

## INVESTIGATING THE AUTHORITY OF THE NIGERIAN COURTS TO GRANT ANTI-ARBITRATION INJUNCTION

By

Nweze, Nnaemeka\* & Dr. Chibike Oraeto Amucheazi\*\*

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### Abstract

*This article investigates the authority of the Nigerian court to grant an anti-arbitration injunction. Even where courts may derive jurisdiction to grant an injunction, the absence of a similar provision in the arbitration legislation suggests that the specific provision on the principle of judicial non-interference in that legislation ousts the jurisdiction of the courts to grant an anti-arbitration injunction. Notwithstanding that some arbitration legislation like the English Arbitration Act of 1996 give the English courts the authority to grant injunctions, the courts seldom exercise such power especially where the aim is to enjoin arbitration. This is because of the negative consequences of anti-arbitration injunctions which amongst others do not encourage international cooperation and fairness in transnational relationships. Because anti-arbitration injunctions most often are rationalized in public policy or forum non-conveniens considerations. This paper provides a theoretical leadership on the way to distinguish and apply the correct perspective of forum non-conveniens in international commercial arbitration.*

**Keywords:** *International Commercial Arbitration, New York Convention, Anti-Arbitration Injunction, Forum Non-Convenient, and Court*

### 1.0 Introduction

In international commercial arbitration, national courts may grant an anti-suit injunction or an anti-arbitration injunction. Anti-suit injunction protects the integrity of the arbitral process and promotes the choice of arbitration as a method of dispute resolution. On the other hand, anti-arbitration circumscribes party autonomy and party consent which are the leitmotifs of arbitration. Application for an anti-arbitration injunction can be sought with the aim of forestalling the commencement of arbitration or discontinuing an arbitral proceeding that had already commenced or even invalidating the enforcement of the arbitral award. Such injunctions are common in situations comparatively describing the judicial attitude of developed Western nations and other countries concerning enforcement of arbitration agreement as ‘judicial *laissez-faire*’ and ‘protectionism/ parochialism’ respectively.<sup>1</sup> The arbitral tribunal retains jurisdiction under arbitration laws (rules) to continue proceedings in default of the

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\* LLB, BL, LLM, Doctoral candidate, Lecturer, Department of International Law and Jurisprudence, Faculty of Law, Alex Ekwueme Federal University, Ndufu Alike, Ebonyi State, Nigeria, Email: nweze.nnaemeka@funai.edu.ng; Tel: 08062747673

\*\* PhD, LLM, FIMC, AIPA, Lecturer, Faculty of Law, University of Nigeria Enugu Campus. Teaches and researches on international law and Jurisprudence. Email: chibike.amucheazi@unn.edu.ng

<sup>1</sup> T. E. Carbonneau, ‘The Exercise of Contract Freedom in the Making of Arbitration Agreements’ [2003] (36) *VJTL*, 1193, 1194; J.D.M. Lew, ‘Does National Court Involvement Undermine the International Arbitration Process’ [2009] (24) (3) *AUILR*, 494; M.A. Petsche, ‘International Commercial Arbitration and the Transformation of the Conflict of Laws Theory’ [2010] (18) (3) *MSJIL*, 463 likens such scenario as “problem of *lex forism*” which he classified into ‘judicial *lex forism*’ and ‘legislative *lex forism*.’ In the context of anti-arbitration injunction, some national courts according to the writer invariably express ‘judicial *lex forism*’ by use of public policy in distorting parties’ choice of law or the forum’s conflict rule.

appearance of a party, thus, virtually every arbitration law (rules) permits a tribunal to render an award in default of the appearance of a party,<sup>2</sup> instituted in a court that is not at the seat of arbitration.

Almost all arbitration statutes following the principle of judicial non-interference provide that the national court shall not intervene in the arbitration except where the court is permitted to act. Even though there are laws that give various national courts the authority to grant injunctions, the New York Convention on the issue of interlocutory procedural applications relating to ongoing conduct of international arbitrations does not permit those national courts to grant anti-arbitration injunctions. In such situations, the Convention obligates national courts to do nothing else other than to refer the parties to arbitration based on the arbitration agreement that is valid and in existence.<sup>3</sup> By a community or harmonious reading of the Convention, there is no provision for the court's involvement in superintending the arbitral procedure. In other words, the national court is not the guardian of the arbitral process but rather the arbitral tribunal. Article II (3) and V of the Convention were designed to ensure that national courts recognize and enforce arbitration agreements and awards. The ambit of those provisions does not extend to judicial supervision of arbitral procedural matters.

This paper aims to investigate the authority of the Nigerian courts to issue anti-arbitration injunctions. Many national courts have the jurisdiction to grant injunctions. Such jurisdiction derives from statutory provisions such as section 72 (1) of the English Arbitration Act and section 37 of the Supreme Court Act of 1981. Also, in Nigeria, section 13 of the Federal High Court Act (FHCA) and section 15 of the Court of Appeal Act (CAA) are two statutory provisions that give the Nigerian court the power and authority to grant injunctions. The question is whether the Nigerian courts can find justification or the jurisdiction to grant anti-arbitration (enjoin arbitration) on the strength of those provisions in the absence of an express provision in the Nigerian Arbitration and Mediation Act (AMA), 2023. This paper will examine the preceding issues.

