

PROMOTION OF INTERNATIONAL TRADE THROUGH THE FEDERAL HIGH  
COURT RULES

BY  
YUSUF O. ALLI, SAN\*

**INTRODUCTION**

This paper was provoked by the need to call attention to some of the provisions of the Federal High Court Rules<sup>1</sup> that could be used in the sphere of litigation to promote International trade. This need is all the more compelling having regard to the all embracing jurisdiction of the Federal High court as expanded by **Decree 107 of 1993**.

It should be remembered that before the promulgation of Decree 107 in 1993, the Federal High Court was a Court of very limited jurisdiction.<sup>2</sup> This position subsequently changed. Some of these changes account for the need to call the attention of the members of the profession to the provisions of the Rules that could be invoked in the appropriate proceedings to the advantage of litigants where causes of action have to do with international trade. The paper will also attempt to call attention of the law makers to the need for some amendments to the Rules of the Federal High Court with a view to enhancing its effectiveness in the promotion of International Trade in Nigeria.

In this era, when the world has become "a global village", each country especially developing

ones like Nigeria must do everything to reform its Laws to encourage the inflow of Foreign Capital Investments.

**SHORT HISTORY OF THE FEDERAL HIGH COURT**

The Federal High Court came into the Nigeria Legal System in 1973 with the promulgation of **Federal Revenue Court Decree**.<sup>3</sup> It is the same court that was renamed Federal High Court by the 1979 constitution of Nigeria.<sup>4</sup> Upon the commencement of the 1979 constitution of Nigeria on 1<sup>st</sup> October, 1979 the establishment of the Court was invested with constitutional flavour.<sup>4</sup>

The constitution provides for the establishment of the court, appointment of the members of the court, jurisdiction, powers, constitution and practice and procedure of the court.<sup>6</sup>

In conception, as the original name suggests, the Court was to be a specialized court that deals with the revenue of the federation. But due to amendments of the enabling law<sup>7</sup> which culminated in **Decree No. 107 of 1993**, the court as is to day now has jurisdiction to deal with virtually all the items on the exclusive legislative list of the 1979 Constityution.<sup>8</sup>

## **INTERNATIONAL TRADE**

In the context of this paper, international trade will be used as the form of trading or business transaction undertaken between a Nigerian person or corporate entity with others outside the shores of Nigeria. In other words, we shall X-ray business transactions that involve any form of trade with other persons or corporate entity outside Nigeria. However, we are not concerned in this paper with the nitty-gritty or the technicalities of international trade such as CIF or FOB contracts. Rather, we shall deal with international trade as a simple economic term.

## **SOME PROVISIONS OF THE FEDERAL HIGH COURT RULES IN AID OF INTERNATIONAL TRADE**

**Order III Rules 1 - 9** make provisions for a method of summary judgement procedure by the name of 'undefended list'. This is a procedure opened to a plaintiff that wants to claim a debt or liquidated money demand from a defendant. He only needs to file a writ with supporting affidavit. In the affidavit, he should depose that in his belief there is no defence on merit to the action. If the defendant fails or neglects to deliver the requisite processes indicating his intention to defend the action or such a defence he filed to the action amount to no defence in the opinion of the trial judge then, the trial judge would be entitled to give judgement in favour of the plaintiff.<sup>9</sup>

It is our view that if the above provisions of the undefended

list are seriously harnessed for the purposes of litigation involving a dispute arising from international trade in Nigeria, it will a id quick resolution of such dispute.

**Order V Rule 1** makes provisions for the assignment of an address within jurisdiction for a plaintiff who is not ordinarily resident in Nigeria. This provision could be very salutary for a defendant that is sued by a foreign company in Nigeria since such plaintiff will be obliged to supply an address within jurisdiction and this will save the defendant the trouble of having to serve processes outside the country, with the attendant cost and strain on time.

