



OUTLOOKS: ANTI-ARBITRATION INJUNCTIONS IN INTERNATIONAL COMMERCIAL ARBITRATION IN NIGERIA

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‘ARBITRATION
- AN
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Over the years, there has been a steady shift from commercial litigation to alternative dispute resolutions (ADR) because of its long drawn process and accompanied technicalities. One of the modes of ADR is arbitration - an alternative means of settling a dispute by impartial persons without a court trial. It is preferred as a means of settling disputes to avoid the expense, delay, and acrimony of litigation.¹ International arbitration has been increasingly recognized as a system overtime and the benefits of any form of arbitration includes fairness and neutrality of the arbitrators to avoid any form of prejudices or predispositions.

International arbitration is defined by **Section 1(3), UNCITRAL (United Nations Commission on International Trade Law) Model Law in International Commercial Arbitration** as, when:

“...:(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country or (d) the parties, despite the nature of the contract, expressly agree



¹ US Legal Definition, 'Arbitration Law and Legal Definition': <https://definitions.uslegal.com/a/arbitration/> (accessed 05.07.2019).

that any dispute arising from the commercial transaction shall be treated as an international arbitration.”²

Anti-arbitration injunction is described as a decision of a local court enjoining the parties, Tribunal, or third parties in the arbitral institution from initiating or continuing with the arbitration; and/or invalidating the arbitral process; suspending enforcement; in some cases taking the form of a retrospective refusal to recognise the jurisdiction of the Tribunal.³

This article analyses the position of anti-arbitration injunction in Nigeria against the backdrop of its implication on international commercial arbitration proceedings.

Anti-Arbitration Injunction in Nigeria

Ordinarily, the principle is that courts are not allowed to intervene in an arbitration matter; this position is enshrined in **section 34 Arbitration and Conciliation Act (ACA)**:⁴ “a Court shall not intervene in any matter governed by this Act except where so provided in this Act.”⁵ The Court of Appeal (CA) reiterated this in **Statoil Nigeria Limited v. NNPC**⁶ that “... It is very clear from the intendment of the legislature that the Court cannot

intervene in arbitral proceedings outside those specifically provided. Where there is no provision for intervention, this should not be done...” This position is settled, having also been stated in several other cases.⁷

As with all rules, there are exemptions. Thus, instances of when the court can interfere in an arbitral proceeding provided for in the **ACA** include **Section 2** in case of revocation of arbitration agreement by the Court; **Section 7(2)(a)** in respect of appointment of arbitrator if the two arbitrators appointed by the parties fail to agree on the third arbitrator; **Section 23** relating to the power of the Court to order the attendance of witnesses; **Section 30** in the case of setting aside of award in case of misconduct by arbitrator; **Section 31** and **32** in respect of recognition and enforcement awards.

Subsequent to **Statoil**, in **SPDC & Ors v. Crestar Integrated Natural Resources Limited**⁸ the CA in the circumstances of that case held that the Court can make an order of injunction regarding an international arbitration. In this case, Crestar entered into a sale and purchase agreement (SPA) with Shell wherein it was stipulated that disputes between the parties should be submitted to

arbitration and conducted at the ICC Arbitration Centre in London, England. Afterwards, Shell terminated the SPA and Crestar filed an action at the Federal High Court (FHC) Ikoyi, Lagos seeking to enforce the SPA.

Shell challenged the jurisdiction of the FHC, seeking stay of proceedings pending reference of the dispute to arbitration in London, in line with the SPA's arbitration clause. Consequently, the FHC ruled in favour of Crestar by dismissing the motion challenging its jurisdiction and application to stay proceedings.

Dissatisfied with the ruling, Shell appealed to the CA and also commenced arbitration proceedings against Crestar according to the procedure in the arbitration clause in the SPA. Crestar then filed its Respondent's Brief pleading with the court to affirm the decisions of the FHC and also sought an injunction preventing Shell from continuing with the London arbitration proceedings.

According to the CA in **Crestar**, the **ACA** provisions that ousts the jurisdiction of the court to grant injunction on arbitration matters is only limited to instances provided for by **section 34 ACA**:

“However, pursuant to Section 34

² UNCITRAL Model Law on International Arbitration (1985), (United Nations document A/40/17, annex 1). The provision is in *pari materia* with Section 57 Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria (LFN) 2004.

³ Genevieve Poirier, 'Use and Abuse of Anti-Arbitration Injunctions: Strategies in Dealing with Anti-Arbitration Injunctions', 23.05.2014: <http://www.arbitration-ch.org> (accessed 03.07.2019).

⁴ Cap. A18 LFN 2004 (*supra*).

