.
4. The arbitrator handed down an award that a dispute had arisen and that the arbitral panel had jurisdiction.
5. The Respondent did not nominate its arbitrator within 14 days as required by the charter party.
6. The Applicant claimed the sum of US D6,636,284 against the Respondent but the Respondent only admitted liability in the sum of \$3,188,340.96.

Again, it is clear from the records that the Respondent submitted to the Jurisdiction of the arbitrator who was a sole arbitrator. By letter of the Respondent to the arbitrator dated 24th March 2015, at pages 13 – 14 of the records of arbitration, the Respondent wrote as follows:



Whilst we recognize that as the sole arbitrator in this matter, it is within the purview of your powers to make an order as to costs between parties, we apply for a 'costs reserved' order ...

It is our opinion that parties be directed to properly put their case before the tribunal so as to enable the tribunal commence with its main business in this matter ...

We humbly urge your good self to exercise your discretion in favour of the Respondent ...

Finally, we submit that our application is not prejudicial to the claimant and same will afford the tribunal the opportunity to apprise the instant issue of Jurisdiction in the overall context of the whole arbitration.

I also see from page 18 of the records of arbitration that on the 17th of March 2015, the arbitrator then sent its directives to the parties and directed the Applicant, who was the claimant, to serve fuller and more complete Points of Claim on or before the 31st of March 2015. In response, the Respondent who was the Respondent in the arbitration, was directed to serve Points of Defence on or before the 28th of April 2015. The Applicant was further directed to serve Point of Reply on or before 12th May 2015. Thereafter, the Applicant shall have liberty to



renew its application for an immediate Partial Final Award in the sum of US \$3,188,340.96. The tribunal then directed that as soon as practicable following receipt of the Points of Claim, Defence and Reply, it would proceed with the reference in the manner agreed in writing by the parties or, failing which the tribunal would proceed in the manner it directed.

The Respondent before me did not deny receipt of the arbitrator's directives. I also see at pages 18 to 19 of the records of arbitration, that on the 31st of March 2015, the Applicant submitted its documents to the tribunal in keeping with the directives of the tribunal and confirmed that a copy had been served on the Respondent.

The Respondent did not send its Points of Defence at all. In consequence, and on the expiry of the period for submission of the Respondent's Points of Defence, the Appellant renewed its application for an immediate Partial Final Award in the sum of US \$3,188,340.00 (which was admitted by the Respondent) on the 13th of May 2015. On the 19th of May 2015, the tribunal sent a reminder to the Respondent and added as follows:

The Respondent's Point of Defence were due to be served in accordance with my directions (direction 4) on or before 28th April 2015. To date Point of Defence have not been served.

In accordance with paragraph 6 of my directions, the claimant has renewed its application.... for an immediate Partial Final Award in the sum of US \$3,188,340.96.

I propose now to proceed to an award. Should the Respondent wish to respond to the application, it is required to do so on or before 5 pm (London time) on Friday 22 May 2015.

If you have any questions please do not hesitate to ask.

See pages 19 – 20 of the records of arbitration. The Respondent did not deny the receipt of this correspondence.

The arbitrator got no response from the Respondent and in consequence, the arbitrator proceeded ex parte and after a review of the claims, facts and evidence and in view of the Respondent's admission, handed down the amended Third Partial Final Award for which recognition and enforcement are now sought by the Applicant/successful party.

It is important to immediately point out that there is no implied term of an arbitration agreement that service of a claim on the proposed Respondent is a precondition to a valid request for arbitration. **See Paul Smith Ltd V. H&S International Holding Inc. (1991) 2**



Lloyd's Rep. 127. It may, of course, be an express term. I have not found such express term in the Charter Party of the parties before me.

Secondly, the only objection of the Respondent as shown in the records of arbitration on the crystallization of dispute between the parties is non sequitur. The question to ask is: what is a dispute? Happily, the Court of Appeal has offered reprieve. In **Bendex Engineering Corporation & Anor V. Efficient Petroleum Nigeria Ltd (2001) 8 NWLR (Pt. 715)333,361, Olagunju, JCA (as he then was)** vividly captured the definition of dispute as "...agitation by contending parties over a right". I see from the records of arbitration that whilst the claim of the Applicant is for the sum USD 6,636, 284.00, the Respondent only admitted liability in the sum of USD 3,188,340.96 as the sum due to the Applicant under the Charter Party contract of the parties. Surely, where a party admits liability to the payment of a certain sum, which is yet to be paid by him, then, by the authority of **Exfin Shipping (India) Ltd Mumbai V. Tolani Shipping Ltd (2006) EWHC 1090**, that fact alone is sufficient to constitute a dispute, as is the case in the matter before me.