After the introduction, part 2 discusses the New York Convention's perspective on the role of the national court in the arbitral process. Part 3 investigates the authority of the Nigerian court to grant an anti-arbitration injunction. Even though section 13 of the FHCA and section 15 of the CAA give the Nigerian court the authority to grant injunctions, those provisions are ousted or at the minimum circumscribed by the express provision of section 64 of the AMA that provides for the principle of judicial non-interference. Unlike the English Arbitration Act of 1996, the AMA, like the antecedent legislation (the Arbitration and Conciliation Act (ACA)) do not give the Nigerian court the authority to grant an injunction. This part further examines the English court's perspective on the anti-arbitration injunction. Notwithstanding that the English Arbitration Act makes provision for the use of injunction; English courts only grant an anti-arbitration injunction in rare exceptional circumstances. Part 4 analyzes the implications of an anti-arbitration injunction in international commercial arbitration. Part 5 is the conclusion.

<sup>2</sup> Model Law art 25 (c); English Arbitration Act section 41 (4) (a) (b); German Arbitration Act 1998, section 1048 (2) (3); ACA section 21; Hong Kong Arbitration Ordinance 2011, section 53; Dutch Code of Civil Procedure; art 1043 a (2). See SCC rules art 35.

<sup>3</sup> Gary Born, 'The Principle of Judicial Non-Interference in International Arbitral Proceedings' [2009] (30) *U Pa J Int'l L*, 1026.

## 2.0 The New York Perspective on the Role of National Courts in the Arbitral Process

At the risk of repetition, both Article II (3) and V of the Convention are mandatory provisions. Article II (3) makes it obligatory for the national court to refer the parties to arbitration based on a valid arbitration agreement. Article V, on the other hand, requires the national court to also defer to the parties' agreement to arbitrate by enforcing the arbitral award. Though the Convention does not provide for kompetenz-kompetenz, it nonetheless with a stroke of genius, indirectly reserves questions of any jurisdictional challenge until after the rendition of the award following Article V (1) (a). Commentators seem not to understand the purpose of Articles II (3) and V (1) (a) of the Convention.<sup>4</sup> The domestic standards where a party may seek a judicial review of an arbitral jurisdictional decision do not align with the Convention standard that Article V (1) (a) promotes. The Model Law on the other hand complements the Convention by outlining specific situations in which the judiciary can assist in the arbitration process. However, the Model Law does not allow judicial oversight of procedural decisions through interlocutory appeals or any other means. For example, the Supreme Court of Quebec in *Compaquie Nationale Air France v Mbaye*<sup>5</sup> considering the stage of the proceeding held that it was too early to request the intervention of the Superior Court of Quebec on matters that can only be referred to it after a definitive arbitral ruling has been issued. Thus, the Court further held that it does not have the authority to investigate those questions at present, but only after the final arbitral ruling has been made.

## 3.0 Ascertaining the Authority of the Nigerian Court to Grant an Anti-Arbitration Injunction

The question is whether the Nigerian court can find its jurisdiction for an injunction (anti-arbitration injunction and anti-suit injunction) based on the statutory provisions of section 13 of FHCA and section 15 of the CAA earlier mentioned. The following analysis will answer the question.

First, even though the jurisdiction of the court is derived from statute and such jurisdiction can also be removed by statute. For example, section 64 of the Nigerian Arbitration and Mediation Act (AMA) previously section 34 of the Arbitration and Conciliation Act (ACA) provides that 'a court shall not intervene in any matter governed by this Act except where so provided in this Act.'<sup>6</sup> Unlike section 72 (1) of the English Arbitration Act, there is no provision under the AMA where the court can grant anti-arbitration. This approach was affirmed in the 2013 case of *Statoil (Nig) Ltd v NNPC (Statoil)*.<sup>7</sup>

In *Statoil*, the Appellants and the 1st Respondent were involved in a production-sharing contract that was signed on May 18, 1993, regarding an oil mining lease. The contract included a provision that stated any disagreement or conflict between the parties regarding the interpretation or execution of the contract would be resolved through arbitration. Notwithstanding this agreement, the 1st Respondent initiated legal action at the Federal High Court against the appellants and the 2nd-4th Respondents. They sought an ex parte order of interim injunction to prevent them from proceeding with the arbitral proceedings. The 1st Respondent argued that the claims involved taxation matters, which they believed should be resolved by either the Tax Appeal Tribunal or the Federal High Court. The Appellants were dissatisfied with the decision of the Federal High Court to award the interim injunction order. Later, they appealed with the Court of Appeal, claiming that according to Section 34 of the Arbitration and Conciliation Act,

<sup>4</sup> Born (n 3)1027.

<sup>5</sup> RJQ 717 (Can).

<sup>6</sup> This provision applies in domestic and international commercial arbitration.

<sup>7</sup> [2013] 14 NWLR (Pt 1373).

the Federal High Court lacked the authority to interfere in the arbitration procedures between the appellants and the 1st Respondent. The Court per Fatima Omoro Akinbami held that:

The Arbitration Act from all the provisions therein, no enactment for the determination prematurely of the proceedings of an arbitration tribunal is provided. In the instant case the issuance of ex-parte injunction does not fall under the exceptions of section 34 of the Arbitration Act. It is very clear from the intendment of the legislature that the court cannot intervene in arbitral proceeding outside those specifically provided. Where there is no provision for intervention, this should not be done. The learned trial judge of the lower court acted outside the jurisdiction conferred on him by granting the ex-parte interim order.

