INJUNCTIONS AND PROTECTIVE ORDERS; Commercial Arbitration in Nigeria

By Olasupo Shasore, SAN

Arbitration continues to enjoy increasing "successful" patronage in Nigerian Commercial disputes. Success in the sense - that parties to arbitration, arbitrators and the courts – are trending to be more cooperative, confident and circumspect respectively. This was self-evident recently when the Court of Appeal in Nigeria reaffirmed the current policy of refusing to "merit review" arbitrators' decisions. In *MUTUAL LIFE & GENERAL INSURANCE LTD v KODI IHEME (2013) 2 CLRN 68* the justices of appeal rejected counsel's invitation to review an arbitral decision on grounds of misconduct and the proverbial allegation of "error on the face of the award".

This approach can never be too frequently commended if only for the ominous signals any contrary predilection of the courts would create in the private dispute resolution machinery. As trends continue to show that courts will "not be over ready to set aside awards where the parties have agreed to abide the decision of a tribunal of their own selection…" the current advancement of commercial arbitration in the sub regions busiest jurisdiction should be encouraged.

What now seems to be an equally vital terrain to protect is, the right to arbitrate, either by restraining the breach of the agreement to arbitrate or protecting (albeit sometimes on an interim basis) the rights of parties during the dispute.

Interim Protective Measures

The power and jurisdiction to make injunctive and protective orders in arbitration is an essential adjunct to the efficiency and effectiveness of arbitration in commercial disputes. This is because certain acts or omissions ranging from dissipation of assets to filing parallel actions could effectively terminate the prospect of successful arbitration proceedings.

The sources of the jurisdiction and power to grant orders in aid of arbitration include national legislation, case law and the rules governing arbitration (both institutional and ad hoc). Increasingly more international arbitration is being seated in Nigeria annually therefore the recent amendments to the Arbitration Rules of the International Chamber of Commerce for instance Article 29 which provides for interim measures requested prior to the constitution of an arbitral tribunal is an important development to the community. This rule permits an emergency arbitrator to issue binding interim measures which may be reviewed either by it or the tribunal when constituted. Under Nigerian Law, the court tribunal may also before an arbitral proceeding take such interim measures of protection that may be necessary in respect of the subject matter of the dispute. The recently established Lagos Court of

Arbitration ("LCA"), an international ADR center located in Lagos Nigeria operates a national Arbitration and Conciliation Act based on the model Law as well as a very progressive State law of 2009; has made its own rules the LCA 2011 Rules which is in the process of review to accommodate similar provision for pre-tribunal constitution measures. The authors of *Commercial Arbitration Law and International Practice in Nigeria (Johnson & Shasore)* hold the view that in addition to the powers of the tribunal, S.21 of The Arbitration Law of Lagos 2009 will entitle a court to make an interim measure prior to the commencement of arbitral proceedings where the court is satisfied that the applicant has a manifest intention to refer the matter to arbitration on the basis of a valid agreement to arbitrate.

Interim orders of Injunction by court

Courts have a general power to grant injunctions in all cases in which it appears to the court to be "just and convenient". The conditions for the grant of injunctions are at the discretion of the Judge; whereas statutes do not refer to arbitration specifically the court will grant an injunction to restrain a party to an arbitral proceedings or any other person in relation to the subject matter of an arbitral proceedings where it appears to the court to be " just and convenient" to do so.

Anti-suit orders & injunctions

Anti-suit injunction by court to restrain the commencement or progress of a court action in a foreign or local jurisdiction, have been known to issue from Nigeria courts. These orders affect arbitration where the party seeking the anti-suit does so to protect arbitral proceedings in Nigeria. It may also be made to ensure the discontinuance of such action particularly where the suit is likely to cause imminent harm, prejudice the subject matter of the dispute or jeopardize the arbitral process.

A court at the request of a party to an arbitration agreement that stays further proceedings in a suit should recognize the principles of comity and act with restraint and caution as it affects foreign jurisdictions. Suits in Nigeria have been the target of such orders by compelling arbitration against possible suit in *Travelport Global Distribution Systems BV v Bellview Airlines Ltd 2012 WL 39258556 (SDNY Sept 10 2012)*. The sound policy of stay of court proceedings in Nigeria in favour of foreign arbitration was laid down by the Nigerian Supreme Court in *The owners of MV Lupex v Nigerian Overseas Chartering & Shipping Ltd (2003) 15 NWLR (pt. 844) 469*.

Anti - Arbitration Injunctions

Any action preventing a party from commencing arbitral proceedings is naturally of great concern. While commercial litigation justifies the anti-suit order as a sometime necessary means to achieve predictable outcomes and the intention of the parties, the same cannot be said of anti-arbitration orders and the inherent abuse it offers.