Thirdly, in the Counter Affidavit of the Respondent it was contended that the Notice of Arbitration was not served on the Respondent's address as furnished in the Charter Party.


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While it is true that it is important that the particular step which is to be performed in order to commence arbitral proceedings be followed, for instance on the issue of service of a request for arbitration, it is not sacrosanct that a default invalidates the arbitral process. The proposed Respondent may of course waive any objection to the failure to comply with the contractual requirement and the arbitration will then proceed as from the original date. Additionally, the Respondent may also lose the right to object if he takes part in the reference without making his objection known. See Russell on Arbitration, op cit., at p.189. In any event, it must be remembered that the parties chose their seat of arbitration and the applicable law to the conduct of arbitration. Part II, Clause 31 of the Charter party contract stipulates that London shall be the seat of arbitration with English law, in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force, as their applicable law to arbitration. I see from Part I of the Charter Party that the contract was made on the 28th of May 2010. The arbitrator or arbitral panel relied on the English Arbitration Act, 1996. In the conduct of its proceedings. This is capable of verification by reference to the record of its proceedings. Consequently, by virtue of Section 124(2) of the Evidence Act, 2011, I acquire knowledge of the fact that there is the English

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Arbitration Act, 1996 from the said records of proceedings and hereby take such knowledge into account in this matter. Additionally, Russell or Arbitration op. cit., at p.189, also refers to the Arbitration Act of 1996 (UK). I also acquire knowledge of the fact of the existence of the Act therefrom. I see from the provisions of Section 73 of the extant Act, the English Arbitration Act of 1996, which apply to the parties' conduct of arbitration, that the failure of the Respondent to object to the place of service of Notice of Arbitration timely – or, as in this case, at all – has led to the loss of the right to object at this stage and I so hold.

In any event, the concept of waiver is capable of definition or description. "Waiver", according to **Eso, JSC (as he then was) in Ariori V. Elemo (1983) 1 SC 13,48-49** means that:

... the person who is to enjoy the benefit or who has the choice of two benefits is fully aware of his rights to the benefit or benefits, but he either neglects to exercise his right to the benefit, or where he has a choice of two, he decided to take one but not both.

See also **Agbaje, JSC (as he then was) in Adegoke Motors Ltd V. Adesanya (1989) 3 NWLR (Pt. 109) 250, 292.**

Surely, if a party objects to any action(s) taken in the course of arbitral proceedings but takes no step to challenge them before an

award is made, he will be deemed to have waived his objections, even if the action(s) amounted to an irregularity on the part of the arbitral tribunal. **See Bignal V. Gale (1841) 2 M & G 830.** Earlier on in this Judgment, I had shown that the Respondent acknowledged the receipt of the Notice of Arbitration. It also submitted to the arbitrator vide its letter of 24th of March 2015, part of which read:

It is our opinion that parties be directed to properly put their case before the tribunal so as to enable the tribunal commence with its main business in this matter ...

I am satisfied that the objection now canvassed by the Respondent in the Counter Affidavit on service of the Notice of Arbitration, is indeed non sequitur. It seems to be an afterthought and the exegesis of an inglorious outing by a drunken and drowning man who clings to just about anything to save the last breadth. I find no merit in it.

An arbitral tribunal has inherent powers to proceed ex parte for good cause. **See Wood V. Leak (1806) 12 VES 412.** No doubts, the law empowers an arbitral tribunal to proceed or continue with the arbitral proceedings in the absence of a party. This will be the case where a party fails to attend or be represented at a hearing or where a party fails to submit any Written Submissions or documents. Here, in order to give the absenting or non-participating party a reasonable

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opportunity, the arbitral tribunal should ensure that it has given that party sufficient notice that it intends to proceed with the arbitration despite that party's absence or non-participation. See **MYRON (MV) (OWNERS) V. TRADEX EXPORT SA (1970) 1 Q.B 527**. In **L.S.D.P.C V. Adold/Stamm International Ltd (1994) 7 NWLR (Pt. 358) 545,564, Ogwuegbu, JSC** (as he then was) held:

An arbitrator may proceed with a reference in the absence of one of the parties if he does not choose to attend. The party ought to have notice that the arbitrator will proceed ex parte in the case if he does not attend. See **Gladwin V. Chilcote (1841) 9 Dowl 550 and Feather Stone V. Copper (1803) 9 Ves. 67; 32 E.R. 526**.