**Order X Rule 2** makes provisions for special bailiff for effecting service of court processes. This provision is very important for the services of court processes outside Nigeria especially for the realization of the benefit of **Rule 9 of Order X** which makes provision for service of court processes on a ship within Nigeria's territorial water. **Rule 5 of Order X** makes beneficial provisions for substituted services of court processes. For those who are similar with the difficulties of effecting personal service of court processes, will appreciate the indispensability of the provisions especially on matters ordering on international trade which will in most probability involve a company or person resident outside Nigeria.<sup>10</sup>

**Order XI** makes copious provisions for the method of effecting

service of foreign court processes issued **from** tribunals and courts from outside Nigeria. Even from the heading of the order<sup>11</sup> it is clear that it was directed in aid of the promotion of international trade.

In **Order XIV Rules 11 - 16** thereof, comprehensive provisions are made for the obtaining of evidence by Nigerian Courts from a witness or witnesses resident in Nigeria on behalf of a foreign tribunal. For a better appreciation of these provisions it would be beneficial to quote in extension provision of Rule 11 which provides as follows:

*"Where under the Foreign Tribunals Evidence Act 1856, or the Extradition Act, any civil commercial matter, or criminal matter, is pending before a Court or Tribunal of a foreign country, and it is made to appear to the Court by commission **rogatoire**, or letter of request, or other evidence as hereinafter provided, that such court or tribunal is desirous of obtaining the testimony in relation to or of any witness within the jurisdiction, the Court may, on the ex-parte application of any person shown to be duly authorized to make the application on behalf of such foreign court or tribunal, and on production of the commission **rogatoire**, or letter of request, or of a certificated signed in the manner, and certifying to the effect mentioned in **Section 2** of the Foreign Tribunals Evidence Act,*

*1856, or such other evidence as the court may require, make such order as may be necessary to give effect to the intention of the enactment above mentioned in conformity with **Section 1** of the said Foreign Tribunal Evidence Act, 1856."*

It is apparent from the above provision that under the rule of reciprocity international trade will get a boost if and when a Nigerian litigant also needs to obtain evidence of a witness resident outside of Nigeria.

In **Order XVI Rule 1**, there is opportunity afforded to a litigant to appear through a proxy when such party is not represented by Legal Practitioner.

**Order XVIII Rules 1 - 7** make copious provisions enabling the Federal High Court to make an order arresting an absconding defendant in cases where such a defendant after becoming aware of the case against him, intends to leave the jurisdiction of the court or dispose or remove his property either in whole or in part to be arrested pending the determination of the matter or that he should give security for his appearance at the court.

It will be seen from the Rules that if properly mastered it will aid the disposal of any dispute involving international trade without the attendant risk of the victor or judgement creditor having a pyrrhic victory.

Another important provision is **Order XIX** wherein provisions are

made for the interim attachment of the property of a defendant that wants to dispose of same during the pendency of the matter before the court. For a full appreciation of the provision, Rule 1 provides **inter alia**

"1.(a) Where the defendant in any suit for any amount or value of five hundred Naira or upwards with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of his property, or any part thereof, or to remove any such property from Nigeria or

(b) Where in any suit founded on contract or for detinue or trover in which the cause of action arose in Nigeria,

(i) The defendant is absent from Nigeria, or there is probable cause to believe that he is concealing himself to evade services; and

(ii) The defendant is beneficially entitled to any property in Nigeria in the custody or under the control of any other person in Nigeria, or such person is indebted to the defendant,

then in either such case, the plaintiff may apply to the court either at the time of the institution of the suit or at any time thereafter until final judgement to call upon defendant to furnish sufficient security to fulfil any decree that may

be made against him in the suit, and on his failing to give such security, or pending the giving of such security, to direct that any property movable or immovable belonging to the defendant shall be attached until the further order of the court."

