



Mandatory Principles of Law and Delocalized Arbitration in International Commercial Arbitration

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ABSTRACT

Mandatory rules denote those rules of law that parties cannot derogate from. These are rules which in appropriate cases supersede the proper law with the result that their provisions, override the will of the parties. It does not matter whether the applicable law is ascertained by reference to an express stipulation or by reference to the forum with the closest connection. It typically regulate matters in which the “interest of the state is too important for them to be in competition with foreign laws” or the will of the parties and it includes those aspects of public policy, which because they reflect the basic social and economic philosophy of a state, are framed in an imperative manner. These include currency and exchange regulations, boycotts and blockades, competition, and environmental protection laws. One of the limitations on party autonomy within a national legal system is that overriding laws of the forum may override the law chosen by the parties. Freedom of choice (autonomy of will) is a general principle of private international law and is to be respected in principle, it should operate within the limits imposed by such other equally important general principles of law or subject to any restraints of public policy. The theory of delocalization is a mode of detaching international commercial arbitration from legal system of the forum. One main purpose of delocalization is to eliminate the unintended effects of certain arbitration tribunal conducting arbitration seized with hostile features of the law of the place where the arbitration is held. Therefore armed with an arbitral power to make interim award basically for protection and preservation of the res, pending the final award. In Nigeria delocalized arbitral award can be refused on the grounds of non-compliance with the mandatory rules and public policy by the arbitral tribunal. The Arbitration and Conciliation Act¹.

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Introduction

The traditional conflict theory postulates that a statute is in inapplicable to a contract unless the statute forms a part of the proper law of the contract or is otherwise applicable as part of the procedural laws of a forum court. However, it has long been accepted that this proposition is subject to the qualification that obligatory laws of the forum may apply to a contract. Thus, one of the limitations on party autonomy within a national legal system is that overriding laws of the forum may override the law chosen by the parties.

As A.F.M. Maniruzzaman puts it, ‘although the parties’ freedom of choice (autonomy of will) is a general principle of private international law and is to be respected in principle, it should operate within the limits imposed by such other equally important general principles of law or subject to any restraints of public policy’².

Mandatory rules denote those rules of law that parties cannot derogate from.

These are rules which in appropriate cases supersede the proper law with the result that their provisions, override the will of the parties. It does not matter whether the applicable law is ascertained by reference to an express stipulation or by reference to the forum with the closest connection. In short, it is a law which applies regardless of, or despite, the proper law of contract. Mandatory Rules, typically regulate matters in which the “interest of the state is too important for them to be in competition with foreign laws” or the will of the parties and it includes those aspects of public policy, which because they reflect the basic social and economic philosophy of a state, are framed in an imperative manner. These include currency and exchange regulations, boycotts and blockades,

¹ Section 52(2) (a)(vii) and (b)(ii) - provides that where recognition and enforcement of an award is sought in the court or where an application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse to enforce an award. It further provides that the arbitral tribunal can refuse the recognition and enforcement where the arbitral procedure

was not in accordance with the law of the country where the arbitration took place.

² Okezie Chukwumerije., Mandatory Rules of Law in International Commercial Arbitration, *Osgoode Hall Law School Arbitration Review, Canada.1993. p. 562 footnote 4.*

competition, and environmental protection laws.³ International Commercial Arbitration is not entirely free from the demands of public policy and other fundamental provisions of relevant Laws. For an award to be valid it must conform to the mandatory rules of the forum be it delocalized or denationalized in order to meet the standards of validity in the place of recognition and enforcement.

In Nigeria, delocalized arbitral award can be refused on the grounds of non-compliance with the mandatory rules and public policy by the arbitral tribunal. The Arbitration and Conciliation Act, section 52(2)(a)(vii) and (b)(ii) -provides that where recognition and enforcement of an award is sought in the court or where an application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse to enforce an award. It further provides that the arbitral tribunal can refuse the recognition and enforcement where the arbitral procedure was not in accordance with the law of the country where the arbitration took place.

