IN THE COURT OF APPEAL
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

ON TUESDAY THE 14TH DAY OF DECEMBER, 2021

BEFORE THEIR LORDSHIPS:

ABUBAKAR DATTI YAHAYA	JUSTICE, COURT OF APPEAL
PETER OLABISI IGE	JUSTICE, COURT OF APPEAL
E. O. WILLIAMS-DAWODU	JUSTICE, COURT OF APPEAL

CA/ABJ/CV/795/2020

BETWEEN:

1. LIMAK YATIRIM, ENERJI URETIM ISLETME HIZMETLERI VE INSAAT A.S.
2. ULUDAG AFRICA POWER LTD
3. LIMAK AFRICA POWER LTD

= APPELLANTS

AND

SAHELIAN ENERGY AND INTEGRATED SERVICES LTD. === RESPONDENT

JUDGMENT
(DELIVERED BY PETER OLABISI IGE, JCA)

This appeal is against the Ruling of the High Court of the Federal Capital Territory, Abuja, coram: Hon. Justice Y. Halilu, J., delivered on 17th day of July, 2020.

The respondent herein as the applicant, via an Originating Motion filed on 27th July, 2018, sought an order of the trial court to set aside the Final Arbitral Award dated 28/06/2018, made by the Arbitral Tribunal in International Chamber of Commerce (ICC) Arbitral Proceedings in ICC International Court of Arbitration (ICA)

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SIGN
DEBORAH MUSA ESQ
PRINCIPAL REGISTRAR
DATE 13/1/2022

Case No: 21617/ZF/AYZ. The Originating Motion together with the supporting affidavit, exhibits and written address is at pages 1 to 193, of the record of appeal.

In opposition to the said Originating Motion, the appellants herein as the respondents before the trial court, filed a counter affidavit and written address. They also filed Originating Motion wherein they sought for the order registering and recognizing the unanimous Final Arbitral Award published on 28th June, 2018 by the International Chamber of Commerce (ICC), International Court of Arbitration composed of Prof. Dr. Nathalie Voser, Prof. Dr. Ziya Akinci and Dr. Michael W. Buhler, sitting in Switzerland in ICC Case No: 21617/ZF/AYZ, and granting the Award Creditor/Applicants leave to enforce the said Final Arbitral Award in the same manner as the Judgment of the trial court. See pages 206 to 207 of the record of appeal.

By an application filed on the 27th March, 2019, the Respondent applied for consolidation of its set-aside suit (CV/2443/2018), with the appellants' enforcement suit (CV/481/2018). The trial court consolidated both suits filed by the appellants on the 7th December, 2018 for recognition/leave for enforcement of the International Award and the one filed by the respondent on 27th July, 2018 to set aside the award.

In a consolidated Ruling delivered by the trial court on the consolidated Suits on the 17th July, 2020, the learned trial judge at pages 349 to 350 of the record of appeal, held as follows:

> *"From the foregoing position of the law, the proceedings of this court in the present suit cannot and does not amount to sitting on appeal over the final award of the arbitrator as wrongly canvassed by Award Creditor/Respondents' counsel.*

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The argument of learned senior counsel for the Awards Debtor/Applicant, Opasanya, SAN, which is to the effect that the arbitral awards sought to be registered in Nigeria contravenes the Mandatory Provision of the NOTAP Act, thus against public policy, hence not valid and be set aside has the support of the law, same is hereby upheld.

Accordingly, the said award contained in Exhibit 'B' which Respondents/Award Creditors seek to have registered and recognized in Suit No: CV/481/18, which is against public policy and hence not valid is hereby and accordingly set aside.

The consolidated suits are like siesmen twins.. only one of the twins shall survive upon surgical operation to separation them.

Having set aside the award in question, Suit CV/481/18 dies a natural death… I say no more."

Dissatisfied with the decision of the lower court, the appellants appealed to this Court vide two notices of appeal; one was filed on the 20th July, 2020 while the second one and which the appellants' brief was anchored on was filed on the 4th day of September, 2020 contained on pages 402 to 421 of the record of appeal. The six (6) grounds of appeal without their particulars are as follows:

"Ground One:

The trial court erred in law when it held, in respect of the international award made in favour of the respondents (as appellants herein) rendered by the International Chambers of Commerce (ICC) International Court of Arbitration (ICA) sitting in Geneva, Switzerland in Case No: 21617/ZF/AYZ arising

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from arbitration not conducted under the *ACA*, at page 27 of the Ruling that:

> "It is instructive to state here that the Power of Courts to set aside foreign arbitral awards in Nigeria is statutorily provided for in Section 48 of the Arbitral and Conciliation Act, Cap A18 LFN 2004 (the Act). This power is also vested in the court by virtue of Order 19 Rule 12 (g) of the Rules of this Honourable Court."

and further held at page 35 of the ruling, relying on section 48 of the Act and Order 19 Rule 12(g) of the Rules of the FCT High Court, that a foreign or local award can be set aside in exceptional circumstances, thereby occasioning a miscarriage of justice.

Ground Two:

The trial court erred in law when it held thus at page 34 of the Ruling:

> "For the court to give recognition to an award which was/is deeply rooted in contract that is in breach of an established law, would amount to giving effect to a contract which became ex-facie void for non-registration as a condition precedent".

and further held thus at page 35 of the Ruling:

> "The argument of learned senior counsel for the Award Debtor/Applicant, Opasanya, SAN, which is to the effect that the arbitral awards (sic) sought to be registered in Nigeria contravenes the Mandatory provisions of the NOTAP Act, thus against public policy, hence not valid and be set aside has the support of the law, same is hereby upheld".

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and thereafter, proceeded to set aside the unanimous international award published in favour of the respondents (appellants herein) as being against public policy and not valid, thereby occasion a miscarriage of justice.

Ground Three:

The trial court misdirected itself when it held thus at page 35 of the Ruling:

> "From the foregoing position of the law, the proceedings of this court in the present suit cannot stand and does not amount to sitting on appeal over the final award of the arbitrator as wrongly canvassed by the award creditors/respondents' counsel."

thereby occasioning a miscarriage of justice.

Ground Four:

The trial court erred in law when it held at pages 29 to 30 of the Ruling that the registration of the Cooperation Framework Agreement (CFA) is a sine qua non for the recognition of the CFA under Nigeria law and further held thus at page 32 of the Ruling:

> "I make bold to say that registration of the said Cooperation Framework Agreement (CFA) clearly is a condition precedent for the recognition and enforcement of such an agreement as parties cannot by agreement flout the provisions of the law in advancing the course of their agreement and run to the law for protection".

thereby occasioning a miscarriage of justice.

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Ground Five:

The trial court misdirected itself when it held thus at page 30 of the Ruling:

> "Respondents/Award Creditor counsel also drew the attention of this court to paragraphs 16, 16.1, 16.2, 16.3, and 16.6 which he said offends section 115 of Evidence Act 2011.
>
> I have considered the said paragraphs vis-à-vis the reply of Opasanya SAN. I am not in agreement that the said paragraphs offend section 115 Evidence Act".

thereby occasioning a miscarriage of justice.

Ground Six:

The decision of the court is against the weight of evidence."

The Appellants' Brief of Argument is dated and filed on the 2nd day of November, 2020; while the Respondent's Brief of Argument is dated and filed 20th day of September, 2021. Appellants' Reply Brief is dated and filed 27th day of September 2021.

The appeal was heard on 30th day of September, 2021, and learned counsel to the parties adopted their respective briefs of arguments. Learned Senior Counsel for the Appellants, Joe-Kyari Gadzama, SAN, distilled four issues for the determination of this appeal. The issues are:

"1. Whether section 48 of the Arbitration and Conciliation Act & Order 19 R. 12 (g) of the FCT High Court Rules empowers the trial court to set aside the foreign award rendered in favour of the appellants arising from arbitration which was not conducted in Nigeria and/or

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under Nigerian law. (Distilled from ground one of the Notice of Appeal).

2. Whether the trial court rightly set aside the award on public policy ground predicated on non-registration of the underlying contract - Cooperation Framework Agreement - between the parties with NOTAP. (Distilled from grounds two and four of the Notice of Appeal).

3. Whether the trial court was right when it held that the proceedings in the suit as constituted did not amount to sitting on appeal over the final award. (Distilled from Ground three of the Notice of Appeal).

4. Whether the trial court was right when it held that the identified paragraphs 16.1, 16.2, 16.3 and 16.6 of the respondent's (Award Debtor) supporting affidavit of Daniel Okun were not in contravention of section 115 of the Evidence Act. (Distilled from ground five of the Notice of Appeal)."

Counsel for the respondent, Ogunmuyiwa Balogun, Esq., on his part also formulated four (4) issues for determination, thus:

"1. Whether section 48 of the Arbitration and Conciliation Act and Order 19 Rules 12 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018 empower the lower court to set aside the foreign award rendered against the respondent? (Distilled from ground one of the Notice of Appeal).

2. Whether the lower court was right in its finding that an award seeking to enforce the CFA, an unregistered registrable agreement under the NOTAP Act, is

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contrary to public policy? (Distilled from ground two and four of the Notice of Appeal).

3. **Whether the lower court was right when it held that the proceedings in the suit as constituted did not amount to sitting on appeal over the final award?** (Distilled from ground three of the Notice of Appeal).

4. **Whether the lower court was right when it held that paragraphs 16.1, 16.2, 16.3 and 16.6 of the respondent's supporting affidavit of Daniel Okum, were not in contravention of section of section 115 of the Evidence Act?** (Distilled from ground five of the Notice of Appeal).

The four (4) issues distilled by learned Senior Counsel for the appellants more, represent their grouse. The appeal will therefore, be determined on the four issues formulated by Senior Counsel to the Appellants.

Issue One:

This issue is - **whether section 48 of the Arbitration and Conciliation Act & Order 19 Rules of the FCT High Court Rules empowers the trial court to set aside the foreign award rendered in favour of the appellants arising from arbitration which was not conducted in Nigeria and/or under Nigerian law.**

Learned Senior Counsel for the Appellants while arguing this issue referred the court to the Arbitral Award at pages 21 to 186 of the record which he said is undoubtedly is an International Award rendered by the International Chambers of Commerce (ICC) International Court of Arbitration (ICA) in Switzerland and was clearly not conducted under the Nigerian Arbitration and Conciliation Act, 2014. Learned Counsel Counsel canvassed that the seat of the

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said award was Switzerland and is been governed by the mandatory provisions of the *Swiss lex arbitri* in accordance with the prior agreement of the parties. He contended that it is a court in Switzerland where the Award was rendered that has the exclusive competence to set aside the award. Counsel pointed out that the words of **Article V paragraph 1 (e) of the New York Convention and Section 52(2)(a)(viii) of the *ACA*** on this point are clear and ought to be accorded their literal meaning. He relied on:

1. KUMAILIA V. SHERIFF (2009) 9 NWLR (PT. 1146) 420, AND
2. OBI V. INEC (2007) 11 NWLR (PT. 1046) 563.

Arguing further, learned Silk posited that the trial court wrongly relied on section 48 of the Arbitration and Conciliation Act (ACA) and Order 19 Rule 12(g) of its Rules in assuming the jurisdiction to set aside a foreign arbitral award. That the said section 48 of the ACA does not apply to international awards arising from arbitration subject to arbitration rules and/or law of a foreign jurisdiction as in the instant appeal. The learned Silk conceded that the trial court has powers to refuse recognition on the limited grounds stipulated in section 52 ACA but posited that the trial FCT High Court lacks the powers to set aside an Award arising from arbitration which was not conducted in Nigeria and/or under Nigerian law. He stated that legislators do not waste words and that section 48 of the ACA which deals with powers of Nigerian Court to set aside an award can only apply to an award rendered in Nigeria and/or under Nigerian law. He cited:

1. EJOH V. INSPECTOR GENERAL OF POLICE (1963) 1 ALL NLR 250 P. 260.
2. BRONIK MOTORS V. WEMA BANK LIMITED (1983) ALL NLR 272.

Learned Senior Counsel posited that it is not in doubt that the seat of arbitration is one of the important choices contracting parties

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make in relation to arbitration as it determines the legal framework that will govern the procedure of the arbitration and importantly, the court with supervisory jurisdiction. He argued that the powers of the trial court in section 48 of the Arbitration and Conciliation Act only apply to awards arising from arbitration conducted in Nigeria and/or under Nigerian law which is not the case here. Counsel referred to the treatise **Ofili Ofili, *"Resisting Enforcement of a Foreign Arbitral Award Under The New York Convention" (2014) 13 NL & PJ (Nigerian Law and Practice Journal), 90 (Council of Legal Education/Nigerian Law School).*** He further relied on the cases of:

1. STABILINI VISIONI LIMITED V. MALLINSON & PARTNERS LIMITED (2014) LPELR - 23090 CA.
2. BHARAT ALUMINUM CO. V. KAISER ALUMINUM TECHNICAL SERVICES, INC. CIVIL APPEAL NO: 7019 OF 2005 (1995) XX YBCA 681 P. 691; AND
3. INTERNATIONAL STANDARD ELECTRIC (ISEC) V. BRIDAS SOCIEDAD ANONIMA PETROLERA 745 P. SUPP (SDNY 1990).

He pointed out that the New York Convention has been ratified by Nigeria, and incorporated into the Arbitration and Conciliation Act (ACA) by section 54 of the ACA and domesticated as the second schedule to the ACA. On the extent of application of the ACA counsel referred the court to: SPDC V. CRESTAR INTEGRATED NATURAL RESOURCES LTD (2015) LPELR - 40034 (CA). He submitted further that section 58 of the ACA, and section 48 of the ACA relied upon by the trial court cannot apply to awards arising from arbitration not conducted in Nigeria and/or under the laws of Nigeria. Counsel stated that Arbitration is parties' driven and it allows parties to determine their choice of substantive and procedural law. That the whole essence of the much asserted concept of party autonomy in arbitration which gives parties the freedom to construct their contractual relation in the way they see fit. He referred to S.

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Abdulhay: Corruption in International Trade and Commercial Arbitration, London, Kluwer Law International, 2004 page 159. He urged the court to resolve this issue in favour of the appellants and hold that the trial FCT High Court lacks powers to set aside the foreign award as it is not a country of the place of under the law in which the Award was rendered.

In response, Learned Counsel for the Respondent started his argument by submitting that the arguments canvassed by the Appellants at paragraphs 4.1.5 and 4.1.12 of the appellants' brief of argument on section 51 and 52 of the *ACA* are not born out of the ground of appeal from which the parent issue is distilled, that is ground one. That appellants relying on sections 51 and 52 of the *ACA*, contended that it is only the Court of seat that has exclusive competence to set aside a foreign award is outside the ambit of ground one of the extant notice of appeal. He referred the court to pages 413 to 422 of the record of appeal. That where an appellant set up and argues or urges a contention which is not so related to the grounds of appeal, that such contention will be liable to being discountenanced and/or struck out. He cited:

1. NNPC V. KLIFCO (NIG.) LTD (2011) 10 NWLR (PT. 1255) 209 AT PAGES 233, PAGES F - G;
2. ADAMU V. IJKARO (1988) 4 NWLR (PT. 89) 474.

