

THE MACHINERY FOR ENFORCEMENT OF DOMESTIC ARBITRAL AWARDS IN NIGERIA - PROSPECTS FOR STAY OF EXECUTION OF NON-MONETARY AWARDS: ANOTHER VIEW*

Abstract

Enforcement of an arbitral award is no doubt a topical issue. Arbitration is a private means of resolving dispute which is resorted to, chiefly because the parties choose to avoid as much as possible employing the state machinery for dispute resolution, namely the court and its dreaded time consuming procedures and technicalities and to save time and money. One aspect of this mode of resolving differences is its emphasis on party autonomy and timely enforcement of its product, which is award. That is why it sounds as apostasy or anathema to speak of stay of execution of award by the courts. Therefore, intervention of the court in arbitral matters or any action or omission that resonates in the negative is sure to draw attention of both scholars and end-users of the product of arbitration. This article attempts to present the author's view of the issue and views canvassed by the learned author who wrote on this topic in Vol. 1 of this Journal.

Introduction

Parties to arbitration *ab initio* choose their arbitrator for better or for worse. Thus, parties are expected to accept an award as binding and enforceable immediately it is rendered.¹ Generally, there is no intention of further prolonging the dispute or a resort to court once an award is made. However, as is with all human endeavours, it does happen that a party may have a good cause for not wanting to abide by the award. In that case, such a party is afforded an opportunity of challenging the award. What happens between the time a challenge is raised and a decision on the challenge is made, is evidently, the thrust of the article under review, but that is limited to non-monetary award. A non-monetary award refers to decisions enjoining a party to act or refrain from acting in a particular manner other than in respect of money. An arbitrator does not possess the power or wherewithal to enforce an award and that is inevitable and even desirable, given the advantages accruing from the application of time-tested economic principle of division of labour. That state of affairs surely calls for state assistance, hence the inevitable involvement of the court and even other law enforcement agencies. It is true that enforcement of award is done by the court. However, execution of the award is the function of the Sheriff. Since the Sheriff cannot act without direction from the court, the need for application to court for enforcement and consequent execution of award arises. Except a court is seised of an application for setting aside an award or an objection to enforcement of an award in a

* **Chukwuemeka E. Ibe** Ph.D, Solicitor & Advocate of the Supreme Court of Nigeria and Head of Department of Commercial & Property Law, Nnamdi Azikiwe University Awka, Anambra State, Nigeria. E-mail ibemeka@gmail.com; chukwuemekaibe21@yahoo.com. Phone No 07031105599; 08082392277

¹ Sections 31 and 51, Arbitration and Conciliation Act, Cap A18, Laws of Federation of Nigeria, 2004

situation where there is a pending application for enforcement of an award, there cannot be an issue of stay of execution whether of monetary or non-monetary award.²

Some text-writers including the learned author of the article under review, in their works, have posited that there are three methods of enforcement of domestic arbitral awards in Nigeria, namely; (a) enforcement by action upon the award (b) Enforcement under section 31 (1) of the Arbitration and Conciliation Act and (c) Enforcement pursuant to section 31 (3) of the Act³. This needs amplification and clarification. The present writer is of the view that there are indeed only two methods of enforcement of domestic award in Nigeria namely, enforcement by action at law and enforcement pursuant to the provisions of Arbitration and Conciliation Act.

Enforcement by Action at law

This method is inapplicable to awards rendered pursuant to the Arbitration and Conciliation Act of the Laws of the Federation of Nigeria. This method can only be used to enforce non-statutory awards which are awards arising out of other domestic means such as customary arbitral award. In such a case, the award creditor has got to institute an action by way of writ of summons wherein he pleads the entirety of his case simultaneously with the fact of arbitration and award. The state of law is as stated in **Eke v Okwaranya**⁴ when the Supreme Court held that a party seeking enforcement of customary law arbitral award shall plead and prove the following:

- (a) That there had been a voluntary submission of the matter in dispute to an arbitration of one or more persons.
- (b) That it was agreed by the parties either expressly or by implication that the decision of the arbitrators would be accepted as final and binding.
- (c) That the said arbitration was in accordance with the custom of the parties or of their trade or business.
- (d) That the arbitrators reached a decision and published their award.
- (e) That the decision or award was accepted at the time it was made.⁵

That followed some earlier decisions such as **Ohiaeri v Akabueze**⁶ and **Agu v Ikewibe**.⁷ There is some controversy in this regard. Certain decisions of the Supreme Court omit requirements (b) and (e) above.⁸ Some scholars argue that those requirements are not necessary and constitute a clog and hindrance to effective application of customary law arbitration. The contention is that those requirements reduce customary law arbitration to a mere attempt at settlement. Arbitration is a judicial process and akin to court proceedings whose outcome is binding and enforceable and this is distinguishable from various modes of negotiation for