Relatedly, in *Stabilini Visinoni Ltd v Mallinson & Partners Ltd*,<sup>8</sup> the respondent was engaged in the business of importing and selling building supplies, whereas the appellant was a company that specialised in civil engineering and construction. The Local Purchase Orders (LPOs) between the two parties included a clause for arbitration. Nevertheless, when a disagreement occurred, the respondent initiated legal actions in court, claiming a violation of the contract and seeking reimbursement for legal expenses. The appellant filed an application requesting the court to suspend the legal proceedings until the parties fulfilled the arbitration provision stated in the LPOs, which mandated that arbitration be pursued before initiating any court action. The respondent admitted to the application. As a result, an arbitrator was chosen and the date for the initial hearing was set, however, the appellant did not attend since their lawyer had a previous commitment. The appellants offered a settlement on the condition that the respondent would withdraw all claims, litigation, and arbitral actions against them. The appellants failed to react to the counteroffer offered by the respondents. Since the appellant did not provide any information regarding the matter, the arbitrator proceeded to make a decision. The appellant thereafter returned to the court, seeking an interim injunction to prevent the arbitrator from proceeding with the dispute between the parties until the application on notice for comparable relief is considered or decided. After the arbitrator rendered the award, the respondent took it to court to enforce it, while the respondent also applied to among other things set aside the award. The trial court, in its ruling, rejected the appellant's request to set aside the award but approved the respondent's request to enforce the arbitral award. The appellant expressed dissatisfaction and appealed to the Court of Appeal.

The Court per Amina Adamu Augie held that the appellant, by agreeing to arbitration, had relinquished its entitlement to address issues through alternative methods of conflict resolution, such as the court. It further held that the appellant, after opting for arbitration, may not subsequently request that the legal principles applicable in a court of law be followed in the arbitral tribunal.

Second, although the cases discussed relate to domestic arbitration, it is important to note that neither the New York Convention nor arbitration laws permit national courts under the Convention to use their legal and equity power to grant an anti-arbitration injunction.<sup>9</sup> This position is not lessened by the fact that the arbitration may be seated within a jurisdiction in which arbitration law provides the court the authority to grant injunctions. For example, the English court irrespective of the provision of section 72

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<sup>8</sup> [2014] 12 NWLR (Pt 1420) 142.

<sup>9</sup> Patrick John Potter, 'International Commercial Arbitration in the United States: Considering Whether to Adopt UNCITRAL'S Model Law' [1989] (10) (3) *Michigan Journal of International Law*, 928.

(1) may not likely intervene in arbitration by granting of anti-arbitration injunction even where London is the seat of arbitration. In the *Elektrim SA v Vivendi Universal SA*<sup>10</sup> case, the claimant requested an injunction to prevent the defendants (respondent in arbitration) from continuing with an arbitration process taking place at the London Court of International Arbitration (LCIA). The claimant, along with the first and second respondents, had shares in a joint venture business that had control over the Polish company responsible for operating Poland's largest mobile telecommunications network. A dispute has emerged between the claimant and respondent regarding an investment agreement that they both entered into. The second respondent has initiated an arbitration in London under the procedures of the LCIA. Before this, the parties had engaged in other arbitrations and court processes. A preliminary agreement was created to resolve the issue of share ownership in the Polish company and to address any pending legal matters. The agreement said that any disagreements would be resolved through arbitration in Geneva, following the guidelines set by the International Chamber of Commerce (ICC).

The second respondent asserted that a legally binding resolution had been reached and initiated an arbitration in Geneva, seeking a determination that the settlement agreement was both binding and enforceable. To prevent the possibility of multiple legal actions and potentially contradictory rulings, the party making the claim requested a court injunction/order to prevent the LCIA arbitration from beginning until after the final resolution of the Geneva arbitration. The London arbitrators had earlier rejected the claimant's request to suspend the arbitration. The court justified its decision to reject the injunction to restrict the LCIA arbitration by citing the limited authority granted to the court to interfere through injunctions before an arbitration award, as stipulated by the English Arbitration Act. Furthermore, the presence of the London arbitration and its enforcement did not violate any legal or fair entitlement of the claimant. The parties had mutually agreed to settle any issues arising from the investment agreement through LCIA arbitration. The engagement in two arbitrations with distinct subject areas was not burdensome or unfair. Furthermore, even if the person making the claim could prove that a certain right had been violated or was at risk due to the ongoing London arbitration, or that the arbitration process itself was burdensome or unfair, the court would not issue an injunction under section 37 of the 1981 Act. This is because doing so would go against the agreement made by the parties to resolve disputes related to the investment agreement through LCIA arbitration. The arbitrators had declined three times to suspend the LCIA arbitration, and the court did not have the authority to examine or overturn those procedural judgements until the LCIA arbitrators made a final decision, as per the Arbitration Act. Undertaking such action by section 37 of the Supreme Court Act would contradict the principles established by the 1996 Act. Furthermore, considering the specific conditions of the case, the court deemed it unfair to impede the LCIA arbitration. The issue arose from two arbitration agreements concerning distinct matters: the second respondent's assertion of the validity of the settlement agreement in the Geneva arbitration, and the claimant's assertion in the LCIA regarding the investment agreement. There was no avoiding the fact that there would be multiple proceedings.