Learned Counsel further argued that the arguments canvassed by the appellants on sections 51 and 52 of the *ACA* are not born out of ground one of the governing notice of appeal. That the appellants' argument are flawed by reason of a fundamental misconception of the scope and import of the referenced sections, that is section 48 of the *ACA* on one hand and sections 51 and 52 on the other hand. That while section 48 of the *ACA* contemplates independent proceedings to set aside an arbitral award, the regime created by sections 51 and 52 of the *ACA* related to recognition and enforcement of arbitral

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award within enforcement proceedings. He stated that the first regime created by section 48 of the ACA falls under the sub-head - 'making of award and termination of proceedings' and clearly enumerates ground upon which an arbitral award may be set aside. That sections 51 and 52 of the ACA, on the other hand fall under the sub-head - 'recognition and enforcement of award' and provides that an award debtor can by relying on any of the grounds spelt out in section 52(2) of the ACA, resist the recognition and enforcement of an arbitral award. Learned Counsel submitted that all arguments canvassed by the appellants on sections 51 and 52 be discountenanced as they are irrelevant to this instant appeal which is premised on setting aside foreign arbitral awards which by literal interpretation of relevant sections is governed by section 48 of the Arbitration and Conciliation Act. That the case of the respondent for setting aside was brought and fought on the basis of section 48 of the ACA. That the caption for Part III of the ACA clearly demonstrates the draftsman's intention that section 48 of the ACA should apply to setting aside the international awards. That the arguments of appellants that section 48 of the ACA only relates to local arbitral awards is thus contrary to the express provision of statute and that the appellants lack the powers to re-write the provision of statute. That to the extent that the parties to the arbitral proceedings culminating to this appeal have their places of business in different countries, with the appellants having their place of business in Turkey and the respondent having its place of business in Nigeria, at the material time, the agreement was concluded, that the local court validly exercised jurisdiction to set aside the award which by paragraph (a) of section 57(2) of the ACA falls to be classified as an international arbitral award regardless of other circumstances spelt out in paragraphs (b)-(d) of section 57 of the ACA. He maintained that the appellants have not pointed to any provision of the ACA that

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supports their proposition, that it is only court of the seat that can set aside a foreign arbitral award. He relied on: OGBUNEKE SONS AND COMPANY LIMITED V. ED & F MAN NIGERIA LIMITED & ORS (2010) LPELR-4688 (CA); where: (i) the seat of the arbitration was in London, (ii) the awards rendered in the international arbitration were foreign arbitral wards (iii) the application to set aside the foreign awards was brought pursuant to section 48 of the *ACA*, (iv) one of the grounds for the application to set aside the foreign arbitral award was that the foreign award were contrary to the public policy of Nigeria. That the court upheld the award debtors' appeal and set aside the foreign awards rendered in favour of the award creditor. He argued that it is only a Nigeria Court that can determine Nigeria's public policy. That the question of setting aside a foreign award on grounds of Nigeria public policy did not arise in the cases relied upon by the appellants. That the cases relied upon by the appellants are not applicable in the instant case. Counsel stated that the order made by the lower court which set aside the international arbitral award rendered in favour of the appellants does not have any extra-territorial effect. That it does not limit the right to the appellant to enforce the foreign award against the respondent outside Nigeria. He placed reliance on ***Roy Goode in his article - 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' Arbitration International, Volume 17, No. 1 at page 25***. Counsel argued that the authorities relied on by the appellants are misconceived, and that the court should discountenance them.

Learned Counsel urged the court to find that the appellants' reference to and reliance on section 51 and 52 of the *ACA* is misplaced and irrelevant and do not arise in this present appeal and that by the combined effect of sections 43, 48 and 57 of the *ACA*, the lower court possessed the power to set aside the arbitral award in this case. Moreso, according to Respondent's learned Counsel, the authorities

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cited by the appellants do not support the proposition that the lower court cannot set aside a foreign arbitral award.

On point of law, learned Senior Counsel for the Appellants in his reply brief, contrary to the submissions of counsel to the respondent, contended that sections 51 and 52 of the ACA referred to in the appellants' brief are not only related to issue one but are in fact germane for the resolution of the issue. He stated that the appellants have relied on the said sections to advance their arguments on issue one. He urged the court to discountenance the contention of the respondent in paragraphs 12 to 15 of the respondent's brief and refuse the respondent's application of this court to strike out paragraphs 4.1.5 and 4.1.12 of the appellants' brief as grossly misconceived and lacking in merit.

On Respondent's contention that sections 43, 48 and 57 (2) of the ACA supposedly empowers the trial court to set aside an international award rendered in Switzerland arising from arbitration not conducted in Nigeria and/or under Nigerian law is untenable; counsel for the appellants posited that this reasoning and line of argument advanced by the respondent is fundamentally flawed. That the theory of territoriality is based on the general principle of international law that a State is sovereign within its own borders and that its law and its courts have the exclusive right to determine the legal effect of acts done within those borders. Learned Senior Counsel urged the court to hold that under the applicable law governing the award arising from the arbitration which is subject matter of this appeal, that the trial court lacked the jurisdiction to set aside the Arbitral Award published by the Arbitral Tribunal at the International Chambers of Commerce (ICC) International Court of Arbitration (ICA) in Switzerland.

RESOLUTION OF ISSUE 1

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The high point of the Appellants contention under issue 1 is that the award sought to be enforced by the Appellant is an international award rendered by International Chambers of Commerce (ICC) International Court of Arbitration and was clearly not conducted under the Nigerian Arbitration and Conciliation Act, 2004. The Learned Senior Counsel to the Appellants J. K. Gadzama, SAN on that score argued in paragraphs 4.1.7 and 4.1.8. as follows:

"4.1.7 *We posit that the trial Court wrongly relied on section 48 of the Arbitration and Conciliation Act (ACA) and Order 19 Rule 12(g) of its Rules in assuming the jurisdiction to set aside a foreign arbitral award. This is because, section 48 of the ACA does not apply to international awards arising from arbitration subject to arbitration rules and/or law of a foreign jurisdiction as in the instant appeal.*

4.1.8 *No doubt, there is a world of difference between setting aside an award and refusing recognition and enforcement. While we concede that the trial Court has powers to refuse recognition on the limited grounds stipulated in section 52 ACA, it is our position that the trial FCT High Court lacks the powers set aside an Award arising from arbitration which was not conducted in Nigeria and/or under Nigeria law."*

As can be seen from the submissions on issue 1, the Appellants are contending that the lower Court was bereft of jurisdiction to have entertained the Respondent's Originating Motion which sought for the setting aside of the final Arbitral Award dated 28/6/2018 which award was made by the Arbitral Tribunal in the International Chambers of Commerce (ICC) arbitral proceedings.

The importance of jurisdiction of a Court or Tribunal cannot be overemphasized. Jurisdictional issue or point is always pivotal in

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adjudication over cause or matter instituted before a Court or Tribunal. Jurisdiction is the heartbeat of every litigation or Suit. Any proceeding or trial embarked upon or undertaken without necessary jurisdiction by a Court or Tribunal will be a nullity. A Defendant needs not file a Statement of Defence formally raising issue of jurisdiction or to challenge the competence of a Court to entertain a cause or matter. It can be raised at any stage of the proceedings and the Court seised of the cause or matter can also raise it suo motu. It is the engine room of any Court or Tribunal

1. CHIEF DANIEL A. OLOBA VS ISAAC OLUBODUN AKEREJ A (1988) 3 NWLR (PT. 84) 508 AT 520 B - E per OBASEKI, JSC. who said:-

"The issue or jurisdiction is very fundamental as it goes to the competence or the Court or Tribunal if a Court or Tribunal is not competent to entertain a matter or claim or suit, it is a waste valuable time for the Court to embark on the hearing and determination of the suit, matter or claim, it- is therefore an exhibition of wisdom to have the issue or jurisdiction determined a before embarking on the hearing and determination of the substantive matter. The issue of jurisdiction being a fundamental issue. It can be raised at any stage of the proceedings in the Court' or first instance or in the Appeal Courts."

This issue can be raised by any of the parties or by the court itself suo motu. When there are sufficient facts ex facie on the record establishing a want of competence or jurisdiction in the court it is the duty of the Judge or Justices to raise the issue suo motu if the parties fail to draw the court's attention to it, see Odiase v. Agho (supra). There is no justice in exercising jurisdiction where there is none. It is injustice to the law, to the court and to the parties so to do.

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2. CBN VS. RAHAMANIYYA GLOBAL RESOURCES LTD (2020) 4 SCM 1 AT 17 B - C per OKORO, JSC who said:-

"The law is indeed well settled that the issue of jurisdiction is fundamental in any proceeding and consequently raises the question of competence of the Court to adjudicate in the matter. It follows therefore that where a Court is devoid of jurisdiction to entertain a case, such proceedings becomes a nullity ab inito no matter how well conducted and decided. Jurisdiction is the life wire of adjudication which should be determined at the earliest opportunity. See Madukolu & Ors v. Nkemdim & Ors (1962) 2 SCNLR 341; Skenconsult (Nig) Ltd v. Ukey (1981) 1 SC 6; Goldmark (Nig) Ltd v Ibafon Co. Ltd. (2012) 10 NWLR (Pt. 1308) page 291, (2012) 5 SCM 113; Nigerian Union of Road Transport Workers & Anor v Road Transport Employers Association of Nigeria & Ors (2012) 10 NWLR (Pt. 1307) 170."

(3) APC & ORS VS E.S.I.E.C. & ORS (2021) 16 NWLR (PT 1801) 1 at 50 A - F per KEKERE-EKUN, JSC.

However in order to determine whether or not a Court or Tribunal possesses the vires to entertain a matter, it is the writ of summons and the statement of claim that will be examined where the action is begun by originating summons or as in this case by Originating motion, it is the reliefs endorsed on the originating summons or the originating motion and the Affidavit in support that twill be examined to discern if the Court approached by a litigant has right to entertain or adjudicate on a cause or matter. See;

1. PEOPLES DEMOCRATIC PARTY VS TIMIPRE SYLVA (2012) 13 NWLR (PART 1316) 85 AT 127 per RHODES-VIVOUR, JSC who said:-

"Jurisdiction to entertain a suit is resolved by scrupulous examination of the writ or summons, the Statement or Claim and the reliefs claimed. No other document should be

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examined. Where the originating process is an originating summons serves as the Plaintiffs pleadings (Statement or Claim). Jurisdiction would be resolved by examining only the originating summons, the reliefs contained therein and the affidavit relied in support."

2. THE ATTORNEY-GENERAL OF THE FEDERATION V THE ATTORNEY-GENERAL OF LAGOS STATE (2017) 8 NWLR (PART 1566) 20 AT 46 E - G per PETER-ODILI, JSC who said:-
"To determine whether or not a court has Jurisdiction, this Court in the case of Olofu v. Itodo (2010) 1 8 NWLR (Pt. 1225) 545 at page 573 paras. D-F held that:
"Also settled is the principle of law that in order to determine whether a court before which a matter pends has the jurisdiction to entertain same, the court has to look at the plaintiff's statement of claim before it and not the defence put forward by the defendant to the action. The claim of the plaintiff in an action includes the originating summons and the affidavit(s) in support to of same where the action is instituted by originating summons as was decided by this Court in the case of Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1020) 427 at: 488 - 589."

The reliefs sought on the Respondent's motion are as follows:

"1. An Order setting aside the Final Arbitral Award dated 28th June, 2018 (the Award) made by the Arbitral Tribunal in the International Chamber of Commerce (ICC) Arbitral Proceedings in ICC International Court of Arbitration case No: 21617/ZF/AYZ LIMAK YATIRIM ENERJI URETIM ISIETME HIZMEIERI VE. INSAAT A.A & ORS VS NORTHWEST POWER LIMITED AND ORS.
2. And for Such Further or other Orders as this Honourable Court may deem fit to make in the circumstances."

The application is predicated on the following ground:

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"AND TAKE NOTICE that the grounds upon which this application is brought are that:

1. The Award is against public policy of Nigeria; and
2. There is an error of law on the face of the Award.

PARTICULARS OF ERROR

a. By Section 5(2) of the National Office Technology and Acquisition
   Promotion (NOTAP) Act, every contract or agreement in relation to transfer of technology entered into by any person in Nigeria is to be registered with NOTAP.
b. The Co-operation Framework Agreement (CFA) entered into by the Applicant and the Respondents was not registered with NOTAP.
c. Performance of the payment obligations under the CFA is by Section 7(1) of NOTAP Act, illegal in the absence of registration of the agreement with NOTAP.
d. A party is not allowed to circumvent the mandatory requirements of a statute.
e. The Arbitral Tribunal found that the CFA requires registration but nevertheless held that the non-registration of the CFA was not sufficient to discharge the Applicant of its payment obligations under the CFA.
f. The award is perverse and in clear contravention of Nigerian law, as it seeks to enforce a payment obligation that clearly contravenes mandatory requirements of a Nigerian statute.

AND TAKE FURTHER NOTICE that at the hearing of this application the Applicant will rely on the following documents.

a. The CFA between the Applicant and Respondents;
b. The Award of the Arbitral Tribunal dated 28 June, 2018.

Dated this 27th day of July 2018."

Another contention of the Appellant is that the Arbitration and Conciliation Act, 2004 Sections 48, 51 and 52 thereof are not applicable to foreign award and as such the trial FCT High Court lacks

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the powers to set aside an Award arising from arbitration which was not conducted in Nigeria and/or under the Nigerian law. According to the learned Senior Counsel Section 52 (2) (a) (viii) of the Arbitration and Conciliation Act ***"further justifies that if the losing party at the arbitral proceedings intends to set aside the award, that can only be done in the Court of the place or arbitration or under the law of that place"*** in this case Switzerland as in Learned Counsel's view lower Court ***"lacked the powers to set aside Arbitral Award rendered in Switzerland."***

It is therefore necessary to reproduce and examine in extenso the provisions of (1) Order 19 Rule 12 (g) of the High Court of the Federal Capital Territory, Abuja Civil Procedure Rules, 2018.

