Statutes of Limitation and ADR Processes

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INTRODUCTION

A statute of limitation is any statute which imposes a limitation of time upon an existing right of action. It is settled law that the reasons for the existence of such statutes are threefold: that long dormant claims have more of cruelty than justice in them; that a defendant might have lost the evidence to disprove a stale claim; and that persons with good causes of actions should pursue them with reasonable diligence.[2] The consequence of this is that those who go to sleep on their claims should not be assisted by the courts in recovering their property and that there should be an end to stale demands. When such stale actions are filed in court, they are usually declared incompetent and statute-barred. An action is statute-barred when no proceedings can be brought in respect of it because the period laid down by the Statute of Limitation has lapsed. However, in determining when a right of action is statute-barred, the issue as to when the right of action arose is very fundamental. This is so because time begins to run when there is in existence a person who can sue and another who can be sued and a cause of action has arisen. A cause of action is the fact or facts which establish or give rise to a right of action. It is the factual situation which gives a person a right to a judicial relief.

In litigation, it is trite law that the Statute of Limitation applies to judicial proceedings. However, it is uncertain whether the statute applies to the alternative dispute resolution (ADR) processes. The aim of this article, therefore, is to examine whether or to what extent if at all, the statute applies to any ADR process.

ADR PROCESSES

Alternative Dispute Resolution (ADR) is the term which identifies a group of processes through which disputes, conflicts, and cases are resolved outside of formal litigation procedures. It developed formally in the United States primarily as an adjunct to the legal system.[3] In Nigeria, it is a re-statement of customary jurisprudence. It generally involves the intercession and assistance of a neutral and impartial third party. We can also define ADR as a system of dispute resolution which is non-binding and serves either as alternatives or supplementary to litigation. By 'non-binding' is meant the absence of imposed decisions.

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2. *Nwadiaro v Shell Development Company Ltd* (1990) 5 NWLR (Pt 150) 322 at 337-338. See also *Egbe v Yusuf* (1992) 6 NWLR (Pt 245) 1 at 13, and *UBN Ltd v Oki* (1999) 8 NWLR (Pt 614) 244 at 253-254.
3. Kovash KK. *Mediation: Principles and Practice*, 2nd ed, (Minn, St Paul: West Group, 2000) p. 6.

Thus a proper ADR procedure does not guarantee a binding result that could be coercively enforced by action, although it can lead to a result. The main distinction between ADR and arbitration lies in this respect. For purposes of this article, however, ADR procedures include arbitration,[4] mediation/conciliation[5] and negotiation.[6]

COMMENCEMENT OF ADR PROCEEDINGS

In most if not all jurisdictions, there are enactments[7] or rules[8] regulating the conduct of either arbitration or mediation/conciliation: whether *ad hoc* or institutional. However, in the case of negotiation, there are no formalised rules on the procedures to be followed. This is left to the parties to decide. Generally the parties are free to agree when arbitral or conciliation proceedings are to be regarded as commenced and where they fail the default procedures[9] provided for in the enactments/rules will apply. Accordingly, section 17 of the ACA provides thus:

4. See generally Brown H and Marriott. A *ADR Principles and Practice,* 2nd ed (London: Sweet & Maxwell, 1999), p. 12; Mackie, K *et al. The ADR Practice Guide: Commercial Dispute Resolution,* 2nd ed (London: Butterworths, 2000) p. 8; Asouzu A A. *International Commercial Arbitration and African States* (Cambridge: Cambridge University Press, 2001) pp. 11-21, and Macfarelane J (ed) *Rethinking Disputes: The Mediation Alternative* (London: Cavendish Puiblishing Ltd, 1997) p. 2.
5. See generally Sutton, David St John and Gill, J. *Russell on Arbitration,* 22nd ed (London: Sweet & Maxwell, 2003) p. 41; Asouzu, *ibid.* Orojo JO and Ajomo MA. *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates (Nig) Ltd, 1990) p. 4; Redfern A and Hunter M. *Law and Practice of International Commercial Arbitration,* 3rd ed (London: Sweet & Maxwell, 2003) p. 4; and Tackaberry J and Marriott A. *Bernstein's Handbook of Arbitration and Dispute Resolution Practice.* 4th ed, vol.I (London: Sweet & Maxwell, 2003) p. 12.
6. See Fisher R and Ury W. *Getting to Yes: Negotiating Agreement Without Giving In,* 2nd ed (New York: Penguin Books 1991) p. xvii; Fisher R and Brown S. *Getting Together: Building Relationships as We Negotiate* (New York: Penguin Books, 1989) p. 133; and Ury W. *Getting Past No: Negotiating Your Way from Confrontation to Cooperation* rev ed (New York: Bantam Books, 1993) p. 3; Maddeux R. *Successful Negotiation,* 2nd ed, 1999, p. 5; and Halpern A. *Negotiation Skills* (London: Blackstone Press Ltd, 1992) p. 3.
7. See Article 21 of the UNCITRAL Model Law on International Commercial Arbitration ('Model Law'), United Nations Document A/40/17, annex I; See also section 14 of the English Arbitration Act, 1996 and section 17 of the Arbitration and Conciliation Act, Cap 19, Laws of the Federation of Nigeria, 1990 ('ACA'). Nigeria is a Model Law country. See Binder P. *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (London: Sweet & Maxwell, 2000) pp. 241-313.
8. UNCITRAL Arbitration Rules, UN General Assembly Resolution 31/98 of 15 December, 1976 ('Arbitration Rules'), and UNCITRAL Conciliation Rules, UN General Assembly Resolution 35/52 of 4 December, 1980 ('Conciliation Rules').
9. This is also referred to as the 'two-level system' which is a way of drafting a provision where the first part of the law grants the parties general freedom in regulating an issue, and the second part sets out the default rules which apply only when no such party stipulation is made. See Binder P, *op. cit.* at 71.

> *Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date the request to refer the dispute to arbitration is received by the other party.*[10]

This is one way of commencing arbitral proceedings. Other enactments or rules may prescribe that a particular step be taken before the proceedings commence.[11] In arbitration, the commencement date is very fundamental both for the purposes of the provisions of the enactment and for limitation purposes. In the words of the learned authors of *Russell on Arbitration,*[12] 'identification of the date of commencement may be of critical importance to the parties in view of contractual or statutory time limits for commencement of the arbitration'. This statutory provision is usually reinforced by arbitration rules and the rules of arbitral institutions.[13] In the absence of any agreement as to when the proceedings are deemed to have commenced, resort to these rules will cure any lacuna. Whereas the ACA does not expressly provide for situations where the parties fail to agree on the date of commencement of proceedings after the appointment of arbitrator(s), section 14(4) of the English Arbitration Act provides thus:

> *Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.*

Similarly, if the arbitrator(s) are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.[14]

In the case of mediation, section 39 of the ACA provides that the conciliation proceedings shall commence on the date the request to conciliate is accepted by the other party. The provision is also supplemented by the rules. Accordingly, Article 2 of the Conciliation Rules provides thus:

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10. See also 60 of the Limitation Act, Cap 522, Laws of the Federation of Nigeria, 1990, 1990 applicable to the Federal Capital Territory, Abuja. All the other states of the Federation have their various statutes of limitation. For Lagos State, see Cap 118, Laws of Lagos State, 1994. See also the English Limitation Act, 1980,Section 14 of the English Arbitration Act, 1996, and section 1044 of the German Code of Civil Procedure. Compare section 18 of the Sri Lankan Arbitration Act which does not grant the parties the freedom of choosing which point in time they determine for the commencement while section 32 of the Hungarian Arbitration Act, LXXI of 1994 draws a time frame between *ad hoc* and institutional arbitration.
11. This may be the making of claim, the appointment of an arbitrator, the notification of such appointment to the other party, the sending of a notice to the other party requiring him to agree to the appointment of an arbitrator, etc.
12. Sutton and Gill, *op. cit.* at 160.
13. See Article 3 of the Arbitration Rules, Article 1.2 of the London Court of International Arbitration (LCIA) Rules, 1998, and Article 4 of the Rules of Arbitration of the International Chamber of Commerce (ICC), 1998. See also the First Schedule to the ACA.
14. See section 14(5) of the English Arbitration Act. See also section 34 of the English Limitation Act 1980; and Prime T and Scanlan G. *The Law of Limitation,* 2nd ed (Oxford: Oxford University Press, 2001) p. 332.