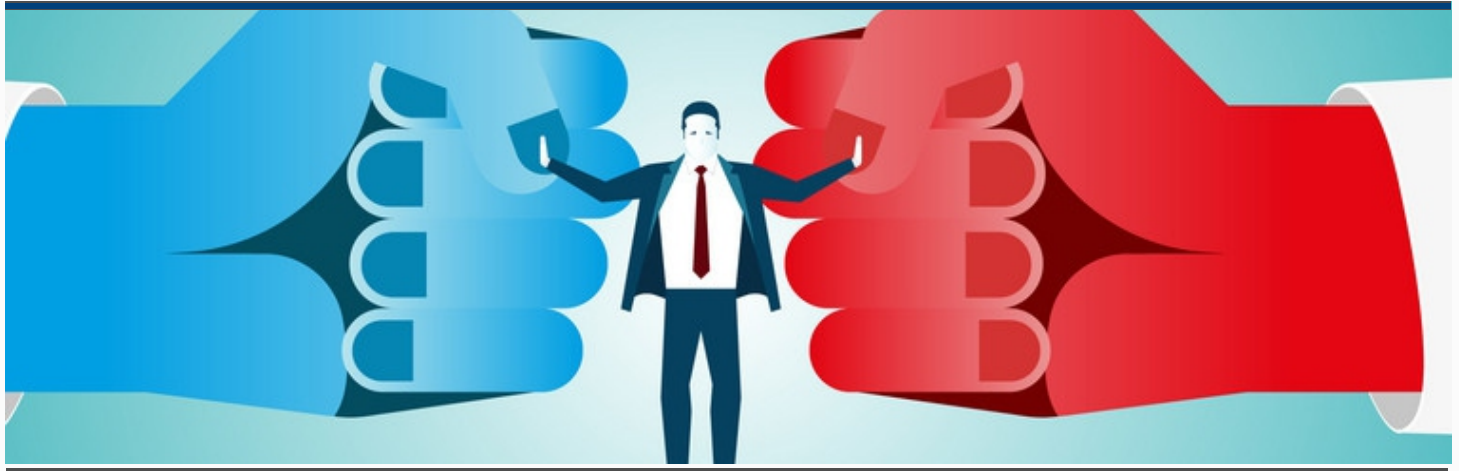
⁵ This provision of the law is in *pari materia* with Article 5 UNCITRAL Model Law (1985).

⁶ [2013] 14 NWLR (Pt. 1373), 29.

⁷ Nigerian Agip Exploration Limited v. NNPC (Unreported Appeal No. CA/A/628/2011 delivered on 25/2/2014).

⁸ [2016] 9 NWLR (Pt.1517), 325-328.





of the Act, the Courts can grant, intervene only 'where so provided in this Act'... The question then is: Is the instant matter governed by the Arbitration and Conciliation Act? ... Therefore, as earlier noted, the provision of the Act is only applicable in respect of arbitration which are 'domestic' in the country..."

In other words, **section 34 ACA** does not limit the jurisdiction of the courts to make orders of injunction with respect to arbitrations seated outside Nigeria but only those seated in the country. The CA also made reference to **Article 5 UNCITRAL Model Law** from which **section 34 ACA** was enacted and noted that according to the UNCITRAL Secretariat: "...the impact of **Article 5** is that the above necessity to list all instances of Court involvement in the model law applies only to matters 'governed by this law.'"⁹

Furthermore, relying on the power conferred on the FHC pursuant to **section 13 Federal High Court Act**¹⁰ and the provisions of **section 16 Court of Appeal Act**¹¹ the CA ruled that the Court has the power to grant injunction in an international arbitration.

Implications of Grant of Anti-Arbitration Injunctions

Devoid of the reasoning of the CA in the decisions reached in the above stated cases, an analysis of the implication of anti-arbitration injunctions is pertinent.

First, the doctrines of *Kompetenz-Kompetenz*, separability, and party autonomy which are the bedrocks of arbitration all point to the overarching principle that a decision as to whether an arbitration should continue, ought to primarily be a question for the arbitration tribunal.¹² No matter how well put, the mere fact that a national court attempts to make a pronouncement on an arbitral proceeding is a form of disruption in the arbitral proceedings whether temporarily or permanently and contradicts established arbitration principles.

Also, the grant of anti-arbitration injunction can be inconsistent with

the laws of arbitration. **Article 16(1) UNCITRAL Model Law** provides that "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement..."¹³ Even in investment arbitration matters, **Article 26 of the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)** provides that "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."¹⁴ All these provisions indicate that what the drafters of the laws intended is an independent arbitration at every point.

In addition, there is the

⁹ See also Emmanuel Gaillard, 'Anti-Suit Injunctions in International Arbitration', Juris Publishing Inc., (2005), p.111.

¹⁰ **Cap.F12, LFN 2004** provides: "13(1) The Court may grant an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do. (2) Any such order may be made either conditionally or on such terms and conditions as the Court thinks just..."

