

ANTI ARBITRAL INJUNCTIONS IN NIGERIA; IMPLICATIONS OF SECTION 64 OF THE ARBITRATION AND MEDIATION ACT

INTRODUCTION

In recent times, arbitration has enjoyed increased patronage in Nigerian commercial disputes. Indeed, parties to arbitration agreements, the arbitrators and the Court are becoming more cooperative and confident, and less circumspect.¹ Thus, including arbitration clauses in commercial agreements afford parties the opportunity to refer their disputes to a “seemingly” simple, quick, convenient and cost-effective process which is geared at saving them from the tedious and complicated procedures of a court². Consequently, arbitration agreements or clauses confer jurisdiction on the arbitral tribunal to constitute and decide the disputes between the parties. However, there may be instances where a party seeks the intervention of a Court by way of an injunction, to restrain the other party from commencing or continuing arbitral proceedings. This category of injunctions has now been termed ‘anti-arbitration injunctions’.

Although the Nigerian Courts generally have the power to grant injunctions in all cases in which it appears to the court to be ‘just and convenient’, however, the grant of anti-arbitration injunctions seems to have been ousted from the Nigerian legal jurisprudence by the decisions of our Court relying solely on the provisions of **Section 34 of the Arbitration and Conciliation Act (the ACA)** (now **Section 64 of the Arbitration and Mediation Act 2023 (AMA)**) which regulates the intervention of the Courts in arbitration.

This article will examine the provisions of **Section 34 of the ACA** now **64 of AMA**, the provisions of the Constitution, the High Courts Act (both Federal and Lagos State) and the decisions of the Court of Appeal in *Stabilini Visinoni Ltd. v Mallinson & Partners Ltd.*³, *Statoil (Nig) Ltd v NNPC*⁴, and *S.P.D.C.N. Ltd v. C.I.N.R. Ltd*⁵, in understanding the implications of **Section 34 of the ACA** now **64 of the AMA**.

¹ Olasupo Shasore, ‘Nigeria: Injunctions and Protective Orders.’ <www.iclg.com>

² Vibhor Gupta ‘India: Arbitration : A Perspective’ <https://www.mondaq.com/india/arbitration--dispute/resolution/935374/arbitration--a-perspective>

³ [2014] LPELR-23090 CA/ (2014) 12 NWLR (Pt. 1420) 134

⁴ (2013) 14 NWLR (pt 1373) 1

⁵ S.P.D.C.N. Ltd v. C.I.N.R. Ltd (2016) 9 NWLR (pt. 1517) CA

Nature of injunctions

An injunction may be seen as an equitable remedy in the form of a Court order that either prohibits or compels ("enjoins" or "restrains") a party from continuing a particular activity. A party who fails to adhere to the injunction faces civil or criminal contempt and may have to pay damages or sanctions for failing to follow the order. It is important to note that at the very core of injunctive reliefs, is the recognition that monetary compensation may not suffice in all instances. An injunction may be permanent or temporary.⁶

The power of the Court to grant an injunction is in equity. The Court will instinctively reserve its equitable powers for situations when there is no adequate remedy at law. This leaves the party seeking an injunction with the heavy burden of demonstrating facts and circumstances warranting the grant of an injunction, especially since the court is well aware of how drastic and serious injunction are and as such applies its discretion with caution. In deciding whether to grant an injunction, the Court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant and grant an injunction which seems consistent with justice and equity under the circumstances of the case. In other words, once the Court is satisfied that the underlying claim or request for an injunction should be taken seriously, the court will exercise its discretion according to "the balance of convenience".

The power of Nigerian courts to grant injunctions is inherent and conferred by the provisions of the Constitution.⁷ This power has been judiciously espoused in a plethora of cases. In the case of *Azuh v UBN Plc*, it was held that by virtue of the powers conferred on the High Court by section 6 (6) (a) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) the High Court has the power to grant an *ex parte* order of interim injunction upon the fulfilment of certain conditions⁸. The High Court Law of Lagos State also confers on the High Court, the power to grant injunctions⁹. Similar provisions exist in the High Court Laws of other States.

Furthermore, this power also exists under **Section 13 of the Federal High Court Act**, which gives the court powers to "*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*

⁶ Akinwale Ogunlola, 'Nigerian Courts, Injunctions and the Electoral Process.'
<<http://www.gamji.com/article6000/NEWS6438.htm>>

⁷ Section 6, Constitution of the Federal Republic of Nigeria 1999 as amended.

