IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON MONDAY THE 18TH DAY OF JANUARY, 2016
BEFORE THE HONOURABLE JUSTICE
M.B. IDRIS
JUDGE

SUIT NO: FHC/L/CS/719/14

BETWEEN:-

VITAMALT (WEST AFRICA) LIMITED .... APPLICANT

AND

VITAMALT PLC ..... RESPONDENT

JUDGMENT

The Applicant by a Motion on Notice brought pursuant to Order 52 Rule 16(1) and (2) of the Federal High Court (Civil Procedure) Rules 2009; Sections 51 and 54 of the Arbitration and Conciliation Act 1988 CAP 18 Laws of the Federation Of Nigeria 2004; Article 32(2) of the Arbitration Rules as contained in the First Schedule of the Arbitration and Conciliation Act 1988 CAP 18 Laws of the Federation of Nigeria 2004; Article III & IV of the Convention on the Recognition and Enforcement

of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") and under the inherent jurisdiction of this Honourable Court, prayed the Honourable Court for the following:-

(1) An Order of this Honourable Court recognizing and enforcing the Partial Final Award of Arbitration Case No. 18476/VRO/AGF dated 27th February, 2014 made by J. H. Pierce, Esq. sole arbitrator, under the auspices of the International Chamber of Commerce International Court of Arbitration held in London, England between the parties Vitamalt (West Africa) Limited and Vitamalt Plc.

(2) An Order of this Honourable Court recognizing and enforcing the Final Award on Costs and Interest dated 20th October, 2014 Arbitration Case No 18476/VRO/AGF/ZF made by J. H. Pierce, Esq. sole arbitrator, under the auspices of the International Chamber of Commerce International Court of Arbitration held in London, England between

the parties Vitamalt (West Africa) Limited and Vitamalt Plc.

AND for such further or other Order or Orders as this Honourable Court may deem fit to make in the circumstances of this Suit.

The Motion on Notice is supported by a Twenty-Five (25) paragraph affidavit deposed to by Adekunle Adewale of Counsel with accompanying documents named Exhibits AOA1, AOA2, AOA3, AOA4 and AOA5. All the paragraphs of the Affidavit and attached exhibits in support of the application were relied upon at the hearing.

A written address accompanied the application.

For the accordance of doubt, the motion provides as follows:-

"AMENDED ORIGINATING MOTION ON NOTICE BROUGHT PURSUANT TO ORDER 52 RULE 16(1) AND (2) OF THE FEDERAL HIGH COURT (CIVIL PROCEDURE) RULES 2009; SECTIONS 51 AND 54 OF THE ARBITRATION AND CONCILIATION ACT 1988 CAP A18 LAWS OF THE FEDERATION OF NIGERIA 2004; ARTICLE 32(2) OF THE ARBITRATION RULES AS

CONTAINED IN THE FIRST SCHEDULE TO THE ARBITRATION AND CONCILIATION ACT 1988 CAP A18 LAWS OF THE FEDERATION OF NIGERIA 2004; ARTICLES III AND IV OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK. 1958) (THE "NEW YORK CONVENTION") AND UNDER THE INHERENT JURISDICTION OF THIS HONOURABLE COURT

TAKE NOTICE that this Honourable Court shall be moved on the ..... day of .... 2015 at 9 O'clock in the forenoon or so soon thereafter as Counsel for the Applicant can be heard for the following prayers:-

1. An Order of this Honourable Court recognizing and enforcing the Partial Final Award in Arbitration Case No. 18476/VRO/AGF dated 27th February, 2014 made by J. H. Pierce, Esq., Sole Arbitrator, under the auspices of the International Court of Arbitration of the International Chamber of Commerce held in London, England between the

parties Vitamalt (West Africa) Limited and Vitamalt Plc.

2. An Order of this Honourable Court recognizing and enforcing the Final Award on Costs and Interest in Arbitration Case No 18476/VRO/AGF/ZF dated 20th October, 2014 made by J. H. Pierce, Esq., Sole Arbitrator, under the auspices of the International Court of Arbitration of the International Chamber of Commerce held in London, England between the parties Vitamalt (West Africa) Limited and Vitamalt Plc.

