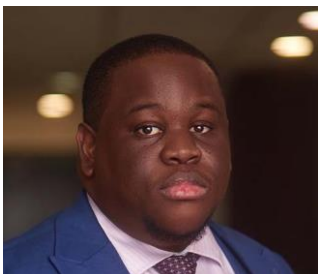


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Understanding Anti-Suit and Anti-Arbitration Injunctions in Nigeria: Implications for Commercial Disputes

Introduction

As Nigeria continues to embrace arbitration and position itself as an arbitration friendly jurisdiction, the intersection of anti-suit and anti-arbitration injunctions holds significant implications for commercial disputes. These legal remedies, although originating from common law jurisdictions, have found relevance in Nigeria's arbitration and litigation practice.

A critical policy objective of the Nigerian government is to attract more foreign direct investment while expanding its participation in global commerce. As a result, it is imperative that businesses and commercial people understand the application and enforceability of these injunctions especially against the backdrop of realizing returns on investment of capital.

This article explores the implications of these injunctions in Nigeria, as it affects the parties' preferred choice of dispute resolution, the principles governing the grant of such injunctions by Nigerian courts, the impact on contractual obligations and choice of dispute resolution mechanisms, and the procedural complexities involved.

Overview of Anti-suit and Anti-arbitration Injunctions

Injunctions, generally speaking, are restraining orders preventing a party from doing an act or mandating that the party does a certain act. It has been defined as "a judicial process or mandate operating in personam by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing."¹

Anti-suit and anti-arbitration injunctions may be similar but arise in different circumstances. Anti-suit injunctions are injunctive orders, typically issued by the courts restraining a party from commencing an action in relation to a dispute that is already subject to an arbitration agreement or from continuing one already commenced in defiance of an arbitration agreement. Similarly, an anti-arbitration injunction is an injunctive order of a court restraining a party or in some cases, an arbitral tribunal, from instituting or maintaining arbitral proceedings.

¹ *Aboseldehyde Lab. Plc v. U.M.B. Ltd. (2013) 13 NWLR (Pt. 1370) 91 at 130-131, paras. H-A*

Scope and Application of Anti-suit Injunctions

It is not unusual that parties to an arbitration agreement, may, instead of settling disputes covered by the said agreement through arbitration, choose to commence a lawsuit in court to settle such disputes. Parties usually take this route due to a variety of factors. It may be that a party alleges that the arbitration agreement is not binding or is null and void, that the dispute is not capable of being settled through arbitration or as is usually the case, a party simply finds the litigation route more convenient.

Ordinarily, where a party to an arbitration agreement has commenced a suit in a court, in violation of the arbitration agreement, the remedy would be to apply to the court for the proceedings to be stayed and the dispute be referred to arbitration.² However, the grant of a stay is discretionary and not as a matter of course. There is still the likelihood that a court may refuse to stay proceedings for a variety of reasons.³ Also, the party may be pursuing litigation in a foreign country that does not recognise or honour the New York convention⁴ thus making it difficult or nearly impossible to seek to stay proceedings and refer the parties to arbitration. As a result, the alternative remedy would be for the party to seek an anti-suit injunction.

The Nigerian Courts have been known to grant such injunctions in deserving circumstances.⁵ Some have however argued⁶ that such injunctions are unconstitutional as they restrict a party's right to access the court. To understand the criteria for the grant of such orders, we may look to the decisions of other courts such as the courts of England and Wales.

English courts historically, seem to have no hesitation in granting such injunctions. As far back as 1911 the English Court of Appeal in the case of ***Pena Copper Mines Ltd v Rio Tinto Co Ltd***⁷ held that: "it is beyond all doubt that this Court has jurisdiction to restrain the Rio Tinto Co. from commencing or continuing proceedings in a foreign court if those proceedings are in breach of contract.". The English Courts have also stated that before an anti-suit injunction may be ordered, it must be established that: (1) the English forum has a sufficient interest in, or connection with, the matter in question; (2) the foreign proceedings causes sufficient prejudice to the applicant; and (3) the anti-suit injunction would not deprive the claimant in the foreign court of a legitimate advantage.⁸ In England, the courts have issued anti-suit injunctions in a variety of instances outside a party simply initiating a suit in violation of an arbitration agreement. For example, an English court issued an injunction against an award-debtor's pursuit of foreign litigation aimed at challenging an English arbitral award.⁹

The English approach may provide guidance on how a Nigerian court may deal with an application for an anti-suit injunction.