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.
(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.
(3) If the other party rejects the invitation, there will be no conciliation proceedings.
(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.[15]

Where the conciliation is to be administered by an institution, the request is made to that institution.[16] The date of commencement of the mediation is usually the date on which the request for mediation is received by the institution.

STATUTORY AND CONTRACTUAL TIME LIMITS

Statutory time limits, whether imposed by the Limitation Act[17] or any other limitation enactment, apply to arbitrations as they do to legal proceedings.[18] The issue is when does time start to run? Is it from the date of the accrual of the cause of action or from the date of the making of the award?[19] More fundamentally, does the publication of an award extinguish any right of action in respect of the former matters in difference and thus give rise to a new cause of action based on the arbitration agreement? In *Murmansk State Steamship Line v Kano Oil Millers Ltd*,[20] the plaintiff brought his action on the award less than six years after the date of the award but more than six years after the defendant's breach of the charter party. The Supreme Court, affirming the judgment of the court of first instance, dismissed the claim as statute-barred. The Court further held that the period of limitation runs after the date of award only when a party has by his own contract waived his right to sue as soon as the cause of action had accrued, but, 'if there is no such *Scot v Avery* clause, the limitation period begins to run immediately (that is, from the breach of the substantive contract)'.[21] However, in *Kano*

15. See also the Third Schedule to the ACA.
16. See the ICC Rules of Conciliation, 1988. See also Article 3 of the WIPO Mediation Rules, 1994.
17. See sections 59-66 of the Limitation Act, Cap 522, Laws of the Federation. See also section 13(1) of the English Arbitration Act.
18. See section 61 of the Limitation Act (Nigeria).
19. Section 7(1)(d) of the Limitation Act (Nigeria) provides that actions to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under an enactment other than the Arbitration and Conciliation, shall not be brought after the expiration of six years from the date on which the cause of action accrued.
20. (1974) 1 ALR Comm 1 at 4 and 7, or (1974) 12 SC 1.
21. See also Asouzu AA.' The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards' (1999) *J.B.L.* March Issue, P. 185-204.

State Urban Development Board v Fanz Construction Ltd,[22] Agbaje JSC quoted with approval Halsburys Laws of England, Fourth Edition, paragraph 611, page 323 thus:

> *The publication of the award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement.*

In other words, time starts to run from the date of the award. This decision is in accord with the law and practice in other jurisdictions.[23] In England, section 13(2) of the Arbitration Act, 1996, empowers a court to order that in computing the time prescribed by the Limitation Acts for the commencement of proceedings (including arbitral proceedings) in respect of a dispute which was the subject matter (a) of an award which the court orders to be set aside or declares to be of no effect, or (b) of the affected part of an award which the court orders to be set aside in part, or declares to be in part of no effect, the period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded.[24]

However, section 7(1) of the Limitation Act[25] provides that actions to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under an enactment other than the Arbitration and Conciliation Act shall not be brought after the expiration of six years from the date on which the cause of action accrued. This a rather curious provision. This is so because the provision fails to draw a line between actions founded on simple contract or quasi-contract and those regulated by arbitration agreement. Arbitration agreements generally involve two contracts, namely, the main or principal contract which is regulated by the proper law of the contract and the collateral or ancillary contract which is regulated by the *lex arbitri*.[26] This has led to the emergence of the doctrine of separability. The reasoning behind the doctrine is that the arbitration clause constitutes a self-contained contract collateral or ancillary to the underlying or 'main' contract.[27] However, the provisions of the Limitation Acts in the various States in Nigeria do not seem to take this distinction into account. It makes sense to provide that in the case of a simple contract, time begins to run from the date on which the cause of action accrued because it is a single contract. It does not make sense to have a similar provision for arbitration where commencement of arbitral proceedings is different from an application to enforce or set aside an award. Different statutory periods generally govern such actions.