The court in Nigeria can refuse the recognition and enforcement of an arbitral award, if it is against the public policy of Nigeria.⁴

International Public Policy may also limit the scope of what is arbitrable. For example, where bribery or some other form of corruption such as financial and other inducements⁵ are found to have been used by the party seeking recognition and enforcement of the award. Recognition and Enforcement of an award may be refused, if the court finds that: "The recognition or enforcement of the award would be contrary to the public policy of that country⁶." Setting aside of arbitration award or agreement for reasons of state or International Public Policy and its scope in relation to arbitration matter.

The Arbitration and Conciliation Act of Nigeria, failed to define Public Policy in particular. As the Act did not define the meaning and scope of International Public Policy, it shall be reasonable to state that foreign award could be set aside where it violates either the domestic or International Public Policy⁷.

The Black's Law Dictionary defined Public Policy to mean, "Community Common Sense and Common Conscience, extended and applied through the state to matters of public morals, health, safety, welfare and the like, it is that general and well settled public opinion relating to man's plain, palpable duty to his fellow man' having regard to all circumstances of each particular relation and situation.⁸

The parties into arbitration contract or into dispute are free to agree on a large number of issues. In other words, apart from areas where courts can intervene on grounds of public policy, the parties are free to agree on the applicable laws being one of the issues on which parties are free to agree upon⁹. The parties can determine the applicable law or the arbitral tribunal can

decide as amiable compositeur. The tribunal shall decide in accordance with terms of the contract and shall take account of the usages of the trade applicable to the transaction. In international arbitration, several laws may be involved including the rules of established arbitration institutions and conventions.

The arbitration tribunal shall decide the dispute in accordance with the law agreed upon by the parties and failing such agreement; the arbitral tribunal shall determine the applicable law. Arbitration and Conciliation Act of Nigeria, 2004, in section 53 follows the UNCITRAL Model Law and provides thus: "Notwithstanding the provisions of this Act the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the arbitration rules set out in the first schedule of this act, or the UNCITRAL Arbitration Rules or any other international rules acceptable to the parties"¹⁰. From the above it means that the parties have the right to determine the governing law to the agreement and the arbitral proceedings in international arbitration proceedings. According to Section 47(1) and (2) of the Arbitration and Conciliation Act 2004,

(1) The arbitral tribunal shall decide the dispute in accordance with the rule in force in the country whose laws the parties have chosen as applicable to the substance of the dispute.

(2) Any designation of law or legal system of a country shall unless otherwise agreed be construed as directly referring to the substantive law of that country and not conflict of law rules¹¹. This section is on all fours with Section 28(1) of the UNCITRAL Model law¹². These subsections reinforce the principle of Party Autonomy. Whereas the Nigerian Act refers to "the rule in force" in the country, the Model Law refers to "the rules of law as are chosen by the parties."

However, whatever is the rule, such a designation refers to the substantive law and not to the conflict of laws rules. The problem with most national laws is that they contain mandatory provisions that add to the rights and obligation contained in the contractual obligation¹³. In addition to the power of the parties to select the applicable law; the arbitrator has considerable powers to choose the procedure to be adopted Article V (1)(d) of the New York Convention and Section 47 (3) of the Act make provisions for this. Section 47 (3) provides that "where the law of the country to be applied is not determined by the parties, the arbitral tribunal shall apply the law as determined by the conflict of laws rules which it considers applicable". The issues of the governing law may arise at three distinct stages: -namely

- i. At the stage of drafting of the arbitration agreement where in the parties may disagree on the applicable law.
- ii. At the stage of arbitral tribunal proceeding before the making of an award and finally.
- iii. At the state of recognition and enforcement or impeachment of an arbitral award.

Parties often disagree on the issue of the governing law at the time of drafting the arbitration agreement and in which case the parties may agree to keep silent and allow the arbitral tribunal to decide it.¹⁴ This often occurs where one party is a state party or a sovereign nation.

