EFFECT OF SECTION 2 OF NIGERIAN CARRIAGE OF GOODS BY SEA ACT (COGSA) CAP 44 ON INWARD BILLS OF LADING TRANSACTIONS[1].

The conflicting decisions of Nigerian Courts on whether or not the Hague Rules as scheduled to Nigerian Carriage of Goods by Sea Act (COGSA) Chapter [Cap.] 44 of the Laws of Federation of Nigeria 1990 is applicable to inward-bound cargo claims or inward bills of lading appear to have now happily been resolved by the recent decision of the Supreme Court of Nigeria in *Leventis Technical –v- Petrojessica Enterprises Limited (1999) 6NWLR(Part 605) 45.* Out of the three international cargo conventions (namely the Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed in Brussels in August 1924, [also known as the Hague Rules], the Hague – Visby Rules 1963 and the United Nations Convention for the Carriage of Goods by Sea [also known as [the Hamburg Rules] of 1979 which took effect from 1st November 1992, only the Hague Rules was domesticated in Nigeria by the incorporation of the Hague Rules as a schedule to the Carriage of Goods by Sea Act (COGSA) 1926 now Cap 44 of the Laws of the Federation of Nigeria 1990. The other two international cargo conventions have not been domesticated by incorporation into Nigerian law.

The said Cap. 44 comprises only 6 (six) Sections and in Section 2 thereof it states as follows:-

"Subject to the provisions of this Act, the [*Hague*] Rules shall have effect in relation to and in connection with the carriage of goods by sea *in ships carrying goods from any port in Nigeria to any other port* whether in or outside Nigeria" (underlining mine for emphasis).

The said Section 2 is in *pari materia* with *Section 2 of the Carriage of Goods by Sea Act Cap 29 of the Nigerian 1958 Laws of the Federation and Lagos*. The said *Section 2 of Cap 44* is also in *pari materia* with Section 1 of the 1924 English COGSA which Section 1has been stated in an article that *Dicey and Morris, Conflict of Laws at page 858* had indicated that by its wording the Hague Rules as scheduled to the English Act were not given force of law in England but were to apply only to outward shipments from the United Kingdom. [See *"The Applicability of International Cargo Conventions in Nigeria" by Abiola Falase-Aluko, published in Modern Practice Journal of Finance & Investment Law, Vol. 2 No. 3 of 1998 at pages 34 to 49*]. Consequently by virtue of the identical Section 2 of the Nigerian Act (Cap 44), the Hague Rules in its schedule are applicable only to outward bound cargo shipped from and not inward bound cargo shipped to Nigeria (except of course as can be seen later the paramount clause in the relevant inward bill of lading stipulates that the Hague Rules shall apply to the transaction).

This correct meaning and judicial interpretation of *Section 2 of Cap 44 was until the recent decision of the Supreme Court of Nigeria in the*

[1] Written by Mr. Michael Igbokwe in 2000.

Leventis Technical case (supra) not made certain because of the conflicting decisions of Nigerian Courts and their application of the said Hague Rules to inward bound cargo, thereby creating confusion in the minds of maritime lawyers and professional advisers not only in preparing for their cases involving cargo claims but also in advising their clients with certainty as to the true and correct effect of Section 2 of Cap. 44. There is no doubt that the conflicting decisions have also caused some counsel in Courts to refer to and rely on the Hague Rules as scheduled to Cap 44 in respect of inward bound cargo claims.

The right attitude should have been and should be that first, the court decides whether the cargo claim relates to an inward bound or outward bound cargo, and if it is the latter, the court applies the Hague Rules as scheduled to Cap 44 but if it is the former, it resorts to the paramount clause in the relevant bill of lading as permitted by Section 4 of Cap 44. In the absence or silence on the issue of the paramount clause in the relevant bill of lading, the court would examine the choice of law clause of the bill of lading to discover the applicable cargo convention, although it can still apply the Hague Rules pursuant to the paramount or choice of law clause if that is the applicable cargo convention. In other words, it is only in the case where the paramount clause (or in its absence), the choice of law clause of the relevant bill of lading provides for the application of the Hague Rules in an *inward-bound* bill of lading, that the Hague Rules can apply to an *inward-bound* cargo claim. [*See generally "The Applicability of International Cargo Conventions in Nigeria by Abiola Falase-Aluko(supra)*].