² Sections 29, 30,32, 48, 51, 52 Arbitration and Conciliation Act, Cap A18 Laws of Federation of Nigeria 2004

³ C. A. Obiozor, *The Machinery for Enforcement of Domestic Arbitral Awards in Nigeria: Prospects for stay of execution of non-monetary award*, (2010) 1 **UNIZIK J.I.L.J.**, 194 at 196; G. A. Ezejifor *The Law of Arbitration in Nigeria*, Longman Ikeja (1997) 115-121; G. Nwakoby **The Law and Practice of Commercial Arbitration in Nigeria**, Iyke Ventures Enugu (2004), 100

⁴ (2001) 4 SCNJ 300 at 323-324.

⁵ **Eke v Okwaranya** (2001) 4 SCNJ 300 at 323-324

⁶ (1992) 2 NWLR (PE 221) 1

⁷ (1991)2 NWLR (part 180) 385

⁸ **Igwego v Ezeugo** (1992) 6 NWLR (part 249) 561

settlement such as conciliation and mediation.⁹ If the plaintiff is successful, the customary arbitral award is merged in the court's judgement. It becomes recognized and enforceable by the court and can be executed as such. This method is also open to common law arbitral award which is not conducted in accordance with the Arbitration and Conciliation Act. Because rarely is common law arbitration encountered in practice, it is deemed expedient to skip discussion on this. The reason why a party seeking to enforce a customary law or common law award has got to prove the five ingredients lies on the fact that such arbitral award is not accorded the status of statutory award which is recognized as binding and enforceable immediately it is rendered.¹⁰ For this reason, with regard to common law and customary law arbitration, the court embarks on full scale trial of the case, reopening issues canvassed by parties and considered by the arbitrator, who may be called upon as a witness in the court proceedings and cross-examined on facts pleaded. Indeed, it is cumbersome and somehow leads to duplication of efforts.

Enforcement of Award Rendered Pursuant to Arbitration and Conciliation Act

Where arbitration is held pursuant to Arbitration and Conciliation Act, the resultant award can only be enforced in the manner prescribed by the Act. One of the underpinnings of the Act is curing the mischief of re-opening the issues already canvassed by parties and adjudicated upon by the arbitrators created by the common law and customary law arbitration. Thus action at law is not a mode of enforcing a statutory arbitral award.

There are two subsections in one section of the Act for enforcement of an award. For this reason, text-writers are of the view that there are two systems for enforcing such arbitral award. However, an examination of the two subsections reveals that only one method is prescribed.¹¹ For ease of reference the section and its two sub-sections are reproduced hereunder:

- (1) An arbitral award shall be recognized as binding and subject this section and section 32 of this Decree, shall, upon application in writing to the court, be enforced by the court.
- (2) The party relying on an award or applying for its enforcement shall supply:
 - (a) the duly authenticated original award or duly certified copy thereof;
 - (b) the original arbitration agreement or duly certified copy thereof.
- (3) An award may, by leave of the court or a judge, be enforced in the same manner as a judgement or order to the same effect.¹²

Read between the lines, both sections create a distinction without difference. Under sub section 1, the applicant, in his written application, prays the court to enforce the award *simpliciter*, not as its judgement. However, it is difficult to see how

⁹ For further consideration of the views, please see C. E. Ibe, **Insight on the Law of Private Dispute Resolution in Nigeria**, El'Demak Publishers Ltd, Enugu 2008, 90.

¹⁰ Section 31 Arbitration and Conciliation Act Cap A18 Laws of Federation of Nigeria 2004

¹¹ It is not unusual for the act to provide two methods of doing one thing that amounts to the same, for example Sections 4 and 5 of the Act contain provisions for enforcement of agreement to arbitrate that are identical.

¹² Section 31, Arbitration and Conciliation Act Cap L18 laws of Federation of Nigeria 2004

this can be done except the court enforces the award in the same manner as a judgement or order of the court, that is to say by involving the Sheriff and Civil Process Procedure which necessarily requires an order of the court. Court judgements are not executed by the court but by the Sheriff hence, the court cannot directly enforce the award by execution.