³ *Ibid* p. 262-263

⁴ Arbitration and Conciliation Act. Cap. A19 Laws of Federation of Nigeria 2010, Section 52(2)(a)(vii) and (b)(ii)

⁵ Redfern A & Hunter M. *op.cit.p.145*

⁶ New York Convention. Art. V 2(b), Arbitration & Conciliation Act Cap A 19 Laws of Federation in Nigeria, 2010 Section 52 (b)(i)(ii)

⁷ Nwakoby Op Cit. p.287

⁸ Black's Law Dictionary *St Paul Minni West Publishing Co. 6th Ed, Centennial Edition 1891 – 1991. p. 12,31*

⁹ The UNCITRAL Model Laws: Arts.3 (1) 11(1), 13(1), 17, 19, 20, 21,22,24, 25, 26, 28, 31(2) and 33.

¹⁰ Arbitration and Conciliation Act: section 53

¹¹ *Ibid. S. 47(1) and (2)*

¹² UNCITRAL Model Laws: S. 28(1)

¹³ Paul.O.Idoringie. *Loc. Cit. p.12*

¹⁴ Nwakoby. *Op. Cit. p. 66*

Lex Arbitri

This is the law governing the arbitration no matter where the arbitration took place. Arbitration does not exist in vacuum. It is not only regulated by the wishes of the parties but also by the governing law, generally referred to as the *Lex arbitri* which is the law of the place or “Seat” of the arbitration, in addition to this law, other laws may have to be taken into account as regulating such matters as the capacity of the parties to arbitrate, the validity of the reference to arbitration, the extent of the arbitration’s jurisdiction and the enforceability of the arbitral award.

In any international commercial arbitration, many national systems of law or legal rules may come into play.

The *lex arbitri* in practice is likely extended to matters such as: Whether a dispute is capable of being referred to arbitration, that is, that such matter is not a criminal matter, or a case on

(i) Marriages and that the case is a case, which is capable of settlement under accord and satisfaction.

(ii) Time limit for commencing arbitration.

(iii) Appointment of the arbitrators.

(iv) The powers of the arbitrators.

(v) The form and validity of the arbitral award, as validity is one of the final requirements for an internationally effective arbitration agreement for the same to be valid “under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made”¹⁵ This requirement is imposed by article V (1) (a) of the New York Convention, which provides that recognition and enforcement of an award may be refused if the arbitration agreement itself is not valid¹⁶. A similar requirement is imposed by the model law, which provides that invalidity of an arbitration agreement is to be decided under the proper law of the agreement (“the law to which the parties have subjected it”) or, failing any indication of the proper law, under the *lex loci arbitri* (“the law of the country where the award was made”¹⁷. The validity of an arbitration agreement may be called into question in many different situations usually at the beginning of the process – a party may challenge a submission to arbitration on the basis that the arbitration agreement is invalid; this challenge may be made to the arbitral tribunal itself or to a court of competent jurisdiction. At the end of the arbitral proceedings, any question as to the validity of the arbitration agreement will normally be raised in the context of an action by the losing party to challenge the award or to resist recognition or enforcement of it; the unsuccessful party will attempt to deny the validity of the arbitration agreement, whilst the successful party will naturally attempt to uphold it.

(vi) The law governing recognition and enforcement of the award.

(vii) The law governing the parties’ capacity to enter into an arbitration agreement.

(viii) Interim measure of protection, this is called interim award, which is an award that the tribunal, may make in the course of its proceedings pending the final determination of the issues in dispute. All decision taken by the arbitral tribunal in respect of such issues as its jurisdiction, competence of any of the parties to be appointed an arbitrator, and the protection of the “res” during the pendency of the matter before the arbitral tribunal are interim awards because they are made in

the course of the arbitral tribunal proceedings.¹⁸ The Nigerian arbitration and conciliation Act: Article 32 (1) of the rules provides that “in addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory or partial awards.”¹⁹ The UNCITRAL MODEL LAW, articles, 1 (2); 8 and 9 are concerned with enforcing the arbitration agreement and interim measures of protection respectively; also articles 35 and 36 of the same Model Law are concerned with recognition and enforcement of the award.²⁰ The laws of many countries give an arbitral tribunal power to make orders for the preservation or detention of the subject matter of the dispute, where it is within the possession or control of one of the parties. Section 13 of Arbitration and Conciliation Act Cap A 18, Law of Federation of Nigeria, 2004 provides that “unless and otherwise agreed by the parties, the Arbitral proceedings:-