3. Sections 48, 51 and 52 of the Arbitration and Conciliation Act.

Order 19 Rule 12 (g) of the aforesaid High Court of Federal Capital Territory provides:

> *"12. Except to subpoena a witness to attend under section 23 of the Arbitration and Conciliation Act which shall be by motion ex-parte, every application in this rule to the Court under the Act-*
>
> *(a)*
> *(b)*
> *(c)*
> *(d)*
> *(e)*
> *(f)*
> *(g) to set aside an award under section 29 thereof;*
> *(h) ....*
> *(i) shall be made by motion."*

Sections 48, 51 and 52 of the Arbitration and Conciliation Act Cap. A18 LFN 2004 provide:

"2. Setting aside of arbitral award

48. The Court may set aside an arbitral award-

(a) if the party making the application furnishes proof

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(i) that a party to the arbitration agreement was under some incapacity;

(ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the laws of Nigeria

(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;

(iv) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or

(v) that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decision on matters not submitted to arbitration may be set aside; or

(vi) that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate; or

(vii) where there is no agreement between the parties under subparagraph (vi) of this paragraph, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act; or

(B) if the Court finds-

(i) that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or

(ii) that the award is against public policy of Nigeria.

51. Recognition and enforcement of awards

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(1) An arbitral award shall, irrespective of the country in which it is made, be recognized as binding and subject to this section and section 32 of this Act, shall, upon application in writing to the Court, be enforced by the Court.

(2) The party relying on an award or applying for its enforcement shall supply-

(a) the duly authenticated original award or a duly certified copy thereof;

(b) the original arbitration agreement or a duly certified copy thereof; and

(c) where the award or arbitration agreement is not made in the English language certified translation thereof into the English language.

52. Grounds for refusing recognition or enforcement

(1) Any of the parties to an arbitration agreement may, request the Court to refuse recognition or enforcement of the award.

(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 recognize or enforce an award.

(a) if the party against whom it is invoked furnishes the Court proof-

(i) that a party to the arbitration agreement was under some incapacity; or

(ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or falling such indication, that the arbitration agreement is not valid under the law of the country where the award was made; or

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(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*

(iv) *that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or*

(v) *that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*

(vi) *that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties; or*

(vii) *where there is no agreement between the parties under sub-paragraph (vi) of this paragraph, that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the law of the country where the arbitration took place; or*

(viii) *that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made; or*

(b) *if the Court finds-*

(i) *that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or*

(ii) *that the recognition or enforcement of the award is against public policy of Nigeria.*

(b) *If the Court finds-*

(3) *Where an application for the recognition or enforcement of an award has been made to a court referred to in subsection (2) (a) (viii) of this section, the Court before*

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which the recognition or enforcement is sought may, if it considers it proper, postpone its decision and may on the application of the party claiming recognition or enforcement of the award order the other party to provide appropriate security."

The law is settled that in the interpretation of any statute or law, subsidiary legislation, instrument, Legal Rules of Court or other Rules, the Statute or law or the document being construed must be given their ordinary grammatical meanings in order to do justice to the parties involved and to respect the real meaning and the intendment of the makers of the law, instrument or document which calls for interpretation. The Sections of the law involved must be read as a whole and not in isolation. See PDP *VS.* HON. (DR) HARRY N. ORANEZI & ORS (2018) 7 NWLR (PART 1618) 245 at 257 H to *258A* per M. D. MUHAMMAD, JSC.

> *"Now, a cardinal principle of interpretation we must not forget, which learned appellant's counsel however seems to ignore, is that provisions of a statute, an instrument or indeed pleadings should not be read in isolation of the other parts of the statute, instrument or pleadings. In order to determine the intendment of the makers of the statute, instrument or pleadings, same should be read as a whole. Thus a clause in any of these must be construed together and with reference to the context and other clauses in the statue, instrument or pleadings in ensuring the discovery of a consistent meaning of the whole, here, the pleading being considered. See Oyeyemi whole, here, the pleading being considered. See Oyeyemi v. Commissioner for Local Government (Kwara State) (1992) 2 SCNJ 266 at 280; (1992) 2 NWLR (Pt. 226) 661 and*

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Artra Industry Nigeria Limited v. NBCI (1998) 3 SCNJ 97 at 115; (1998) 4 NWLR (Pt. 546) 357."

Thus, in the interpretation of statute words therein must be interpreted literally so as to bring out succinctly the intention of the lawmakers without taking into account extraneous matters or issues. See OZONMA (BARR) VS. INEC & ORS (2015) 16 NWLR (PART 1485) 197 at 223 E-G where M. D. MUHAMMAD JSC said:

> *"The interpretative task of the foregoing desired a communal consideration from the lower court. Whenever a court is faced with the interpretation of statutory provisions, the statute must be read as a whole in determining the object of a particular provision. Thus, all provisions of the statute must be read and construed together unless there is a very clear reason independently. To achieve a harmonicons result, a section must be read against the background of another to which it relates. This principle is indispensable in giving effect to the true intentions of the makers of the statute. See Rabiu v Kano State (1980) 8-11 SC 130, (1981) 2 NCLR 293 and Attorney-General Lagos State v. Attorney-General Federation (2014) ALL FWLR (Pt. 740) 1296 at 1331, (2014) 9 NWLR (Pt. 1412) 2.17."*

And on page 224 E My Lord continues:

> *"Lastly, courts must interprete the law within the context of its constitutive words and refrain from seeking the meaning of the statute outside the clear words employed by the legislators. See Senator Dahiru Bako Gassol v. Alhaji Abubakar Umar Turaki & Others. (2013) 3 SCNJ 6 (2013) 14 NWLR (Pt. 1374) 221 and Mr. Ugochukwu Duru v. federal Republic of Nigeria (2013) 2 SCNJ 377, (2013)*

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6 NWLR (Pt. 1351) 441."

A community reading or interpretation of the provisions of the Rules of the Federal Capital Territory High Court and Sections 48, 51 and 52 of the Arbitration and Conciliation Act Cap A18 LFN 2004 glaringly shows that Courts in Nigeria including the High Court of the Federal Capital Territory, the lower Court, are imbued and invested with jurisdiction to refuse recognition of both local and foreign Arbitral Awards without recourse to the Court of the Country where the arbitration took place. The lower Court is also expressly empowered and conferred with jurisdiction to set aside an arbitral award made outside Nigeria upon an application of a party to the arbitration irrespective of the Country in which it is made within the limited circumstances listed or enumerated in Sections 48 and 52 of the Arbitration and Conciliation Act Cap A18 setting out conditions for refusing recognition or enforcement of an arbitral award.

It is mandatory that an Award/Creditor must first apply for recognition and enforcement of an arbitral award before any of the Courts designated under Arbitration and Conciliation Act before it can be enforced in like manner as a judgment or Order of the said Court pursuant to Section 31 of Arbitration and Conciliation Act. Section 32 of the said Arbitration and Conciliation Act also gives right to any of the parties to an arbitration agreement to approach the Court and request the Court to refuse recognition or enforcement of the award.

Furthermore the Arbitration and Conciliation Act Cap 18 LFN 2004 is clearly applicable to an arbitral award made or awarded within and outside Nigeria so long as the arbitral award is meant for enforcement within Nigeria.

The long title to the said Act eloquently stated so and provides as follows:-

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"An Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration."

Flowing from above and with profound respect to the Appellant's learned Senor Counsel the lower Court is empowered to set aside foreign award rendered in favour of the Appellants notwithstanding that the arbitration proceedings was not conducted in Nigeria or under Nigerian law. See;

1. MTN NIGERIA COMMUNICATION LTD VS. MR ETUK HANSON (2017) 18 NWLR (PART 1598) 594 AT 414 E - G per SANUSI, JSC who said:-

"There is therefore no gainsaying that the High Court of Akwa-Ibom State when dealing with the motion sat as a court of first instance as rightly submitted by the learned counsel for the appellant. It is my considered view that when a High Court sits to consider an application to set aside an arbitral award, it is not sitting as an appellate court over the arbitral award of the arbitrator. This is so because it is empowered to determine whether or not the findings of the arbitrator and his conclusions were wrong in law.

What that court is expected to do in that circumstance, is simply to look at the award and determine whether on the state of the law as understood by the arbitrator and as reflected on the face of the award, the arbitrator complied with the law as he perceived it rightly or wrongly."

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At pages 424 H TO 425 A - B KEKERE-EKUN, JSC said:-

"Section 57 of the Act provides that "court" means the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court.

In order to determine whether the jurisdiction of the court is appellate or original, it is necessary to consider what the court has power to do when called upon to set aside an arbitral award. The jurisdiction of the court in this regard is very narrow. It was held by this court in A. Savoia Ltd. v. Sonubi (2000) 2 NWLR (Pt. 682) 539 @. 551 F - G that the court's jurisdiction to interfere with the award of an arbitrator is limited to setting aside the award or remitting it to the arbitrator for reconsideration. It was further held that the court has no jurisdiction to determine any matter which is the subject of the arbitration proceedings.

In Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. (2000) 12 NWLR (Pt.681) 393 at 410, paras. A-B. His Lordship Oguntade, JCA (as he then was) stated inter alia:

> *"The lower court was not sitting as an appellate court over the award of the arbitrators. The lower court was not therefore empowered to determine whether or not the findings of the arbitrators and their conclusions were wrong in law. What the lower court had to do is to look at the award and determine whether on the state of the law as understood by them and as stated on the face of the award, the arbitrators complied with the law as they themselves rightly or wrongly perceived it. The approach here is subjective. The court places itself in the position of the arbitrators, not above them, and then determines on that hypothesis whether the arbitrators followed the law as they understood and*

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expressed it."

(Emphasis mine)

On page 426C My Lord KEKERE-EKUN, JSC also said:-

"In effect, when a High Court is exercising its powers under the Arbitration and Conciliation Act to set aside an arbitral award it is exercising its original jurisdiction in a supervisory capacity)."

At pages 427 G - H TO 428 EKO, JSC said:-

"Sections 29, 30 and 48 of the Arbitration and Conciliation Act empower the High Court, in its supervisory jurisdiction, to set aside arbitral award. The appellant had, pursuant to this provision, approached the High Court to set aside the arbitral award made by the Sole Arbitrator. The High Court pursuant to section 272 (1) & (2) of the 1999 Constitution has this supervisory jurisdiction, When section 272 (1) & (2) of the Constitution are read together with sections 29, 30 and 48 of the Arbitration and Conciliation Act, it appears to me, and I so hold, that the jurisdiction vested in the High Court is akin to its jurisdiction in prerogative remedies particularly in certiorari proceedings. Though the procedure has a close semblance with appellate procedure, it is clearly not appellate. The supervisory jurisdiction vested in the High Court, by the combined effect of section 272 (1) & (2) of the Constitution and sections 29, 30 and 48 of the Arbitration and Conciliation Act, is for the High Court to exercise its supervisory control over the arbitral tribunal or arbitrator(s) and thereby control or prohibit them from acting extra-jurisdictionally. It is not an appellate jurisdiction. Oguntade, JCA (as he then was) made this point in Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. (2000) 12 NWLR (Pt.681) 393 at page 410 and I completely agree. In my considered view whenever the High Court is called upon

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to exercise this supervisory control, in its supervisory jurisdiction, over arbitrator(s) and arbitration proceedings it acts not in its appellate jurisdiction but in its original jurisdiction as a first instance court. Section 241 (1)(a) of the Constitution is unambiguous."

2. BILL CONSTRUCTION CO. LTD V IMANI & SONS LTD/SHELL TRUSTEES LTD (2006) 19 NWLR (PART 1013) 1 AT 16 A - B per AKINTAN, JSC who said:-

"In section 29(1)(a) of Arbitration and Conciliation Act (Cap. 19, Laws of the Federation of Nigeria, 1990)

> *"A party who is aggrieved by an arbitral award may within three months - (a) from the date of the award ... by way of an application for setting aside, request the court to set aside the award."*

The appellant applied to the Lagos High Court on 26th March, 1997 under section 31 of the Arbitration and Conciliation Act for leave to enforce the said award as a judgment or order to the same effect as that of the said High Court."

3. MR. CHARLES MEKWUNYE VS MR CHRISTIAN IMOUKHUEDE (2019) 13 NWLR (PART 1690) 439 AT 448 D - H TO 483 A - E per ABBA AJI, JSC.

At page 508 F - G EKO, JSC said:-

> *"By dint of section 15 of the Court of Appeal Act, 2004 and Order 4 of the extant Court of Appeal Rules, 2011, the lower court was empowered to set aside an arbitral award, if and when the respondent, the applicant in the originating motion, established his claims. However, from the facts of this case the respondent did not establish the grounds for his seeking to set aside the arbitral award; and was therefore not entitled to the judgment he had sought."*

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4. NITEL V ENGR. EMMANUEL C. OKEKE (2017) 9 NWLR (PART 1571) 439 AT 473 A - H per KEKERE-EKUN, JSC who said:-

"At the outset, I must say that learned counsel for the respondent correctly stated the position of the law that arbitration proceedings are sui generis. An application to set aside an arbitral award is not in the nature of an appeal against the award. An arbitral award is regarded as a final and conclusive judgment on all matters referred and the courts are enjoined, as far as possible to uphold and enforce arbitral awards, having regard to the fact that it is a mode of dispute resolution voluntarily agreed upon by the parties. See: Ras Pal Gazi Construction Co. Ltd. v. F.C.D.A. (2001) 10 NWLR (Pt. 722) 559 at 569 D-E; Commerce Assurance Ltd. v. Alli (1992) 1 NSCC 556; (1992) 3 NWLR (Pt. 232) 710.

The rather limited circumstances in which a court can set aside an arbitral award are provided for in section 29(2) and 30 of the Arbitration and Conciliation Act, Cap. A 18, Laws of the Federation of Nigeria, 2004 as follows:

"29(2) The court may set aside an arbitral award, if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside.

30(1) Where an arbitrator has misconducted himself, or where the arbitral proceedings or award has been improperly procured, the court may on the application of a party set aside the award.

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(2) An arbitrator who has misconducted himself may, on the application of any party be removed by the court."

In Taylor Woodrow (Nig.) Ltd. v. Suddeutsche Etna-Werk GMBH (1993) 4 NWLR (Pt. 286) 127 at 142 - 144 A - E, this court set out comprehensively what amounts to misconduct by an arbitrator. See also: A. Savoia Ltd. v. Sonubi (2000) 12 NWLR (Pt. 682) 539 at 547 D - G."

(Underlined mine)

5. METROLINE NIG. LTD & ORS VS ALHAJI MUKHTAR M. DIKKO (2021) 2 NWLR (PART 1761) 422 AT 445 D - E per RHODES-VIVOUR, JSC.
6. TOTAL ENGINEERING SERVICES TEAM INC. V CHEVRON (NIG) LTD (2017) 11 NWLR (PART 1576) 187 AT 215 H TO 216 A - F per KEKERE-EKUN, JSC.

In the result issue 1 is resolved against the Appellants.

