

## THE MACHINERY FOR ENFORCEMENT OF DOMESTIC ARBITRAL AWARDS IN NIGERIA – PROSPECTS FOR STAY OF EXECUTION OF NON-MONETARY AWARDS\*

### Abstract

*The decision of an arbitral tribunal is known as “award”. There are domestic, international and foreign awards. An award is domestic when it is bereft of any international or foreign content. It is made within the local jurisdiction of a state and neither the parties nor the subject matter to which it relates has any international characteristic. A domestic award may or may not direct the payment of money. Either way, the Nigerian jurisprudence has fashioned out the mechanisms for enforcement of such awards. A party to an arbitral process may be dissatisfied with an award arising therefrom and may, therefore, not evince the desire to implement it. Such a party may intend to stall the execution of the award against him. This article investigates the possibilities of stay of execution of domestic non-monetary awards in Nigeria, using the dynamics of reference to case law and statute.*

### 1. Introduction

There are various categorizations of awards. Awards may savour of local content, in which case they do not cut across national or municipal frontiers. Such awards are recognized as domestic awards. An award may also be international or foreign.

Domestic awards may be interim, interlocutory, partial, default, final or may arise from consent, otherwise recognized as consent awards. Such awards may or may not involve the payment of money by the unsuccessful party. Where the latter is the case, such award qualifies as a non-monetary award. The scope of this paper is non-monetary awards.

There are three enforcement systems for domestic awards under the Nigerian legal system. A domestic award is enforceable by action upon the award, by application under section 31(1) of the Arbitration and Conciliation Act and by the summary method prescribed by section 31(3) of the same Act.

Enforcement of awards is done before the regular courts. This is because an arbitral tribunal becomes *functus officio* after an award is made. Indeed, except for interpretation or correction of such awards, an arbitral tribunal cannot resume jurisdiction over an award unless the court remits a matter to it for re-consideration. In the same way, the court has no powers to turn an arbitral award into its own judgment. An unsuccessful party cannot also “appeal” against an award to the court in the same way as an appeal may be made against the judgment of a lower court to an appellate court. The court may only set aside, remit or enforce an award. In view thereof, it becomes pertinent to determine whether the court can stay execution of a domestic non-monetary award in Nigeria.

### 2. Mechanisms for Enforcement of Domestic Awards in Nigeria

After a domestic award is made, the successful party in the arbitral process may desire to put machinery in motion to reap the fruit of the award. Such a party may explore the three mechanisms, which are available in Nigeria for enforcement of domestic awards. They are: (i)

---

\* Dr. C.A. Obiozor; Senior Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State.

Enforcement by Action upon the Award, (ii) Enforcement under Section 31(1) of the Arbitration and Conciliation Act, (iii) Enforcement pursuant to Section 31(3) of the Act. A summary of the three systems is discussed hereunder.

**(i) Enforcement by Action upon the Award**

One peculiar feature of the Nigerian legal system is the infusion of the English law into it. One of such laws is the English common Law. The common law is, therefore, a constituent of the Nigerian jurisprudence. This has subsisted from the colonial era to date.<sup>1</sup>

The mechanism for enforcement of domestic awards by action upon the award takes its origin from the common Law. The position of the common Law is to view every valid arbitral award as a contract, which is inexorably binding on the disputing parties.<sup>2</sup> In consequence, it is incumbent on an unsuccessful party to implement the award without delay. However, as with all instances of human interactions, the unsuccessful party may not pursue the path of implementation of such awards. At such times, the successful party who desires to reap the benefits of the award enjoys a right of action to enforce the award against the unsuccessful party.<sup>3</sup>

The successful party commences the process of action upon the award by taking out a writ of summons in which he prays the court to recognize/validate and enforce the award. Thereafter, the parties proceed to issues and the process culminates in the judgment of the court. In order to succeed, the successful party/plaintiff must demonstrate a cause of action. In this regard, such a party must prove the subsistence of a number of elements, i.e., that there was a submission or arbitration agreement between the parties; that there was a dispute between the parties within the contemplation or anticipation of the submission or the arbitration agreement; that pursuant to the submission or arbitration agreement, the parties appointed their arbitrator(s); that the arbitral tribunal took up the dispute and handed down an award on it, and finally that the unsuccessful party had neglected or failed and/or refused to implement the award.<sup>4</sup>

Once the court makes a pronouncement validating an award, the successful party stands in the position of a judgment creditor while the unsuccessful party passes for a judgment debtor. The award then constitutes *estoppel* and the successful party may take steps to assert the judgment by executing the award.