(a) At the request of a party, order any party to take such interim measure of protection as the Arbitral Tribunal may consider necessary in respect of the subject matter of the dispute and

(b) Require party to provide appropriate in connection with any measure taken under paragraph A of this section²¹ the essence of this section is to preserve the “res” when an action is pending in court. It is to prevent irreparable damage that might occur as a result of the destruction of the subject matter. It should however be noted that a court of competent jurisdiction properly seised of the matter may grant interim or conservatory measures upon the application of a party and such an application will not be deemed to be a waiver of the agreement to arbitrate. Article 26(3) of the first schedule to the Nigerian Arbitration Act – states that “A request for interim measures addressed by any party to court shall not be deemed in compatible with the agreement to arbitrate or as a waiver of that agreement”²² An Arbitral tribunal has no power over persons who are not parties to the arbitration clause, or submission agreement. Accordingly, where the property that is to be preserved is not within the control or possession of one of the parties, the tribunal cannot make an effective order. When a situation like this arises, the supportive role of the court is sought by the party who desires the interim measure.²³ In contrast, the consideration of sovereign immunity may be relevant when, either prior to or during the proceedings, the party having a claim against a foreign state needs to seek judicial support to obtain decisions that are beyond the powers of the arbitrators and fall within the exclusive jurisdiction of the courts. Such may be the case in regard to the production of evidence, the appointment of experts to inspect the disputed quality of goods, or other interim measures of protection, including attachment of assets in litigation or intended to secure satisfaction of an award. To the extent that such measures do not require compulsion, there is no reason to believe that sovereign immunity should be a factor of determination. The situation is otherwise the same in the case

¹⁸ Nwakoby. *Op. Cit.* p.174

¹⁹ Arbitration and Conciliation Act Cap A 18 Law of Federation of Nigeria 2004, Art. 32(1) of the Rules.

²⁰ UNCITRAL MODEL LAW: Arts. 1(2), 8 and 9, 35 and 36.

²¹ Arbitration and Conciliation Act, Section 13

²² Art. 26(3) of the First Schedule to the Nigerian Arbitration Act, 2004.

²³ Mohammed M. Akanbi. “*Modus Law of Arbitration, with Particular Reference to Nigeria’s Arbitration and Conciliation Act, 2004*”, *Modus International*_2003No 5 (3) p 12.

¹⁵ Redfern A. & Hunter M. *Op.Cit.* p. 148

¹⁶ New York Convention: Art. V (1)(a)

¹⁷ Model Law: Art 34(2)(a)(i) and 36(1)(a)(i)

of attachment or similar measures of execution provided that the award is valid award. Delocalised Arbitral Tribunal in international commercial arbitration is *stricto sensu* a perfect tribunal with all necessary powers to make *ex parte* award, to preserve the res, or with respect to issues as to its jurisdiction and competence. Delocalization theory is also a mode of detaching international commercial arbitration from legal system of the forum. One main purpose of delocalization is to eliminate the unintended effects of certain arbitration tribunal conducting arbitration seized with hostile features of the law of the place where the arbitration is held. Therefore armed with an arbitral power to make interim award basically for protection and preservation of the res, pending the final award. Also a declaratory Award is a pronouncement on the rights of the parties; it establishes the legal position as between the parties to a contract and has a binding effect as between them. For example, in the *ARAMCO Arbitration*²⁴ ARAMCO claimed that its exclusive right to transport oil from its concession area in Saudi Arabia had been infringed by the agreement made between the Saudi Arabia Government and Aristotle Onassis. The Late Greek Ship Owner and his company.