⁸ (2014) 11 NWLR (Pt. 1419) 580 (P. 606, paras. D-E)

⁹

so to do". This power has also been tested in plethora of authorities including the case of *Akingbola v Chairman, EFCC*¹⁰,

Anti-arbitration injunctions in Nigeria

Anti-arbitration injunction is one of the many forms in which injunctions can be granted by the Court. Anti-arbitration injunctions are injunctions which seek to prevent the initiation or continuation of an arbitration proceedings, invalidate the arbitral process, suspending enforcement, and in some cases, it may take the form of retrospective refusal to recognise the jurisdiction of the tribunal. They could be sought for various reasons such as;

- where there is no agreement to arbitrate;
- where arbitral proceedings have been initiated at the wrong seat;
- where arbitral proceedings have been initiated before the wrong institution;
- where the arbitral proceedings are outside the scope of the arbitration agreement;
- where an arbitration of a certain issue is *res judicata*;
- where an exclusive court jurisdiction clause has been breached; and
- where an arbitration has been commenced against a third party who was not a party to the agreement.¹¹

In Nigeria, over the years, case law has suggested that the powers of a Court to intervene in arbitration are as defined under **Section 34 of the ACA**, now **64 of the AMA** which provides that; *"A court shall not intervene in any matter governed by this Act except where so provided in this Act."* This provision has been interpreted, in a few decisions of our Appellate Courts, to mean that the Courts are not empowered to grant arbitral injunctions because, such power is not provided for under the Act. The Court of Appeal in the case of *STATOIL (NIG) LTD V NNPC*¹² adopted this approach.

In that case, the Appellants and the 1st Respondent were parties to a production sharing contract dated the 18th of May 1993 in respect of an oil mining lease, which provided for reference of any difference or dispute between the parties concerning the interpretation or performance of the contract to arbitration. Despite this agreement, the 1st Respondent commenced a suit at the Federal High Court against the appellants and the 2nd -4th Respondents, seeking an *ex parte* order of interim injunction, restraining them from continuing with the arbitral proceedings due to the fact that the claims were related to

¹⁰ (2012) 9 NWLR (Pt. 1306) 475

¹¹ Romesh Weeramantry, 'Anti-Arbitration Injunctions: The Core Concept.'

¹² (2013) 14 NWLR (pt 1373) 1

matters of taxation, which the 1st Respondent contended were matters that ought to be determined by either the Tax Appeal Tribunal or the Federal High Court. The Appellants were aggrieved with the ruling of the Federal High Court granting the order of interim injunction. Subsequently, they appealed to the Court of Appeal, asserting that by Section 34 of the Arbitration and Conciliation Act, the Federal High Court did not have the power to intervene in the arbitral proceedings between the appellants and the 1st Respondent. The Court held per **Honourable Justice Akinbami J.C.A;**

“ In this instant case, the issuance of ex-parte interim injunction does not fall under the exceptions to section 34 of the Arbitration Act. The learned trial Judge of the lower Court acted outside the jurisdiction conferred on him by granting the ex-parte interim order...the interim order granted by the lower court ex-parte is hereby discharged” ¹³

In the same vein, the Court of Appeal in *STABILINI VISINONI LTD. V MALLINSON & PARTNERS LTD.*¹⁴ delivered a similar decision. In that case, the respondent was a dealer in the importation and sales of building materials, while the appellant was a civil works and construction company. The Local Purchase Orders (LPOs) between the two parties contained an arbitral clause. However, when a dispute arose, the respondent commenced proceedings via the court, for breach of contract and cost of action. The appellant brought an application praying the court to stay proceedings until the parties complied with the arbitral clause contained in the LPOs which stipulated referral to arbitration prior to commencement of court action. The respondent conceded to the application. Consequently, an arbitrator was appointed and the date for the preliminary meeting was fixed, which the appellant did not honour as the counsel apprised of the matter had a prior engagement. The appellants proceeded to propose settlement on the condition that the respondent withdrew/discontinued all claims, suits and arbitral proceedings against them. The respondents made a counter offer which the appellants failed/refused to respond to. Seeing that the appellant was not forthcoming in the matter, the arbitrator moved to render an award. The appellant then went back to the court, praying for an interim order to restrain the arbitrator from ‘taking steps in the dispute between the parties until the motion on notice for similar reliefs is heard or determined.’ The arbitrator subsequently rendered the award, and the respondent went to the court to enforce it, while the respondent applied to set it aside, inter alia. The trial court, in its judgment, dismissed the appellant’s application to set aside the award, but granted the respondent’s application to enforce the arbitral award. The appellant was dissatisfied and appealed to the Court of Appeal.

¹³ Pp. 25, paras. C-F; 28, para. H; 29, paras. F-H

¹⁴ [2014] LPELR-23090 CA/ (2014) 12 NWLR (Pt. 1420) 134

The Court held that the appellant, by submitting to arbitration, had surrendered its right to have disputes between them resolved by the other means of conflict resolution such as the court. The Court also held that the appellant, having chosen to take the respondent down the path of arbitration, could not then turn around to demand that the legal principles that obtain in a court of law must be complied with at the Arbitral Tribunal.

In a more recent decision in the case of **S.P.D.C.N. Ltd v. C.I.N.R. Ltd (supra)** the Court of Appeal, in the determination of the matter (International Arbitration), considered **Section 13 of the Federal High Court Act**, and **Section 15 of the Court of Appeal Act**, the provisions of which respectively state that the Courts have the power to grant injunctions as bestowed upon them by the Constitution.