AND for such further or other Order or Orders as this Honourable Court may deem fit to make in the circumstances of this Suit

GROUNDS IN SUPPORT OF THE APPLICATION

FURTHER TAKE NOTICE that this Application is predicated on the following Grounds:

1. That the Applicant herein by virtue of a License Agreement dated 1st August 2000 and Addendum dated 30th April, 2004 (hereinafter jointly referred to as 'the Contracts') granted the Respondent the exclusive right to use, apply, exploit and engage its (Applicant's) Trade Mark in Nigeria as comprised in "Vitamalt", duly registered at the Nigerian Trade Marks Registry under RTM 21366 in Class 32 as well as the exclusive right to engage in the production, marketing, sales, distribution and supply of the vitaminised malt drink within the territory of Nigeria, under the Trade Name of "VITA MALT'"; for which the Respondent was obligated to pay Royalties to the Applicant in accordance with the manner agreed under the Contracts.

2. That the Respondent breached the Contracts by its (Respondent's) failure to

pay the accrued Royalties to the Applicant and a dispute arose between the parties

3. That by mutual consensus of the parties, the dispute was referred to Arbitration under the auspices of the International Chamber of Commerce International Court of Arbitration holden in London, England in accordance with the terms of Articles 29.3 of the Contracts.

4. That on the 27th February 2014, the duly constituted Arbitral Tribunal delivered a Partial Final Award on the issues referred to it by both parties.

5. That on the 20th October, 2014, the duly constituted Arbitral Tribunal delivered a Final Award on Costs and Interest on the issues referred to it by both parties.

6. That the Respondent has not satisfied both the Final Partial Award dated 27th February 2014 and the Final Award on Costs and

Interest 20th October, 2014, or any part thereof till date.

7. That by the applicable laws, the Applicant requires leave of this Honourable Court for the recognition and enforcement of both Awards in the same manner as a Judgment of this Honourable Court, hence, the instant application.

This Amended Originating Motion was taken out by Yusuf Asamah Kadiri, Esq., of Jackson, Etti & Edu; Legal Practitioners for the above named Applicant of 400 Capability Green, Luton, Bedfordshire LU1 3LU, United Kingdom, whose address for service is Jackson, Etti & Edu, 3-5 Sinari Daranijo Street (RCO Court), off Ajose Adeogun Street, Victoria Island, Lagos"

The Respondent filed a Counter Affidavit and a written Address in opposition. The Applicant then filed a Reply Address on points of law.

At the hearing, the parties relied on the process filed and adopted their written addresses.

In the Applicant's written address, the issue formulated for determination was whether this Honourable Court has the power to grant recognition and enforcement of the Arbitral Awards, the subject matter of this suit.

It was argued that this Court is empowered by virtue of the relevant provisions of the laws to grant leave to the Applicant to enforce the Partial Final Award dated 27th February, 2014 and the Final Award on Costs and Interest dated 20th October, 2014.

The Applicant argued that it had juxtaposed the facts of this case with the ingredients to be proved by an Applicant for Enforcement of Arbitral Award and demonstrated that the required ingredients are appropriately present in the Applicant's application, and that it is therefore expedient that once an award has been given, it qualifies for recognition and enforcement under the relevant applicable laws or convention.

In view of the submissions made, the Court was urged to grant the reliefs contained in the Applicant's application.

The following authorities were relied on:-

LIST OF AUTHORITIES

STATUTES

1. **FEDERAL HIGH COURT (CIVIL PROCEDURE) RULES 2009.**
2. **ARBITRATION AND CONCILIATION ACT 1988 CAP A18, LAWS OF THE FEDERATION OF NIGERIA, 2004**

JUDICIAL AUTHORITIES

(1) **ONWU V. NKA (1996) 7 NWLR (PT. 458) 1 AT PAGE 17**

(2) **COMMERCE ASSURANCE LIMITED V. ALLI (1992) 3 NWLR (PT 232) 710 AT PAGE 725**

(3) **EBOKAN V. EKWENIBE & SONS TRADING CO. (2001) 2 NWLR (PT. 696) 32 @ 41**

(4) **CHRISTOPHER BROWN LTD V. GENOSSENSCHAFT ETC (1953) 2 ALL ER @ 1040.**

(5) **TULIP (NIG) LTD V. N.T.M.S.A.S (2011) 4 NWLR (PT. 1237) 254 @ 288 PARA F-G.**

In the Respondent's written address, the issue

formulated for determination was whether the Arbitral Awards rendered by J.H. Pierce Esq on 27th February and 20th October, 2014 which compels a Nigerian party to breach Nigerian law directly applicable to the subject matter is not unrecognisable and unenforceable for being contrary to public policy in Nigeria.