This mechanism is available for the enforcement of domestic awards made pursuant to a submission<sup>5</sup> or a customary arbitration agreement.

**(ii) Enforcement under Section 31(1) of the Arbitration and Conciliation Act**

Where an arbitration agreement is in writing, the Arbitration and Conciliation Act<sup>6</sup> regulates it. In that case, a domestic award made pursuant to such agreement comes within the purview

---

<sup>1</sup> See s. 32 of the Interpretation Act, cap. I 23, Laws of the Federation of Nigeria, 2004.

<sup>2</sup> Indeed, there is an implied term in an arbitration agreement that parties agree to perform the award. See **Norske v. London General Insurance Co. Ltd.** [1927]43 TLR 541

<sup>3</sup> See **Bremer v. Drewry** [1933]1 KB 753.

<sup>4</sup> See **Ebokan v. Ekwenibe & Sons Trading Co.** [2001]2 NWLR (pt. 696)32, 41-42.

<sup>5</sup> A common law arbitration agreement is known as “Submission”.

<sup>6</sup> See s.1(1) of the Arbitration and Conciliation Act, cap A18, Laws of the Federation of Nigeria, 2004.

of the enforcement provisions of the Act. For such cases, the award may be enforced under section 31(1) of the Act. The section provides thus:

An arbitral award shall be recognized as binding and subject to this section and section 32 of this Act shall, upon application in writing to the court, be enforced by the court

Here, if the court is satisfied that a domestic award made under the Act merits enforcement, it shall, upon application in writing to it, make an order for the enforcement of the award. By the same token, the provision allows the court to refuse the recognition and enforcement of such awards pursuant to section 32.

Unfortunately, the Act does not stipulate the nature of the written application envisaged by its section 31(1). However, it is our position that the matter ought to be resolved by reference to the rules of the court before which such application is made.<sup>7</sup> As such, in Anambra State, for instance, such applications shall be made by Motion on Notice, pursuant to Order 39 Rule 1(1) of the High Court of Anambra State Rules,<sup>8</sup> which provides that:

Where by these rules any application is authorized to be made to a judge, such application shall be made by motion, which may be supported by affidavit and shall state under what rule of court or Law the application is brought.

The term “Court” for purposes of section 31(1) of the Arbitration and Conciliation Act means the High Court.<sup>9</sup> As such, a judge in the High Court of Anambra state is authorized to hear the application. Consequently, since the High Court Rules govern the conduct of civil proceedings before the court, such applications are to be made in accordance with the Rules of that court, i.e., by Motion on Notice.

### **(iii) Enforcement Pursuant to Section 31(3) of the Arbitration and Conciliation Act**

The third system for enforcement of domestic awards in Nigeria is found in section 31(3) of the Arbitration and Conciliation Act. Again, this provision of the Act only applies to awards made pursuant to written arbitration agreements. The process prescribed by section 31 (3) is otherwise recognized as the summary and prompt method for enforcement of awards. It offers a quick method for the enforcement of arbitral awards. The section stipulates thus:

An award may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.

The first step taken by a successful party is to pray the court, by way of originating summons, for leave to enforce the award.<sup>10</sup> Upon the grant of leave, the successful party is placed in the

---

<sup>7</sup> See the view of Uwais , JSC (as he then was) over matters of similar nature in **Noibi v. Fikolati** [1987]1 NWLR (pt. 52)619,630.

<sup>8</sup> High Court of Anambra State (Civil Procedure) Rules, 2006.