Although the dispute between ARAMCO and the Saudi Government was a serious one, neither party wished to jeopardize their long standing trading relationship. It was therefore agreed that the dispute be referred to a team of arbitrators. However it was agreed that the award should be of only declaratory effect, with neither party claiming damages for any injury suffered. The arbitral tribunal said that, There is no objection whatever to parties limiting the scope of the arbitration agreement to the question of what exactly is their legal position. When the competence of the arbitrators is limited to such a statement of the law and does not allow them to impose the execution of an obligation on either of the parties, the Arbitration Tribunal can only give a declaratory Award²⁵

An important advantage of a declaratory award can be seen in a situation, where parties have a continuing trading relationship and the parties do not wish to run the risk of damaging this relationship in the process of resolving the dispute. The effect of the declaratory award is merely to state the legal position of the parties and not to make them liable for damages, because the award is not capable of enforcement *simpliciter*.

Where an *ex parte* award is made, it is where one of the parties to the dispute refuses to appear in arbitral proceedings. However, rather than having a stalemate, the arbitral tribunal may proceed with the hearing *ex parte*. It means they may proceed in the absence of one party, and consequently issue an award. When this kind of situation arises, the award that is made by the tribunal is known as a default award.

There are several instances where a tribunal is empowered to proceed *ex parte* and issue a default award. For example:

- (i) A party may decide not to participate in the proceeding from the beginning on the grounds that the arbitral tribunal lacks jurisdiction or for no reason at all.
- (ii) A party may refuse to reply to correspondence from an arbitral tribunal or to comply with any procedural directions as to submission of written dealing etc.
- (iii) A party may initially participate in the proceedings but later on refuse to appear again.

(iv) A party, though not expressly stating his unwillingness to participate, may cause a delay so unreasonable that the application of the party present would be justified in treating the other party as having abandoned his right to present his case.

(v) A party so disrupts the hearing by making it impossible to conduct it in an orderly manner.

It should be noted that all the instance shown above are not exhaustive of the situations allowing an arbitral tribunal to proceed *ex parte* and consequently issue a default award what matter most is the fact that the act of one party such that the Arbitral tribunal would have no choice but to conduct the proceeding *ex parte*.

However, before reaching a default award the arbitral tribunal should be mindful of the fact that one party has not had the full opportunity to present his case and this could be a ground for challenging any award. Accordingly the arbitral tribunal must consider the merits of the case and make a determination of the substance of the dispute the burden of accessing the evidence or facts put forward by the active party rests, solely on the tribunal. The tribunal is not expected to rubber stamp a claim presented to it. For the default award to be enforceable, it should contain the following;

1. The award should reflect the efforts made by the arbitral tribunal to inform the opposing party of the claimant's case.
2. The award should reflect the efforts made by arbitral tribunal to secure the presence / particular of the opposing party.
3. The award should also reflect the fact that the arbitral tribunal had genuinely addressed itself to the merits of the case.
4. The award must also show that the arbitral tribunal had satisfied itself on the question of jurisdiction, whether or not it was raised.
5. The recital of the award should contain a detailed procedure of the arbitral proceeding.

Where an additional award is demanded, is where a final award omits certain claims, a party can give notice to the other party with a request to the arbitral tribunal to make an additional award in respect of claims omitted from the final award. Such an additional award may be made where, for example evidence has been led in respect of a claim but no award was made, the additional award sort of complement the final award.

Some Arbitration rules recognize the need to empower the arbitrator to make additional award after a final award has been made. An example of this provision can be found in article 37 of the arbitration rules²⁶ Section 28(4) to (7) of the Nigerian Act also provides as follows-

Section 28(4) unless otherwise agreed by the parties, a party may within thirty days of receipt of the award, request the arbitral tribunal to make an additional award as to the claims presented in the arbitral proceeding but omitted from the award.

Section 28(5) if the arbitral tribunal considers any request made under subsection 4 of this section to be justified, it shall within sixty (60) days of the receipt of the request, make the additional award.