It was argued that the License Agreement was not registered with the National Office for Technology Acquisition and Promotion (Hereafter "NOTAP") as required by Section 4 of the National Office for Technology Acquisition and Promotion Act, Cap N62, Laws of the Federation of Nigeria, 2004 (Hereafter "the NOTAP ACT") and therefore cannot be enforced.

It was also argued that the Agreement between parties which provides for the payment of 5% royalty to the Applicant is illegal and contrary and above the limit stipulated as payable in the breweries/beverage industry in Nigeria under the Revised Guidelines for the Registration and Monitoring of Technology Transfer Agreement published by the NOTAP, and that an enforcement and recognition of the Award will be contrary to public policy

because the Agreement under which arbitral proceedings were conducted is not registered, illegal and unenforceable.

The Court was urged to dismiss the Originating motion. The following cases were relied on:-

(1) **ADAMU VS. UMAR (2009) 5 NWLR (PT. 1133) 41**

(2) **EKPENYONG VS. NYONG (1975) 2 SC 65**

(3) **SOLEIMANU VS. SOLEIMANU (1998) 3 NLR 811.**

(4) **LAINIORS- TREFILIERES – CABLERIES DE LENS SA VS. SOUTHWIRE CO (484) FSPP 1063**

(5) **ABDULRAHMAN VS. THOMAS (2012) 5 CLRN 162**

(6) **ALAO VS. ACB LTD (1998) 3 NWLR (PT. 542) 339.**

In reply, the Applicant argued that the Respondent should not be allowed to benefit from its own wrong by raising illegality as a defence. It was contended that the award was not contrary to public policy.

The following authorities were relied on:-

JUDICIAL AUTHORITIES

1. **BEECHAM GROUP LIMITED VS. ESSDEE FOOD PRODUCTS NIGERIA LIMITED (1985) 3 NWLR PART 11 PAGE 112 AT 116.**
2. **SOLEIMANY VS. SOLEIMANY (1998) 3 WLR 811.**
3. **LAMINIORS-TREFILIERIES-CABLERIES DE LENS, S.A VS. SOUTHWIRE CO 484 F. SUPP.1069 (N.D. GA. 1980).**
4. **ALAO VS. ACB LIMITED (1998) 3 NWLR (PART 542) PAGE 339 AT 335.**
5. **TOTAL NIGERIA PLC VS. CHIEF ELIJAH OMONIYI AJAYI (2003) LPELR-6174 (CA).**
6. **CHIDOKA VS. FIRST CITY FINANCE COMPANY LIMITED (2013) 5 NWLR (PT 1346) 144 AT 163, PARAGRAPH B-G.**
7. **LINTCH FILED VS. DREYFUL (1906) 1 K.B AT 559.**
8. **SOSAN VS. HFP ENGINEERING (NIGERIA) LIMITED (2004) 3 NWLR PART 861 PAGE**

546 AT 573 -574 PARAGRAPHS E-B

9. EMMANUEL O. ADEDEJI VS. NATIONAL BANK OF NIGERIA LTD & ANOTHER (1989) 1 NWLR PART 96 AT PAGE 226 AND 227
10. PAN BISBILDER (NIGERIA) LTD VS. F.B.N LTD (2000) 1 NWLR PART 642 PAGE 684 AT 695 PARAGRAPHS B-D.
11. OYEGOKE VS. IRIGUNA (2002) 5 NWLR PART 760 PAGE 417 AT 439-440.
12. MAGIT VS. UNIVERSITY OF AGRIC., MAKURDI (2005) 19 NWLR (PT. 959)
13. UNIVERSITY OF CALABAR TEACHING HOSPITAL & ANOR VS. BASSEY (2008) LPELR-8553 (CA)

TEXT

CHITTY ON CONTRACTS, GENERAL PRINCIPLES, TWENTY-SEVENTH EDITION VOLUME 1 AT PAGE 858 PARAGRAPH 16-131.