<sup>9</sup> This includes the High Court of a state, the High Court of the Federal Capital Territory or the Federal High Court. See s. 57(1) of the Arbitration and Conciliation Act, *op. cit.*, note 6.

<sup>10</sup> See **Imani & Sons Ltd. v. Bill Const. Co. Ltd.** [1999]12 NWLR (pt. 630)254, 261.

position of a judgment creditor in litigation.<sup>11</sup> At this time, he may then employ any of the appropriate machinery available to a judgment creditor at law to execute the award.

The above analysis represents the existing machinery for enforcing domestic awards in Nigeria. The next question is to determine whether the court can stay execution of an arbitral award.

### **3. The Issue of Stay of Execution of Awards**

To stay execution of a decision is to suspend its enforcement pending further direction. In relation to arbitral awards, the question is to determine whether it lies within the jurisdiction of the court to stay execution of such awards – particularly, non-monetary awards, which form the plank of this article. This question is topical in view of the decision of Belgore JSC, in **Ras Pal Gazi Const. Ltd. v. F.C.D.A**<sup>12</sup> in which his lordship held that the role of the High Court, which is invited to enforce an arbitral award, is simply to enforce the award, if it is not challenged by a request to set it aside. The reason for this, according to his lordship, is that an arbitral tribunal ought ordinarily to enforce its award just as a court enforces its judgment but since an arbitrator becomes *functus officio* after an award is made, the successful party has no choice but to approach the court to pursue its enforcement. While such application is brought, it is not permissible for the court, for instance, to convert the arbitral award into its own judgment. The court either enforces or refuses the enforcement of the award. In view thereof, it is of some scholarship to determine whether the court may entertain an application for stay of execution of a non-monetary award under any circumstance. In order to set the tone for this discourse, it is apposite to examine the basis for the grant of stay of execution at law.

#### **(i) Legal Basis for Stay of Execution of Non-Monetary Decisions**

The right of appeal is a constitutional right.<sup>13</sup> Consequently, the court must not assume a stance, which would stall a citizen's exercise of this constitutional right.<sup>14</sup> Nevertheless, it is true that an appeal, *per se*, shall not operate as a stay of execution.<sup>15</sup> In that event, a party who is dissatisfied with the decision of a court may file an appeal against it and follow it up with a prayer for a stay of execution of such decision.<sup>16</sup>

An order for stay of execution is an interim order, which does not possess the attribute of finality. As we stated earlier, it is nothing more than an order for suspension of rights, which a court has pronounced in favour of a respondent and for the preservation of property pending the determination of an appeal against the judgment in respect of that right and or property. Put differently, an order of stay of execution arrests further action by the court in a matter and prevents the beneficiary of a judgment or order of court from putting the legal process of warrant of execution in respect of the judgment or order into operation.<sup>17</sup> This accords with the

---

<sup>11</sup> See **Shell Trustees Ltd. v. Imani & Sons Ltd.** [2000]6 NWLR (pt. 662)639, 662.

<sup>12</sup> [2001]10 NWLR (pt. 722)559.

<sup>13</sup> See ss. 241 and 243 of the Constitution of the Federal Republic of Nigeria, 1999.

<sup>14</sup> See **N.B.C. Plc. v. Buraimoh** [2006]6 NWLR (pt. 976)387, 400.

<sup>15</sup> See **Ofordeme v. Onyegbuna** [2006]5 NWLR (pt. 974)549, 560.

<sup>16</sup> See **Coker v. Adeyemo** [1965]1 ANLR 120.