The Court of Appeal in this matter also held that;

“By virtue of section 13 of the Federal High Court Act, 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. Any such order may be made either conditionally or on such terms and conditions as the court thinks just. The implication of the foregoing is that pursuant to the provision of section 15 of the Court of Appeal Act, the Court of Appeal can exercise the powers conferred upon the Federal High Court to grant an injunction, such as an anti-arbitration injunction, under section 13 of the Federal High Court Act. Thus, the Court of Appeal and the Federal High Court can grant an order of injunction enjoining a foreign arbitration proceeding. To this extent, the respondents’ preliminary objection failed and was accordingly struck out.”

However, the Court was of the view that the power to grant anti-arbitration injunction was limited to international arbitration and not domestic arbitration. The Court held that under domestic arbitration, **by virtue of Section 34 of the ACA, a Nigerian court shall not intervene by granting any injunction enjoining any arbitral proceedings brought pursuant to the provisions of the Arbitration and Conciliation Act.**¹⁵

As brilliant as this principle may seem, it is pertinent to note, that in the opinion of this writer this provision has been misconstrued, as there is a seeming assumption that the provision of the former **Section 34 of the ACA** was to curtail the powers of the Courts to grant injunctions, which may likely not be the intendment of the provision. This is because there is nothing expressly stated in that provision or any other provision of the ACA that a Court may not grant an anti - arbitration injunction. If the Court of Appeal

¹⁵ (P. 323, paras. C-F)

was willing to grant an anti-arbitration injunction in respect of an international arbitration, the write sees no reason why our Courts should interpret Section 34 to divest our Courts of jurisdiction to grant anti-arbitration injunctions. Assuming Section 34 or any other provision of the ACA indeed ousts the jurisdiction of the Court to grant anti -arbitration injunctions then that said provision is inconsistent with the Constitution which gives the Courts jurisdiction to grant injunctions and to that extent same must be invalid, null and void because the Constitution is the highest law of the land and therefore all other laws owe their legitimacy to it. Accordingly, any law which is inconsistent with it cannot survive. In other words, all laws made by the National and State Assemblies owe their survival to it, and therefore any law that conflicts with any of its provisions will be a nullity. That being so, the jurisdiction of the High Court conferred or vested by the constitution cannot be taken away or in any way interfered with by any legislation or other statutory provision. If it is desired to divest, tamper or interfere with the jurisdiction granted by the constitution, it is only the constitution itself, through a constitutional amendment that can do so¹⁶.

In the case of **AMCON v. Shittu (Unreported CA/L/1266/2019)** the Court of Appeal considered a provision of the Assets and Management Corporation of Nigeria (Amendment No. 2.) Act 2019¹⁷, which restrains the Court from granting an order of injunction against the Corporation. In declaring that provision null and void, It was held **per Dongban-Mensem (JCA)** delivering the lead judgment that;

“The provision of Section 34(6) of the AMCON Act seeks to curtail the discretion of the court and also seeks to curtail the rights of citizens to seek redress or help from the Court. This is inconsistent with the provisions of the Constitution and is therefore declared null and void to the extent of its inconsistencies.”

In England, the Courts are clothe with jurisdiction to grant anti-arbitration injunctions restraining persons from commencing or participating in arbitration proceedings. The jurisdiction of the Court in this regard is founded on its inherent powers under section 37 of the Senior Courts Act 1981 (SCA 1981). The Court is also empowered under sections 44 and 72 of the Arbitration Act 1996. This power is however used in exceptional circumstances, in that the pro-arbitration stance adopted by the courts require them to step back where the arbitrators are seized of an issue relating to their own jurisdiction. *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft*¹⁸ is

¹⁶ ONWERE v. NWAZUO & ORS (2012) LPELR-20838(CA)

¹⁷ Section 34(6), AMCON Act 2019

¹⁸ (No 2) [2011] EWHC 345 (Comm)

an example of an exceptional circumstance in which an anti-arbitration injunction was held to be appropriate¹⁹. In that case, the Court was emphatic in holding 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... In the present case the claimant can establish that the continuation of the arbitration will be a breach of its legal rights... This is also a case in which the claimant can establish that it would be vexatious and oppressive to allow the arbitration to continue since this court has already held that there is no arbitration agreement. Allowing the arbitration to continue will therefore not only involve the claimant in duplication of work and needless expense, but it will do so on a jurisdictional basis which this court has already held does not exist. In conclusion, I am satisfied this is one of those rare and exceptional cases in which it is appropriate to grant an anti-arbitration injunction

Conclusion

It is the opinion of the writer that the provisions of the new **Section 64 AMA** that prohibits the intervention of the courts except where so provided by the Act do not expressly strip the courts of their power to grant anti-arbitration injunctions, or injunctions generally even in arbitral matters. Even if it did, the provision would be inconsistent with the Constitution and a clear violation of the powers granted to the Courts – thereby rendering them null and void to the extent of its inconsistency. I believe a better approach will be for our courts to accept that they possess the jurisdiction to grant such injunctions, however the exercise of that jurisdiction should only be in exceptional cases as noted by the Court of Appeal in **S.P.D.C.N. Ltd v. C.I.N.R. Ltd**, where it was held that,

“Anti-arbitration injunction will generally only be granted in exceptional circumstances. 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.”

¹⁹ ‘Anti-arbitration Injunctions.’ Arbitration Law Monthly, Maritime Insights & Intelligence Limited.
<www.i-law.com>