Issues Two:

This issue is - **whether the trial court rightly set aside the award on public policy ground predicated on non-registration of the underlying contract - Cooperation Framework Agreement - between the parties with NOTAP.**

Learned Senior Counsel for the Appellants while arguing this issue, relying on the case of STANBIC IBTC HOLDING PLC V. FRCN (2020) 5 NWLR (PT. 1716) CA, maintained that the trial court wrongly set aside the award on the ground that the underlying contract - the Cooperation Framework Agreement (CFA) - between the parties was not registered with NOTAP as required under the NOTAP Act. He argued that the non-registration of the CFA with NOTAP does not *ipso facto* affect its validity and/or make it illegal as wrongly misconceived by the trial court. That, it was wrong despite being referred to the binding authority of this Court in STANBIC IBTC

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HOLDING PLC V. FRCN (supra), the trial court still proceeded to set aside the Award on the ground that the underlying contract - CFA - was illegal for non-registration with NOTAP as required under the NOTAP Act. That the NOTAP Act only subjects processing of payments by or on the authority of the Federal Ministry of Finance, Central Bank of Nigeria or any licensed bank in respect of payments due under all registrable contracts or agreements for transfer of foreign technology. That such payment awarded against the respondent in the arbitral award would not even fall within the contemplation of the NOTAP Act since it was payment for damages and not payment for transfer of technical know-how. That even the respondent appreciated that the sum awarded in favour of the appellants in the award was computed damages and not the sum due under the CFA. That contracting parties can enforce the terms of a registrable contract notwithstanding that the contract was not registered with NOTAP. That it was improper for the respondent who already benefited from FCA and who had the duty to register same with NOTAP, to turn around to challenge the Award based on non-registration with NOTAP. Moreso, learned Counsel contended that the trial court did not consider all the facts in the said award especially in paragraph 11 of the CFA (pages 18 of the record) that the very CFA shall be governed by and enforced in accordance with the laws of Turkey, before reaching its decision. He emphasized that the trial court was in great error when it held that registration of the CFA was *sine qua non* and proceeded to set aside the award due to non-registration of the CFA with NOTAP. He urged the court to uphold the arguments of the appellants on this issue and resolve same against the respondent.

In response to this issue, counsel for the respondent stated that there is no dispute that the CFA did not have NOTAP Registration, rather, that the narrow issue which this court is invited

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to determine is whether such non- registration precludes the appellant from enforcing the CFA against the respondent and by extension the arbitral award predicated thereon was rightly set aside by the lower court on ground of public policy under section 48(2)(b) of Arbitration and Conciliation Act. He argued that the case of STANBIC V. FRCN relied upon by the appellants does not render such contract illegal, null and void. That what the NOTAP Act creates is an obligation subsequent to the contract in question and not a pre-contract obligation, in which case, that non-compliance would render the contract inchoate and performance in breach of the mandatory provision of law would be unlawful. He cited:

1. SODIPO V. LEMNINKANEN OY & ANOR (1986) LPELR - 3087;
2. HUEBNER V. AERONAUTICAL IND. ENG. (2017) 14 NWLR (PT. 1586) 397.

Counsel maintained that a contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration. That a contract, like the CFA in the instant case, though prima facie legal and concerned with the attainment of a lawful purpose, is unenforceable by reason of its performance which contravenes a statute. That the condition subsequent to the creation of the CFA which was to register it with NOTAP, is a mandatory provision of the law which raises a mandatory requirement of law compliance issue and thus a public policy issue. He further relied on:

1. AWOJUGBAGBE LIGHT IND. LTD V. CHINUKWE (1995) 4 NWLR (PT. 390) 379;
2. MUSA V. AHMAD (2018) LPELR - 44247 (CA);
3. GREAT (NIG.) INSURANCE PLC V. ZEAL TRUST LTD (2020) LPELR - 53107 (CA).

He maintained that the implication therefore is that an inchoate transaction, as the instant CFA, cannot be enforced directly or

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indirectly by way of an award. That the concerted efforts and primary objective of the legislators in passing the NOTAP Act, as expressed in section 6 of the NOTAP Act, is to encourage the manufacture and use of locally sourced technology and to protect Nigeria from being a dumping ground of locally available and over-prized technology sourced abroad amongst others, for the good of the public. That to achieve this core mandate, the NOTAP became vested with the power to register or refuse the registration of registrable contracts. That to further ensure compliance with this mandatory obligation to register registrable contract, that the legislators prescribed that non-registration will attract payment limitations by prohibiting the repatriation of funds to foreign investors through the official channels. Counsel stated that a contract which violently violates the provisions of a statute as inn this case, with the sole aim of circumventing the intendment of the law maker is against public policy and makes nonsense of legislative efforts to streamline the ways and means of business relations. He cited:

1. TOTAL NIGERIA PLC V. AJAYI (2003) LCN/1511 (CA).
2. CORPORATE IDEAL INSURANCE LTD V. AJAOKUTA STEEL COMPANY LTD & ORS. (2014) LPELR 22255 (SC).

Learned Counsel opined that the award which compensates the appellants for alleged failure of the respondent to honour its obligation cannot stand because it seeks to indirectly mandate payment obligations which the NOTAP Act frowns at. That to hold otherwise would amount to giving effect to an award that reinforces a contract that contradicts the law in turns has the potential of causing more harm to Nigeria. He urged the court to out rightly reject the invitation by the appellants to ridicule our laws and also to protect the public policy of Nigeria by upholding the setting aside of

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the Award which is premised on a contract the contravenes the mandatory provisions of the NOTAP Act.

Counsel for the Appellants, on point of law submitted that the decision of the trial court is clearly predicated on non-registration of the CFA, which is the complaint on this issue in this appeal. He stated that all the authorities cited by the respondent on this issue are distinguishable and inapplicable in the circumstances, as none of this cases cited by the respondent deal specifically with non-registration of registrable contracts with NOTAP. He maintained that the trial court was in great error when it set aside the international award on public policy ground predicated solely on non-registration of the CFA with NOTAP.

<u>RESOLUTION OF ISSUE 2</u>

The bone of contention under issue 2 is whether the lower Court was right in setting aside the award on public policy ground predicated on non-registration of the underlying contract-cooperation Frame Work Agreement between the parties with NOTAP.

The learned Senior Counsel to the Appellants had argued that that the non-registration of the agreement between the parties in accordance with the NOTAP Act does not infringe public policy and cannot constitute a ground for setting aside the arbitration award. The Appellant relied on the decision of this Court in the case of STANBIC IBTC PLC V FRN (2020) 5 NWLR (PART 1716) (sic) to contend that contracting parties can enforce the terms of a registrable contract notwithstanding that the contract was not registered with NOTAP.

In response to the Appellant's position the learned Counsel to the Respondent posited that since there is no dispute that the CFA did not have NOTAP registration, what the Court is called upon to determine is whether the non-registration precludes the Appellants from enforcing the cooperation Agreement against the Respondent and by extension whether the arbitral award was rightly set aside by

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the lower Court on ground of public policy under Section 48(2)(b) of the Arbitration and Conciliation Act, 2004.

On the import of STANBIC V FRN learned Counsel to the Respondent agreed that he case is authority that non-registration of a registrable contract with NOTAP does not render the contract illegal, null and void. To learned Counsel for Respondent, NOTAP creates an obligation subsequent to the contract in question and not a pre-contract obligation but non-compliance would render the contract inchoate and performance in breach of mandatory provision of the law would be unlawful. He urged the Court to reject the call by Appellants to ridicule our laws.

In the Appellants' Reply Brief they reiterated their argument in the main that the Nigeria Court has no power to set aside arbitral award made outside the Country and as such Section 48 of the Arbitration and Conciliation Act and other Sections of the Act do not apply.

Specifically in paragraph 2.26 of the Appellants' Reply Brief the Appellants' learned Senior Counsel to them submitted:-

> ***"We urge this Honourable Court to hold that Section 48 of the Act, and indeed other Section(s) of the ACA, does not apply to and to empower a Nigerian Court to set aside an international award arising from arbitration not conducted in Nigeria and/or under Nigerian law. This is the interpretation that accord more with global objective of satisfying legitimate expectations of fostering international co-operation among courts world wide."***

Again with considerable respect to the learned Senior Counsel to the Appellants there is no such law or principle in arbitration law. Municipal Courts have jurisdiction though limited, to set aside an arbitration award where it is afflicted by unconscionable acts and where recognition and enforcement of the arbitral award will amount

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to violation of public policy as enumerated in Sections 48 and 52 of the Arbitration and Conciliation Act Cap A18 LFN 2004. The law of the seat of arbitration outside the shores of Nigeria is not applicable when it comes to enforcement of an arbitral award(s). The applicable law is that of the place of enforcement and where an award debtor resists the recognition and enforcement of the award at the place of enforcement as in this case, the Nigeria law is applicable and not the law of Switzerland or Turkey as submitted by the Appellants.

The submission of the Appellants in the first sentence of paragraph 2.26 of Appellants' Reply Brief to the effect that Section 48 of the Arbitration and Conciliation Act 'and indeed other section(s) of the ACA does not apply to and/or empower a Nigerian Court to set aside an international award arising from arbitration not conducted in Nigeria and/or under Nigerian law" are grossly unfounded and have no support in arbitration law. See;

1. BILL CONSTRUCTION CO. LTD V IMANI & SONS LTD/SHELL TRUSTEES LTD (2006) 19 NWLR (PART 1013) 1 AT 16 A - C per AKINTAN, JSC.
2. NITEL V ENGR. EMMANUEL C. OKEKE (2017) 9 NWLR (PART 1571) 439 AT 473 A - H per KEKERE-EKUN, JSC.
3. MTN NIGERIA COMMUNICATION LTD VS. MR ETUK HANSON (2017) 18 NWLR (PART 1598) 394 at 414 A - H to 415 A - C per SANUSI, JSC who said:
   "From the wordings of subsection 2 of section 272 of the 1999 Constitution, a State High Court has jurisdiction to deal with complaint against proceedings brought before it and in exercising such jurisdiction it can be said that it is sitting as a court of first instance and not, as an appellate court. This is moreso because the word "appeal" is defined to substantially mean a complaint against a decision of a trial court. See Oredoyin v. Arowolo (1989) 4 NWLR (Pt. 114) 172; Ngige v. Obi (2006) 14 NWLR (Pt. 999) 1; The Minister of Petroleum And Mineral Resources & Anr v.

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Exposhipping Line (2010) LPELR-3189 SC; (2010) 12 NWLR (Pt. 1208) 261. An appeal is generally regarded as a proceeding undertaken to have a decision reconsidered by a higher authority or the submission of a lower court's decision to a higher court for review and possible reversal. See Black's Law Dictionary, Ninth Edition at page 112.

See also Corporal Livanus Ugwu v. The State (2013) LPELR-20177 (SC), (2013) 4 NWLR (Pt. 1343) 172. There is therefore no gainsaying that the High Court of Akwa-Ibom State when dealing with the motion sat as a court of first instance as rightly submitted by the learned counsel for the appellant. It is my considered view that when a High Court sits to consider an application to set aside an arbitral award, it is not sitting as an appellate court over the arbitral award of the arbitrator. This is so because it is empowered to determine whether or not the findings of the arbitrator and his conclusions were wrong in law.

What that court is expected to do in that circumstance, is simply to look at the award and determine whether on the state of the law as understood by the arbitrator and as reflected on the face of the award, the arbitrator complied with the law as he perceived it rightly or wrongly. It is therefore a subjective test, as the judge simply takes the position as the arbitrator and not above him and determines the issue in that perspective alone. See the case of Baker Marina Limited v. Danos & Curole Cont. Inc. (2001) 7 NWLR (Pt. 712) 337 at 352; A. Savoia Ltd. v. Sonubi (2000) 12 NWLR (Pt. 682) 539 at 551 para F-G, Baker Marina (Nig.) Ltd. v. Chevron (Nig.) Ltd (2000) 12 NWLR (Pt. 681) 393 at 410. Again, looking at the prayers contained in the motion the appellant approached the trial court seeking orders for review of the decision of the sole arbitrator with a view to setting aside the al arrived at by the arbitral parties definitely invoking the Juris

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section 272 (2) of the 1999 provisions, the High Court with the responsibility of considering the proceedings of the arbitral panel and thereby using its supervisory function or jurisdiction as a court of first instance, even though it has no business or required to call evidence. The learned counsel for the appellant cited and relied on some decided authorities to support his stance on that point which said authorities are in my view germane and relevant and duly supported."

In his own contribution, my Lord EKO, JSC had this to say on page 427G-H TO 428 A - C of the Report:-

"Sections 29, 30 and 48 of the Arbitration and Conciliation Act empower the High Court, in its supervisory jurisdiction, to set aside arbitral award. The appellant had, pursuant to this provision, approached the High Court to set aside the arbitral award made by the Sole Arbitrator. The High Court pursuant to section 272 (1) & (2) of the 1999 Constitution has this supervisory jurisdiction, When section 272 (1) & (2) of the Constitution are read together with sections 29, 30 and 48 of the Arbitration and Conciliation Act, it appears to me, and I so hold, that the jurisdiction vested in the High Court is akin to its jurisdiction in prerogative remedies particularly in certiorari proceedings. Though the procedure has a close semblance with appellate procedure, it is clearly not appellate. The supervisory jurisdiction vested in the High Court, by the combined effect of section 272 (1) & (2) of the Constitution and sections 29, 30 and 48 of the Arbitration and Conciliation Act, is for the High Court to exercise its supervisory control over the arbitral tribunal or arbitrator(s) and thereby control or prohibit them from acting extra-jurisdictionally. It is not an appellate jurisdiction. Oguntade, JCA (as he then was) made this point

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in Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. (2000) 12 NWLR (Pt.681) 393 at page 410 and I completely agree. In my considered view whenever the High Court is called upon to exercise this supervisory control, in its supervisory jurisdiction, over arbitrator(s) and arbitration proceedings it acts not in its appellate jurisdiction but in its original jurisdiction as a first instance court. Section 241 (1)(a) of the Constitution is unambiguous."

4. MR. CHARLES MEKWUNYE VS MR CHRISTIAN IMOUKHUEDE (2019) 13 NWLR (PART 1690) 439 AT 448 D - H TO 483 A - E per ABBA AJI, JSC.

I am of the firm view that Arbitration and Conciliation Act is applicable and the lower Court has power to entertain the suit of the Respondent.

The major defence or grounds raised against the Appellants by Respondent and relied upon for applying for the setting aside of the award are:-

1. Failure to register the CFA under NOTAP.
2. Violation of public policy.

The next vital point is whether the lower Court was right in holding that the award contravene public policy and thereby set aside the arbitral award.

What is public policy?