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22. (1990) 4 NWLR (Pt 142) 1 at 37.
23. See *Agromet Motorimport v Maulden Engineering Co.* (1985) 1 WLR 762, and Sutton and Gill, *op. cit.* at 367.
24. See also section 34(5) of the English Limitation Act, 1980 and section 63 of the Limitation Act of the Federal Capital Territory, Abuja and similar provisions in the States of the Federation.
25. This provision is the same in all the States of the Federation of Nigeria and the Federal Capital Territory of Abuja.
26. See Sutton and Gill, *op. cit.* at 64, and Asouzu, *op. cit.* at 433.
27. See *Bremer Vulkan Schiffbau aund Maschinenfabrik v South Indian Shipping Corporation Ltd* (1981) 1 Lloyd's Rep 253 at 259.

In *City Engineering Nigeria Ltd v Federal Housing Authority*,[28] the issue before the court was when time began to run for the purpose of the enforcement of an arbitration award. In that case, there was a breach of contract on 12 December 1980, arbitral proceedings started on 11 December 1981 and ended in November 1985, and application to enforce the award was made in November 1988. There was no counter-affidavit praying for an order of the court to set aside the award. The Supreme Court, in replying on the provisions of sections 8(1)(d) and 63 of the Limitation Law of Lagos State,[29] held that the limitation period ran from 12 December 1980 when the cause of action accrued and not November 1985, the date of the making of the arbitration award. Consequently, the action was statute-barred. In the words of Asouzu:

> *The court distinguished and refused to apply* Agromet Motorimport v Maulden Engineering *(1985) 2 All E.R. 436 and Mustill & Boyd,* Commercial Arbitration *(1982) p.162 whilst holding that* KSUDB v Fanz Construction Ltd *(1990) 4 N.W.L.R. (Pt 142) p.1 was not relevant to the question in issue.*[30]

Instead the court applied the *ratio* in *Murmansk State Steamship Line v Kano Oil Millers Ltd*, supra. Based on the provisions of section 8(1)(d) of the Limitation Law of Lagos State, this is a correct interpretation of the provision. However, if the drafters of the law had adverted their minds to the doctrine of separability, the provisions would have been different. The parties have agreed that in the event of a dispute arising out of or under the contract, it should be resolved by arbitration. Consequently, for purposes of commencement of action, time runs from the date when the cause of action accrued while in the case of challenging an award, time runs from the date of the award. The distinction between commencement of action and setting aside or challenging an award is very important for ease of appreciation of the issues.

In *Araka v Ereagwu*,[31] one of the issues for determination was when to apply to set aside an arbitral award either under section 29 or section 30 of the ACA. Section 29(1), ACA[32] provides that a party who is aggrieved by an arbitral award may, within three months from the date of the award, request the court to set aside the award if the applicant furnishes proof that the arbitrator exceeded his jurisdiction. Similarly, section 30, ACA[33] provides that where an arbitrator misconducts himself or where the proceedings or award has been improperly procured, the court may, on the application of a party, set aside the award. Section 30, ACA makes no reference to a time limit. In that case, the award was made on 8 September 1994 and an application was made on 6 February 1995 to enforce. On 21 April 1995, a counter-affidavit was filed seeking to set aside the award while on 25 April 1995, a fresh application was filed under section 30, ACA for an order of the court to set aside the award on the ground that the arbitrator misconducted himself. At the trial it was argued that since there was no statutory