Where this procedure is predicated on the absence of a valid agreement to refer the dispute in question to arbitration, the irresistible rebuttal is that such disputes are themselves arbitrable. However a party to on-going arbitral proceedings could approach the tribunal for an "injunction" or to stay proceedings. Tribunals seated in Nigeria ought not to and if trends are followed do not grant such requests. The reasons are obvious not the least being to protect the fundamental objectives of arbitration namely "parties should be free to agree on how their disputes are to be resolved and such agreements shall be binding and enforceable".

However it was not uncommon for a party to an arbitral proceeding to approach a court for an injunction to restrain further proceedings in arbitration, a wholly undesirable practice. Owing to a misinterpretation of the effect of foreign jurisdiction clauses in arbitration agreements invoking admiralty and maritime jurisdiction the Nigerian court of appeal has fortunately moved from *The MV Panormos Bay & Ors v Olam Nigeria plc (2004) 10 CLRN 77* where the courts were in favour of the prospect of anti – arbitration proceedings to the more recent case of *Onward Enterprises Ltd v MV "Matrix" & Ors (2011) 5 CLRN 254* where the court of appeal now holds the view that the court will stay proceedings pending foreign arbitration based on the duty of the court to enforce arbitration agreements.

Injunction to prevent dissipation

This injunction is protective in nature. It is usually sought by a Claimant in an arbitral proceeding where it appears that by the conduct of the respondent or its privies, the respondent may not be able to satisfy any award that may be made in the matter. Because of the purpose of this category of injunctions, it is advisable to seek same from the court in the exercise of its general powers to grant injunctions when it is "just and convenient" to do so. A party may request an arbitral tribunal particularly where the conduct amounting to the risk of jeopardizing the claim is directly that of the Respondent. In any other case, for example where the orders sought are against third parties not party (ies) to the arbitration – only the court would have jurisdiction.

The High Court in Nigeria was recently confronted with an important and novel situation in *LASG v PHCN (2012) 7 CLRN 134*: a party to arbitral proceedings approached the court for orders to prevent dissipation while at arbitration. In that case, the claimant had reasons to believe that the assets of the respondent were in the process of being dissipated while arbitration was still pending. The claimant feared that if not protected, any award made in its favour may be of no value as the respondent would not have any further assets to meet its claims.

The respondent had monies in its accounts in several banks. A request could not be made to the arbitral tribunal as the banks were not parties to the arbitration agreement. Naturally, the respondent contested the application arguing that the court lacked jurisdiction or power to make the order owing to the agreement to arbitrate between the parties: the court specifically located its power:

"…in the application of article 26 (3) it is clear and unequivocal that the request for interim measure addressed by any party to the court shall not be deemed incompatible with the agreement to arbitrate or as a waiver to that agreement."

Respondent then contended that only the arbitral tribunal had power to make interim measures in respect of proceedings before it. The court rejected this argument and held that in view of the fact that the parties in custody of the monies sought to be "attached" were not parties to the arbitration agreement, the request could only properly be made to the court:

"The non-parties who were to be ordered by the court to carry out some specified orders is the reason why the arbitral panel is not the proper forum for the reliefs sought"

The request was granted and the court made an order restraining the respondent from dealing with monies standing to its credit in the account maintained in the banks. The restraining order was made to last until the determination of the arbitration.

Enforcement of interim measures

Without doubt, protective orders of injunctions and interim measures issued by the courts in aid of arbitration are inherently easier to enforce. They lend themselves to the normal mechanics of court enforcement and the force of compliance. Legislation allows parties to approach court for interim measures and such request shall not be deemed to be incompatible or a waiver of the agreement to arbitrate.

As seen above Arbitral tribunals may make orders and may direct a party to take such interim measure of protection as the tribunal may consider necessary. This will take the form of an interim award thereby making it enforceable.

An arbitral tribunal may also grant interim measures. Such interim measures may include a direction that parties maintain status quo pending the delivery of a final award on the dispute, preserve the subject matter of the dispute and provide a means of preserving the assets out of which a subsequent award may be satisfied. In order to be entitled to an interim measure, the party seeking such an interim measure shall satisfy the tribunal (*amongst other things*) that there is a serious issue to be determined on the merits of the claim. As in final awards interim awards are enforced by application for recognition and enforcement.

Many African jurisdictions are now supportive of arbitration; recent developments show that Nigeria and I dare say Lagos has led in many respects in seeking to bolster certainty and effectiveness of the arbitral process. The scope of the arbitrators' authority to issue protective measures is an important feature of this advancement. Once the courts appreciate their supportive role (as they now seem to) when interim matters are submitted, the confidence of parties in arbitral decisions particularly in

commercial disputes from African seats will provide opportunity option and ultimately save costs where the need arises. The entire region may yet be recognized not mere as users, but arbitration friendly jurisdictions.