² See Section 5(1) of the Arbitration and Mediation Act 2023 and Article II(3) of the New York Convention.

³ ***U.B.A. Plc v. Trident Consulting Ltd. (2023) 14 NWLR (Pt. 1903) 95 at 137*** and ***O.S.H.C. v. Ogunisola (2000) 14 NWLR (Pt. 687) 431 at 446 para. A.***

⁴ Article II(3) of the New York Convention states that: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

⁵ See the unreported case of ***P.E Bitumen Resources (Nigeria) Limited v. Cocean Nigeria Integrated Limited – LD/17896GCM/2024, Delivered on 20 June 2024 by Hon. Justice Oresanya of the High Court of Lagos State***, where the Court granted an anti-suit injunction in favour of arbitration to prevent an abuse of processes.

⁶ Joseph N. Mbadugha SAN, 'Effect of The Remedy of Stay of Proceedings on Anti-Suit Injunction in International Arbitration in The Light of New York Convention, Nigeria and European Union Laws' [2023] 19(3) Unizik Law Journal 76

⁷ (1911) 105 LT 846

⁸ ***Airbus Industrie G.I.E. v. Patel et al., (1998) 225 N.R. 173 (HL)***

⁹ ***C v D, [2007] EWHC 1541 (Comm)***

Scope and Application of Anti-arbitration Injunctions

As alluded to above, these injunctions restrain a party or in some cases an arbitral tribunal¹⁰ from commencing or maintaining arbitral proceedings. The need for an anti-arbitration injunction may arise in a number of circumstances. A party might allege that the arbitration agreement is null and void and thus the dispute arising thereunder ought not to be settled through arbitration, or that the dispute in question is not capable of being settled by arbitration or that there is no dispute at all. It must be stated that more often than not, such injunctions are sought as an obstructionist tactic to derail or at the very least stall the commencement of valid arbitral proceedings.

One Nigerian case that extensively dealt with anti-arbitration injunctions is the case of **S.P.D.C.N. Ltd. v. C.I.N.R. Ltd.**¹¹ In that case, the Court of Appeal explained that an anti-arbitration injunction will only be granted in exceptional circumstances. The court further held that:

“In order to establish exceptional circumstances, it will usually be necessary, as a minimum; to establish that the applicant’s legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable, these being the principles which govern the grant of injunctions to restrain proceedings in a foreign court ...”

The Court of Appeal in that case, examined the facts of the case and granted the application for an anti-arbitration injunction on the basis that the applicant had shown that the matter leading up to the application was commenced before the request for arbitration was issued, that the proceedings before the court had continued and even led to an appeal before the Court of Appeal while the arbitral proceedings at the arbitral tribunal in London was still at its preliminary stages, that it will be *“oppressive, vexatious or unconscionable to allow the arbitration proceeding to continue as same will not only involve the applicant to engage in duplication of work and needless expense; but also expose them to risk a decision that they have submitted to the jurisdiction of the tribunal in relation to the substantive matter before it.”* The Court of Appeal held that the Applicant had satisfied the requirement to establish exceptional circumstances for the grant of an injunction of this nature.

Challenges

Certain legal issues and challenges arise as a result of these injunctions. We shall discuss them below.

Enforcement

Anti-suit and anti-arbitration injunctions are notoriously difficult to enforce. For instance, under Nigerian law, the Supreme Court has in a longline of cases restated that foreign decisions are not binding on courts in Nigeria.¹² Therefore, an anti-suit injunction would generally have no binding effect on Nigerian Courts, especially because such decisions

¹⁰ See **Salini Construttori S.P.A. v The Federal Democratic Republic of Ethiopia Addis Ababa Water and Sewerage Authority, Case No.10623/AER/ACS, 21 ASA BULL. 82 (2003).**

¹¹ (2016) 9 NWLR (Pt. 1517) 300.