Section 28(6), the arbitral tribunal may, if it considers it necessary, extend the time limit within which it shall make a

²⁴ (1963) 27 ILR p.195

²⁵ *Ibid*, p. 145

²⁶ Arbitration and Conciliation Act Cap. A19 Laws of Federation of Nigeria, 2010, S.28 (41-71) see also Art. 37 of UNCITRAL Arbitration Rules. 1976

correction, give an interpretation or make an additional award under subsection (2) or (5) of this section.

Section 28(7) makes the provision of section 26 of this Act, which relate to the form and contents of an award applicable to any correction or interpretation or to an additional award under this section 28 of the Act.

Final Award: Is an award that will dispose of all (or all of the remaining) issues which have been raised in the arbitration, usually resulting from proceedings which have been contested through out²⁷ However, the term “final award” is customarily reserved for an award which completes the mission of the arbitral tribunal and subject to certain exceptions, the issue of a final award renders the arbitrators *functus officio*²⁸ this means they cease to have jurisdiction over the matter.

It should be noted that, categories into which an award can be divided are not water tight, for instance it is not only awards made at the conclusion of an arbitral proceeding that can be termed final awards. Some other decisions or awards of the arbitrator, made in the course of the arbitral session may also be termed final award. An award becomes final when it is conclusive of any point on a subject matter of the dispute²⁹. The final award of the arbitrator may also embrace other kinds of awards. For instance, it may embody an agreed settlement between the parties in which case, it is generally known as a consent award.³⁰ Alternatively, it may result from proceedings in which the respondent has failed or refused to participate, in which case it is generally known as default or *ex parte* award³¹ Once an arbitral tribunal has made its award, it has fulfilled its functions and its existence comes to an end, save for possibility of incidental matters such as the correction of obvious errors in its award. For instance many developed systems of national law permit the correction of minor clerical or typographical errors in awards either at the request of one or both of the parties or by the arbitral tribunal on its own initiative For example, sections 26 (1) (a) and (2) of the Nigerian Arbitration Act³² empowers the arbitral tribunal to correct in the award any error in computation, whether clerical or typographical error or any errors of a similar nature and such correction shall form part of the award.

It should be noted however that arbitral tribunal cannot apply the “slip rule” to vary an award which occurs and also represents tribunal’s decision and also if the mistake or error of law, the arbitrator cannot rectify it.

Delocalized Arbitral Panel is a full-fledged arbitral tribunal, as such has the power to exercise in its proceedings any of the above stated powers and render such award as the case may be.

The question is whether attachment is compatible with arbitration. If the answer is in the affirmative then immunity needs to be considered.

In private arbitrations, it is generally agreed that recourse to courts for the purposes of attachment is not incompatible with the agreement to arbitrate³⁴.

There is no reason why these rules of arbitration law should cease to apply when one of the parties is a foreign state. In that case, however, sovereign immunity may have a decisive impact upon the solution that may ultimately prevail. To this extent the rules of immunity are not concordant^{34a}. This is true in general and in particular in regard to prejudgment attachment. The issue is sensitive one. If the protection of interest of creditors of foreign states is the paramount consideration, the creditors should be put in a position to prevent the removal of property within their reach by attaching or garnishing the assets of their alleged debtor.

It is, however, clear that indiscriminate use of prejudgment measures of execution can lead to abuse and seriously interfere with the conduct of governmental activities. Those two considerations are reflected in contemporary rules of immunity, but the rules do not provide uniform solutions. Article 1610(c) and (d) of the foreign immunity Act (FSIA), eliminates the earlier practice of prejudgment attachment for the purpose of acquiring jurisdiction and maintaining a *quasi in rem* action against a foreign state. Pursuant to article 1610(c) and (d): “No attachment can be made before rendition of judgment unless: -

- (1) The foreign state has explicitly waived its immunity or
- (2) The purpose of the attachment is to secure satisfaction of a judgement and not to obtain jurisdiction.