I am satisfied that the arbitrator in the case before me gave sufficient notice to the Respondent, who failed to appear or failed to submit its Written Submissions or document(s). I see from the records of arbitration that the arbitral tribunal sent a reminder to the Respondent on the 19th of May 2015 that the Respondent was out of time in filing its Points of Defence and that in accordance with paragraph 6 of its directions, the Applicant, who was claimant, had renewed its application for an immediate Partial Final Award in the sum of US \$3,188,340.96.

The tribunal then ended the reminder thus:



I propose now to proceed to an award should the Respondent wish to respond to the application, it is required to do so on or before 5 pm (London time) on Friday 22 May 2015. If you have any questions, please do not hesitate to ask.

Surely, that was sufficient indication to the Respondent that the arbitral tribunal was going to proceed whether or not it appeared or participated. The Respondent had not denied the receipt of the reminder. It nevertheless chose not to attend. It cannot now validly contend that it was not given an opportunity or was otherwise not able to present its case, or as it deposed in paragraph 9 of its Counter Affidavit, that it had a case which would have been put to the arbitrator. The law is clear, that a party to arbitration cannot claim a denial of fair hearing if he was properly informed that arbitral proceedings would go on if he failed to attend and yet he chose not to attend. **See Ajidahun V. Ajidahun (2000) 4 NWLR (Pt. 654) 605.**

Parties to arbitration are deemed to have covenanted to perform a valid award. Consequently, where there is default on the part of the unsuccessful party, the successful party may approach the court on the strength of the implied covenant for a Judgment of the court giving effect to the award. Consensual arbitration, such as the type prescribed

in the Charter Party, is, as the name suggests, a product of agreement. It must be remembered that parties are under a duty to carry out the terms of their contract. **See Abaju V. Adikpa (1994) 1 NWLR (Pt. 322) 621, 629.** As in this case, the duty on the parties is the duty to go to arbitration. As was rightly and most eminently stated by His Lordship, **Nnaemeka Agu, JSC (as he then was) in Commerce Assurance Ltd V. Alli (1992) 3 NWLR (Pt. 232) 710, 725:**

The underlying principle is that parties to a dispute have a choice. They may resort to the normal machinery for administration of Justice by going to the regular courts of the land and have disputes determined, both as to the fact and to the law, by the courts. Or, they may choose the arbitrator to be Judge between them. If they take the latter course, they cannot, when the award is good on the face of it, object to the award on grounds of law or of facts.

I have carefully considered the submission of learned Respondent counsel and find that much as submissions of counsel are not evidence, neither the submissions nor the Counter Affidavit in this suit challenges the records of proceedings culminating in the award before me.

Accordingly, and by virtue of section 125 of the Evidence Act, 2011, I have tested the objection(s) of the Respondent by reference to the

records of the arbitral proceedings, which must be allowed to speak for itself. I have therefore contained myself accordingly except where otherwise necessary.

In the final analysis, and upon a holistic review of the processes in this Suit and the relevant law and principle, I find that the Amended Third Partial Final Arbitral Award dated the 24th of June 2015 is a valid award and the objections of the Respondent to an order for its recognition and enforcement are empty and without merits.

Accordingly, it is hereby ordered and I hereby make an order for the recognition and enforcement of the Amended Third Partial Final Arbitral Award dated the 24th of June 2015 and delivered in London, England, United Kingdom by Stephen Hofmeyr QC, sole arbitrator in the matter of an arbitration between Augusta Offshore SPA and Seabulk Offshore Operators Nigeria Ltd in the same manner as a Judgment or Order of this Honourable court.

Court: No order as to Costs.

O. Y. THOMAS (MRS)
CERTIFIED TRUE COPY
Principal Executive Officer II
FEDERAL HIGH COURT
IKERI, LAG

HON JUSTICE (PROF)
CHUKA AUSTINE OBIOZOR
JUDGE

27/06/2016



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