<sup>17</sup> See **Shodeinde & Ors. v. The Registered Trustees of the Ahmadiyya Movement- in-Islam** [1980]1-2 SC 163; See also **Kalu Igwe v. Kalu** [1990]5 NWLR (pt. 149)155, 164.

maxim *pendente lite nihil innovetur*, which literally means that nothing shall be changed during the pendency of an action.<sup>18</sup>

A prayer for stay of execution must be for a specific period. It must be sought pending the determination of an appeal. It must, therefore, not be sought for an indefinite or indeterminate period.<sup>19</sup> In determining the application, the courts aim at doing substantial justice to the parties and the court may grant it where the appeal raises a recondite question.<sup>20</sup> Be that as it may, it is not in every case where the grounds of appeal raise arguable point or points of law that a stay of execution will be granted. Each case would be considered on its own merit. However, where an appeal does not involve substantial points of law necessitating that matters be kept in *status quo* pending the determination of the appeal, a stay of execution will be refused.<sup>21</sup> The position of the law on the point was vividly captured in the words of Belgore, JSC, in **Odedeyi. v. Odedeyi**,<sup>22</sup> thus:

‘special circumstances’ though may include strong and substantial ground of appeal, this alone may not be enough. A strong and substantial ground of appeal does not necessarily mean that the appeal may succeed; certainly the court must be wary of such ground so as not to prejudice the substantive appeal. In cases where the *res*, the subject matter of the appeal, is at the risk of destruction if a stay is not granted, or its nature may be altered as to make it irreversible to its original state ... the court in its discretion will grant a stay of execution pending determination of the appeal.

In **V.S.T. Co. Ltd. v. Xtodeus Trading Co**<sup>23</sup> also, Ogundare, JSC summed up the guiding principles thus:

When it is stated that the circumstances or conditions for granting a stay should be special or strong, we take it as involving a consideration of some collateral circumstances and perhaps in some cases inherent matters, which may, unless the order for stay is granted, destroy the subject matter of the proceedings or foist upon the court, especially the Court of Appeal, a situation of complete helplessness or render nugatory any order or orders of the Court of Appeal or paralyze, in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the Court of Appeal, there could be no return to the *status quo*.

Where an application is made, it is, therefore, not granted as a matter of course. The courts have an unimpeded discretion to grant or refuse it although the court’s discretion must be exercised judicially and judiciously.<sup>24</sup> Normally, there is a presumption that the judgment or

---

<sup>18</sup> See **Doma v. Ogiri** [1998]8 NWLR (pt. 561)193, 207.

<sup>19</sup> See **C.P (Nig.) Ltd. v. Midas Bank Plc.** [2006]13 NWLR (pt. 996)61, 69.

<sup>20</sup> See **Oginni v. International Bank** [1994]3 NWLR (pt. 330)89.

<sup>21</sup> See Kalgo, JSC, in **Fatoyinbo v. Osadeyi** [2002]11 NWLR (pt. 778)384, 394.

<sup>22</sup> [2000]3 NWLR (pt. 650)655, 659-660.

<sup>23</sup> [1993]5 NWLR (pt. 296) 675,686.

<sup>24</sup> *Ibid.*, p. 688.

order appealed against is correct and valid until the contrary is established. The practice, therefore, is not to deprive a successful litigant of the fruits of judgment unless under very special circumstances.<sup>25</sup>

Having reviewed the guiding principles for stay of execution, it now behoves us to examine the possibility of staying the execution of a domestic non-monetary award in Nigeria.

**(ii) Prospects for Stay of Execution of Domestic Non-Monetary Awards**

Generally, every award possesses the attribute of finality. In one sense, this would mean that there could be no “appeal” against it to the court. A party who is dissatisfied with it may only apply to the court to set it aside. Consequently, a court, which is moved to enforce an award, cannot, as we observed earlier, transform the award into its own judgment. On the face of it, therefore, the only business of the court at such a time is to enforce or refuse the enforcement of the award. Does this then mean that the machinery for execution of awards is not capable of stay?

We did recognize three systems for the enforcement of domestic awards in Nigeria, namely, by action upon the award, or by application under section 31(1) or section 31(3) of the Arbitration and Conciliation Act.<sup>26</sup> We submit, that in these instances, the judgment handed down by the court sequel to an action upon the award, or the order of court directing the enforcement of an award under section 31(1) of the Act or the order of court granting a successful party/applicant leave to enforce an award pursuant to section 31(3) of the Act, qualifies as a “decision” under the Nigerian jurisprudence, in view of the position of the Constitution. The term “decision” has a constitutional definition. Section 318(1) of the Constitution of the Federal Republic of Nigeria,<sup>27</sup> provides thus:

‘Decision’ means, in relation to a court, any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation.