Black's Law Dictionary 11th Edition page 1487 defines and describes public policy as follows:-

> *"The public policy. (16c) 1. The collective rules, principles, or approaches to problems that affect the commonwealth or (esp.) promote the general good; specif., principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society against*

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public policy. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is "contrary to public policy." - Also termed policy of the law.

> *"The policy of the law, or public policy, is a phrase of common use in estimating the validity of contracts. Its history is obscure; it is most likely that agreements which tended to restrain trade or to promote litigation were the first to elicit the principle that the courts would look to the interests of the public in giving efficacy to contracts. Wagers, while they continued to be legal, were a frequent provocative of judicial ingenuity on this point, as is sufficiently shown by the case of Gilbert v. Sykes [16 East 150 (1812)] ...: but it does not seem probable that the doctrine of public policy began in the endeavor to elude their binding force. Whatever may have been its origin, it was applied very frequently, and not always with the happiest results, during the latter part of the eighteenth and the commencement of the nineteenth century. Modern decisions, however, while maintaining the duty of the courts to consider the public advantage, have tended more and more to limit the sphere within which this duty may be exercised." William R. Anson, Principles of the Law of Contract 286 (Arthur L. Corbin ed., 3d Am. ed. 1919).*

2. More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large."

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The apex Court and this Court have also defined what public policy means. See:

1. NWACHINEMELU IKEMEFUNA OKONKWO V MRS. LUCY UDEGBUNAM OKAGBUE & 2 ORS (1994) 9 NWLR (PART 368) 301 AT 335G-H TO 336A-C per OGUNDARE, JSC who said:-

   "What is the meaning of "public policy?" The expression is not defined in the Evidence Act nor in the Interpretation Act. Jordan, F.J. attempted a definition of this expression in the Australian case of Re Jacoh Morris (deceased). (1943) NSWSR 352, 355 when he said:

   "The phrase 'public policy' appears to mean the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so that anything is treated as against public if it is generally regarded as injurious to the public interest...... It is well settled that a contract is not enforceable if its enforcement would be opposed to public policy .... public policy is not, however, fixed and stable. From generation to generation ideas change as to what is a variable thing. It must fluctuate with the circumstances of the time; Naylor, Benson & Co. 1. Krainische Industries Gesellschaftt supra).

   New heads of public policy come into being, and old heads undergo modification."

   And in Egerton v. Brownlow (Earl) (1853) 4 HL Cas 1, 196; 10 ER 359,437 Lord Truno defined it thus:

   "exceptions have been made to the expression of 'public policy', and it has been confounded with what may be called political policy; such as whether it is politically wise

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to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign States; with all which, as applied to the present subject, it has nothing whatever to do. Public policy, in relation to this question is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of law, or public policy in relation to the administration of the law."

2. STATOIL NIGERIA LTD V INDUAN NIGERIA LTD & ANOR (2021) 7 NWLR (PART 1774) 1 AT 126 per dissenting opinion of AGIM, JSC who said:-

   "A public policy is a principle that is generally accepted by members of Society as the accepted value for the general well-being of the society. Its existence as a fact does not require proof because it is common knowledge in that society and the knowledge is not reasonably open to question. This is so by virtue of S. 124(1) of the Evidence Act 2011."

3. ANDREW MARK MACAULAY V K.Z.B. OF AUSTRIA (1999) 4 NWLR (PART 600) 599 AT 611 - 612 per OMOBONIKE ATINUKE IGE, JCA who said:-

   "Public Policy has been described by Jowitt's Dictionary of English Law - Second Edition as "The principles under which freedom of contract and private dealings is restricted by law for the good of the community."

I have under issue one set out Sections 48 and 52 of ACA enumerating the grounds upon which the relevant Court under the Arbitration and Conciliation Act 2004 can set aside arbitral award and grounds for refusing recognition and enforcement of an arbitral

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award irrespective of the country in which it is made.

It is again germane here to bring to the fore that under Section 48(b) (ii) and 52(b)(ii) of the said Act an award can be set aside and the Court can refuse recognition and enforcement of an arbitral award if the Court finds that the award is against public policy of Nigeria or that the recognition or enforcement of the award would be against the public policy of Nigeria.

The suit of the Respondent wherein an Order setting aside the final arbitral award dated 28/6/18 made in favour of Appellants was predicated on two principal grounds:

(a) That the award is against public policy of Nigeria; and

(b) There is an error of law on the face of the award.

Reliance was placed on Sections 5(2), 7(1) of the National Office for Technology Acquisition and Prohibition Act Cap N62 LFN 2004. The further contention is that failure to register the agreement between the parties christened "Cooperation Framework Agreement" (CFA) in accordance with the dictates of NOTAP Act renders the arbitration award emanating from the arbitration that arose from the said unregistered agreement unenforceable and as being against Public Policy.

After examining Sections 4, 5, 6, 7 and 8 of the said Act the lower Court agreed with the Respondent that enforcement of the arbitral award will be against public policy on account of failure to register the agreement as mandatorily required by law.

On page 394 of the record the lower Court found:-

> *"Realizing the fact that it is a mandatory provision of the NOTAP Act which is a Nigerian Law that has been transgressed upon; now that parties have had to resort back to a Nigerian Court for the enforcement of the arbitral award; should this Court ignore the observation of the Award Debtor/Applicant bordering on non-*

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compliance with the law?

I clearly do not think so, in view of the fact that the said registration of the Cooperation Framework Agreement (CFA) is a sine qua non for the recognition of the CFA under the Nigerian Law."

The lower Court upheld the position of the Respondent on page 400 - 401 of the record of appeal whereat it held:-

"The argument of learned Senior Counsel for the Award Debtor/Applicant, OPASANYA SAN, which is to the effect that the arbitral awards sought to be registered in Nigeria contravenes the Mandatory Provisions of the NOTAP Act, thus against public policy, hence not valid and be set aside has the support of the law, same is hereby upheld.

Accordingly, the said award contained in Exhibit "B" which Respondents/Award Creditors seek to have registered and recognized in Suit No. CV/481/18 which is against public policy and hence not valid is hereby and accordingly set aside."

It is here apposite to set out the salient sections of the National Office for Technology Acquisition and Prohibition Act particularly Sections 4, 5, 6, 7, 8 and 9 which are as follows:-

"4. *Functions of the National Office*

Subject to section 2(1) of this Act, the National Office shall carry out the following functions—

(a) the encouragement of a more efficient process for the identification and selection of foreign technology;

(b) the development of the negotiation skills of Nigerians with a view to ensuring the acquirement of the best contractual terms and conditions by Nigerian parties entering into any contract or agreement for the transfer of foreign technology;

(c) the provision of a more efficient process for the adaptation of

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imported technology;

(d) the registration of all contracts or agreements having effect in Nigeria on the date of the coming into force of this Act, and of all contracts and agreements hereafter entered into, for the transfer of foreign technology to Nigerian parties; and without prejudice to the generality of the foregoing, every such contract or agreement shall be so registrable if its purpose or intent is, in the opinion of the National Office, wholly or partially for or in connection with any of the following purposes, that is to say;

(i) the use of trademarks;

(ii) the right to use patented inventions;

(iii) the supply of technical expertise in the form of the preparation of plans, diagrams, operating manuals or any other form of technical assistance of any description whatsoever;

(iv) the supply of basic or detailed engineering;

(v) the supply of machinery and plant; and

(vi) the provision of operating staff or managerial assistance and the training of personnel; and

(e) the monitoring, on a continuous basis, of the execution of any contract or agreement registered pursuant to this Act.

Registration of contracts, etc

5. *Application for registration of contracts and agreements*

(1) Every contract or agreement which on the date of the coming into force of this Act had been entered into by any person in Nigeria and which still has effect on the commencement of this Act in relation to any matter referred to in section 4 (d) of this Act shall be registered with the National Office in the prescribed manner not later than six months after the commencement of this Act.

(2) As from the commencement of this Act, every contract or agreement entered into by any person in Nigeria with another person outside Nigeria in relation to any matter referred to in section 4 (d) of this Act shall be registered with the National Office in the prescribed manner not later than sixty days from the execution or conclusion thereof.

(3) Every application for the registration of a contract or agreement under this section shall be addressed to the director and shall be accompanied by such number of certified true copies of such contract and agreement and by all other related documents including annexures

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thereto and such other documents and information as may be specified in any particular case by the director.

6. Registration

(1) <u>Where the director is satisfied that none of the specifications mentioned in sub-section (2) of this section has been contravened he shall issue the applicant therefore a certificate in such form as may be prescribed</u>.

(2) The director shall not register any contract or agreement where he is satisfied that it falls within any of the following specification, that is to say--

(a) where its purpose is the transfer of technology freely available in Nigeria;

(b) where the price or other valuable consideration therefore is not commensurate with the technology acquired or to be acquired;

(c) where provisions are included therein which permit the supplier to regulate or intervene directly or indirectly in the administration of any undertaking belonging to the transferee of the technology and are, in his opinion, unnecessary for the due implementation or execution of such contract or agreement;

(d) where there is an onerous or gratuitous obligation on the transferee of the technology to assign to the transferor or any other person designated by the transferor, patents, trademarks, technical information, innovations or improvements obtained by such transferee with no assistance from the transferor or such person;

(e) where limitations are imposed on technological research or development by the transferee;

(f) where there is an obligation therein to acquire equipment, tools, parts or raw materials exclusively from the transferor or any other person or given source;

(g) where it is provided that the exportation of the transferee's products or services is prohibited or unreasonably restricted or where there is an obligation on such transferee to sell the products manufactured by it exclusive to the supplier of the technology concerned or any other person or source designated by the transferor;

(h) where the use by the transferee of complementary technologies is prohibited;

(i) where the transferee is required to use permanently or for any unconscionable period personnel designated by the supplier of the technology;

(j) where the volume of production is limited for sale and where resale prices are, in contravention of the Price Control Act or any other

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enactment relating to prices, imposed for domestic consumption or for exportation;

(k) where the transferee is required to appoint the supplier of technology as the exclusive sales agent or representative in Nigeria or elsewhere;

(l) Where the contract or agreement is expressed to exceed a period of ten years or other unreasonable term where this is less than ten years;

(m) Where the consent of the transferor is required before any modification to products, processes or plant can be effected by the transferee;

(n) Where an obligation is imposed on the transferee to introduce unnecessary design changes;

(o) Where the transferor, by means of quality controls or prescription of standards, seeks to impose unnecessary and onerous obligations on the transferee;

(p) Where there is provision for payment in full by the transferee for transferred technology which remains unexploited by him;

(q) Where there is a requirement for the acceptance by the transferee of additional technology or other matter, such as consultancy services, international sub-contracting, turn-key projects and similar package arrangements, not required by the transferee for or in connection with the principal purpose for which technology is to be or has been acquired by him;

(r) Where the transferee is obliged to submit to foreign jurisdiction in any controversy arising for decision concerning the interpretation or enforcement in Nigeria of any such contract or agreement or any provisions thereof.

(3) Notwithstanding the foregoing provisions of this section, in any case where the Council is satisfied that it would be in the national interest so to do, it may direct the director to issue a certificate to an applicant notwithstanding any convergence between the terms and conditions of a contractor agreement and the specifications laid down in sub-section (2) of this section.

(4) Where the parties, on the director or advice of the director, subsequent to a refusal by the director to issue a certificate of registration, make required adjustments in respect of any contract or agreement or terms and conditions thereof, the director may issue the requisite certificate of registration.

7. Effect of registration

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(i) Subject to section 8 of this Act, no payment shall be made in Nigeria to the credit of any person outside Nigeria by or on the authority of the Federal Ministry of Finance, the Central Bank of Nigeria or any licensed bank in Nigeria in respect of any payments due under a contract or agreement mentioned in section 4 (d) of this Act, unless a certificate of registration issued under this Act is presented by the party or parties concerned together with a copy of the contract or agreement certified by the National Office in that behalf.

8. Cancellation of registration

(1) Where the director is satisfied that any contract or agreement has, to the registration thereof, been amended or modified in contravention of the provisions of this Act, he shall give notice in writing to the parties concerned of his intention to cancel the certificate of registration and the provisions of section 9 of this Act relating to appeals shall apply to any such notice as if it were a notice to reject an application for registration.

(2) Where no appeal is lodged as provided under subsection (1) of this section, the Director shall, with the approval of the Council, cancel the certificate of the party concerned.

9. Appeals, etc.

(1) Any person aggrieved by the proposal of the director to reject an application for registration may, within sixty days after the date of notice of intention to reject the application given to him, lodge with the secretary a notice of appeal to the Council.

(2) The notice of appeal shall be in writing setting out the grounds on which it is made and the secretary shall lay it before the meeting of the Council next holding after the notice of appeal was lodged with him.

(3) Where an appeal is allowed, the Council shall cause the director to issue a certificate of registration in that behalf and where an appeal is disallowed, the aggrieved party shall, subject to the applicable rules of court, have a right of further appeal to the Federal High Court.

(4) Appeals shall lie from decisions of the Federal High Court under this section in the same manner and to the same extent as appeals from the decisions of the court in civil proceedings given by that Court sitting at first instance." (Underlined mine)

The law is settled beyond peradventure that in the interpretation or construction of any law, subsidiary legislation, instrument, Legal Rules of Court, the statute or law or the document being construed must be given their ordinary grammatical meanings in

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order to do justice to the parties involved and to respect the real meaning of the law and the intendment of the makers of the law or document which calls for interpretation. The relevant sections or provisions of the law being interpreted must be read as a whole in order not to defeat the purpose or the obvious ends the law is designed to serve particularly when the words of the statute or legislation being construed are clear and unambiguous. See:-

1. PDP VS. HON. (DR) HARRY N. ORANEZI & ORS (2018) 7 NWLR (PART 1618) 245 at 257 H to *258A* per M. D. MUHAMMAD, JSC.
2. WADATA ISAH *V* THE STATE (2018) 8 NWLR (PART 1621) 346 AT 361 B - C per BAGE, JSC who said:-
3. MOHAMMED SANI MUSA VS DAVID UMAR & ORS (2020) 11 NWLR (PART 1735) 213 AT 256 H TO 257 A - D per ARIWOOLA, JSC who said:-

"Indeed, it is an elementary but fundamental principle of interpretation of the words of a statute that the words used in the law where clear and unambiguous should be given their ordinary meaning. See; Lt. Gen. Ishaya R. Bamayi (Rtd) v. A. G., of the Federation & Or. (001) LPELR - 730 (SC) (2001) 12 NWLR (Pt. 727) 468 (2001) 7 SC (Pt. 11) 62; (2001) 11 SCM 80.