The above provision is a veritable tool that can be employed to telling effect in the prosecution of a litigation that deals with any element of international trade. In a true life situation, a Nigerian may want to take undue advantage of a foreigner with whom he enters into an international transaction. If the Nigerian wants to dispose of his property either real or personal, the foreigner would legitimately invoke the powers of the court under the Rules to frustrate such an action. Albeit, the rule can also operate in the converse.

One important provision of the Federal High Court Rules that has a direct bearing on international trade is **Order XXI** which for its importance is quoted hereunder:

1. "When the extreme urgency or other peculiar circumstances of the case appears to the court so to require, it shall be lawful for the court on the application of any plaintiff, by warrant under seal of the court, to stop the clearance or to order arrest and detention by the sheriff of any ship about to leave the jurisdiction (other than a ship enjoying immunity from civil process), and such

*clearance shall be stopped or the ship arrested and detained accordingly: provided always that no such warrant shall be issued at the instance of any plaintiff unless the application shall be supported by an affidavit of the facts.*

2. *the court may at any time release a ship detained under this order upon such terms as it may deem reasonable."*

In this paper, we shall not belabour the whole gamut of shipping law but suffice to state that, in the exercise of the power of detention of a ship, the court will be guided by the principle that are similar to the one that guide the court in the grant or refusal of interim and/or interlocutory injunction.<sup>12</sup>

**Order XXX** deals with settlement of issues. This is a beneficial procedure that can be used by parties to a cause before the court on non-contentious matters or even in contentious ones to agree on the appropriate questions that call for determination in the case. Once this is done, the procedure of giving evidence is dispensed with partially or totally and the parties through their counsel would address the court on the issue that are so settled. This procedure shortens the time of litigation appreciably.<sup>13</sup>

**Order XLII** provides for reference of questions of facts, or account to be referred by court to a referee for

investigation. The importance of this in the adjudication process will better be appreciated by a recall of the provision of **Rule 1** of the order, which appear in the following terms:

*"In any cause or matter in which all parties interested who are under no disability consent thereto, and also without such consent in any cause or matter requiring any prolonged examination of documents or accounts or any scientific or local examination, which cannot in the opinion of the court, having regard to the business before it, conveniently be made by the court in the usual manner, the court may at any time, on such terms as it may think proper, order any question or issue of fact, or any question or account arising therein, to be investigated before a referee to be agreed upon between the parties, or, failing such agreement, appointed by the court."*

There is no gain saying it that the above provisions could be found very handy in the terrain of international trade with C.I.F. and F.O.B. contracts and complex international accounting system. Most of this complexity could develop in any litigation involving international trade, thus, the usefulness of the provision in such cases.

In most international trading contracts which could become subject of litigation at any time, the insertion of arbitration clauses is very important and a *sine qua non*.

This is why the copious provisions made in **Order XLII** of the Federal High Court Rules is a welcome adjunct to the provisions of their **Arbitration and Reconciliation Act**.<sup>14</sup>

The above highlighted provisions of the Federal High Court Rules even without an attempt at exhaustiveness could be gainfully employed beneficially in favour of litigants that found themselves in matters involving international trade.

The above position is all the more compelling in view of the enlarged jurisdiction of the Federal High Court by the provisions of **Decree 10y of 1993**.<sup>15</sup>

#### **SUGGESTED REFORMS**

It is our view that, even though the provisions highlighted above could aid the promotion of international trade, there are rooms for reforms and improvements which are suggested below for a better effectiveness of the Rules:

1. It is suggested that, since the Federal High Court now deals almost exclusively on all matters in the exclusive legislative list, there should be a provision in the Rule that would empower that court to give its judgement in any currency not necessarily in Naira.
2. The concept of juristic personality should be relaxed so as to accommodate foreign companies that want to sue or be sued in their names.<sup>17</sup> This we submit will assist parties in litigation in International Trade

Matters before the Federal High Court.