The cases applying the Hague Rules as scheduled to *Cap 29, 1958 Laws of Nigeria and Lagos or Cap 44, 1990 Laws of the Federation of Nigeria* to inward bills of lading, without properly or at all considering the effect of Section 2 of Cap 29 of 1958 or Cap 44 of 1990 will now be considered in order to show the confusing and unsettled situation before the Supreme Court's decision in the *Leventis Technical Case* (supra).

In *Henry Stephens & Sons Limited –v- Polish Steamship Company & Anor (1969) 1NSC 139* in which the Plaintiffs claimed damages for a short-delivery of cement *shipped from Poland* to Lagos, the High Court Lagos (Adefarasin J.) held that the action was statute – barred not having been commenced within one year from the date the cause of action accrued in accordance with Article 3 Rule 6 (of the Hague Rules) of the schedule to the COGSA Cap 29. On the other hand, in *Allied Trading Company Limited -v- Elder Dempster Lines & NPA (1976) 1NSC 276 at 279* where in a claim for damages in respect of short-delivery of one bale of cotton handkerchiefs shipped *from Madras* to Lagos out of five bales delivered to 2nd Defendant's warehouse, the High Court of Lagos (Agoro J.) stated as follows after setting out Section 2 of Cap 29 1958 Laws:-

"The present action arose from the Carriage of Goods by Sea in *a ship carrying goods from Madras* to Apapa, Lagos Nigeria. This in my view is outside the contemplation of Section 2 of Cap. 29 Laws of the Federation. In the circumstance, I would hold that paragraph 6 of Article III of the Schedule to Carriage of Goods by Sea Act, Cap 29 does not apply to the

carriage of goods by sea relating to or connected with the present action. Accordingly, the limitation period of one year for bringing an action will not avail the first Defendant.")Underlining is mine for emphasis).

Thereafter, came the judgement in *Kano Oil Millers Limited –v- Bulk Lighterage (Nigeria) Limited (1984) 2NSC 198*, where the Plaintiff sued for damages for loss or non-delivery of rice shipped from Singapore to Apapa four years after the cause of action was deemed to arise. The High Court Lagos (Jinadu J.) at page 200 stated:-

"It would appear that the cause of action arose in 1978 and the action was commenced in 1982, a period of clear 4 years from the time the cause of action was deemed to have accrued so that if the Carriage of Goods by Sea Act (Cap 29) of the Laws of the Federation of Nigeria is applicable, the action should have been commenced sometime in 1979. However Section 2 of this Act provides as follows:-

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It seems to me that this Act by the provision quoted above applies only to *ships carrying goods from any port in Nigeria* to any other port either in Nigeria or outside it. From the facts of this case, the consignment of rice is by a ship from Singapore to Nigerian port and in my view the Carriage of Goods by Sea Act (Cap 29) of the laws of Nigeria would not apply consequently the action need not to be commenced within 12 months from the date it accrued".

However, in *Kaycee (Nigeria) Limited –v- Prompt Shipping Corporation & NPA No. 2 (1986) 2NSC 431* in which the Applicants were consignees of two cases of door locks shipped from Hong Kong by Climax Limited on board a vessel owned by the 1st Defendant and sued for the cost of the non-delivery goods as a result of short-delivery; the Supreme Court applied Article 3 Rule 6 of the Hague Rules of COGSA 1926 in holding that the period of limitation of action is one year and not 3 days as provided in clause 24 of the relevant bill of lading.

In the case of *Dr. Adikibi -v- Nigerian National Shipping Line Limited (1987) 3NSC 152*, the Plaintiff's case containing his household and personal effects which was shipped to Port Harcourt Nigeria from England was found broken and the goods in it found not to be the goods actually shipped. Upon the Plaintiff's action for damage for negligence and loss of his goods, and counsel's contention that the *1971 UK COGSA* applied, the Federal High Court of Nigeria (Mohammed J.) held at page 159:

"With due respect to the learned counsel, I think this submission is misconceived. As far as I am aware, the Carriage of Goods by Sea Act, Cap 29 of the Laws of the Federation of Nigeria and Lagos, 1958 and the rules made thereunder, popularly known as the Hague Rules is the applicable law…"

and consequently applied Article 4 Rule 5 of the Hague Rules in finding the Defendants liable to the equivalent of ₦100 (Nigerian currency).