Again subsection (3) is said to be a summary and prompt procedure¹³. Under this method, the award creditor seeks the leave of the court or judge to enforce the award in the same manner as a judgement or order to the same effect. It is clear that the expression 'by leave of court,' the Award Creditor is required to pray the court for that leave. This again calls for an application to be made to the court. Notice also the Act's penchant for verbiage in its use of the expression "leave of the court or a judge". Clearly, court here is co-terminous with a judge. It would be futile to argue that court in this context is distinct from a judge. So too is the case with subsections (1) and (3) which say the same thing in different ways.

The learned author of the article under review approached the issue from a procedural point, when he posits that in respect of subsection 1, application should be by Motion on Notice, but with regard to subsection 3, the Originating Summons is to be used¹⁴. Reliance was placed on **Imani & Sons Ltd v Shell Trustees Ltd**¹⁵. Interestingly, the learned author observed that the Act did not stipulate the nature of the written application envisaged by its section 31 (1). He then concluded and took the position that the matter is to be resolved by reference to rules of court before which such an application is made.¹⁶ Whereas the conclusion is correct the premise, it is with respect submitted, is incorrect. This is so because the Act is the substantive law and ought not to contain the adjectival law within it. Rules of court generally are made for court procedure; hence rightly, it is to the rule of the court of the enforcement forum that recourse is to be had. Various High Court Rules¹⁷ prescribe the mode for enforcement of an arbitral award. Although the learned author applied Order 39 Rule 1 (1) of the High Court Civil Procedure Rules 2006 Anambra State to subsection 1 alone, the application of the Rules is not altogether right because the Rules speak of all applications. There is no reason to exclude Section 31(3) in the Rule's ambit. Quite apart from this, Order 39 Rule 4 (1) specifically provides the procedure for enforcement of Arbitral award that is by means of Motion on Notice¹⁸. Thus, a party seeking the leave of a court should come, not by way of Originating Summons as was the case before the advent of 2006 High Court Civil Procedure Rules but by Motion on Notice. Therefore, such cases as **Imani & Sons Ltd v Shell Trustees Ltd** no longer apply, in at least, Anambra State. However, where the Rules of Court are silent on the issue, the application can be brought by an Originating Summons. That we

¹³ C. Obiozor *op cit*.

¹⁴ *op cit*

¹⁵ (1999) 12 NWLR (pt. 630) 254, 261

¹⁶ Obiozor *op cit* 197

¹⁷ Arbitral Awards arising out of Arbitration and Conciliation Act can only be enforced at the High Court. Section 57 Arbitration and Conciliation Act, Cap A18, Laws of Federation of Nigeria 2004

¹⁸ For full exposition, see C. E. Ibe, Reflections on the Provisions in the High Court Civil Procedure Rules, 2006, Anambra State for the Enforcement of Arbitration Award, **Capital Bar Journal**, July, 2010, 76 Nigerian Bar Association, Akems Communications Ltd.

think is the only occasion where the decision in **Imani & Sons Ltd** and like can be resorted to.

In retrospect, there is only one method of enforcing an arbitral award pursuant to an arbitration conducted in accordance with the Act, namely by way of Motion on Notice, but where there is no provision made in the Rules of a Court for enforcement of a statutory award, the originating summons is to be employed.

Stay of Execution of Award?

The issue of stay of execution of award by the court cannot arise under the Act because the Act in its holistic approach has amply taken care of circumstances which may create the need. . .Section 31 is made subject to section 32 of the Act which reads:

Any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award.

The court may also set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration so however, that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that party of the award which contains decisions on matters not submitted to arbitration may be set aside.¹⁹

It seems that there cannot be a situation where an award debtor would want a stay of execution of a non-monetary or even a monetary award in the absence of an ongoing suit in a court of law. It is only logical to observe that an award debtor cannot speak of a stay of execution of the award during the pendency of a suit brought for enforcement by the award creditor, for the simple reason that the said suit was brought because there has already been a stay of execution of the award by the award debtor, so to say. On the other hand, where the award debtor desires a stay of execution, during the pendency of an action for enforcement, he shall, pursuant to Section 32 of the Award apply to the court to refuse to recognize and enforce the award stating the reasons for such if the application is brought pursuant to section 31 of the Act. On the other hand, the award debtor may choose to attack the award directly by applying to the court pursuant to sections 29 or 30 of the Act, seeking to set aside the award, which also produces the same *lis pendis*²⁰ effect. This application will make the issue of execution *sub-judice* and thus, the award cannot be enforced pending the decision of the court. It falls within the *lis pendis* rule; in which case the parties are barred from acting on the substance of the matter before the court, namely, the award during the pendency of the application. An award is not a judgement of court and since it is not appealable, there is no attendant need to follow the general principle that an appeal does not operate as a stay of execution. Meanwhile, the execution of the award is