In Mohammed Abacha v. Federal Republic of Nigeria (2014) LPELR- 22014 (SC) (2014) 6 NWLR (Pt. 1402) 43; (2014) 1 SCNJ 37; (2014) 11 WRN 1 (2014) 1 SC (Pt. 1) 114; (2014) All FWLR 412, this court opined as follows:

"In the interpretation of statutes, the cardinal rule is that where the provision of a statute is clear and unambiguous, the duty of the court is to simply interpret the clear provision by giving the plain wordings their ordinary interpretation without more. It

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is not the function of a court of law to bend backwards to sympathise with a party in a case in the interpretation of a statute merely for the reason that the language of the law seems harsh or is likely to cause hardship" See; also, Kraus' Thompson Organisation v. National Institute for Policy and Strategic Studies (NIPSS) (2004) 9 -12 SCM (Pt.2) 53; (2004) 17 NWLR (Pt.901) 44; Abubakar Abubakar & Ors v. Saidu Usman Nasamu (2012) LPELR - 7826 (SC); (2012) 5 SCM 1; (2012) 17 NWLR (Pt. 1330) 523."

I am of the solemn view that NOTAP was enacted to give impetus to the Federal Government's drive in acquisition of technical know-how and transferring same to the Nigerians in the overall interest of Nigeria and its people. The law is designed for the benefit of Nigeria as a direct policy of government and in order to give seriousness into it, the law expressly and mandatorily direct all persons in business bordering on transfer of foreign technology to Nigeria to register such contract in home office via NOTAP.

The Nigerian Legislature whose function it is to make or enact laws for peace, order and good government of the Federation or any part thereof enacted the provisions of Section 7 of NOTAP Act as contained in the NOTAP Act and makes it clear that any contract relating to transfer of technical know-how to Nigeria, which is not registered as statutorily provided will suffer consequences.

In other words the parties to such contract are prohibited from paying or transferring any funds or money transfer to the benefit of any of the party outside the shores of this Country where there is failure to register such contract as directed.

The Appellants and the Respondent were and are fully aware of the implications of non-registration of the contract in breach of the

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statutory law of this Country yet recalcitrantly went ahead with the performance of the contract without complying with sections 4, 5, 6 and 8 of NOTAP ACT. In other words the parties to this appeal deliberately and in breach of the said Act proceeded with the execution of the contract, the performance or failure to perform the obligations under the contract led them to arbitration outside Nigeria. The attention of arbitrators were drawn to the breach of the Nigerian law, NOTAP Act.

The Arbitrators agreed that the law ought to have been complied with but believed in their wisdom that the failure would not affect the arbitration.

The parties violated Nigerian Law and the public policy of Nigeria by failing to comply with relevant provisions of NOTAP Act. The Appellants are not above the laws of Nigeria neither is the Nigerian company, Respondent exempted from complying with NOTAP Act.

It is the paramount statutory and constitutional duty of every person whether corporate or otherwise to conform with Rule of Law and due process in order to enjoy corresponding benefits from the government, or the good people of Nigeria. There can be no sacred cow and there can be no compromise on the need for citizens, foreigners or organisations or companies to obey the law of Nigeria.

The contract is against public policy both from the nature of the acts to be performed under the contract by both parties and from the nature of the consideration leading to the contract as it was designed for the benefits of the parties within and outside Nigeria. What the parties did is a slap on the face of Nigerian Law and against public policy.

The law did not prohibit the contract but what it statutorily demands is that the entire spectrum of the contract or agreement must be beneficial to Nigeria and Nigerians especially in the areas of

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transfer of technology.

The entire sections of the National Office for Technology Acquisition and Promotion Act makes it eloquent and mandatory clear that it is the public policy of Nigerian Government that all contracts or agreement having effect in Nigeria for transfer of foreign technology to Nigerian Partners and Nigerians as contained in the Cooperation Frame Work Agreement between the Appellants and the Respondent shall be registered if in the opinion of the National Office the agreement or contract either in part or in whole is in connection with matters set out in Section 4(d)(i),(ii), (iii), (iv) and (vi) already reproduced to enable the National Office, the Agency of the Government of the Federation to monitor on continuous basis, the execution of any contract or agreement registered pursuant to the Act.

The parties in this appeal are ad idem that the CFA agreement or contract is a registrable instrument and its registration was rejected for failure to comply and conform with NOTAP Act. The Cooperation Framework Agreement between the parties was NOT registered and no efforts was made so to do.

It means that the parties to this appeal were under a statutory and bounden duty to register the CFA agreement immediately upon execution by the parties to this suit, at the National Office otherwise all of them will suffer the consequences enacted in Section 7 of the Act which makes it clear that no payment shall be made in Nigeria to the credit of any person outside Nigeria by or on the authority of Federal Ministry of Finance, Central Bank, or any licenced bank in Nigeria in respect of any payments due under the contract or agreement mentioned in Section 4(d) of NOTAP Act UNLESS a Certificate of Registration issued under NOTAP Act is presented by the party or parties concerned together with a copy of the contract or agreement certified by the National Office in that behalf.

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It must be noted here that the Appellants sought for an order registering and recognizing the Final Arbitral Award published in their favour on 28/6/2018 pursuant to Section 31 and 51 of the Arbitration and Conciliation Act Cap A18 LFN 2004 so that it can enforce the said arbitrary award as Award Creditors in the sum of USD17,478,193.40 as damages for contractual breach plus interest against the Respondent. The principal beneficiary of the arbitral award is the 1st Appellant/Award Creditor and it is a foreign company registered in Turkey and with its Head Office in Turkey.

By the clear provisions of Section 7 of the NOTAP Act no payments can lawfully or legally be transferred or paid to the credit of 1st Appellant and indeed the three Appellants without a violation of the Nigerian laws particularly NOTAP Act. Payment for transfer of technology under the circumstance of failure of registration of the CFA will clearly be in contravention of the mandatory stipulations and prescription of Nigerian law. To allow the recognition and enforcement of the arbitral award will be against public policy of Nigeria and a monumental disservice to the rule of law and due process in Nigeria.

The requirements of the said law is not a private right that can be contracted out. It is for performance of public duty.

The law is for the larger interest of Nigeria and Nigerians thus a public policy of Nigeria. The argument of the learned Senior Counsel to the effect that the Respondent is estopped from raising defence of public policy predicated on failure to comply with NOTAP Act because according to him Respondent has benefited under the Agreement cannot hold sway because the mandatory requirement for registration of the Agreement under NOTAP is NOT a private right conferred on the Respondent. The law deals with public policy of Nigeria. It cannot be waived or traded off by any individual, company or organization.

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All the parties herein breached the said NOTAP Act and its purpose and intendment. If they had complied with the law as in registration of the Agreement Section 7 of the NOTAP Act cannot be invoked against the Appellants. The Appellants cannot wriggle out of the consequences of the failure to obey and comply with the NOTAP Act. The law is not made for fun. What NOTAP Act prescribes is a matter of public policy of Nigeria.

I agree in *toto* with the submissions of the Respondent's learned Counsel to the effect that the recognition and enforcement of the arbitral award in Nigeria will be against public policy of Nigeria and the performance of payment obligation under the contract is by Section 7(1) of NOTAP Act illegal as the Cooperation Framework Agreement was not registered as provided by NOTAP.

I am also of the view that enforcement of the monetary arbitral award made in favour of the Appellants will be a direct violation of Section 7(1) of NOTAP Act because the award is against public policy of Nigeria as the Cooperation Framework Agreement which is the fountain or foundation of the arbitration and the arbitral award was not registered under the NOTAP Act as it is mandatorily and statutorily required under the Nigerian law(s). The arbitral award cannot therefore be enforced in Nigeria or recognized as, it is legally incapable of enforcement. See:

1. MR. SEGUN BABATUNDE V BANK OF THE NORTH LTD & ORS (2011) 18 NWLR (PART 1279) 738 AT 761 H TO 762 A per ADEKEYE, JSC who said:-

   "A court will not however enforce an agreement between the parties which is fraudulent or tainted with deceit or against public policy."

2. CHIEF EMMANUEL OGBONNA V THE AG. IMO STATE & ORS (1992) 1 NWLR (PART 220) 647 AT 696 A - E per AKPATA, JSC who said:-

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"No individual can waive the right bestowed on a people by their Constitution or rules and regulations proclaimed by them as a matter of public policy for peace, order and harmony in the community, even though such policy may at a point in time be seemingly beneficial to only an individual.

I think the observation of Mahahan CJ. (India) in Behram Khurshid v. Bombay State (1955) AIR 123 quoted in Ariori Ors. v. Elemo & Ors. (1983) 1 S.C. 13 at 67 although not with approval, is apt in the circumstances of this case. It reads:

> *"These fundamental rights have no been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy."*

There is a distinction in respect of rights in which the State or Community itself and the litigants are both interested and the rights in the nature of purely personal rights. It is in respect of the latter that an - individual can be estopped by his conduct from subsequently asserting his right. In the case of A-G of Bendel State v. A-G of the Federation & Ors. (l982)3 N.C.L.R. 1 (1981) 10 S.C. 1 at page 54 Bello, J.S.C. (as he then was) put it succinctly thus:

> *"Firstly, with regard to private citizens, estoppel may operate against a person who avails himself of the benefit of a statute enacted for the accommodation of purely private rights and*

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subsequently attempts to question its validity. <u>Secondly, the law does not permit a person to contract himself out of or waive the effect of a rule of public policy laid down by a statute and consequently the courts may not invoke estoppel against a person who purported to have contracted himself out or waive such rule."</u> (Underlined mine).

3. A.G. BENDEL STATE V A.G. FEDERATION & ORS (1981) N.S.C.C. 314 AT 338 - 339 per FATAI-WILLIAMS, CJN who said:-

   "In any case, as Chief Williams has rightly pointed out, an illegality, such as the one complained of, is a valid answer to a plea of estoppel in pais.

   There is another answer to this submission, Neither a State nor an individual can contract out of the provisions of the Constitution. The reason for this is that a contract to do a thing which cannot be done without a violation of the law is void. See Maritime Electric Co. Ltd. v. General Dairies Ltd (1(937) A.C. (P.C,) 610 at pp. 620-621; and South Ottawa v. Perkins U.S, Supreme Court Reports. (24 Lawyers Edition) 154 at page 157 where Mr. Justice Bradley who delivered the opinion of the court observed, rightly in my view, as follows:-

   "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an Act of the Legislature could thus be a law in one case and for one party, and not a law in another case for another party;

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a law today, and not a law tomorrow; a law in one place, and not a law in another in the same State. And whether it be a law or not a law is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case."

More importantly, it seems to me that the plaintiff (Bendel State), when it received its allocation of revenue, received it in its capacity as a government with obligation to make financial provision for the services which it provides for the people of Bendel State. It will not only not be in the public interest, but it will also be contrary to public policy to refuse money needed for such, services on the ground that there is a claim with respect to the allocation in court. (Spencer Bower on "Estoppel by Representation" - 2nd Edition - paragraph 141 at page 135). It would have been most irresponsible for it to do so. In these circumstances, the contention that Bendel State is estopped from instituting these proceedings or that it has waived its right to sue has no merit whatsoever and I reject it in its entirety."

4. SOLEIMANY V SOLIMANY (1999) 3 ALL E.R. 847 AT 857 TO 858 A - D per WALTER, L. J. who said:-

"An English court exercises control over the enforcement of arbitral awards as part of the lex fori, whatever the proper law of the arbitration agreement or the place where the arbitration is conducted. If a claimant wishes to invoke the executive power in this country to enforce an award in his favour, he can only do so subject to our law. For the purposes of the present dispute, that means s 26 of the 1950 Act. There was no express provision in that section that an award would not be enforced if enforcement was contrary to public policy; but there was such a provision in

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relation to foreign awards in s 37(1), and it is hard to suppose that a more liberal regime applied to English awards. It is now expressly provided in S. 68(2) of the Arbitration Act 1996 that an award may be challenged on the ground that it is contrary to public policy; and S. 2(2)(b) of that Act in effect provides that the enforcement of awards shall be governed by English law even if that is not otherwise the law applicable to the arbitration.) It follows that an award, whether domestic or foreign, will not be enforced by an English court if enforcement would be contrary to the public policy of this country.

It is clear that it is contrary to public policy for an English award (i.e. an award following an arbitration conducted in accordance with English law) to be enforced if it is based on an English contract which was illegal when made.

That follows from the decision of this court in David Taylor & Son Ltd v Barnett [1953] 1 All ER 843, [1953] 1 WLR 562, where the award was based on a contract for the sale of Irish stewed steak at two shillings and four pence per pound, whereas the maximum price allowed under the Defence (General) Regulations 1939, SR & a 1939/927, was two shillings and three farthings per pound."

At page 859 the Lord Justice said:-

"So we turn to the enforcement stage, on the basis (as we have already concluded), that the arbitrators had jurisdiction. Even if we were wrong in the view already expressed that an arbitration agreement between robbers (for example) to arbitrate their disputes would itself be void, it is in our view inconceivable that an English court would enforce an award made on a joint venture agreement between bank robbers, any more than it would

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enforce an agreement between highwaymen, Everet v. Williams (1725) referred to in Lindley on Partnership (13th edn, 1971), p 130, note 23. Where public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it. If Buxton J expressed a contrary view in SR v HH (8 December 1994, unreported), we have to say that we do not agree with it. Mr Serota, on this appeal, accepted that an English court could go behind the award, at least if the arbitration was governed by English law.

The reason, in our judgment, is plain enough. The court declines to enforce an illegal contract, as Lord Mansfield said in Holman v Johnson (1775) 1 Cowp 341, [1775-1802] All ER Rep 98 not for the sake of the defendant, nor (if it comes to the point) for the sake of the plaintiff. The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it. In the present case the parties were, it would seem, entitled to agree to an arbitration before the Beth Din. It may be that they expected that the award, whatever it turned out to be, would be honoured without further argument. It may be that Abner can enforce it in some place outside England and Wales. But enforcement here is governed by the public policy of the lex fori." (Underlined mine)

The award was rightly set aside under Section 48 and 52 of the

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Arbitration and Conciliation Act, 2004.

The decision or findings of the lower Court cannot be faulted. Issue 2 is resolved against the Appellants.

Issue Three:

This issue is - **whether the trial court was right when it held that the proceedings in the suit as constituted did not amount to sitting on appeal over the final award.**

On this issue, learned Senior Counsel for the appellants argued that all the issues raised in the respondent's (as applicant) supporting affidavit before the trial court were the same. That same issues were raised and addressed by the arbitral tribunal. He referred to page 30 of the record of appeal where it is stated that the Arbitral Tribunal indeed, considered the entirety of the parties' argument and submission before the tribunal. That all arguments advanced by the respondent in support of its set-aside suit (CV/2443/18) were substantially the same arguments it canvassed before the arbitral tribunal. He referred to pages 90 to 91 of the record) as well as paragraphs 639 to 649 of the Award which was before the trial court.