Furthermore, the case of *Allied Trading Company Limited –v- China Ocean Shipping Company Limited (1990) 3NSC 617 at 621 and 622* which concerned damages for loss and/or non-delivery by the Defendant as common carriers and bailees for reward of goods consigned to the Plaintiffs from China, the Federal High Court of Nigeria (Odunowo J.) applied Article 3 Rules 5 & 6 of (the Hague Rules of the) COGSA Cap 29 in holding that the Defendant failed to discharge the onus on it that it acted without negligence.

In the same connection, in the case of *Baba Girei (Nigeria) Limited –v- Belgian Overseas Chartering & Shipping N. V. Inc. (1991) 4NSC 33*, which concerned *inward cargo from Belgium* in respect of which an action was filed 8 months out of time, both counsel for the two sides referred to and relied on the provisions of Cap 44; the Federal High Court (Jinadu J.) held at page 41 that by virtue of the provisions of Cap 44, (pursuant to Article 3 Rule 6 thereof), the action as between the Applicant and the 2nd Respondent was statute-barred and it ought to be dismissed.

There is also the case of *Inco Beverages Limited –v- Class W. Brons & Ors (1991) 4NSC 123 at 128* where the Plaintiffs claimed damages against the Defendants for negligence in not employing reliable work force to ensure their goods [granulated sugar] shipped from outside Nigeria were not tampered with and to ensure safe delivery thereof, the Federal High Court (Belgore CJ) relying on *Kaycee (Nigeria) Limited –v- Prompt Shipping Company Limited (supra*) upheld Defendant's counsel's submissions that the suit was statute-barred under the COGSA for not being brought within one year.

The attitude of the Court of Appeal [the court to which an appeal lies from the trial court before an appeal can be lodged against its decision to the Supreme Court], to the situation has also been that of applying the provisions of the Hague Rules to inward bill of lading transactions. Consequently, in the case of *Balogun-v-Panalpina World Transport [Nig] Limited [1999]1 N.W.L.R. [Part 585] 66 at 80-81*, the Court of Appeal [Lagos], followed the Supreme Court's decision in the *Kaycee [Nig.] Limited-v-Prompt Shipping Company Limited* case [supra] and its previous decision in *U.A.C. of Nigeria Limited-v-Global Transport, Oceanico SA [1996] 5NWLR [Part 448] 291* in applying Article III rule 6 of the Hague Rules of the schedule of COGSA cap. 44 to hold that the action against the 1st defendant shipping agent of the 2nd defendant for non-delivery of a bus shipped from Belgium, was statute-barred for not being commenced within one year of the non-delivery of the bus.

Out of the above cases, only the courts in two of them, namely the had correctly interpreted *Allied Trading Company Limited* and *Kano Oil Millers* and complied with Section 2 COGSA by refusing to apply the Hague Rules in its schedule to *inward bills of lading* transactions. It was in the above unsettled state of judicial authorities on the applicability of the schedule of COGSA Cap 29 (now cap 44) to inward bound cargo claims that the Supreme Court of Nigeria delivered on 30th April, 1999, its judgment in *Leventis Technical Limited –v- Petrojessica Enterprises*

Limited (1999) 6NWLR (Part 605) 45, where it considered the effect of both Section 2 of COGSA Cap 44 and the paramount clause of the relevant bill of lading.

The facts of the case are that the Plaintiff/Appellant's goods (electric and gas cookers) were in 1977 shipped through the Facship Lines in Spain for delivery at the Lagos port but were cleared by the Respondent agent of the Facship Lines at Burutu Port Nigeria without the immediate knowledge of the Plaintiff/Appellant. On taking delivery of the goods in March 1978, 138 crates of gas cookers valued at ₦92,745,139 were found missing, the delivery of which the Plaintiff/Appellant sued for on 9th August, 1984. The learned trial Judge of the Federal High Court (Ojutalayo J.) held that the Hague Rules applied to the transaction by virtue of *Section 2 of the COGSA Cap 44.* However, the Supreme Court held at page 54 (per His Lordship Ogundare JSC.);