28. (1997) 9 NWLR 224.
29. Which is the same thing as sections 7(1)(d) and 62 of the Limitation Act of the Federal Capital Territory, Abuja.
30. Asouzu, *op. cit.* no. 28 at 189. See also Uba Nwangwu. 'Enforment of Arbitration Awards and Limitation of Actions' (1990) 2 *Justice* 9 cited in Asouzu, *ibid.*
31. (2000) 15 NWLR (Pt 692) 684 at 706.
32. See also Article 34(4) of the Model Law.
33. This is not expressly provided for in the Model Law but see generally the grounds in Articles 34 and 36 of the Model Law.

time limit under section 30, the time limit of three months in section 29 was inapplicable. The Supreme Court held thus:

> *The prescribed time within which to make an application to set aside an arbitral award under the Arbitration and Conciliation Act, 1988 (now, Cap 19) is three months from the date of the award irrespective of whether the application is predicated under section 29 or section 30 of the Act.*[34]

We submit, therefore, that at the earliest opportunity, the provision in section 8(1)(d) and similar provisions should be amended in line with the practice in other jurisdictions.

It is noteworthy that the effect of a statutory time limit is to provide a procedural bar to the remedy which has to be raised by way of defence to the claim. It does not go to the jurisdiction of the arbitral tribunal but merely proves a defence to the claim: *Leif Hoegh & Co A/S Petrolsea Inc. (The 'World Era')*.[35] However, the existence of a time bar does not deprive the arbitrator of jurisdiction, but in the context of a party seeking to expand his existing claim in the arbitration after the time limit has elapsed, there may well also be want of jurisdiction because the relevant cause of action was not included in the original reference. Where a reference to arbitration is contractual and a statutory time limit is raised, the onus is on the claimant to show the date on which the arbitration is commenced and when the right of action arose. Although section 36 of the ACA provides that the arbitral tribunal may, if it considers it necessary, extend the time specified for the performance of any act under the Act, this does not extend to statutory time limits. Although this power is not expressly given to the courts in Nigeria under the ACA, even in England where the power is given, section 12(5) of the Arbitration Act (English) provides that an order made under the section does not affect the operation of the Limitation Act. Indeed section 13(1) of the Arbitration Act (English) expressly provides that the Limitation Acts apply to arbitral proceedings as they apply to legal proceedings.[36] The consequence of this is that the limitation periods are extended in case of the disability of a party, acknowledgement, part payment, fraud and mistake.[37]

Other than statutory time limits, there are contractual time limits. According to the learned authors of *Russell on Arbitration*:

> *A time limit in an arbitration clause (or in arbitration rules incorporated by reference) may (1) impose a time limit for commencing arbitration proceedings, and /or (2) provide that a claim shall be barred or extinguished if arbitration is not commenced within the time limit. These provisions are not necessarily found together.*[38]

The effect of such a clause or rule seems to be that the dispute is removed from the jurisdiction of the court. However, since such provisions are not necessarily found together, the contract may limit the time for commencing arbitration without barring or extinguishing

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34. See also *Commerce Assurance Ltd v Alli* (1992) 3 NWLR (Pt 232) 710 and *Home Development Ltd v Scancila Contracting Co Ltd* (1994) 8 NWLR (Pt 362) 252.
35. (1992) 1 Lloyd's Rep 45.
36. See also section 61 of the Limitation Act (Nigeria) which provides that the Act and any other limitation enactment shall apply to arbitrations as they apply to actions in the court.
37. See sections 34-58 of the Limitation Act (Nigeria).
38. Sutton and Gill, *op. cit.* at 160.

the claim, depriving a party who is out of time of his right to claim arbitration but leaving open a right of action in the courts.[39] Alternatively, such a clause may make compliance with a time limit, a condition of any claim without limiting the operation of the arbitration clause, leaving a party who is out of time with the right to claim arbitration but so that it is a defence in the arbitration that the claim is out of time and barred.