There is an earlier case with a similar ruling before the *Elektrim SA* case. In the case of *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd*, Jarvis requested a suspension of the arbitration process due to the existence of simultaneous legal proceedings, the potential for conflicting outcomes from these proceedings, and the belief that the arbitration process would not be useful. The court determined that

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<sup>10</sup> [2007] EWHC (Comm) 571.



it had the authority to consider the case, but emphasized that an order would only be granted in rare and extraordinary situations. The court's decision to deny an injunction took into account the Commercial Court's previous rejection to give an anti-arbitration injunction in the recent *Elektrim SA* case(s) earlier discussed. According to the *J Jarvis* court, it is worth noting that the Commercial Court has never granted an injunction to stop an arbitration. The court made the following observations: (1) it had the authority to issue an order under section 37 of the Supreme Court Act of 1991; (2) the court can exercise its discretion if (a) the injunction does not result in unfairness, and (b) continuing with the arbitration would be burdensome, harassing, morally unacceptable, or improper use of the legal system; (3) the court should use its discretion cautiously, considering the principles of the Arbitration Act; and (4) any delay in the application would be significant and could potentially render it unsuccessful. In sum, the court noted that the argument of multiple proceedings (that is before the court and arbitral tribunal) being vexatious is untenable because concurrent proceedings in court and before an arbitrator are bound to occur occasionally due to the obligatory language of section 9 of the Arbitration Act.

#### 4.0 The Implications of Anti-Arbitration Injunction in International Commercial Arbitration

The current use of anti-arbitration injunction greatly erodes the confidence of international businesses parties who may be by inadvertence or naivety thought arbitration as a one-stop shop system of dispute resolution. Those parties may be disappointed with the arbitral system especially where the national court at the threshold or immediately after the commencement of arbitration interrupts the system by way of an anti-arbitration injunction. Because 'men are won by the present far more than by the past'<sup>11</sup> it is doubtful whether they may consider the threat of anti-arbitration injunction as a lesser evil to litigation.

It is quite unlikely that a national court would have a valid reason to grant an anti-arbitration injunction of the nature being considered. This is because of the following implications of an anti-arbitration injunction in the arbitral process. First, without going as far as the negative effect of an anti-arbitration injunction on the arbitral authority is the fact that prudent international businessmen and businesswomen prefer the arbitration method of dispute resolution for its informality and party autonomy which the state-controlled procedure in litigation does not provide. This is much as Machiavelli asserts that 'a wise prince should rely on what he controls, not on what he cannot control.'<sup>12</sup> Relatedly and of no lesser concern are the doctrines of competence-competence and separability, and how the grant of anti-arbitration injunction may impugn these hallowed doctrines of international commercial arbitration. Both doctrines support the unassailable position that the primary authority to determine whether an arbitration should proceed lies with the tribunal chosen by the parties.<sup>13</sup>

Second, the Model Law Article 5 and cognate provisions in national arbitration laws do not allow national courts to interrupt the arbitration process by granting anti-arbitration injunctions. The mandate that 'no court shall interfere in matters regulated by this Law unless specifically provided for in this Law' going by the provisions of Article 5 of the Model Law suggests that the role of national courts

<sup>11</sup> Niccolo Machiavelli, *The Prince* (England: Penguin Books 2003) 77 (explaining that the action of a new prince that is shown as a trait of ingenuity earns him more respect and the attention of the people than an action that is based on "hereditary" leadership).

<sup>12</sup> *Ibid*, p. 56.

<sup>13</sup> Lew (n 1) 509.

under the Convention is to support the commencement of the arbitration process and to prevent it from derailing after commencement. An anti-arbitration injunction is opposed to those objectives. The Nigerian case of *Shell Petroleum Development Company of Nigeria v. Crestar Integrated Natural Resources Limited*<sup>14</sup> (SPDCN) is a good example of where the Court of Appeal ordered an anti-arbitration injunction against SPDCN, restraining it from continuing with an ICC Arbitration seated in London.

Third, the exclusive supervisory jurisdiction of the court of the seat is exercisable in extremely restricted situations. A fortiori, other national courts are prohibited from interfering in the arbitral process. The authority of those courts is limited to enforcing arbitration agreements and enforcing arbitral awards. National courts especially in developing jurisdictions are wont to apply public policy analysis as the basis for issuing anti-arbitration injunctions. Such judicial attitude, public policy concerns can be manipulated to favour a local interest. Also, the dishonest application of public policy can become a façade that masks judicial corruption. Public policy concern strictly speaking are postponed or deferred until a time a prevailing party seeks recognition and enforcement of the award, however, this contradicts the tenets of international commercial arbitration considering the slippery nature of those concepts.<sup>15</sup> Public policy therefore should sparingly be referred to and also interpreted so restrictively. The Convention art V (2) (b) does not contemplate the illegality of arbitration agreement reason being that State parties under the doctrine of competence-competence regardless of the variation under national laws had ceded this power to the arbitral tribunal to decide such allegations. From a practical point of view, an allegation of the illegality of agreement in international commercial arbitration (as was the case in *SPDCN*) is usually orchestrated to negate parties' original intention to submit such issues to arbitration and for the arbitral tribunal to thereafter determine liability of parties under the main contract. For example, the second issue for determination in *SPDCN* case was whether the Court in the circumstance ought to grant the anti-arbitration injunction sought by the applicant. The circumstance in issue was an allegation of illegality of the arbitration agreement which it was argued violates Nigerian public policy under section 51 of the Oil and Gas Content Act. Hence, the SPDCN court enjoined the arbitration. That view is a violation of Nigerian treaty obligation under the Convention. Even in pure domestic setting where national courts consider allegation of illegality of ordinary contractual agreement, they interpret public policy narrowly within their domestic sense of justice and morality that by extension is still compatible with the international/Convention standard. As far as consent of parties to a main contract was mutual and was not induced by fraud, mistake, misrepresentation and duress, national court particularly in developing jurisdictions should maintain a well-considered view that a beneficiary (or anticipatory beneficiary) of such contract cannot plead its illegality or raise public policy defence in order to evade his obligation to arbitrate as long the other party has performed or is willing to fulfill his own end of the contractual bargain except 'ex facie, the main contract is illegal such as where the principle of *ex turpi causa non oritur action* applies.' The Nigerian Courts have applied such position in some cases.<sup>16</sup> Questions of fraud, misrepresentation or other vitiating elements could shade into public policy during the enforcement stage of award so as to invoke the oversight function of state