I have read the processes filed and I have carefully considered the submissions made. Should this application be granted in the light of the law and the facts presented?

Any of the parties to an arbitration agreement may request the Court to refuse recognition or enforcement of an award rendered in their arbitration. See Arbitration and Conciliation Act (Supra) S. 32. The court where recognition or enforcement of an award is sought or where an application for refusal of recognition or enforcement is brought may, irrespective of the country in which the award is made, refuse to recognise or enforce the award if the party against whom it is invoked, furnishes the court with proof that:-

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

(ii) he 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 law of the country where the award was made; or

(iii) 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) the award deals with a dispute not contemplated by or not falling within the terms of the

submission to arbitration; or

(v) the award contains decision 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 recognised and enforced; or

(vi) 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) 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. See Arbitration and Conciliation Act (supra), S.52(1) and (2)(a)

The Court may also refuse to recognise or enforce an award if the Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria or that the recognition or enforcement of the award is against the public policy of Nigeria.

The grounds under which a foreign award can be set aside by a Nigerian Court are provided by the Arbitration and Conciliation Act, Cap A.I8 Laws of the Federation of Nigeria, 2004. Thus, section 48 of this Act provides:

The Court may set aside an arbitral award: -

(a) if the party making the application furnishes proof -

(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 decisions 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 (v) 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."

In the case of **CHRISTOPHER VS. EKWENIBE & SONS TRADING CO. (2001) 2 NWLR (PT. 696) 32 AT 41-42, PARAGRAPHS H-A,** the Court of Appeal relying on the English case of **CHRISTOPHER BROWN LTD VS. GENOSSENSCHAT ETC (1953) 2 ALL ER @ 1040,** stated the elements which an applicant seeking to enforce an arbitral award must prove and held that:

"In an application to enforce an award, the Plaintiff must prove:

1. The making of the contract which

contains the submission;

2. That the dispute arose within the terms of the submission;

3. That the arbitrators were appointed in accordance with the clause that contains the submission.

4. The making of the award; and

5. That the amount awarded has not been paid"

Applying the above position of the law to the instant case, it appears that the Applicant has satisfied the above provisions of the law as follows:-

(a) The contract which contains the submission. As averred in paragraphs 7 and 15 of the Affidavit in support of this application, there was in existence a contract between the parties which contained an arbitration clause in the event a dispute arose

out of the contract. See Exhibit AOA1 which is the contract containing the said arbitration clause.

(b) The dispute arose within the terms of the submission. The Applicant has also established that there arose a dispute between the parties that was duly submitted to arbitration. See paragraphs 15 and 16 of the Supporting Affidavit. See also Exhibit AOA 3, being the Terms of reference consensually executed by both the Applicant and Respondent herein.

(c) Arbitrators were appointed in accordance with clause that contains the submission. See paragraphs 16, 17, 18 and 19 of the supporting affidavit where the Applicant stated as a fact that a sole arbitrator was duly appointed to hear and determine the dispute in accordance with the Arbitration Agreement and no

objection was raised to the validity or jurisdiction of the arbitrator.

d) The making of the award: See paragraphs 20 and 23 of the supporting affidavit and Exhibits AOA 4 and AOA5 which clearly establish that an Award was made by the arbitrator in respect of disputes submitted by parties for determination.

e) That the amount awarded has not been paid: The Applicant has stated as a fact that till date, the Respondent has not satisfied the Award or any part thereof, hence the need to resort to this Honourable Court for the recognition and enforcement of the same. See paragraph 23 of the supporting affidavit to this instant application.

