

Review Article

Interlocutory Remedies and Arbitration Issues in Debt Recovery

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Abstract: Lawyers, Creditors, debt collectors, and debtors alike are uncertain about how to pursue the process of debt collection. This study attempts to navigate the many options open to parties internationally and domestically. The jurisdictions of local courts under municipal laws, conventions and case law have been re-examined and confirmed; to assist parties in the compass of their navigation of debt recovery. The role of arbitration has been examined in a milieu of protracted litigation, adversarial court processes and strained business relationships and loss of financial resources. The objective of their paper is mainly to advise judicial officers, lawyers, creditors, law students to save the time of the courts. As clarity has been provided, foreign direct investments would no lawyer be uncertain of what the courts will do to secure repayment of loans.

Keywords: Arbitration, Injunction, Court restrained order, Foreign Courts, Superior Court.

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1. INTRODUCTION

Usually, the courts utilize various processes to enforce recovery of debts. The use of injunctions has been very effective in this regard.

However, there are different types of injunctions available by the Courts:

- Mareva Injunction
- Anton Pillar Injunction
- Exparte Interim Injunction
- Interlocutory Injunction
- Perpetual Injunction

i. Mareva Injunction

Under this injunction, the creditor could seize the property of his debtor before the judgment was delivered against the debtor and then retain the property as security for payment of the debt when he finally wins the case. However, to remove the fears on the part of the creditor that maybe the debtor might dispose the properties prior to the judgment date, Mareva Injunction was introduced. Finally, the purpose of this injunction is to prevent the injustice of a defendant from taking away his assets which might be used in satisfying a judgment from the jurisdiction

However, the limitation of Mareva injunction are;

- It is not granted to enhance the position of the creditor as against other creditors by giving him priority on the assets of the debtors.

- It permits all drawings relating to the debtor's reasonable living expenses not more than a specific sum
- It does not spread to assets outside jurisdiction.

ii. The Anton Pillar order:

This is an order of court, made ex-parte and requiring a defendant or respondent to allow certain persons to enter his premises to search for documents and movable articles as are specified in the court order, and to permit such documents or articles to be taken away. It is seen as an Order of the Court that gives right to search premises and seize evidences without prior warnings. It is also called search orders.

iii. An interlocutory injunction

This is a court order to compel or prevent a party from doing certain acts pending the final determination of the case. It is an order made at an interim stage during the trial, and is usually issued to maintain the status quo until judgment is made.

iv. A Perpetual Injunction

This is one ordered by the Courts to restrain any person from a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent multiplicity of judicial cases. Ordinarily, it should be issued when the lawsuit underlying activity is resolved.

2. ENFORCEMENT OF ARBITRAL AWARDS FOR DEBT RECOVERY

In the age of globalization, increasing commercial transactions and trade is not without disputes. To guarantee a fair playing ground and the continuity of tranquil market space, it is commonplace to find dispute resolution clauses inserted into agreement between parties, especially when it involves multinationals. In the event of breach of the agreement, the dispute resolution clause defines the path the parties will chart in resolving their dispute.

Arbitration has emerged as a popular and effective mechanism for resolving commercial and trade disputes. Arbitration is favourable to parties because of its neutrality, confidentiality, speed, flexibility and the awards are easily enforced. The Supreme Court has held on the effect of arbitral award that "It is very clear and without any iota of doubt, that an arbitral award made by an arbitrator to whom a voluntary submission was made by the parties to the arbitration, is binding between the parties" [1].

An Arbitral award granted outside Nigeria is enforceable and binding on parties to it. A seamless ecosystem for enforcement of foreign judgments or arbitral awards boosts investors' confidence. According to World Bank Ease of Doing Business Index, 2018, Nigeria ranked 96th on enforcement of contract index and it takes about 454 days to enforce a contract through the court. The length and stress involved hurts business interest. Consequently, it is imperative that the arbitral award be enforced and respected in a seamless fashion.

3. ENFORCEMENT OF AWARDS GRANTED OUTSIDE NIGERIA

i. Registration of the Award under the Foreign Judgments (Reciprocal Enforcement) Act 1990

The Act allows the enforcement and recognition of foreign judgements within six years of the judgement. The purport of the law is to accord recognition and enforcement to judgement of foreign courts that accords reciprocal respect to judgements of the Nigerian court.

Section 2 of the Act defines judgement to include arbitral award. Such judgment or award would have to be registered in a Nigerian court with the jurisdiction to hear the dispute. The judgment must be final and conclusive between the parties. The court will enforce monetary award payable and not fine or penalty.

The Federal High Court Civil Procedure Rules 2009 provides for the enforcement of foreign Arbitral awards. Order 52 Rule 17 stipulates that "where an

award is made in proceedings on an arbitration in a foreign territory to which the Foreign Judgments (Reciprocal Enforcement) Act extends, if the award was in pursuance of the law in force in the place where it was made; it shall become enforceable in the same manner as a Judgment given by a court in the place and the proceedings of the Foreign Judgments (Reciprocal Enforcement) Act shall apply in relation to the award as it applies in relation to a Judgment given by that court."

The Supreme Court in the case of *Macaulay v R.Z.B of Austria* has held that only judgments from superior courts in the United Kingdom and other commonwealth countries are recognised and enforced in Nigeria [2].

ii. Under Section 51 of the Arbitration & Conciliation Act, 1990

Section 51 of the Arbitration and Conciliation Act guarantees the recognition of an arbitral award regardless of the jurisdiction it was granted and binding on the parties to it.

The party seeking to enforce the Award shall apply to the court. According to Section 32 of the Act, the party relying on an award or applying for its enforcement shall supply the court with:

- a. a duly authenticated original award or a duly certified copy;
- b. copy of the original arbitration agreement or a duly certified copy;
- c. a duly certified translation in the English language if the award was not granted in English language.

In addition, Section 52 of the Act itemises the list of grounds for refusing recognition or enforcement.

iii. Enforcement under Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

Nigeria is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958. Hence, the convention applies in Nigeria. Section 54 of the Arbitration and Conciliation Act 1990 domesticates the convention. Nigeria has a reciprocal obligation under the convention to recognise and enforce arbitral award granted in other co-signatory states.

iv. Instituting an action upon the award

A plaintiff can bring an action upon the award in a Nigerian court and it would have effect as the judgement of the court. The plaintiff will need to establish that:

- a. there is an existence of arbitration clause in the agreement;

¹ *Ras Pal Gazi Construction Co. Ltd v F.C.D.A (2001) LPELR-SC.45/96*

² (2003) 18 NWLR (Pt. 852) 282

b. the arbitration was properly conducted in compliance with the agreement; and the award is valid.

A defendant may be left to challenge the award, the conduct of the arbitration or the jurisdiction of the arbitral tribunal.

v. Enforcement under the International Centre for Settlement of Investment Disputes (ICSID)

Nigeria domesticated International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act on 29th November, 1967 for enforcement of awards given by ICSID. The ICSID Act allows for the recognition and enforcement of arbitral awards granted by ICSID.

A copy of the award duly certified by the Secretary-General of the Centre is deposited with the

Supreme Court by the party seeking its recognition and shall be enforced like a judgement of the Apex court.

CONCLUSIONS AND RECOMMENDATIONS

- i. There is a plethora of both domestic and international laws governing the enforcement of arbitral awards in Nigeria. Lawyers should endeavor to utilize these processes for efficacious recovery of debts.
- ii. The clarity in the Judicial processes aids foreign investors to access justice and engenders protection of foreign investments.
- iii. The Courts need to augment the initiatives made for arbitration to create a platform for economic and social development through speedy trials and compliance with the rule of law all through the process.

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