3. It is also advocated that the concept of **locus standi** be severally watered down, especially in case involving shipping Law. This will assist all the parties involved in a ship charter party to get justice with little or no difficulties. The Court of Appeal made this point eloquently in the recent case of **Fareast Mercantile Co. Ltd. V Boothia Maritime Inc.**<sup>18</sup>
4. There is a need for the amendment of the provision of **Order XV Rule 6** of the Federal High Court Rules which deals with security for costs. At least this amendment could be in line with the recent Supreme Court decision in the case of **Oduba v. Houtmangracht**.<sup>19</sup>

In this case, the Supreme Court frowned at the way and manner the courts have been interpreting **Order XV Rule 6** supra.

In our view, all that is needed is for a better rewording of the provisions of the Rules so as to remove ambiguities.

#### **CONCLUSION**

In this paper, we have tried to call attention to some of the provisions of the Federal High Court Rules that could be exploited by litigants before that court in the promotion of international trade. It is also our hope that the operators of the Rules, that is the judges of the Federal High Court, will employ where necessary a liberal and progressive interpretative stance

in the operation of the Rules. We have also tried to suggest some necessary reforms to the Rules for a better promotion of international trade. We need not belabour the point that - "no man is an island" and therefore, we should be willing to borrow a leaf from the reformations or other Rules from other common Law jurisdictions.

It is our hope that the next century that is at the doorstep will not meet our Court Rules in the anachronistic garb which they currently wear.

#### FOOTNOTES

1. See Cap. 134 Laws of Federation of Nigeria 1990.
2. **Bronik Motors v. Wema Bank Limited** (1983)1 SCNLR 296, where the provisions of **Section 7(1)** of the Federal High Court Act was interpreted by the Supreme Court.
3. **Federal Revenue Court Decree No. 13 of 13<sup>th</sup> April, 1973.**
4. **Section 6(5) (c ) of the CFRN 1979.**
5. **Section 228 - (1) of the CFRN 1979.**
6. **Section 228 - 233 of the CFRN 1979.**
7. Decree 60 of 1991, and Decree 16 of 1992.
8. Second schedule (part 1) of the 1979 Constitution as amended.
9. For detailed discussion of the undefended list procedure under the rule of courts in Nigeria see: **"The Undefended List Provisions in the Uniform High Court Civil Procedure Rules". By Yusuf O. Ali, Esq.; Published in the Gravitas Review of Business and Property Law Vol. 2 No. 12 November -**

**December, 1989.**

10. **Odutola v. Kayode** (1994)2 NWLR (Pt. 324)1 at 15 where the supreme court stated that where personal services of Court processes is required, a party cannot carry out substituted service except by order of court.
11. The wording reads **"Service in Nigeria for Foreign Tribunals"**.
12. **See: Onwadike & Co. Ltd. V Brawal Shipping** (1996)1 NWLR (pt. 422) 65 **Falomo v. Banigbe** (1998)7 NWLR (pt. 559) 679.
13. See the case of **Maximum Insurance Co. ltd. V. Owoniyi** (1994)3 NWLR (pt. 331) 178 at 194 where the court fully espoused the intricacies and subtleties of procedure of settlement in a case.
14. See **Kano State v. Franz Construction Co. Ltd.** (1990)4 NWLR (pt. 142).
15. The Decree among other amended Section 230 of the 1979 Constitution which conferred jurisdiction on the Federal High Court.
16. See:
  - (1) **Broadline Enterprises Ltd. V. Monterey Maritime Corporation** (1995)9 NWLR (pt. 417)1.
  - (2) **Prospects Textile Mill Ltd. V. IC.I. Plc. England** (1996)6 NWLR (pt. 457) 668.
  - (3) **Zalgitter Stahl Gmbh v. Aridi Industry Ltd.** (1996)7 NWLR (pt. 459) 192.
17. **See: Carlen Nig. Ltd. V. UNIJOS** (1994)1 NWLR (pt. 323) 631.
18. (1998)5 NWLR (pt. 551) 620 at 629 - 630.
19. (1997)6 NWLR (pt. 508) 185 at 200 - 201.