Particularly relevant is the provisions of the Arbitration Clause contained in the License Agreement,

which stipulates that where a dispute or disagreement arises out of or in relation to the License Agreement, such a dispute shall be fully and finally settled by binding arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. For the avoidance of doubt, I will quote specifically Clauses 29.1, 29.2 and 29.3 of the License Agreement as follows:-

> "29.1 This Agreement shall be governed by and construed in accordance with Nigerian law.
>
> 29.2 It is the Parties desire that any dispute or disagreement which may arise among them be amicably settled, without resort to litigation or, in first instance, formal arbitration, and the Parties will attempt to settle any such disputes through consultation and negotiation in good faith and in a spirit of mutual cooperation. All disputes or disagreements among

the parties arising out of or relating to this Agreement which cannot be resolved by the relevant employees of the Parties, shall be brought before a conciliation committee consisting of one director from each Party with the authority to bind that Party. The conciliation committee shall, within twenty (20) days after a written request from any Party, meet in person (or, by telephone, if agreeable to all Parties) and attempt to work out a settlement. Such meeting shall be held in London or such other location as mutually agreed by all Parties.

29.3 Any dispute or disagreement out of or relating to this Agreement which cannot be amicably settled by the conciliation committee shall be fully and finally settled by binding arbitration, under the

Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC), the proceedings to take place in London, England and the language of the proceedings to be in English."

The afore-stated mutually agreed procedure was complied with which finally culminated into a Request for Arbitration filed by the Applicant at the International Chamber of Commerce Secretariat and the parties executing the Terms of Reference dated 2nd August, 2012

At the conclusion of the Arbitral proceedings, the Tribunal delivered its Award in favour of the Applicant and reserved claims for costs and interest for a final award. See Exhibit AOA4 attached to the Applicant's Affidavit in support of the instant suit. It is clear that further to its award in Exhibit AOA4, the Tribunal has now delivered a final award on costs and interest contained in a document. See Exhibit AOA5 attached to the Applicant's Affidavit in support of the instant suit.

By virtue of the provisions of Section 51 of the Arbitration and Conciliation Act and the Rules of this Court, this Court has the powers and discretion to grant the Applicant the leave to enforce the Award as judgment of this Court. I refer to the decision of the Court of appeal in the case of **TULIP (NIG) LTD VS. N.T.M.S.A.S (2011) 4 NWLR (PT. 1237) 254 AT 288 PARAGRAPHS F-G**, where it was stated per Ogunbiyi, J.S.C. that:

> *" ... the presupposition and the anticipation therefore, is that the leave of court must first have been sought and obtained before the condition precedent could be satisfied. The absence of such had therefore rendered the award fallen short of the standard of a judgment."*

In Order to vest the Court with jurisdiction over an application for recognition and enforcement of an arbitral award, the Applicant must supply the duly authenticated original copy of the award or a duly certified copy of same and the original copy of the

arbitration agreement or duly certified copy thereof.

The required documents are already exhibited in the supporting Affidavit to this Application. See Exhibits AOA1, AOA2, AOA 4 and AOA5.

Furthermore, quite apart from the law, the parties by virtue of Clause 29.3 of the License Agreement above quoted, expressly and mutually submitted to the jurisdiction of the Tribunal, hence the Partial Final Award of 27th February, 2014 and the Final Award on Costs and Interest dated 20th October, 2014 rendered by the Tribunal are final and binding on the parties therein.

It is trite law that where parties agree to refer their dispute to arbitration and an award is made, it is binding on the parties. See the case of **ONWU VS. NKA (1996) 7 NWLR (PT. 458) 1 AT PAGE 17 PARAGRAPHS D-E,** where the Supreme Court, per Iguh, J.S.C. stated thus:-

> *"The law is well settled that where disputes or matters in difference between two or more parties are by consent of the disputants submitted to* a ------- *forum,*

inclusive of arbitrators or a body of persons who may be invested with judicial authority to hear and determine such disputes and matters for investigation ... and a decision is duly given, it is as conclusive and unimpeachable ... as the decision of any constituted Court of the land. Such decision is consequently binding on the parties and the courts in appropriate cases will enforce it."

The Court is empowered to grant the leave for the recognition and enforcement of the Arbitral Award dated 27th February, 2014 and the Final Award on Costs and Interest dated 20th October, 2014 on the terms the Award can be enforced in the same manner as a judgment or order of this Court and all the methods of enforcing a judgment of the Court will be available in like manner to the Applicant.