He pointed out that the law is settled beyond peradventure that in an application to set aside an arbitral award, the trial court does not sit as an appellate court over the award and that it is therefore, not even empowered to determine whether or not the findings of the arbitrators and their conclusions were wrong in law. He relied on the case of BANKER MARINA LTD V. DANO & CUROLE CONT. INC. (2001) 7 NWLR (PT. 712) PG. 337 AT 353 - 353 PARA H - C. He contended that the respondent's suit was indeed an invitation to the trial court to suit on appeal over the decision of the Arbitrators. That the trial court was wrong when it held at page 35 of its Ruling that the proceedings in the respondent's suit (CV/2443/18) did not amount to sitting on appeal over the final award of the arbitrators. He cited:

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AYE-FENUS ENT. LTD V. SAIPEM (NIG.) LTD (2009) 2 NWLR (PT. 1126) CA 483. He urged the court to find in favour of the appellants and resolve this issue against the respondent.

Reacting to this issue, learned Counsel to the respondent, contrary to the arguments of the counsel for the appellants, stated that the simple question that must be answered in the resolution of this issue, is whether the question the lower court was called to determine was the same as the questions determined by the Tribunal. He answered in negative. He posited that the lower court was called to determine the validity of the Award in the light of the public policy of Nigeria and that the Tribunal determined the rights and obligations of the parties arising from the CFA. That the issues submitted before the two adjudicatory bodies were quite different, and that the lower court did not sit on appeal over the findings of the Tribunal. He stated that the case of BAKER MARINA LTD V. DANO & CUROLE CONT. INC (supra), relied upon by the appellants is unhelpful to them. He urged the court to discountenance it. Counsel submitted that the lower court acted within its jurisdiction when it set aside the award for being patently erroneous in law. That the case of Baker Marina recognizes that a court can set aside 'an arbitral award for error of law appearing on the face of the award' and that this is what the lower court has done in the instant case. He opined that an error of law simply connotes an erroneous determination of the applicable legal rules/principles. That the lower court indeed recognized the finding of the Arbitral Tribunal that the CFA required registration with NOTAP and that, that requirement is mandatory, he referred to pages 393 - 394 of the record of appeal.

He urged the court to resolve this issue in favour of the respondent and hold that the lower court acted within its jurisdiction when it set aside the award owing to the patent error of law in the Award.

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RESOLUTION OF ISSUE 3

The Appellants have accused the lower Court assuming appellate jurisdiction over the award made in their favour. According to their Learned Senior Counsel *"the Respondent's suit was indeed an invitation to the trial Court to sit on appeal over the decision of the Arbitrators."*

In relation to this aspect of the appeal page 400 of the record of the appeal is apposite. The Learned Judge found as follows:

> *"Permit me to state here and now that an award, Foreign or local can be set aside in exceptional circumstances. Section 48 of ACA Cap A18 LFN (2004) and Order 19 Rule 12 (g) of the Rules of Court of the High Court of FCT are clear on this issue.*
>
> *The argument of Gadzama, SAN for the Award Creditors/Respondents on above issue is most misplaced.*
>
> *From the foregoing position of the law, the proceedings of this court in the present suit cannot and does not amount to sitting on appeal over the final ward of the arbitrator as wrongly canvassed by Award Creditors/Respondents' counsel. The argument of learned senior counsel for the Award Debtor/Applicant, Opasanya SAN, which is to the effect that the arbitral awards sought to be registered in Nigeria contravenes the Mandatory Provisions of the NOTAP Act, thus against public policy, hence not valid and be set aside has the support of the law; same is hereby upheld."*
>
> *The jurisdiction of the ......is contained in Section 257 of the Constitution of the Federal Republic of Nigeria which provides:*
>
> *"257.(1) Subject to the provisions of section 251 and any other provisions of this Constitution and in addition to such other jurisdiction as may be*

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conferred upon It by law, the High Court of the Federal Capital Territory, Abuja shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

2. The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of the Federal Capital Territory, Abuja and those which are brought before the High Court of the Federal Capital Territory, Abuja to be dealt with by the Court in the exercise of its appellate or supervisory Jurisdiction."

In addition to the above jurisdiction donated to the lower Court the National Assembly has also by virtue of Arbitration and Conciliation Act Cap A18 LFN 2004 Sections 5,629, 30, 31, 32 48, 49, 51 and 52 thereof vests in the Federal Capital Territory High Court powers:

1. to stay proceeding pending arbitration.
2. upon application to it to appoint arbitrators for the parties in accordance with agreement of the parties.
3. to set aside an arbitral award.
4. to refuse recognition or enforcement of the award.
5. to grant an order recognizing an award by granting leave for its enforcement irrespective of the Country in which it is made subject to grounds for refusal of recognition contained in section 48 and 42 of the Arbitration and Conciliation Act 2004.

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Thus the High Court of Federal Capital Territory has Constitutional supervisory jurisdiction as well as statutory jurisdiction and powers over matters relating to arbitration proceedings including award(s) and recognition and enforcement of an arbitral award.

The jurisdiction exercised by the lower Court in setting aside the arbitral award is not an appellate jurisdiction but a supervisory jurisdiction bestowed upon lower Court by the Constitution of the Federal Republic of Nigeria (1999) as amended and by virtue of Arbitration and Conciliation Act Cap A18 2004 LFN. See:

1. BILL CONSTRUCTION CO. LTD VS, IMANI & SONS LTD (2006) 19 NWLR (PART 1013) 1 at 16 A - C per AKINTAN, JSC.
2. NITEL VS ENGR EMMANUEL V. OKEKE (2017) 9 NWLR (PART 1571) at 473 A - H per KEKERE -EKUN, JSC.
3. MTN NIGERIA COMMUNICATION LTD VS. MR ETUK HANSON (2017) 18 NWLR (PART 1598) 394 at 414 A - H to 415 A - C per SANUSI, JSC who said:

"From the wordings of subsection 2 of section 272 of the 1999 Constitution, a State High Court has jurisdiction to deal with complaint against proceedings brought before it and in exercising such jurisdiction it can be said that it is sitting as a court of first instance and not, as an appellate court. This is moreso because the word "appeal" is defined to substantially mean a complaint against a decision of a trial court. See Oredoyin v. Arowolo (1989) 4 NWLR (Pt. 114) 172; Ngige v. Obi (2006) 14 NWLR (Pt. 999) 1; The Minister of Petroleum And Mineral Resources & Anr v. Exposhipping Line (2010) LPELR-3189 SC; (2010) 12 NWLR (Pt. 1208) 261. An appeal is generally regarded as a proceeding undertaken to have a decision

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reconsidered by a higher authority or the submission of a lower court's decision to a higher court for review and possible reversal. See Black's Law Dictionary, Ninth Edition at page 112.

See also Corporal Livanus Ugwu v. The State (2013) LPELR-20177 (SC), (2013) 4 NWLR (Pt. 1343) 172. There is therefore no gainsaying that the High Court of Akwa-Ibom State when dealing with the motion sat as a court of first instance as rightly submitted by the learned counsel for the appellant. It is my considered view that when a High Court sits to consider an application to set aside an arbitral award, it is not sitting as an appellate court over the arbitral award of the arbitrator. This is so because it is empowered to determine whether or not the findings of the arbitrator and his conclusions were wrong in law.

What that court is expected to do in that circumstance, is simply to look at the award and determine whether on the state of the law as understood by the arbitrator and as reflected on the face of the award, the arbitrator complied with the law as he perceived it rightly or wrongly. It is therefore a subjective test, as the judge simply takes the position as the arbitrator and not above him and determines the issue in that perspective alone. See the case of Baker Marina Limited v. Danos & Curole Cont. Inc. (2001) 7 NWLR (Pt. 712) 337 at 352; A. Savoia Ltd. v. Sonubi (2000) 12 NWLR (Pt. 682) 539 at 551 para F-G, Baker Marina (Nig.) Ltd. v. Chevron (Nig.) Ltd (2000) 12 NWLR (Pt. 681) 393 at 410. Again, looking at the prayers contained in the motion the appellant approached the trial court seeking orders for review of the decision of the sole arbitrator with a view to setting aside the al arrived at by the arbitral panel definitely invoking the Juris section 272 (2) of the 1999 provisions, the High Court with the responsibility of considering the proceedings of the arbitral panel and thereby using its supervisory function or jurisdiction as a court

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<u>of first instance, even though it has no business or required to call evidence</u>. The learned counsel for the appellant cited and relied on some decided authorities to support his stance on that point which said authorities are in my view germane and relevant and duly supported." (Underlined mine)

At pages 423 H to 426 A - B my Lord KEKERE-EKUN, JSC held:

> *"This issue highlights the misconception commonly held regarding the status of the High Court when hearing an application to set aside an arbitral award. Section 272(1) & (2) of the 1999 Constitution, as amended provides:*
>
> > *"272(1) Subject to the provision of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest; obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.*
> >
> > *(2) The reference to civil and criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction."*
>
> *Thus the jurisdiction of the High Court may be original, appellate or supervisory.*
>
> *Sections 29 and 30 of the Arbitration and Conciliation Act, Cap. A 18 Laws of the Federation of Nigeria, 2004 make provisions for the setting aside of an arbitral award as*

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follows:

> "29. (1) A party who is aggrieved by an arbitral award may within three months-
>
> (a) from the date of the award; or
>
> (b) in a case falling within section 28 of this Act, from the date the request for additional award is disposed of by the arbitral tribunal, by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section.
>
> (2) The court may set aside an arbitral award, if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside."

Section 57 of the Act provides that "court" means the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court.

In order to determine whether the jurisdiction of the court is appellate or original, it is necessary to consider what the court has power to do when called upon to set aside an arbitral award. The jurisdiction of the court in this regard is very narrow. It was held by this court in A. Savoia Ltd. v. Sonubi (2000) 2 NWLR (Pt. 682) 539 @. 551 F - G that the court's jurisdiction to interfere with the award of an arbitrator is limited to setting aside the award or remitting it to the arbitrator

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<u>for reconsideration. It was further held that the court has no jurisdiction to determine any matter which is the subject of the arbitration proceedings</u>.

(Underlined mine)

In Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. (2000) 12 NWLR (Pt.681) 393 at 410, paras. A-B. His Lordship Oguntade, JCA (as he then was) stated inter alia:

> *"The lower court was not sitting as an appellate court over the award of the arbitrators. The lower court was not therefore empowered to determine whether or not the findings of the arbitrators and their conclusions were wrong in law. What the lower court had to do is to look at the award and determine whether on the state of the law as understood by them and as stated on the face of the award, the arbitrators complied with the law as they themselves rightly or wrongly perceived it. The approach here is subjective. The court places itself in the position of the arbitrators, not above them, and then determines on that hypothesis whether the arbitrators followed the law as they understood and expressed it.". [Emphasize mine]*

See also: Aye-Fenus Ent. Ltd. v. Saipem (Nig.) Ltd. (2009) 2 NWLR (Pt. 1126) 483 @ 513 H - 514 H. It is evident from the above that the role of the High Court with regard to an application to set aside an arbitral award is not appellate as the court cannot go in to the merit of the award. It can either set it aside, uphold it or remit it to the arbitrator to reconsider a particular aspect. It is akin to the jurisdiction exercised by the High Court in respect of an application for judicial review.

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It was held in Gov., Oyo State v. Folayan (1995) 8 NWLR (Pt. 413) 292 @ 322-323 H - B that:

"(a) a judicial review is not an appeal;

(b) the court must not substitute its judgment for that of the public body whose decision is being reviewed;

(c) the correct focus is not upon the decision but the manner in which it was reached;

(d) what matters is the legality and not the correctness of the decision and

(e) the reviewing court is not concerned with the merits of a target activity."

See also: Military Administrator of Imo State & Anor. v. Nwauwa (1997) LPELR- 1876 (SC) @ 23-24 E- A, (1997) 2 NWLR (Pt. 8490)675.

In effect, when a High Court is exercising its powers under the Arbitration and Conciliation Act to set aside an arbitral award it is exercising its original jurisdiction in a supervisory capacity.

A decision whether or not to set aside an award is a final decision from which an aggrieved party is entitled to appeal as of right by virtue of section 241 (1)(a) of the 1999 Constitution, as amended."

Eko JSC held on pages 427 - G - H to 428 A of the Report as follows:

"Sections 29, 30 and 48 of the Arbitration and Conciliation Act empower the High Court, in its supervisory jurisdiction, to set aside arbitral award. The appellant had, pursuant to this provision, approached the High Court to set aside the arbitral award made by the Sole Arbitrator. The High Court pursuant to section 272 (1) & (2) of the 1999 Constitution has this supervisory

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jurisdiction, When section 272 (1) & (2) of the Constitution are read together with sections 29, 30 and 48 of the Arbitration and Conciliation Act, it appears to me, and I so hold, that the jurisdiction vested in the High Court is akin to its jurisdiction in prerogative remedies particularly in certiorari proceedings. Though the procedure has a close semblance with appellate procedure, it is clearly not appellate. The supervisory jurisdiction vested in the High Court, by the combined effect of section 272 (1) & (2) of the Constitution and sections 29, 30 and 48 of the Arbitration and Conciliation Act, is for the High Court to exercise its supervisory control over the arbitral tribunal or arbitrator(s) and thereby control or prohibit them from acting extra-jurisdictionally. It is not an appellate jurisdiction. Oguntade, JCA (as he then was) made this point in Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. (2000) 12 NWLR (Pt.681) 393 at page 410 and I completely agree. In my considered view whenever the High Court is called upon to exercise this supervisory control, in its supervisory jurisdiction, over arbitrator(s) and arbitration proceedings it acts not in its appellate jurisdiction but in its original jurisdiction as a first instance court. Section 241 (1)(a) of the Constitution is unambiguous." (Underlined mine)

3. MR. CHARLES MEKWUNYE VS MR CHRISTIAN IMOUKHOEDE (2019) 13 NWLR (PART 1690) 439 at 482 B - G per ABBA AJI, JSC.

EKO, JSC on page 508 F- G of the Report has this to say:

"Appeal is by way of re-hearing, and it is a continuation of the proceedings of the court of trial from which the appeal proceeded. By dint of section 15 of the Court of Appeal Act, 2004 and Order 4 of the extant Court of Appeal Rules, 2011, the lower court was empowered to set aside an arbitral

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<u>award, if and when the respondent, the applicant in the originating motion, established his claims</u>." (Underlined mine)

For avoidance of doubt section 57 of the Arbitration and Conciliation Act defines Court to mean the High Court of a State, High Court of Federal Capital Territory, Abuja or the Federal High Court while the same Act defines judge" to mean a Judge of the enumerated Courts. See ADEOYE MAGBAGBELA VS TEMITOPE SANUNIL (2004) LPELR - 10817 (CA) 1 AT 8 per ADEREMI, JCA who said:

"In Adeoye Magbagbeola vs Temitope Sanni (2000) LPELR - 10817 (CA) 1 AT 8 where Aderemi, JCA said:-

> *"And for what are the definition of "Court" and "Judge" Section 57 says:*
>
> > *"Court means the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court: and ''Judge'' means a Judge of the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court."*

The submissions of the Appellants is with considerable respect misconceived.