In *Smeaton Hanscomb & Co Ltd v Sasson I Setty, Son & Co (No. 1),*[40] a contract for the sale of mahogany logs had a clause requiring any dispute arising with respect to any matter connected with the contract to be referred to arbitration and provided "any claim must be made within 14 days from the final discharge of the goods before they are removed". After the 14 days had elapsed, the buyers put forward a claim in respect of shortage and defective quality. On a special case being stated it was held that the buyers could not maintain the claim as the clause went not to the appointment of the arbitration, but to the making of the claim which the arbitrator had to determine, and it had been left to the arbitrator and not to the court to determine the point finally so far as it was a question of fact.[41] Like the *contra preferentem* rule, time bar clauses are construed strictly against the party relying upon them.[42] Similarly, a time bar clause can be unilateral. In other words, even where there is no mutuality where arbitrators found that the time bar clause plainly deals with buyers' complaint and not sellers', a request for arbitration by sellers even when made outside the contractual time limit is not statute-barred.[43]

In analysing the effect of the law on contractual time bars which provide that arbitration must be commenced within a specified time limit, it is pertinent to consider the *Scot v Avery Clauses*.[44] Such contractual clauses are usually inserted in an arbitration agreement to the effect that no cause of action shall accrue until an award is made. In other words, the arbitration of disputes is a condition precedent to any court action.[45] Such clauses are ineffective to extend the limitation period in respect of the matter to be referred to

39. Such clauses are usually referred to as *Atlantic Shipping Clause*. See *Atlantic Shipping & Trading Co v Louis Dreyfus & Co* (1922) 2 AC 250. See also *Pinnock Brothers v Lewis & Peat Limited* (1923) 1 KB 690.
40. (1953) 1 WLR 1468.
41. See also *A/S Det Dansk-Franske Dampskibsselskab v Compagnie Financiere D'Investissements Transatlantiques S.A. (Compafina) (The "Himmerland")* (1965) 2 Lloyd's Rep 353 where the Centrocon arbitration clause provided that 'Any claim must be made in writing and the Claimant's Arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred …' A claim was made out of time and the court held that the claim was barred even though the cause of action giving rise to the claim had not arisen or come to the knowledge of the claimant until too late to enable him to comply with the clause.
42. *Minister of Materials v Steel Brothers & Co Ltd* (1952) 1 TLR 499.
43. *W J Alan and Co Ltd v El Nasr Export and Import Co* (1971) 1 Lloyd's Rep 401.
44. *Scot v Avery* (1856) 25 LJ Ex 308.
45. See also *Board of Trade v Cayzer, Irvine & Co Ltd* (1927) AC 610.

arbitration.[46] Thus the cause of action is deemed to have accrued in respect of the matter at the time when it would have accrued but for that term in the submission. The consequence is that such a provision is completely disregarded for limitation purposes.

It is abundantly clear, therefore, that the statutes of limitation apply to arbitration. However, do they apply to negotiation and mediation? In all the enactments on statute of limitation, there is no reference to negotiation or mediation. Does this mean, therefore, that when a dispute is being negotiated or referred to mediation, time does not run? Since there appears to be no statutory provisions on this, reliance will be placed on case law. It should be borne in mind that the ADR processes take place 'in the shadow of the law' as the parties appraise the types of outcome likely to be imposed by a court, and develop criteria which both sides can accept as fair for reaching an agreement.[47] Thus the issue of legal proceedings has a significant impact on all negotiations and mediation.[48]

In *Hewlett v London County Council*,[49] the parties addressed several letters to each other which contained suggestions for a settlement, the sum which the plaintiff would be willing to accept and requests for more particulars. When negotiations broke down, the plaintiff instituted an action and the defendant relied on section 1(a) of the Public Authorities Protection Act, 1893 which prescribed a limitation period of six months. It was held, on appeal, that the defendant was not estopped from relying on the Act. In other words, negotiation did not stop the time from running.

In *Lahan v The Attorney-General of Western Nigeria*[50] attempts were also made at negotiations but the issue was whether such negotiations would stop the time from running. The court, per Fatayi Williams J (as he then was) relied on *Hewlett v London County Council*, *supra* and held that negotiations between the parties will not stop the time from running.