Again, an arbitral award once recognised is binding on the parties until it is set aside. Thus, section 31 (1) of the Arbitration and Conciliation Act CAP A18 Laws of the Federation of Nigeria, 2004 provides that an arbitral

award shall be recognised as binding and in **TULIP (NIG.) LTD VS. N.T.M.S.A.S. (2011) 4 NWLR (PT.1237) 254,** the Court of Appeal held that. *"Where parties agree to refer their dispute to arbitration and an award is made it is binding on the parties ...See* **TULIP (NIG.) LTD VS. N.T.M.S.A.S. (SUPRA) AT 275 PARA. B.** The Supreme Court of Nigeria clearly established the principle in **ONWU VS. NKA (1996] 7 NWLR (PT.458) 1** when it held that:-

> "The Law is well settled that where dispute or matters in difference between two or more parties are by consent of the disputants submitted to a domestic forum, inclusive of arbitrators or a body of persons who may be invested with judicial authority to hear and determine such disputes ... and a decision is duly given, it is as conclusive and unimpeachable (unless and until set aside on any of the recognised grounds) as the decision of any constituted court of the land. Such a decision is consequently binding on the parties and the courts in appropriate cases will

enforce it. See **ONWU V. NKA (1996) 7 NWLR (PT.458) 1 AT 17 PARAS. D-E.**

A final and binding award has a *res judicata* effect and as such none of the issues decided therein can be re-opened by any of the parties. In ***RAS PAL GAZI CONSTRUCTION* CO. LTD VS. F.C.D.A (2001) 10 NWLR (PT.722) 559** *the* Supreme Court of Nigeria, per Katsina-Alu, JSC (as he then was), held that:

"An award made, pursuant to arbitration proceedings constitutes a final judgment on all matters referred to the arbitrator. It has a binding effect and it shall upon application in writing to the Court, be enforced by the court. What this means is this, if an award was not challenged then it became and was a final and binding determination of the matters between the parties. The simple question to be resolved is whether a Court can make the award a judgment of the Court. I am in agreement with the Court of Appeal that the Court has no such jurisdiction. The reason is obvious as I shall show shortly. Once an award has been made, and not

challenged in Court, it should be entered as a judgment and given effect accordingly. The losing party cannot be heard to say he wants to argue some point or other. Just as he would not be allowed to do so in the case of a judgment not appealed from, he should not and would not do so in the case of an award that he has not challenged. If an issue is raised for decision and has been decided, that is final. The' parties cannot be allowed thereafter to re-open it. The reason is that just as the parties would not be allowed to do so in the case of a judgment not appealed from, the point so decided is res judicata. See **RAS PAL GAZI CONSTRUCTION CO. LTD V. F.C.D.A. (2001) 10 NWLR (PT. 722) 559 AT 571 D -E.** See also **AYE - FENUS ENT. LTD. V. SAIPEM (NIG.) LTD (2009) 2 NWLR (PT. 1126) 483 AT 522.**

The binding of an award starts from the time it is rendered and communicated to the parties and continues thereafter whether there is an application to recognise it or not unless it is set aside. Thus, in **SHELL TRUSTEES (NIG.) LTD VS. IMANI & SONS LTD (2000) 6 NWLR (PT. 662) 639 AT 662 PARA. B,** the Court of Appeal held that

an award is binding on the parties before it gets to the Court while in **RAS PAL GAZI CONST. CO. LTD VS. F.C.D.A.** the Supreme Court of Nigeria held that:-

> "It is very clear and without any iota of doubt that an arbitral award made by an arbitrator to whom a voluntary submission was made by the parties to the arbitration, is binding between the parties ... The parties have the right to challenge the award in Court but until any of the parties succeeds in challenging the award, the award has the force and effect, for all purposes, as a Court Judgment . See **RAS PAL GAZI CONSTRUCTION CO. LTD. V. F.C.D.A. (2001) 10 NWLR (PT. 722) 559 AT 574 PARAS. F-G.**

Learned Counsel for the Respondent has argued that the License Agreement entered into between the Applicant and Respondent is unenforceable given the fact that it was not registered with the National Office for Technology Acquisition and Promotion (NOTAP) pursuant to Section 4 of the NOTAP Act.