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<sup>14</sup> [2016] 9 NWLR Pt1517.

<sup>15</sup> Carboneau, (n 1) 1193.

<sup>16</sup> S.I. Strong, 'Limits of Procedural Choice of Law' [2014] (39) (3) *Brooklyn Journal of International Law* 1038, 1039; *Thomas W & Son (Nig Ltd) v PI Ltd* [2019] 12 NWLR (Pt 1687) 543,544; *BBA Pupo & Sons Ltd v OHMB* [2016] 13 NWLR (Pt 1529) 216.

in ensuring that citizens' rights are not compromised in a private process.<sup>17</sup> Therefore, justifying anti-arbitration on public policy grounds can encourage simultaneous litigation in multiple jurisdictions. A good example is the US case of *General Electric Co v Deutz AG*<sup>18</sup> where a US court issued an anti-arbitration injunction to halt an arbitration process seated abroad. The original agreement stipulated that any disputes would be resolved through ICC arbitration in London and was made between General Electric and a third party. Deutz subsequently became a part of this agreement. General Electric initiated legal action in a US court against Deutz, claiming that they had violated the terms of their contract. Deutz replied by seeking an order to enforce General Electric's obligation to participate in arbitration according to the arbitration agreement, and it commenced an ICC arbitration. General Electric filed a motion for an anti-arbitration injunction to prevent Deutz from continuing with the ICC arbitration in London. The court issued the anti-arbitration injunction by exercising its inherent authority to award injunctive relief. The court believed that to uphold the global character of the arbitration, it should reject the narrow criteria that often apply to cases involving anti-suit injunctions against foreign court proceedings. According to the court, two elements needed for the grant of an anti-arbitration injunction has been met. First, the ICC arbitration initiated by Deutz posed a threat to the jurisdiction of the US forum. Second, by initiating arbitration proceedings, Deutz was deliberately avoiding compliance with important US public policies. Nevertheless, upon appeal, the Third Circuit Court of Appeals overturned the decision to award the injunction, determining that the district court did not adhere to the stricter criteria for granting injunctions against arbitration and failed to consider the norms of public policy or as the court puts it international comity. Consequently, the parties involved in this conflict dedicated a significant amount of time and resources to judicial proceedings that ultimately failed to resolve their issue. Such parallel proceedings (instead of the arbitral proceedings instituted at the seat of arbitration) are vexatious and disadvantage the party (usually the claimant) who desires to arbitrate. This needs to be examined further because many courts in developing jurisdictions and scholars do not understand it within the arbitration context.

A typical example of multiple proceedings that is oppressive and also an abuse of court process is those instituted in breach of valid arbitration agreement. To put it differently, forum shopping is an abuse of court process<sup>19</sup> because it is 'an action which is one (or more) too many'<sup>20</sup> that is not brought in good faith and they are consequently vexatious or oppressive<sup>21</sup> and should therefore be dismissed, however, since national courts cannot suo motu enforce arbitration agreement except when there is a request for a stay of judicial proceedings, they may suo motu enforce arbitration agreement or better put dismiss a parallel proceeding that violates agreement to arbitrate on ground of abuse of process which is

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<sup>17</sup> Carbonneau (n 1)

<sup>18</sup> 129 F Supp 2d 776 (WD Pa 2000), rev'd in part, 270 F 3d 144 (3d Cir 2001).

<sup>19</sup> The Supreme Court of Nigeria in *Ezenwo v Festus* [2020] 16 NWLR (Pt1750) 332 (SC) held that forum shopping is a gross abuse of court process and when this happens, the court should dismiss such action; *Okorocho v PDP* [2014] 7 NWLR (Pt 1406) 225 (SC). Although these cases did not involve arbitration law or subject matter of arbitration agreement, the law in Nigeria is that what constitutes abuse of court process is multi-faceted and it includes instituting multiple actions or parallel proceedings on a particular subject matter; *Maina v EFCC* [2020] 2 NWLR (Pt 1708) 234(CA). Anti-arbitration action is a very good example of parallel proceedings; *Ezenwo* (n 5) 332; *Okorocho* (n 5) 225.

<sup>20</sup> *Dike Ogu v Amadi* [2020] 1 NWLR (Pt 1704) 50,51 (SC); 57, 58 per Baje JSC quoting Tobi JSC in *Ntuks v NPA* [2007] 13 NWLR (Pt 1050) 392.