In *Nwadiaro v Shell Development Company Ltd*,[51] the issue before the Court of Appeal was whether the action of the plaintiff was statute-barred. The claim of the plaintiff against the defendant at the Oguta Judicial Division of Imo State High Court was for N100,000.00 (one hundred thousand naira):

> *being compensation for the blockade by the defendant of the p[laints "UTU IYI EFI CREEKS AND PONDS" along the access road to well 3 location, lying and situate at Oguta farmland in the Oguta Judicial Division* from 1966 till date.[52]

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46. See section 62 of the Limitation Act (Nigeria) which provides thus: 'Notwithstanding a term in a submission to the effect that no cause of action shall accrue in respect of a matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purposes of this Act and of any other limitation enactment (whether in their application to arbitrations or to other proceedings) be deemed to have accrued in respect of the matter at the time when it would have accrued but for that term in the submission'. See also section 13(3) of the Arbitration Act (English), 1996.
47. Macfarlane, *op. cit.* at 7.
48. Mackie et al. *op. cit.* at 23.
49. (1908) 24 JLR 331.
50. (1961) WNLR 39. See also *Inco Beverages Ltd v Class W Brons & Ors* (1990-93) Vol. 4 NSCC 123 and *Inlaks Ltd v Polish Ocean Lines* (1980-1986) Vol.2 NSC 501.
51. (1990) 5 NWLR (Pt 150) 322.
52. Emphasis added.

The writ of summons was dated 23 May 1985 but filed in court on 27 May 1985 and the Statement of Claim was filed on 17 June 1985. Instead of filing a Statement of Defence, the defendant filed a motion for an order of court dismissing the action on the ground that it was statute-barred, the suit having been commenced more than six years after the cause of action had arisen. In the counter-affidavit, the plaintiff deposed that the blockade was a continuous one and that the negotiation between the parties, which started in November 1984, continued till April 1985. The High Court held that since the cause of action arose in 1966, the action was statute-barred. Dissatisfied with the decision, the plaintiff appealed to the Court of Appeal. One of the issues for determination was when the cause of action arose. The Court held that since the cause of action arose from 1966 till date, that is, when the writ of summons was issued on 27 May 1985, the action was not statute-barred. In distinguishing the facts of the case from that of *Lahan v The Attorney-General of Western Nigeria*, *supra*, the Court held that the fact that negotiations between the parties will not stop the time from running is subject to a qualification. The Court held further:

> *It obviously must depend upon the stage which the negotiation had reached. It must also be qualified in one other way; if there has been admission of liability during negotiation and all that remains is fulfillment of the agreement, it cannot be just and equitable that the action would be barred after the statutory period of limitation giving rise to the action if the defendant were to resile from his agreement during the negotiation.*

The import of this judgment is that although negotiations do not *per se* stop the time from running, this is subject to some qualifications especially where there is an admission which is like an acknowledgment.[53] Such an acknowledgement is one of the exceptions to the limitation statutes.[54] The Court of Appeal's decision was affirmed by the Supreme Court in *Eboigbe v The Nigerian National Petroleum Corporation*,[55] where the Court, per Adio JSC, held thus:

> *Although the law does not prohibit parties to a dispute from engaging in negotiation for the purpose of settling the dispute, generally such a negotiation by parties does not prevent or stop the period of limitation stipulated by a statute from running. The law is that when in respect of a cause of action, the period of limitation begins to run, it is not broken and it does not cease to run merely because the parties engaged in negotiation. The best cause for a person to whom a right of action has accrued is to institute an action against the other party so as to protect his interest or right in case the negotiation fails. If, as in this case, the negotiation does not result in a settlement or in an admission of liability, the law will not allow the time devoted to negotiation to be excluded from the period which should be taken into consideration for the determination of the question whether claim has become statute-barred.*

53. Under section 36 of the Limitation Act (Nigeria), an acknowledgment means acknowledgment of indebtedness, a claim, title, or a right. See also sections 37-43 of the Limitation Act.

54. Under section 44, every acknowledgment shall be in writing and signed by the person making it or his agent. There is no legal requirement that the acknowledgment must be stamped as a deed.