¹² See the cases of **Air Via Ltd. v. Oriental Airlines Ltd. (2004) 9 NWLR (Pt. 878) 298** and **Ladoja v. INEC II (2007) 12 NWLR (Pt. 1047) 119.**

are not even capable of being registered in Nigeria.¹³ A Nigerian court may simply refuse to follow such an order and hold that it had no effect in Nigeria. Furthermore, as earlier indicated, it may also be held that such orders are against public policy as they limit a party's constitutional right to access the court.¹⁴

Anti-arbitration injunctions also suffer from the same predicament because arbitral tribunals may simply refuse to obey the said injunction. This was the case in **ICC Case No. 1062321 ASA Bull, 59, 99 (2003)**. Where an arbitral tribunal, in the face of an anti-arbitration injunction, refused to obey same and stated as follows:

"...we are of the view that it would be improper, in light of our primary duty to the parties, to observe the injunctions issued by those courts [in the arbitral seat], which have already significantly delayed these proceedings, given that they have the effect of frustrating the parties' agreement to submit disputes to international arbitration...[T]he Arbitral Tribunal will continue to prosecute these arbitral proceedings in accordance with its duty to the parties in a manner consistent with their arbitration agreement."

It may therefore be difficult to ensure compliance with such injunctive orders. The only possible remedy would be to commence contempt proceedings where a party refuses to obey such orders, but this has its own logistical issues especially when dealing with parties in different jurisdictions.

Competence-competence¹⁵

As previously mentioned, one of the main reasons a party would seek to restrain the commencement of arbitral proceedings is because one party alleges that the arbitration agreement is illegal, null, void or inoperative. The party may also be alleging that the dispute is not capable of being settled by arbitration or that there is no dispute at all. These are issues that affect the jurisdiction of the arbitral tribunal and its competence to hear the dispute. The position of Nigerian law is that it is the arbitral tribunal that has the jurisdiction to rule on its own jurisdiction. This is the principle of competence-competence. This principle has been codified in **Section 14(1) of the Arbitration and Mediation Act 2023** which states that:

"The arbitral tribunal shall rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement"

As a result, a Nigerian court may be hesitant to grant an anti-arbitration injunction on this basis because it may prefer that the arbitral tribunal be left to rule as to the competence of the arbitration. Specifically on this point, the Delhi Court in the case of **Union of India v. Vodafone Group Plc United Kingdom & Anr¹⁶** refused to grant an anti-arbitration injunction

¹³ See Section 3(2) of the Foreign Judgments (Reciprocal Enforcement) Act, Cap 152, Laws of the Federation of Nigeria, 1990 and Section 2 of the Reciprocal Enforcement of Foreign Judgments Ordinance, Cap 175, Laws of the Federation of Nigeria and Lagos, 1958 which both provide for the registration of foreign judgments whereunder a sum of money is payable. Orders of injunction are not registrable under these statutes.

¹⁴ See the decision of the Supreme Court in **Cotecna Intl Ltd. v. Churchgate (Nig.) Ltd. (2010) 18 NWLR (Pt. 1225) 346** that: *"The Constitution guarantees every citizen a right to vent his grievances in court **Uninhibited accessibility to the court of law by Nigerian citizens that operates under the rule of law to vent their grievances is the hallmark of civilization.**" [Emphasis supplied]* see also the Court of Appeal case of **Guda v. Kitta (1999) 12 NWLR (Pt. 629) 21** where the Court of Appeal explained that: *"It is better to allow a party to go to court and to be heard than to refuse him access to the court. This is so because Nigerian courts have inherent powers to deal with vexatious litigants or frivolous claims. Justice should not be rationed."*

¹⁵ Often also referred to as Kompetenz-Kompetenz.

¹⁶ CS (OS) 383/2017.

particularly due to the principle of competence-competence. In that case, the Respondent had commenced 2 parallel arbitral proceedings against the Union of India, India contended that the second arbitration was an abuse of process which should be restrained by the Court and sought an anti-arbitration injunction in this regard. The Court in that case held that “[w]hether the arbitrators under the India-United Kingdom BIPA choose to stay the arbitral proceedings properly brought before them, whilst related arbitration proceedings are pending is entirely a matter for them under the doctrine of kompetenz-kompetenz **and the circumstance that arbitrators may do so cannot form an appropriate basis for the National Court to restrain the arbitration.**[Emphasis supplied]”

Conclusion

In conclusion, anti-suit and anti-arbitration injunctions may serve as vital tools for protecting parties' rights and ensuring the enforcement of contractual obligations regarding the preferred dispute resolution mechanism. However, challenges remain, particularly in balancing the interests of parties seeking to enforce contractual rights against those seeking to evade them through foreign litigation or arbitration.

Looking ahead, judicial clarity and guidance will be essential in fostering confidence among international investors and stakeholders. Clear procedural rules and robust enforcement mechanisms will further enhance Nigeria's attractiveness as a jurisdiction for commercial arbitration.