The lower Court acted within its jurisdiction and it did not sit as an Appellate Court over the arbitral award published in Appellants' favour.

Issue 3 is resolved against the Appellants.

<u>Issue Four</u>:

This issue is - whether the trial court was right when it held that the identified paragraphs 16.1, 16.2, 16.3 and 16.6 of the Respondent's (Award Debtor) supporting affidavit of Daniel Okun were not in contravention of section 115 of the Evidence Act.

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L earned Counsel to the Appellants, on this issue argued that in the appellants' (respondents before the trial court) written address filed on 15th March 2019, it was contended that paragraph 16, particularly paragraphs 16.1, 16.2, 16.3 and 16.6 of the respondent's (applicant before the trial court) supporting affidavit of Daniel Okun filed on 27th July, 2018, were liable to be struck out for being in violation of section 115 of the Evidence Act, 2011. Counsel reproduced the content of the said paragraphs and submitted that the trial court failed to consider the import of the identified offending paragraphs of the affidavit in support of the Originating Motion before it which are clearly legal arguments and/or conclusions prohibited in an affidavit by virtue of section 115 of the Evidence Act particularly sub-sections (1) & (2). He contended that the identified paragraphs were indeed in contravention of section 115 of the Evidence Act and ought to have been struck out by the trial court. That such was the only course open to the trial court which it failed to do. He cited:

1. BAMAYI V. STATE (2001) 8 NWLR (PT. 715) 276; AND
2. OKPONIKPERE V. STATE (2013) 10 NWLR (PT. 1362) 209.

He urged the court to resolve this issue in favour of the appellants, allow this appeal and set aside the decision of the trial court delivered on 17th July, 2020, and dismiss Suit No: FCT/HC/CV/2443/2018.

Responding to this issue, counsel for the respondent submitted that the preamble to the implicated paragraphs of the affidavit, that is paragraphs 16.1, 16.2, 16.3 makes it manifestly clear that the deponent was deposing to his belief of fact that were not within his personal knowledge but rather from information he received from a third party. He urged the court to discountenance the appellants' submission and endorse the decision of the lower court that the implicated paragraphs of the affidavit did not offend section 115 of the Evidence Act 2011. That the appellants did not urge any argument

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on the miscarriage occasioned by the alleged defective paragraphs of the affidavit. That it is not every error or law or misdirection that will occasion the reversal of a finding made by the court. He cited the case of: The GOVERNOR OF OYO STATE V. YERIMA & ORS. (2014) LPELR - 24131 (CA). Counsel argued further that the decision of the lower court being challenged on appeal was driven by documentary evidence and not the deposition in the affidavit. That assuming the implicated paragraphs in the affidavit were indeed defective, it will not change the finding made by the lower court that the foreign arbitral award contravened public policy of Nigeria. He urged the court to discountenance the argument of the appellants and resolve this issue in favour of the respondent.

RESOLUTION OF ISSUE 4

The Appellant had submitted that paragraphs 16.1, 16.2, 16.3 and 16.6 of the Affidavit in Support of the Originating Motion filed by the Respondent in Suit No. FCT/HC/CV/2443/18 culminating into this appeal violated Section 115(1)(2) and (4) of the Evidence Act, 2011. The said Section 115 of the Evidence Act 2011 provides as follows:-

> *"115.-(1) Every affidavit used in the court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.*
> *(2) An affidavit shall not contain extraneous matter, by way of objection, prayer or legal argument or conclusion.*
> *(3) When a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.*
> *(4) When such belief is derived from information received from another person, the name of his informant shall be stated, and reasonable particulars shall be given respecting the informant, and the time, place, and circumstance of the information."*

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The impugned paragraphs of the said Affidavit read thus:-

"16. *At a strategy session held at the offices of Olaniwun Ajayi LP, at The Adunola, Plot L2, 401 Close, Banana Island, Ikoyi, Lagos on 17.07.18 at about 12:00 pm, co-counsel to the Applicant Wolemi Esan Esq, advised that the Award is unenforceable on the grounds that:*

16.1 *Section 5(2) of the NOTAP Act requires that every contract or agreement entered into by any person in Nigeria in relation to transfer of technology be registered with NOTAP;*

16.2 *Performance of payment obligations under the CFA which entails transferring money to the credit of the 1st Respondent outside Nigeria is illegal in the absence of registration of the agreement with NOTAP;*

16.3 *A party is not allowed to circumvent the mandatory requirements of a statute;*

16.4 *The CFA was not registered with NOTAP as required by the NOTAP Act.*

16.5 *The Arbitral Tribunal found that the CFA requires registration but nevertheless held that the non-registration of the CFA was not sufficient to discharge the Applicant of its obligations to perform its payment obligations under the CFA;*

16.6 *The Award is perverse and in clear contravention of Nigerian law, as it seeks to enforce a payment obligation that clearly contravenes mandatory requirements of a Nigerian statute; and*

16.7 *The Award is contrary to public policy."*

The test to be adopted in discerning whether an Affidavit runs Counter to Section 115 of the Evidence Act (formerly Sections 86 and 87 of the Evidence Act 2004) can be found in the cases of:-

1. ISHAYA BAMAIYI VS THE STATE (2001) 8 NWLR (PART 715) 270 AT 289 C - F where UWAIFO, JSC said:-

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"I think the legal position is clear, that in any affidavit used in the court, the law requires, as provided in sections 86 and 87 of the Evidence Act, that it shall contain only a statement of facts and circumstances derived from the personal knowledge of the deponent or from information which he believes to be true, and shall not contain extraneous matter by way of objection, or prayer, or legal argument or conclusion. The problem is sometimes how to discern any particular extraneous matter. The test for doing this, in my view, is to examine each of the paragraphs deposed to in the affidavit to ascertain whether it is fit only as a submission which counsel ought to urge upon the court. If it is, then it is likely to be either an objection or legal argument which ought to be pressed in oral argument; or it may be conclusion upon an issue which ought to be left to the discretion of the court either to make a finding or to reach a decision upon through its process of reasoning. But if it is in the form of evidence which a witness may be entitled to place before the court in his testimony on oath and is legally receivable to prove or disprove some fact in dispute, then it qualifies as a statement of facts and circumstances which may be deposed to in an affidavit. It therefore means that prayers, objections and legal arguments are matters that may be pressed by counsel in court and are not fit for a witness either in oral testimony or in affidavit evidence; while conclusions should not be drawn by witnesses but left for the court to reach."

2. ALHAJI YEKINI JIMOH VS THE HON. MINISTER FCT & ORS (2019) 5 NWLR (PT. 1664) 54 AT 63 H TO 64A-D per EKO, JSC who said:-

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"A deponent of an affidavit in any proceeding before a court of law is a witness in the matter. Section 115(1) of the Evidence Act, 2011 enjoins the deponent as a witness, to depose to facts in an affidavit that "either of his own personal knowledge or from information which he believes to be true". It is not enough to set out in the preamble paragraphs of an affidavit for the deponent to restate the facts that he has been authorized either by his principal or employer, and the client to make the affidavit; and that he derived the facts averred in the affidavit in the course of his employment and/or from his personal knowledge and/or information generally. For every assertion in a specific averment the deponent, consistent with section 115(1), (3) & (4) of the Evidence Act, must disclose with particulars his source of information and belief."

What Section 115 of the Evidence Act provided for as could be seen in the decision of the apex Court is that:-

(1) Deponent to an Affidavit must speak from information derived from his personal knowledge and where the information is from the knowledge of another person the deponent must clearly say so and disclose the informant's name.

(2) The Affidavit must not engage in legal argument or prayer or conclusion.

(3) The deponent to an Affidavit must have faith and believe in facts deposed to even if it is derived from a third party.

(4) Where the ground for believing a fact is derived from another, the person, the deponent must in addition state the time, place and circumstance of the information.

The impugned paragraphs of the Affidavit as listed by the Appellant do not offend the provisions of Section 115 of the Evidence

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Act 2011 because the deponent graphically stated his position, the facts within his knowledge and facts or information derived from a third party and grounds for his belief.

More importantly the contract forming the nucleus or kernel of the dispute between the parties and which contained arbitration clause which took the parties before Arbitration Tribunal (Co-operation Framework Agreement dated 28/2/13 (CFA) has engendered serious controversy between the parties.

The Respondent had contended before the Arbitrators that the said Contract which was marked Exhibit "A" in FCT/CV/2443/18 violated the provisions of National of National Office for Technology and Promotion and Cap N62 LFN 2004 in that it was not registered as required by the Act as such payment for transfer of technology would be in contravention of the mandatory requirements of Nigerian Law.

Both parties agreed that the defence was raised and placed before the arbitrators at the arbitral proceedings held at the International Chamber of Commerce. It is not enough for the Appellant to contend that the paragraphs of the Affidavit violated Section 115 of the Evidence Act, the specific subsection which the paragraphs contravened must be stated. I am of the solemn view that from the circumstances of this case the depositions contained in paragraphs 16.1, 16.2, 16.3 and 16.6 are not in contravention of Section 115 of the Evidence Act.

In any event the facts contained in the aforesaid paragraphs were stated in paragraphs 3 - 15 of the said supporting Affidavit on pages 4 - 6 of the record.

All the paragraphs of the Affidavit ought to be taken and read together moreso that the Appellants had joined issues with the Respondent on the facts contained in the Respondent's Supporting Affidavit in their Appellant's Counter Affidavit sworn to on 15th March, 2019 by Mark

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Chidi Agbo, a Legal Practitioner in the Chambers of Appellant's Counsel, paragraphs 5 and 6 thereof.

The identified paragraphs of the Supporting Affidavit of the Respondent which the Appellants complained contained legal arguments or prayers, are in my firm view valid paragraphs which did not and do not contravene Section 115 of the Evidence of Act. Contrary to the Appellants' argument that the trial Judge "failed to consider the import of identified offending paragraphs of the affidavit in support of the Originating Motion", the learned trial Judge actually considered them on page 395 of the record whereat the trial Court said:-

> *"Respondents/Award Creditor Counsel also drew the attention of this Court to paragraphs 16, 16.1, 16.2, 16.3 and 16.6 which he said offends Section 115 of Evidence Act 2011.*
>
> *I have considered the said paragraphs vis-à-vis the reply of Opasanya SAN. I am not in agreement that the said paragraphs offend Section 115 Evidence Act."*

Consequently issue 4 is hereby resolved against the Appellant.

The Appellants' appeal lacks merit and the Appellants' appeal is hereby dismissed in its entirety.

The Ruling of High Court of Federal Capital Territory (Coram: HON. JUSTICE Y. HALILU) delivered on 17th July, 2020 in Suit No. FCT/HC/CV/2443/18 IS HEREBY AFFIRMED.

The Appellants shall pay costs of N250,000.00 (Two Hundred and Fifty Thousand Naira) to the Respondent.

PETER OLABISI IGE
JUSTICE COURT OF APPEAL

APPEARANCES:

OGUNMUYIWA BALOGUN, ESQ with BABATUNDE IGE for APPELLANTS.

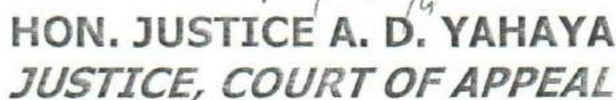
JOE-KYARI GADZAMA, SAN with DARLINGTON ONYEKWERE and CHIDI MARK AGBO for RESPONDENT.

CERTIFIED TRUECOPY
SIGN
DEBORAH MUSA ESQ
PRINCIPAL REGISTRAR
DATE 13/1/2022

APPEAL NO: CA/A/CV/795/2020

ABUBAKAR DATTI YAHAYA (JCA)

I have read in advance, the leading Judgment of my learned brother ***Ige JCA*** just delivered and I am totally in agreement with his reasoning and conclusion. The Arbitration and Conciliation Act 2004, is not limited to Arbitration Awards made within Nigeria. It applies to Arbitral Awards made outside the shores of Nigeria. Section 48 thereof, gives the High Court the power to set aside an arbitral award, including that made outside Nigeria for the reasons stated therein. In ***SAVOIA LTD. V. SONUBI (2000) 2 NWLR (PT. 682) 539,*** it was held that a court can indeed set aside an arbitral award and may also refer same to the Arbitrator for a review. The trial court was therefore right when it considered the application to set aside the Arbitral Award and also when it set it aside, since the Contract giving birth to the Arbitration, was invalid for failure to comply with the NOTAP Act on its registration. I too find no merit in this appeal and I dismiss it. I affirm the Ruling of trial court delivered on 17th July, 2020 in ***Suit No: FCT/HC/CV/2443/18.*** I abide by the Order as to costs.



HON. JUSTICE A. D. YAHAYA
JUSTICE, COURT OF APPEAL

APPEAL NO. CA/ABJ/CV/795/2020

ELFRIEDA OLUWAYEMISI WILLIAMS-DAWODU, (JCA)

I have had the opportunity of reading in draft the lead Judgment just delivered by my learned brother, **Peter Olabisi Ige, JCA,** and I agree with the reasoning and conclusion contained therein.

As clearly stated in the lead Judgment it is long settled and very elementary now that the issue of jurisdiction is pivotal, lifeline and fundamental in any adjudication before a Court or Tribunal. It is said to be the heartbeat of any litigation and any Suit embarked upon without necessary jurisdiction is a nullity. The issue can be raised at any stage of the proceedings even for the first time at the apex Court. The Court itself can raise it suo motu. It is equally long settled and firm that where the issue whether or not a Court has jurisdiction to entertain a Suit arises, it is the writ of summons, the statement of claim that need be carefully and thoroughly considered for the reliefs contained

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therein. No other document should be examined. See the cases of **MADUKOLU VS NKEMDILIM (1962) 1 ALL NLR 587; CHIEF DANIEL A. OLOBA VS ISAAC OLUBODUN AKEREJA (1988) 3 NWLR (PT. 84) 508 AT 520 B AND CBN VS. RAHAMANIYYA GLOBAL RESOURCES LTD (2020) 4 SCM 1 AT 17 B.**

Given the foregoing and the fuller reasons clearly laid out in the lead Judgment, I also disallow this appeal as it lacks merit and it is hereby dismissed. The Ruling of the Court below delivered on 17th July, 2020 in Suit No. FCT/HC/CV/2443/18 is hereby affirmed.

I make no order as to costs.

ELFRIEDA OLUWAYEMISI WILLIAMS-DAWODU
Justice, Court of Appeal