<sup>21</sup> See *Maina* (n 17) 234.



exemplified by forum shopping.<sup>22</sup> National court may retain jurisdiction to entertain a subject matter of arbitration agreement if a party in arbitration does not request for stay of judicial proceedings. However, the court may on its own dismiss the matter based on domestic doctrinal principles that implicates its jurisdiction. Such domestic principles are independent or unconnected with the arbitration agreement and a very good example is abuse of court process. It is however surprising that Nigerian court just like many national courts rarely dismisses action in breach of arbitration agreement on the basis of abuse of process especially where the arbitration agreement is not sought to be enforced through application for stay of proceedings.<sup>23</sup> National courts do not have the jurisdiction to tag proceedings in a foreign seat as vexatious or disadvantageous, per Obaseki Adejumo, where the Court held that continuation of the London arbitral proceedings would be “vexatious”, “oppressive” or “unconscionable” to the applicant because it would apart from exposing him to huge cost and expenses, might also produce an award that may not be enforced for violating Nigerian public policy under section 51 of Nigeria Oil and Gas Content Development Act.<sup>24</sup> Those considerations do not apply in international commercial arbitration even if the continuation of the arbitration (vis a vis the litigation proceeding) is more convenient for the party seeking it. For instance, the Caribbean Court of Justice in *British Caribbean Bank Ltd v the Government of Belize*<sup>25</sup> held that ‘there is no presumption that the pursuit of multiple proceedings is vexatious or oppressive or an abuse of process in itself, nor is there vexation or oppression if there is an advantage to the party seeking the arbitral proceedings.’ In other words, to grant an anti-arbitration injunction based on the convenience of a party seeking the application is reprehensible. Such is inconsistent with the spirit and the traditional sense of forum non-conveniens. According to Gardner,<sup>26</sup> ‘Scottish courts first coined the term “forum non conveniens” in the 1800s in reference to the longstanding concept of forum non competens, or the lack of competence (jurisdiction) to hear a case.’ That is to say, that forum non-conveniens was not originally conceived to mean inconvenient forum but instead wrong or suitable forum.<sup>27</sup>

In light of the above, national courts misclassify the doctrine by considering factors or circumstances that are inapplicable in arbitration. This is because those factors are at variance with those vitiating factors such as fraud, mistake and misrepresentation that may invalidate an arbitration agreement. For this reason, it is important to distinguish the liberal sense of forum non-conveniens from the traditional point of view of forum non-conveniens, as per Obaseki Adejumo, where the Court held that continuation of the London arbitral proceedings would be “vexatious”, “oppressive” or “unconscionable” to the applicant because it would apart from exposing him to huge cost and expenses, might also produce an award that may not be enforced for violating Nigerian public policy under section 51 of Nigeria Oil and Gas Content Development Act. The traditional sense of forum non conveniens also suggests that the national court where the action is instituted lacks jurisdiction from the point of view that action before it is an abuse of process. This strongly suggests that the action was commenced in a wrong forum.<sup>28</sup>

<sup>22</sup> *AG Kwara State & 1 ors v Alh (Hon) Ishola Lawal & ors* [2018] 3 NWLR (Pt 1606) 266 (SC). Albert Jan van den Berg, ‘The New York Convention 1958: An Overview’ p 10, available at <https://cdn.arbitration-icca.org/s3fs-public/document/media-document/media012125884227890new-york-convention-of-1958-overview.pdf>

<sup>23</sup> The New York Convention 1958: An Overview (n 22).

<sup>24</sup> See *SPDCN* (n 14) 334-337

<sup>25</sup> *British Caribbean Bank Ltd v the Government of Belize* [2013] CCIJ 4 (AJ) para 40 quoted in Strong (n 7) 330; Lew (n 1) 501.

<sup>26</sup> M Gardner, ‘Retiring Forum Non Conveniens’ (2017) 390 (92) *NYULR* 414.

<sup>27</sup> *Ibid.*

<sup>28</sup> NOGICDA 2010.

The liberal sense is where domestic or cross-border tort action<sup>29</sup> (or a contract with jurisdiction clause), where the Supreme Court of Nigeria refused to grant stay of proceedings on the basis that the matter was already statute barred in Germany which was the jurisdiction chosen by the parties as evidenced in the bill of lading. The Court quoted approvingly the distinction made by Lord Denning MR in “*The Fehmarn*” to the effect that choice of jurisdiction clause in a bill of lading which designate that all disputes shall be referred to Russian Court unlike arbitration clause cannot oust the jurisdiction of English Court<sup>30</sup> is instituted in a competent forum<sup>31</sup> especially in common law jurisdiction, with the advent of Council Regulation No 44/2001, the use of the doctrine of *forum non conveniens* in civil law jurisdictions has some limitation where the alternative forum is another member State. The doctrine however applies in full force where the alternative forum is a court of non-member State. To a certain permissible degree, the doctrine of *forum non conveniens* applies in some civil jurisdictions.<sup>32</sup> which finds that National courts in such proceedings apart from considering the availability of alternative forums also balance private and public interest,<sup>33</sup> including but not limited to the availability of alternative forum or convenience of parties weigh in favour of dismissal or order of stay of proceedings as the case may be. In contrast, where a court finds that it has no jurisdiction on the basis that action before it is nothing other than forum shopping or abuse of process, the best order for the court to make in the circumstance it to dismiss the matter. The Convention Article II (3) and Article 8 of the Model do not provide for dismissal but stay of proceedings at the instance of a party in arbitration. However, abuse of process gives national courts the power to dismiss an action suo motu. It is surprising that little or no answer has been given by commentators to the question of whether the Convention article II (3) permits State court to dismiss an action on the basis of abuse of process. Although the effect of order of dismissal and order of stay of proceedings would leave an unwilling respondent in arbitration with no other option than to revert to his original agreement to arbitrate. This is with the sense of foreboding that the tribunal might proceed in default of his appearance, their effects are not the same on the court and parties alike as will be shown in the following analysis.

