



## **The Role of Legislations and the Courts in protecting Foreign Investments in Nigeria**

Under **Section 6 (6) of the 1999 Nigerian Constitution**, Nigerian legislations and powers of the courts extend to all matters between persons or between government and any person in Nigeria, and to all actions and proceedings for the determination of any question as to the civil rights and obligations of that person. This means a foreigner or foreign business may invoke the provisions of Nigerian legislations and the judicial powers of the court to protect its civil rights and investments whether against Nigerians, a Nigerian company or even the Nigerian government.

### **Protection of foreign investments**

#### **(1) Stay of court proceedings subject to arbitration**

**Section 4 and 5 of the Arbitration and Conciliation Act** empowers the court to stay court proceedings subject to both local and foreign arbitration. It does not matter whether the seat of arbitration is Nigeria or the arbitrators would be Nigerians or the Nigerian Arbitration and Conciliation Rules apply to the arbitration.

#### **(2) Application of foreign law**

If the parties to a contract agree that foreign law will apply in resolving their disputes, **Section 69 of the Evidence Act, 2011** provides that the Nigerian court shall apply the foreign law once it has jurisdiction to hear the case. In such instance, the court shall admit the opinion of an expert who in his profession is acquainted with the foreign law. The expert may produce to the court books which they declare to be works of authority upon the foreign law in question. Upon receipt of the book and necessary explanation from the expert, the court shall construe the information contained therein for itself in making its decision.

#### **(3) Discretion to stay proceedings on foreign jurisdiction clause**

Where parties to a contract entered in Nigeria agree that where dispute arise between them, a foreign court will have jurisdiction to hear the case, by the *ratio* in the case of **Sonnar Ltd v Nordwind** (1987) NWLR (Pt. 66) 520, the Nigerian court is not bound to stay proceedings and decline jurisdiction in face of the foreign jurisdiction clause. The court will exercise its discretion in line with the justice of the case.

#### **(4) Waiver of *in personam* jurisdiction**

A Nigerian party to an international contract who later becomes a debtor may move from its place of business to another jurisdiction in a bid to frustrate its creditors from commencing an action or executing a judgment against it. The creditors can sustain an action against the debtor in any jurisdiction in Nigeria if the debtor had waived his right to personal jurisdiction in the contract. This is because it is settled Nigerian law that though a person cannot waive subject matter jurisdiction, he can waive his personal jurisdiction.

#### **(5) Enforcement of arbitral awards and foreign judgments in Nigeria**

Under **Section 57 of the Arbitration and Conciliation Act**, Nigerian courts would uphold a foreigner or foreign business' right to enforce a local or foreign arbitral awards as well as enforce foreign judgments in Nigeria whether or not he is resident in Nigeria or carrying on business in Nigeria.

#### **(6) Recognition and Enforcement of International Centre for Settlement of Investment Disputes (“ICSID”) Awards**

**ICSID** was established under the **Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)**. It has a limited scope and jurisdiction. The subject matter of the proceedings must be an ‘*investment matter*’ and one of the parties must be a contracting State or any constituent sub-division or agency thereof designated to the Centre by the State and the other party must be a national of another contracting party. The parties must agree to be bound by the **ICSID Convention** for it to apply to the exclusion of all other laws. The implication of this is that the national Courts of contracting States are restrained from interfering with the proceedings of the ICSID.

An award by ICSID is enforceable in Nigeria by virtue of **Section 1 of the International Centre for Settlement of Investment Disputes Act** which provides that;

*“Where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for Settlement of Investment Disputes, a copy of the award duly certified by the Secretary-General of the Centre aforesaid, if filed in the Supreme Court by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgment of the Supreme Court, and the award shall be enforceable accordingly”*

Once the ICSID award is registered at the Supreme Court, it ranks on the same level as a final judgment of Supreme Court of Nigeria.

#### **(7) Right of action**

Under **Section 60 (b) of the Companies and Allied Matters Act**, a foreign company has a right of action against a Nigerian or a Nigerian company whether or not it is registered in Nigeria.

#### **(8) Right of foreign creditors in insolvency proceedings in Nigeria**

A foreign creditor can institute an action in court in its name or in the name of its attorney against a debtor for debt recovery in the same manner as a local creditor, as long as the debtor or its assets, or the underlying contract which gave rise to the debt was performed, within the jurisdiction of the court. The processes and remedies available to a local creditor also apply to a foreign creditor.

Under **Section 238 of the Bankruptcy and Insolvency Act**, where there is a bankruptcy, insolvency or reorganization order made against a debtor in a foreign proceeding, a certified copy of the order is, in the absence of contrary evidence, proof that the debtor is insolvent and a foreign representative has been appointed. In this instance, following an application of the foreign representative, the court can limit the property that the Nigerian trustee has power over.

In respect of a foreign proceeding commenced for the purposes of effecting a composition, extension of time or scheme of arrangement, on application by a foreign representative in a Nigerian court, the court may grant a stay of the proceeding against the debtor.

#### **(9) Right against expropriation**

Under **Section 25 of the Nigerian Investment Promotion Commission Act**, no person who owns, whether wholly or in part, the capital of any business shall be compelled by law to surrender his interest in the capital to any other person. There shall be no acquisition of an enterprise to which this Act applies by the Federal Government, unless the acquisition is in the national interest or for a public purpose and a fair and adequate compensation paid. The business has a right to go to court for the determination of its interest or the amount of compensation to which he is entitled. Any compensation payable under this section shall be paid without undue delay, and authorisation for its repatriation in convertible currency shall where applicable, be issued.

#### **(10) Right to own land**

Under **Section 38 of the Companies and Allied Matters Act**, a foreign company duly registered in Nigeria is a corporate person with a legal right to own land in Nigeria and other rights of a natural person.

#### **(11) Tax exemptions and holidays**

In order to encourage foreign investments, under **Section 22 of the Nigerian Investment Promotion Commission Act**, a foreign company is entitled to tax holidays for some startup businesses and investment in disadvantage areas.

#### **(12) Right to invest and repatriate dividends**

Under **Section 17, 21 and 24 of the Nigerian Investment and Promotion Act**, foreigners have a right to invest or acquire shares in any Nigerian company and are guaranteed unconditional transferability of funds through an authorised dealer, in freely convertible currency, of—

- (a) dividends or profits (net of taxes) attributable to the investment;
- (b) payments in respect of loan servicing where a foreign loan has been obtained; and
- (c) the remittance of proceeds (net of all taxes), and other obligations in the event of a sale or liquidation of the enterprise or any interest attributable to the investment.