¹¹ **Cap.C36, LFN 2004**: "The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the Court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final Judgment in the appeal..."

¹² Klaus Peter Berger 'The Lex Mercatoria (Old and New) and the Trans Lex-Principles', Trans-lex.org Law Research: https://www.trans-lex.org/969000/_principle-of-separability-of-the-arbitration-clause/#references (accessed 27.07.2019).

¹³ Similar provision is in **Section 12(1) ACA**.

¹⁴ **Articles V and VI European Convention on International Commercial Arbitration 1961** also preserve the respective rights of the tribunal and of the court to consider the question of the jurisdiction of the arbitrator.

probability to wield political power and sentiments in the use of anti-arbitration injunction especially when a state is involved. Accordingly, it was opined that “*In most cases, anti-arbitration injunctions are part of deliberately obstructionist tactics, typically pursued in sympathetic local courts, aimed at disrupting the parties' agreed arbitral mechanism... even if the power to enjoin arbitral proceedings were recognized in principle to exist, that authority should be exercised with the utmost circumspection and only in rare circumstances.*”¹⁵

Looking through the unpleasant history of corruption and abuse of court process, there is the possibility that if national courts are eventually granted the right to make interim injunctions regarding international arbitration matters without a standard guideline, political sentiments could set in and this will be inimical to the growth of arbitration in the country.¹⁶

In **Salini Construttori S.P.A. v. The Federal Democratic Republic of Ethiopia**, the parties entered into a contract for the construction of an emergency raw water sewage reservoir for Addis Ababa, the Ethiopian capital. In the contract, it was agreed that any dispute that arises should be submitted to the rules of the Conciliation and

Arbitration of the ICC by one or more arbitrators appointed under the rules. A dispute arose and the Appellant requested for the appointment of arbitrators by the ICC in accordance with the agreement.

The Respondent challenged the jurisdiction of the appointed arbitrators and then applied to the Federal Supreme Court of Ethiopia for an injunction to stay the arbitral proceedings pending the determination of the jurisdiction of the arbitrators, which was subsequently granted. The injunction was dismissed by the arbitral body on the ground, *inter alia* that the application was improperly made and that a state or state entity cannot resort to its local court to frustrate an international agreement in which it is a party.¹⁷

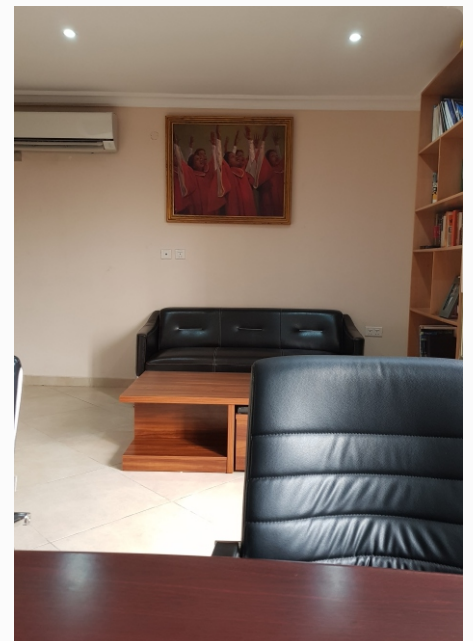
Another effect of giving the court a leeway to interfere in an international arbitration vide injunctive orders is the timing implications. Bearing in mind the delays in the Nigerian judicial system, parties in an arbitration may spend so much time appealing against an injunction that may eventually be reversed by the Supreme Court. It is imperative that the court should avoid a clear case of futility of its processes.

Also, the problem with the grant of anti-arbitration injunction is the

feasibility of its enforcement. In **Salini's case**, the orders of the court were not enforced by the arbitrators hence, it did not serve its purpose. It behoves the court to address the vanity of such orders or reliefs in an international arbitration, before granting them.

Anti-Arbitration Injunction in other Jurisdictions

In the English courts a number of cases have decided that courts have the power to grant an injunction to restrain a person from pursuing arbitration proceedings in another jurisdiction.¹⁸ However, the exercise of that power is plainly limited to exceptional cases, as otherwise the English court runs the risk of usurping the arbitration agreement. In **Sabbagh v Khoury**,¹⁹ Knowles JCA, enunciated that where the injunction sought would restrain participation in an arbitration with a foreign seat, there was a need for “*exceptional circumstances*” and “*caution*” in the exercise of the power.



¹⁵ Gary B. Born, 'International Commercial Arbitration', (2009), Vol 1, pp. 1049 and 1054.