Clearly, therefore, the judgment in an action upon the award or the order under section 31(1) or (3) of the Act are “decisions” within the contemplation of the Nigerian Constitution.

A party who is dissatisfied with a decision may appeal as of right or with leave of the High Court, for instance, to the Court of Appeal.<sup>28</sup> Specifically, under section 241(b) of the Constitution,<sup>29</sup> an appeal shall lie, as of right, from the High Court to the Court of Appeal, where the ground of appeal involves a question of law. We submit that a decision of a court on the enforceability of an arbitral award in an action upon the award, or pursuant to section 31(1) or (3) of the Arbitration and Conciliation Act, involves an issue of law. Therefore, a party who is dissatisfied with such “decision” can appeal as of right against it. Where a valid appeal, which raises arguable or substantial grounds is made on the point, the appellant may apply for the suspension of the judgment or order by way of motion for stay of execution if exceptional

---

<sup>25</sup> See **Vaswani Trading Co. v. Savalakh** [1972]12 SC 77, 81-83.

<sup>26</sup> CAP A18 LFN, 2004

<sup>27</sup> 1999

<sup>28</sup> SS 241,242 and 243 of the Constitution of the Federal Republic of Nigeria, 1999.

<sup>29</sup> *Ibid.*

or special circumstances are established. Where such order is made, the effect is to put the successful party's enjoyment of the fruit of the award in abeyance pending the hearing and determination of the appeal on the judgment or order for enforcement of the award. In this way, therefore, it is possible to stay the execution of an award, albeit circuitously.

#### **4. Findings**

- (i) There can be no "appeal" directly to the court against an award. The court may only set aside or refuse to recognize and enforce an award or remit it to the arbitral tribunal for reconsideration. In consequence, no application can be lodged directly to court to stay execution of an award.
- (ii) There are three systems for enforcement of domestic non-monetary awards in Nigeria. Where a court makes a pronouncement on the recognition and enforcement of an award, such pronouncement can be appealed against. While the appeal subsists, it is possible to move the court to stay execution of its decision. In this way, the execution of the award is stayed.

#### **5. Conclusion/Recommendation**

A Court, which is invited to enforce an arbitral award, has no competence to transform the award into its own judgment. For now, there is no right of appeal against an award to the court.

Unfortunately, although arbitration is an alternative to litigation in dispute settlement, there are no provisions in arbitration to permit or authorize an arbitrator to enforce awards. Except as may be permissible at law, an arbitrator becomes *functus officio* once the award is made. This makes it inevitable that the courts be approached to enforce an arbitral award.

Non-monetary awards are those, which do not involve the payment of money. Where such awards are domestic, they could be enforced by the courts in Nigeria by action upon the award, or pursuant to section 31(1) or (3) of the Arbitration and Conciliation Act. In such applications, a judgment or order made pursuant thereto amounts to a decision under the Nigerian Constitutional jurisprudence. As such, it is amenable to appeal. Where a valid and substantial or arguable notice and grounds of appeal is lodged against such judgment or order, the unsuccessful party/appellant may obtain an order for stay of execution of such judgment or order for the enforcement of the award. Where this is the case, the arbitral award comes under suspension pending the hearing and determination of the appeal. In this way, the execution of the award is stayed although circuitously.

It is our view that this circuitous approach is wasteful and not cost effective. A valid award constitutes estoppel and binds the disputing parties in the same way as a judgment or order of court. The current trend in our law, which does not allow for a direct application to court to stay execution of an award is in need of change. If the benefit of stay of execution of an award can be obtained indirectly, the time is ripe to permit appeals directly to courts against arbitral awards. By this approach, a party who is dissatisfied with an award may directly apply for a stay of its execution before the court. This saves time and resource.