"I think the learned (trial) Judge was in slight error here. Section 2 [i.e. of COGSA cap. 44] which provides:-
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applies only where the ship carries goods from a port in Nigeria to any other port whether in or outside Nigeria. In the present case the goods were carried from a port outside Nigeria to a port in Nigeria. The Court below (i.e Court of Appeal) is however right to hold that what applied the Hague Rules in the present action is clause 2 of the bill of lading (Exhibit "A") titled "Paramount Clause". The clause provides:-
'Paramount Clause:
The Hague Rules contained in the International Convention for the Unification of Certain Rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment the corresponding legislation of the country of destination shall apply, but in respect of shipment to which no such enactment are compulsorily applicable, the terms of the said Convention shall apply".'

The Supreme Court then went ahead and applied Article 3 Rule 6 of the Hague Rules in holding that the action was statute-barred for not being filed within one year and even though it was brought against the shipowner's agent, the agent was entitled to take advantage of the statutory defence of limitation of action (under Art 3 Rule 6 Hague Rules) which is open to its principal when sued.

Therefore, apart from clarifying the hitherto unsettled position as to the effect of Section 2 of COGSA on *inward bound* cargo claims or bills of lading by showing that the Hague Rules in the schedule to COGSA cap. 44 are not applicable to claims in respect of cargo shipped into Nigeria as already correctly stated in the Lagos High Court cases of *Allied Trading and Kano Oil Millers Limited (supra*), it is instructive that the Supreme Court also made it clear that even though by Section 2 of the COGSA the Hague Rules (schedule to COGSA) are not applicable to inward bound cargo claims, the Hague Rules will apply to such inward bound cargo claims if by virtue of the paramount clause of the relevant bill of lading,

the Hague Rules are the applicable international cargo convention. Thus, the proper application of the effect of the paramount clause by the Supreme Court in the *Leventis Technical case* (supra) is its recognition of the parties' freedom to contract (*pacta sunt servanda*) and Courts duty to give effect to the cargo convention term agreed to by the parties and stipulated in the bill of lading.

It is observed that in the *Leventis Technical case* [supra], none of the counsel drew the attention of the Supreme Court to its earlier decision in the *Kaycee* case [supra] or asked the Supreme Court to overrule itself in the *Kaycee case.* Consequently, there are still two conflicting decisions of the Supreme Court on the matter of the effect of Section 2 of Cap.44 on inward-bound bill of lading in that in the *Kaycee* case [supra] it applied the Hague Rules of COGSA to an inward bound bill of lading and in the *Leventis Technical* case [supra], it held that as a result of *Section 2 of COGSA Cap.44, the Hague Rules of COGSA Cap.44* did not apply to inward-bound bill of lading.

Consequently, it seems that parties or counsel whose client's claims are supported by the cases that have not correctly considered the effect of and applied, Section *2 of COGSA* may want to argue that there is a conflict between the two Supreme Court decisions in *Kaycee (supra*) and *Leventis Technical* and that the latter did not overrule the former and that as such the former is still good judicial authority binding on the lower trial court. Moreover, courts that are lower in hierarchy than the Supreme Court (i.e. Court of Appeal and Federal High Court), may have some difficulty in deciding as to which of the two Supreme Court's decisions they should follow. It is submitted that even though it has been held both that where there are two conflicting decisions of a higher court, the lower court is free to choose which of the decisions to follow (*see Adegoke Motors –v- Adesanya (1988) 2NWLR (Pt 74) 108 at 123*) and that where two Supreme Court's decisions are in conflict the latter in time is binding on the lower court (*see Yusuf –v- Egbe (1987) 2NWLR (Pt 56) 341 at 354);* such lower courts should overcome the difficulty by choosing and following the Supreme Court's decision in the *Leventis Technical case* [which is the latter in time of its two decisions in the *Kaycee* and the *Leventis Technical* cases and] which correctly states the true legal position. However, there is no doubt that in an appropriate case coming before the Supreme Court where the issue of the conflict in the two cases arises for determination, the Supreme Court will not hesitate to harmonise the cases by looking at them again or by overruling itself in the *Kaycee* case if necessary, in order to make for certainty and make the task of professional advisers and legal practitioners easier.

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Effect of Section 2 of COGSA wdpp1-4