¹⁹ Section 29

²⁰ The *lis pendis* doctrine is said to be “[the] doctrine which is embedded in the common law [which] gives notice to persons by way of warning that a particular property is the *res* of a litigation and that a person who acquires any interest in it must know well ahead that the interest will be subject to the decision of the court on the property . . . which means, during litigation nothing new should be introduced” per Tobi JSC in **Eneke v Int. Merchant Bank of Nigeria Ltd & Ors**, (2007) Vol. 146 LRCN 842 at 845

already stayed by the very act of the award debtor which ignited the application for enforcement brought by the award creditor and by his non-action on the award which necessitated his application for setting aside of the award! The presence of the two sub-sections in section 31, dealing on the same matter may create a problem of flux just like sections 4 and 5 of the Act dealing on the same subject matter of enforcement of agreement to arbitrate.

Effect of party autonomy on “stay of execution of awards”

One feature of the process of arbitration pursuant to the Act has always been party autonomy. The Act is replete with such provisions.²¹ It is often forgotten that once parties opt for arbitration under the Act, they are bound by the entire provisions of the Act. In this regard, reference is made to Section 34 of the Act, which again for ease of reference is produced hereunder:

A court shall not intervene in any matter governed by this decree except where so provided in this Decree

By opting for arbitration, parties have renounced their rights to apply fully the provisions of the Constitution in respect of adjudication. The plank upon which all arguments raising the issue of right of appeal and subsequent right to obtain a stay of execution is first and foremost anchored on Section 6 of the Constitution of Federal Republic of Nigeria 1999 which clearly empowers the courts to decide “all matters between persons and all actions and proceedings relating thereto for the determination of any question as to his civil rights.” It is important to remember that sections 241, 242 and 318 (1) of the Constitution can be called in aid only when section 6 of the said constitution has been rightly applied. This is so, because it is Section 6 of the Constitution which provides the leg for the later sections that is to say Sections 241, 242 and 318 (1) of the Constitution. Where parties *ab initio* decide to avoid as much as possible the Section 6 of the Constitution method by opting for arbitration, it seems wrong and uncalled for to visit them with the full sledge hammer of those sections of the Constitution. Finding solution to any problem arising under the circumstances should first be exhaustively dealt with by reference to the provisions of the Act and thus, there cannot be an issue of circuitously staying execution of an award.

Stay of Execution of Domestic Non-Monetary Award or Stay of Execution of judgement, order or decision of the Court?

Where a court refuses to grant application for enforcement of an award in spite of an objection raised in reliance on section 32 of the Act, that decision is no longer an award or product of arbitration and as such, it goes without saying that it is appealable. It is the same case with respect to application brought pursuant to section 29 or 30 of Act. If the award debtor appeals against the judgement of the High Court which of course he has a right to do, the issue would no longer be enforcement of the award *simpliciter*. The issue now bothers on the interventionist act of the High Court or a Court of appeal rendering judgement recognizing the award. The learned author clearly recognized this in his findings.²² It is with all respect, submitted that the erudite learned author deviated, and missed the mark when he wrote of the award

²¹ See for instance section Sections 18, 19 (3), 20(1) Sections 18, 19 (3), 20(1)

²² C. A. Obiozor *op. cit* 201 and 202

being circuitously stayed and posited that this is wasteful and not cost effective. By so doing he created a non-existing problem. This is so because it is not the province of the Act²³ to make laws for High Court or Rules of such Court. For clarity, there can never be an issue of stay of execution of an award whether monetary or otherwise either at the High Court or an appellate Court. The issue which can arise sequel to an order, decision or judgment of the High Court or Court of Appeal in respect of an award is stay of execution of such order, decision or judgement. This is so because an arbitral award is always enclosed in a sacred purse, as it were, and never tampered with by the courts. Arbitrators cannot at the same time become enforcers and executors of their award. This is contrary to separation of powers doctrine and even goes against the grain of economics which favours division of labour for cost and time effectiveness. The law remains that either the award is enforced by order or judgment of court or is set aside - no more, no less. The issue of stay of execution remains and will always remain with decisions, orders, judgements and the likes of court (which may uphold or set aside an award) and never with the decision of an arbitrator as contained in an award.

Conclusion

It is clear from the foregoing exposition that the state of law with regard to stay of execution of domestic award whether monetary or non-monetary is in a sort of equilibrium thus in a perfect state of balance and needs not be tampered with. It is cost and time-wise effective sustaining the idea of party autonomy - the core of arbitration – necessary in this connection for the protection of private dispute resolution mechanism.

²³ Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria 2004