¹⁶ That corruption in the Nigerian judiciary has put it under negative spotlight is saying the obvious. See for example, Samson Folarin, 'Falana Laments Corruption in Judiciary, Seeks Reform', *The Punch*, 17.04.2019: <https://punchng.com/falana-laments-corruption-in-judiciary-seeks-reform/> (accessed 06.08.2019); At his valedictory session upon retiring from the Supreme Court, Uwaifo JSC observed: “Corruption was once thought to be only in the magistracy because of the disturbing way some of the personnel tended to abuse their office... It gradually crawled to the High Courts and would appear to have had a foothold among a noticeable number of judicial officers there... Now, there is real apprehension that the appellate court may soon be infested if not already contaminated with some of these vices”: <http://www.nigerianlawguru.com/articles/general/MAY%20THE%20SUPREME%20COURT%20NEVER%20BECOME%20AN%20UNDERGROWTH.pdf> (accessed 06.08.2019).

¹⁷ ICC Arbitration No. 10623/AER/ACS: https://www.italaw.com/documents/Salini_v_Ethiopia_Award.pdf. (accessed 27.07.2019) This was the same case in *Himpurna California Energy Ltd. v. Republic of Indonesia*, YCA XXV (2000): <https://www.scribd.com/doc/85525468/1999-Award-HCE-v-Indonesia> (accessed 27.07.2019).

¹⁸ *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm) and *Claxton Engineering Services Ltd v TXM Olajés Gázkutató Kft* (No 2) (2011) EWHC 345 (Comm) etc.

¹⁹ *Sabbagh v Khoury & Ors.* (2018) EWHC 1330 (Comm).

For the Swiss jurisdiction, the Geneva Court of first instance held in *Air (PTY) Ltd v International Air Transport Association (IATA) & Anor. (PTY)*,²⁰ that anti-arbitration injunctions are incompatible with the Kompetenz-Kompetenz principle, a general principle of international arbitration hence, Swiss Courts do not issue anti-arbitration injunctions nor enforce foreign anti-arbitration injunctions. The counsel to the respondents in the *PTY'S* case stated that anti-suit/anti-arbitration injunctions constitute a fearsome weapon in the hands of those that wield it hence, it should be scarcely and prudently used, if at all.²¹

The American courts have always walked on egg shells in terms of granting anti-arbitration injunctions. In *Société Générale de Surveillance, S.A. v. Raytheon European Management and Systems Co.*,²² the First Circuit Court of Appeal held that the court had the power to enjoin an international arbitration pursuant to section 4 of the 1925 Federal Arbitration Act (FAA),²³ In *Republic of Ecuador v. Chevron Corp.*, the Second Circuit Court upholding this position went further to state that its decision that an injunction was proper was based on the particular circumstances presented in the appeal.



In advising the U.S. courts, it was opined that there is a pressing need for consistency from the US federal courts so that opportunistic litigants will not take advantage of this lacunae to impede the arbitral process by seeking injunctive relief in inappropriate cases.²⁶ Furthermore, courts must, at the very least, be clear in defining the source of their authority for the injunction to be granted and also such anti-arbitration injunctions should comply with the United States' obligations under the relevant conventions.²⁶

Conclusion

From international perspective, it can be deduced that countries either prohibit the grant of anti-arbitration injunction or are extremely cautious to grant such injunctions. The Nigerian Courts have had a positive approach to

the recognition of arbitration clauses, to now allow each court a subjective approach for the grant of anti-arbitration injunction without a form of check might create a strain between national courts and arbitral tribunals. In order to guide the courts, a review of the current national laws on arbitration can be done by international arbitration experts to consider when the court should be empowered with the authority to grant anti-arbitration injunctions regarding issues not covered by the law.

To sum up, taking a cue from other jurisdictions, national courts should be watchful in granting anti-arbitration injunctions in an international commercial arbitration.

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²⁰ République et Canton de Genève, Tribunal de première instance. Order of 2 May 2005, *réf. C/1043/2005-15SP*: https://www.lalive.law/wp-content/uploads/2017/07/msc_tgi_anti_arbitration_2005.pdf (accessed 03.03.2019).

²¹ Matthias Scherer, et al, 'Anti-Arbitration and Anti-Suit Injunctions in International Arbitration: Some Remarks Following a Recent judgment of the Geneva Court': https://www.lalive.law/wp-content/uploads/2017/07/msc_tgi_anti_arbitration_2005.pdf (accessed 03.08.2019).

²² (1st Cir. 1981), 643 F.2d 863.

²³ This position was also affirmed in *Westmoreland, inInt'l Shipping Co. v. Hydra Offshore, Inc.*, (2d Cir.1989), 875 F.2d 388.

²⁴ (2d Cir. 2011), 638 F.3d 384, 391.

²⁵ Jennifer L. Permesly, 'US Courts and the Anti-Arbitration Injunction', *The Journal of the London Court of International Arbitration*, (2012) Vol. 28, No. 2, pp. 295-324.

²⁶ Ibid.