55. (1994) 5 NWLR (Pt 347) 649 at 659-660.

It is submitted, therefore, that where one stands the risk of running out of time, the proper approach is to institute an action in court and apply for an adjournment to enable the negotiations to take place and where there is a proper ADR clause, apply for a stay of proceedings until the process is completed. If in the course of the negotiations, admissions are made, then such admissions will extend the limitation period but such admissions are privileged.[56] Such admissions are one of the qualifications to the general rule and akin to an acknowledgement. An acknowledgment is one of the exceptions to the limitation statutes. To be effective, the acknowledgment must be made in writing and signed by the party or his agent (including a personal representative). However, where the negotiations break down, then the court proceedings will resume.

It is also submitted that in the case of mediation, the process will not stop the time from running. A safety valve, therefore, is to adopt the ratio in *Eboigbe v Nigeria National Petroleum Corporation*, *supra*. Support for the need to institute an action can also be found in Article 16 of the Conciliation Rules which provides thus:

> *The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.*

One other way of protecting the interest of the party engaged in conciliation who wants to benefit from his right to judicial proceedings should the conciliation break down is that in the course of the conciliation proceedings he must endeavour to get the other party to agree to an extension of time. If the proceedings are conducted under the Mediation Rules of the World Intellectual Property Organisation (WIPO) the provisions of Article 27 of the Rules will apply. The provisions will suspend the running of limitation period under the statute of limitation while the mediation/conciliation proceedings are being conducted from the date of the commencement of the mediation until the date of the termination of the mediation. Article 1(2) of the Conciliation Rules allows the parties to exclude or vary any of the rules at any time. If the proceedings are conducted under the Conciliation Rules, reliance can be placed on this provision to add an article similar to Article 27 of the Mediation Rules of WIPO.

Given the growing importance of the ADR processes, the limitation statutes should be extended to the processes. It is conceded, however, that in most jurisdictions, there is no legal regime regulating mediation.

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56. See Article 20 of the Conciliation Rules and section 25 of the Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990, as amended. This section deals with 'without prejudice' proceedings.

CONCLUSION

In this article, we have highlighted the point that the statutes of limitation apply to arbitral proceedings the same way that they apply to judicial proceedings. However, while in judicial proceedings time begins to run from the date of the accrual of the cause of action, that of arbitral proceedings appear out of tune in Nigeria in view of the provisions of the statutes of limitation. At the moment, therefore, it is advisable that parties to arbitral proceedings should initiate court proceedings and seek an adjournment to enable them arbitrate so that they are not caught by the provisions of the statute. We submitted that in arbitral proceedings, a line should be drawn between the statutory time for commencement of an action and that for setting aside an arbitral award. This is so because for commencement of action, the statutory time limit is six years from when the cause of action accrued, that for setting aside an award is three months from the date of the award. There are also contractual time limits as in *Atlantic Shipping* and *Scot v Avery Clauses* though the provisions of the statutes of limitation make the *Scot v Avery Clause* ineffective. Where parties resort to the ADR processes like mediation and negotiation, there is no statutory provision on this. The general rule is that the processes do not stop time from running. Reliance was, therefore, placed on case law and it was established that in the case of negotiation, the general rule applies subject to some qualifications like an admission of liability. Such admission is akin to an acknowledgment that normally extends the limitation period. This position was extended to mediation.

It is advisable, therefore, that parties adopting the ADR processes should go to court, within the limitation period, to institute an action and apply for an adjournment to enable the processes to be fully exploited. If there is a proper ADR clause, the parties can apply for a stay of proceedings. This is to ensure that where there is breakdown in the process, the action will not be statute-barred. Indeed if this procedure is adopted and there is settlement, this will be entered by the court as consent judgment. This is an aspect of case management. Thus as a court judgment, enforcement will be easier than enforcing mediation initiated by the parties themselves. In other words, this procedure will cure one of the drawbacks of the ADR processes, namely, that of enforcement.