This rule applies to assets of the foreign state, its political subdivisions, and its agencies and instrumentalities, and, pursuant to Article 1611(b) of Foreign Sovereign Immunity Act, 1976.³⁵ Also Section 13(2)(4), United Kingdom State Immunity Act.1978 (SIA)³⁶ leads to the conclusion that the property of foreign states is immune, from prejudgment attachment whereas attachment is possible against the assets of other agencies.³⁷

The European Convention denies execution, whether prior to or after judgement, against the property of a foreign sovereign. The convention permits attachment against the property of any other foreign entity, including central banks, unless it is established that the entity in question performs public functions.

Pursuant to article 26 of the ICSID Convention, consent to arbitration is “exclusive of any other remedy”, at least to the extent that the parties have not otherwise agreed. In the absence of specific agreement, the “exclusivity” of ICSID arbitration would therefore bar the parties from seeking interim measures in domestic courts.

The parties may, however, request the arbitral tribunal to recommend provisional measures for the preservation of their respective rights.³⁸ These measures cannot include attachment, which is within the sole control of domestic courts whose interference with ICSID proceedings is excluded by

²⁷ Gaius Ezejiolor, *“The Law of Arbitration in Nigeria”*, Lagos, Longman Nigeria PLC, 1st ed. 1997, p.94

²⁸ *Ibid.* P. 94

²⁹ *Ibid.* P.94

³⁰ *Ibid.* P. 95

³¹ *Ibid.* P. 95

³² Arbitration and Conciliation Act, Cap A 19 Laws OF Federation of Nigeria 2010 S. 26 (1) (a) and (2)

³⁴ George R Delaume, *Transnational Contract, Dobbs Terry N.Y. Oceana Publications 1982. p.79-89 para.13.10*

^{34a.} 108 *Ibid.* 79-27

³⁵ FISA, 1970: Art [S.1610(c) and (d)] and 1611(b)(1)

³⁶ UK SIA, 1978, Art S.13 (2)(4), 14(4) and 14(1)

³⁷ Delaume. *Op.Cit.* p .41

³⁸ ICSID Convention: Rule 39

Article 26,³⁹ certain clauses provide that the parties expressly agree to comply with interim measures recommended by the arbitral tribunal and that the state party to the dispute waives any right to assert the defence of the sovereign immunity not only in regard to the enforcement of an award, but also in regard to any interim measures, including attachment of the assets of the state involved⁴⁰ for example, The consent to ICSID Arbitration shall not preclude any party to this agreement from taking any provisional measures or pursuing any provisional measures or pursuing any provisional remedies, which may be available to such party under the laws of any arbitration proceedings pursuant to this agreement or pending the rendering, execution and payment in full of any arbitral award made by the Arbitral Tribunal... The government hereby agrees that, should the (investor) bring any judicial proceeding in relation to any matter arising under this Agreement, including without limitation of any arbitration proceeding and any action to enforce any arbitral award, no immunity from such judicial proceeding, from attachment of the (government's) or with respect to its properties, any such immunity being hereby waived by the (government)"⁴¹

Conclusion

It is good to delocalize international commercial arbitration from the national and local laws and its legal regime and courts, except at the execution of the tribunals award.

The theory of delocalization is a mode of detaching international commercial arbitration from legal system of the forum. One main purpose of delocalization is to eliminate the unintended effects of certain arbitration tribunal conducting delocalize arbitration seized with hostile features of the law of the place where the arbitration is held. Therefore an arbitral power to make interim award basically for protection and preservation of the res, pending the final award.

Recommendation

It is recommended that arbitrators in international commercial arbitration be mindful and take perfect and good

cognition of mandatory rules of the seat of arbitration while rendering an arbitration award in a dispute, to enable such an international arbitral award to be enforceable in the country where the recognition and enforcement is sought under article 1 (1) of the New York Convention⁴².

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⁴² Shall apply to the recognition and enforcement of arbitral awards in the territory of a state where the recognition and enforcement of such awards made are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.

³⁹ ICSID Convention: Art 26

⁴⁰ Delaume. *Op.Cit.* p.42

⁴¹ *Ibid.*p.42