Application for stay of proceedings does not grant the court power to *suo motu* refer parties to arbitration since technically speaking, it has supportive jurisdiction over the matter and must as a result hear the parties even on a prima facie basis. Where the national court conducts a full review instead of a prima facie review, the procedure would add to the court’s docket and will considerably consume the time and resources of the parties. Such a circumstance may also create an opportunity for the court to fall into

<sup>29</sup> American cases, of *Gulf Oil co v Gilbert* 330 US 501, 508-09 (1947); *Piper Aircraft Co v Reyno* 454 US 235 (1981); *Spiliada Maritime Corp v Cansulex Ltd* (1987) AC 460,476.

<sup>30</sup> Nigerian court apply the text enunciated by Brandon J in “*The Eleftheria*” [1969] 1 Lloyd’s Rep 237 in resolving disputes with choice of jurisdiction clause. For instance, in *Sonnar (Nigeria) Limited & Anor v Partenreeder MS Nordwind & Anor* [1987] (Pt 66) 520 (*Sonnar*. “*The Fehmarn*” (1958) 1All ER 333, 335.

<sup>31</sup> P Michell, ‘The Mareva Injunction in Aid of Foreign Proceedings’ (1996) 34 (4) *OHLJ* 795 states that national court (in cases not governed by arbitration law) ordinarily have subject matter jurisdiction during *forum non-conveniens* analysis but they ought to “defer” to another court elsewhere.

<sup>32</sup> G Andrieux, ‘Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments- How Can We Benefit from Past Experiences in Conciliating the Two Doctrines of Forum Non-Conveniens and Lis Pendens’ [2005] 323 (27) *LLICLR* 347, 348; A Reus, ‘Judicial Discretion: A Comparative View of the Doctrine of Forum Non-Conveniens in the United States, the United Kingdom and Germany’ (1994) 455 (16) *LLICLR* 492- 496 mentions sections of statutes in civil law countries like Prussia and Switzerland that allow the use of the doctrine.

<sup>33</sup> JH Samuels, ‘When is an Alternative Forum Available? Rethinking the Forum non-Conveniens Analysis’ [2010] 85 (3) *ILJ* 1060,106; SI Strong, ‘Anti-suit Injunctions in Judicial and Arbitral Procedures in the United States’ [2018] 66 *AJCL* 171; Reus (n 29) 462, 463, 471-473; Andrieux (n 29) 339, 340.

the error or temptation of public policy consideration which is usually raised by an unwilling party or respondent in the arbitration. To this end, anti-arbitration suits could be used as an offensive to intimidate a claimant in arbitration into settlement if such action is challenged by an application for stay of proceedings.

In contrast, dismissal of an action that is an abuse of process can be made by the court suo motu and such an approach is faster and can invariably be secured using summary judgment procedure at the instance of the plaintiff. The court by merely looking at the affidavits before it will conclude that an arbitration proceeding is pending elsewhere. Even though the order of dismissal is a domestic standard, it derives its validity under the more favourable regime of the Convention.

Fourth, the grant of anti-arbitration injunction puts the enforcement forum in a bad light before the comity of nations. It portrays the enforcement forum as corrupt and unsuitable for resolving international disputes where a foreigner is a party. It is therefore not surprising that a local would always run to its national court, not being the court of the seat of arbitration to seek an anti-arbitration injunction. According to the International Chamber of Commerce (ICC), in 2006, out of the thirty-one instances where anti-arbitration injunctions were approved, twenty-five were granted by courts from the country of one of the involved parties. The situation becomes further dubious when one party is a government or government organization, or a politically exposed person which requests and receives an anti-arbitration injunction from its own state court. There have been other regrettable instances of this nature. *Himpurna California Energy v Republic of Indonesia*<sup>34</sup> is a well-known case where an Indonesian court issued an injunction to prevent an arbitral tribunal from deciding on an Indonesian state-owned firm. The issue originated from multiple contracts pertaining to the construction and operation of an electricity generation plan in Indonesia. The contracts stipulated for ad hoc arbitration with the jurisdiction of Jakarta under the UNCITRAL Rules. The Republic of Indonesia was later subject to two separate arbitration cases. Following the issuance of an unfavourable ruling by the initial arbitral tribunal against PLN, a state-owned electrical business in Indonesia, an Indonesian court issued two injunctions. The first injunction ordered the suspension of the execution of the initial ruling, while the second injunction prevented the occurrence of a subsequent arbitration.

In the case of *Salini Costruttori SPA v The Federal Democratic Republic of Ethiopia*<sup>35</sup> the courts of the state party issued an injunction to halt arbitration procedures that were going against the state party's interests. The arbitration was seated in Ethiopia, but the arbitrators chose to conduct sessions in Paris for the sake of convenience. The Ethiopian delegate contended that this constituted a misuse of the procedure. In order to exert the highest level of pressure to stop the arbitration process, the Ethiopian courts issued two anti-arbitration injunctions. One injunction was specifically targeted at the arbitral tribunal, while the other was addressed against the claimant.