I think that it is pertinent to reproduce the provisions of Section 4(1) of the National Office for Technology Acquisition and Promotion Act CAP N62 Laws of the Federation of Nigeria, 2004 states that:

> *"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"*

The same Act provides in Section 7(1), for the effect of the non- registration of a contract with the NOTAP and states as follows:-

> *" ... 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 if any payments due under* a *contract or agreement ... unless* a *certificate* of *registration issued under this Act is presented by* a *party concerned"*

The above provision of the law has also been given a judicial interpretation by a Superior Court of record in Nigeria in the case of Beecham Group **LIMITED VS. ESSDEE FOOD PRODUCTS NIGERIA LIMITED (1985) 3 NWLR PART 11 PAGE 112 AT 116 PARAGRAPHS B-C.** In that case, the Nigerian Court of Appeal per Mohammed JCA (as he then was) held that:-

" ... the non-registration of *a contract registrable under Section 4(d)* of *the National Office* of *Industrial Property Decree No.* 70 of 1979 *(as the Act was previously called), does not render the contract invalid or unenforceable. The penalty for non-registration* of *such contract is* as *provided under Section* 7

of *the Decree that foreign exchange will not be released in respect* of *such contract."*

It is also trite law that where a statute imposes an obligation to register contracts of a particular kind and provides penalty for failure to register, the non-registration of such a contract has been held not to render the contract in itself unenforceable. See the international standard text of **Chitty on Contracts - General Principles, Twenty-Seventh Edition, Volume 1 at page 858 paragraph 16-131.**

Following from the above, it is clear that the failure, neglect and refusal of the Respondent to register the said Agreement with the NOTAP, does not render the contract illegal or unenforceable.

Learned Counsel for the Respondent, also argued that the rate of 5% of net sales agreed under the Licence Agreement, as royalties payable by the Respondent, is illegal, and placed reliance on Exhibits C and D attached to the Respondent's Counter Affidavit. However, the Respondent failed, refused,

neglected or deliberately omitted to refer the Court to the provisions of the statute or NOTAP Guidelines which has been that a 5% royalty in a transaction of the nature as the subject matter of this suit is illegal. Exhibit D that the Respondent heavily relied on does not *prima facie* state the law that was violated by the 5% royalty agreed by the parties under the licence Agreement.

It appears that under the Revised Guidelines on Acquisition of Foreign Technology made in 1983, pursuant to the National Office of Industrial Property (NOIP) Act Cap 268 Laws of the Federation of Nigeria 1990, (now the National Office for Technology Acquisition and Promotion Act CAP N62 Laws of the Federation of Nigeria 2004), which was in force as at the commencement of the licence Agreement, the statutory range of percentage of the net sales that could be paid as royalties upon parties' agreement on any contract relating to Know-How, Patents and other industrial property rights range is 1-5% of net sales.

In the subsequent Revised Guidelines on

Acquisition of Foreign Technology issued in 2003 under the NOTAP Act, the same range was stipulated for payment of royalties on to transactions relating to Know-How, Patents and other industrial property rights.

It is apparent therefore, from the above provisions of the law that parties can agree to pay any percentage between the ranges of 1% and 5% of net sales, as royalty for Know-How, Patents and other industrial property rights by a licensee of such rights.

Therefore, the contention of the Respondent that the agreed 5% of net sales payable as royalty to the Applicant is illegal is baseless and unfounded in law. It is clear that the rate of 5% of net sales for Royalty agreed by the parties in the licence Agreement is legal and enforceable under Nigerian law and therefore the Respondent is bound by the same.

The Respondent has also argued that the Director of NOTAP refused to register the Licence Agreement because the 5% rate for the royalty was in contravention of the Law. It is clear from NOTAP's revised guidelines that the rate as stipulated in the licence Agreement was not outside the range stipulated

in the guidelines. Therefore, whatever was purportedly done by the Director of NOTAP, as indicated in Exhibit C and D was in error.

I hold therefore that the Licence Agreement is not invalid, and the 5% royalty agreed by the parties under the said agreement is not illegal.

The Agreement and the Award cannot be contended to be contrary to public policy.