*Hub Power Co (HUBCO) v Water & Power Development Authority of Pakistan*<sup>36</sup> (WAPDA) is another example where a state party to an arbitration agreement enjoined arbitration. The disagreement

<sup>34</sup> [Interim Award of 26 September 1999 and Final Award of 16 October 1999—Yearbook Commercial Arbitration, Volume XXV—2000. This case is cited in Lew (n 1) 511-512.

<sup>35</sup> Case No. 10623/AER/ACS, 21 ASA BULL. 82 (2003) (Int'l Ct. Arb. 2001)

<sup>36</sup> Civ App Nos 1398 & 1399 of 1999. Lew (n 1) 512.

originated from a Power Purchase Agreement (PPA) that was made between HUBCO, a Pakistani corporation, and WAPDA, a state-owned company in Pakistan. The Supreme Court of Pakistan was tasked with determining which of the two anti-suit injunctions to support. HUBCO successfully got an injunction preventing WAPDA from resolving the issue using any method other than ICC arbitration. In response, WAPDA sought an injunction to prevent HUBCO from proceeding with the arbitration. The Supreme Court of Pakistan determined that the sole issue to be resolved was whether the dispute should not be arbitrated upon based on public policy. The majority concluded that the issues submitted were not suitable for arbitration due to their criminal nature. Therefore, it was determined that HUBCO should cease its pursuit of the London arbitration and instead present its claim to the courts of Pakistan.

In the case of *Société Générale de Surveillance SA (SGS) v Federation of Pakistan*,<sup>37</sup> the Pakistani Supreme Court issued an injunction against SGS, prohibiting it from engaging in any activities related to the ICSID arbitration. The issue originated from a contract regarding the evaluation of all customs duties that must be paid on products brought into Pakistan. The contract included an arbitration clause stipulating that any disputes would be resolved by arbitration in Islamabad, in accordance with the Pakistani Arbitration Act of 1940. When a dispute arose, SGS promptly commenced legal actions in Switzerland. SGS contended that it was unable to depend on the arbitration clause due to the possibility of a fair trial prospect in Pakistan. The request made by SGS was rejected by the Swiss courts. SGS subsequently commenced arbitration proceedings at the International Centre for the Settlement of Investment Disputes ("ICSID") under the Pakistan-Switzerland bilateral investment treaty ("BIT"). Due to the fact that the ICSID Convention and the Pakistan-Switzerland BIT were not incorporated into Pakistani law, the Supreme Court approved Pakistan's request to initiate arbitration under the Arbitration Act of 1940, as specified in the contract. It is important to highlight that despite facing intimidation, the tribunals remained undeterred and proceeded with their work in the majority of the cases mentioned, even after an injunction against arbitration was issued.

Fifth, an anti-arbitration injunction undermines the established procedure for setting aside an award or refusing enforcement, even if a competent court were to do so in the future. In as much as it could be researched, there is no Nigerian case law on this point. However, the points are effectively demonstrated in the English court ruling of *Albon v Naza Motor Trading*.<sup>38</sup> Under those circumstances, the party making the claim requested a court order to prevent the opposing party from proceeding with arbitration in Malaysia. This was based on the argument that there was a verbal agreement that fell under English law. Despite the existence of a documented joint venture agreement that included an arbitration clause was signed by the parties in Malaysia, and was subject to Malaysian law, the claimant alleged that their signature had been fraudulently replicated. The High Court granted an order to halt the proceedings in Malaysia until the English court determines the legitimacy of the signature. The judge asserted jurisdiction based on three grounds: Firstly, the oral contract was made under English law. Secondly, the respondent had requested to suspend the English court proceedings in favour of arbitration proceedings, thereby submitting to the jurisdiction of the English court. Lastly, if the injunction was not granted, the ongoing proceedings would become redundant.

<sup>37</sup> Supreme Court of Pakistan (Appellate Jurisdiction), Civ. App. Nos. 459 & 460 of 2002, ¶ 84, 2003 YB COMM. ARB. (Int'l Council for Comm. Arb.) 1312, 1341.

<sup>38</sup> [2007] EWHC (Ch) 1879 (Eng.) 20, 22, 27.

## 5.0 Conclusion and Recommendation

International businessmen and businesswomen resort to arbitration in order to eliminate or reduce to the barest minimum the influence of the local court either at the seat of arbitration or elsewhere. Hence, national courts should be circumspect in the use of anti-arbitration injunction. The English courts for example do not usually enjoin arbitration except where arbitration is wrongly brought. Those are cases where it is manifestly clear that there is no basis for arbitration and that justice would be served by a litigation in the English court. The Nigerian courts do not have the jurisdiction to grant anti-arbitration following the clear principle of judicial non-interference which section 64 of the AMA promotes. A progressive judicial attitude on the principled application of anti-arbitration injunction promotes international relations and comity. Otherwise, an unprincipled use of an anti-arbitration injunction has many adverse implications and may create an international perception capable of discouraging foreign partners from engaging in business with a national whose national courts are notorious for an anti-arbitration injunction. Bearing in mind that national courts invariably resort to forum non conveniens analysis as a doctrinal tool for the grant of anti-arbitration, recommends that national courts should be guided by the essence of forum non-conveniens in international commercial arbitration. It simply suggests that national courts lack the jurisdiction to grant anti-arbitration injunctions.