Assuming that the said License Agreement is illegal, it is trite law that a party who has enjoyed benefits from an illegal contract cannot be allowed to plead illegality as a shield from performing its obligation under the illegal contract. In fact, morality, equity, good conscience and public policy demand that such persons are stopped from raising illegality as a defence

The above assertion is deeply rooted in two distinct maxims of Equity which are to the effect that a party shall not be allowed to benefit from his own wrong and that the court of Equity shall not allow the machinery of the law to be used as an engine

of fraud. See the case of **CHIDOKA VS. FIRST CITY FINANCE COMPANY LIMITED (2013) 5 NWLR (PT 1346) 144 AT 163, PARAGRAPH B-G** where Per Muntaka-Coomassie JSC adopted the exposition of the law as clearly expressed by Farewell J. in **LINTCH FILED VS. DREYFUL (1906) 1 K.B AT 559** that:

> *"1 agree that the view so expressed represents the correct position of the law in this matter. I am always not comfortable at the practice where a party after seeking and obtaining money from a friend for resuscitation of his ailing or dwindling business will turn around to rely on technicalities or loopholes in the law as a cover to absolve himself from contractual obligations by putting a defence under Money Lenders Law, as done by the appellants in this*

case. This is pes-simi exempli of *business relations and this court would not lend support for such* a *party to bite the finger that fed him and deprive him* of *his hard earned money. A man who, with his eyes open and without the other party committing any fraud against him, enters into* an *agreement with another, should be prepared to abide by the terms* of *the agreement illegal or otherwise un- enforceable in law. I cannot allow the appellants, after collecting money from the respondent to do business, to now turn around to plead the Money Lenders law in order to escape the refund* of *the said money....*"

See also the case of **SOSAN VS. HFP ENGINEERING (NIGERIA) LIMITED (2004) 3 NWLR PART 861 PAGE 546 AT 573 -574 PARAGRAPHS E-B**, where the Court, citing with approval the decision of the Court of Appeal, per Akpata, JCA (as he then was) in the case of **EMMANUEL O. ADEDEJI V. NATIONAL BANK OF NIGERIA LTD & ANOTHER (1989) 1 NWLR PART 96 AT PAGE 226 AND 227**, held that:

> *Apart from the principle* of *law involved in this case, it is morally despicable for* a *person who has benefited from* an *agreement to turn round and say that the agreement is null and void.* In *pursuance* of *the principle that law should serve public interest, the courts have evolved the technique* of *construction in bonan partem. One* of *the principles evolved from such construction in the interpretation* of *Statutes is that* no *one should be*

allowed to benefit from his own wrong (nollus commodum capere posttest de juria sua propria). As Widgrey, LJ said in Buswell v. Goodwin (1971) 1 *All ER 418 at* 421, *'The proposition that* a *man would not be allowed* to *take advantage* of *his own wrong is* no *doubt* a *very salutary one and one which the court would wish to endorse'. The effect is usually that* a *literal meaning* of *the enactment is departed from where it would result in wrongful self- benefit."*

See also the cases of **PAN BISBILDER (NIGERIA) LTD VS. F.B.N LTD (2000) 1 NWLR PART 642 PAGE 684 AT 695 PARAGRAPHS B-D** and **OYEGOKE VS. IRIGUNA (2002) 5 NWLR PART 760 PAGE 417 AT 439-440** in support of the above principle of law

It is clear that in the instant case, the Respondent has alleged illegality as its defence to the performance of its obligations in the Licence

Agreement, which the Respondent, on his free will entered into and was in fact remitting Royalties to the Applicant until 2008, and which the ICC International Court of Arbitration has now awarded in favour of the Applicant. Further, it appears that the same Respondent benefitted immensely from the contract during the production of the vitaminised malt drink branded with the Plaintiff's registered trademark "Vitamalt" and the attendant reputation and goodwill. Surreptitiously or otherwise, the Respondent has now reneged in the discharge of its obligation under the said License Agreement on the ground that the said contract is illegal, void and unenforceable, and that, the Respondent cannot therefore be called upon to discharge their obligations under an illegal contract.

I hold that this conduct is highly irrepressible, unacceptable in law, offending to the principle of equity and good conscience, and should be condemned in its entirety.

I hold therefore, in the light of the foregoing, that this singular act of the Respondent is tantamount to using the machinery of the law to perpetuate fraud

and this cannot stand.

Overall, I hold that the Originating Motion has merit and it is granted as prayed.

M.B. IDRIS
JUDGE
18/1/16

A.A. Mbah with M.A. Adeniyi for the Applicant
I.A. Onyekwelu with A.O Coker for the Respondent