# THE SANCTITY OF ARBITRATION AGREEMENTS AND THE PRINCIPLE OF LIMITED COURT INTERVENTION:

## ECOBANK NIGERIA LIMITED & 11 ORS.

## VS.

## AITEO EASTERN E AND P COMPANY LIMITED & ANOR. *APPEAL NO: CA/A/1067/2019.*[1]

**BY**

**ADEDOYIN RHODES-VIVOUR (MRS.) SAN, C.Arb***

## 1.0. INTRODUCTION

The Jurisprudence of Nigerian courts has generally tend towards the pro-arbitration approach of enforcing valid arbitration awards/agreements and the principle of limited court intervention in arbitration proceedings. The Nigerian Court of Appeal in ***Eco Bank Nigeria Limited & 11 Ors. V. Aiteo Eastern E and P Company Limited & Anor,*** (hereinafter referred to as the ***"Eco Bank's Case"***) affirmed the pro-arbitration approach of the Nigerian courts. The court refused to issue a mandatory injunction to discontinue an International Chamber of Commerce (ICC) arbitration proceedings in respect of which the English High Court had earlier issued an anti-suit interim injunction restraining Aiteo Eastern E and P Company Limited (hereinafter referred to as ***"Aiteo"***) from continuing the proceedings before the Nigerian Federal High Court and bringing any claims arising out of the Facility Agreements entered into by the parties in any forum other than the ICC arbitral tribunal seated in London.[2] Aiteo had applied to the Nigerian Court to restrain Eco Bank Nigeria Limited and 11 others (hereinafter collectively referred to as ***"the Lenders"***) from giving effect to the interim order of anti-suit injunction earlier issued by the English High Court pertaining to the matter.

The decision affirmed the approach laid down in several cases, including ***Metroline (Nig.) Ltd. v. Dikko (2021) 2 NWLR (Pt. 1761)*** **422** in which Honourable Justice Rhodes-Vivour JSC, condemned the disturbing trend of filing frivolous challenges against arbitral awards in Nigeria. The Jurist reiterated the need to respect arbitration agreements and in condemning the Appellant's application to set aside the relevant award aptly opined thus:

> *"I intend to comment on the disturbing trend where all manner of appeals are filed against awards. It is time litigants fully understand, respect and appreciate the nature of arbitration agreements they freely enter into. It is the duty of counsel to explain the nature of these agreements and not encourage their clients to disregard them when they get unfavorable awards.* ***Arbitration agreements ought to be respected and the resultant awards complied with.***

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[1]The Nigerian Court of Appeal Ruling dated the 17th day of February, 2023.

[2]***Africa Finance Corporation & 8 Ors. V. Aiteo Eastern E and P Company Limited*** **Claim No. CL-2020-000808**, High Court of Justice, Business and Property Courts of England and Wales, Honourable Justice Cockerill DBE.

***<u>We should always bear in mind the importance of respecting arbitration agreements, more so those that have international connotations..."</u>***

Similarly in ***Polaris Bank v. Magic Support (Nig.) Ltd (2020) LPELR-53106(CA),***the Nigerian Court of Appeal referred to the opinion of Honourable Justice Ephraim Akpata, JSC in the book *"The Nigerian Arbitration Law"* where he succinctly opined that *"the court should not be seen to encourage the breach of a valid arbitration agreement, particularly those with international flavour."*

The decision of the court in Eco Bank's Case further affirms the supportive role of the Nigerian courts towards arbitration agreements and the resultant awards. This paper seeks to review: (1) the decision of the court in Eco Bank's Case in the light of similar court decisions, (2) the application of Section 34 of the Nigerian Arbitration and Conciliation Act (ACA) Cap18, LFN 2004 and (3) the earlier dissenting reasoning/decision of the Nigerian Court of Appeal in ***Shell Petroleum Development Company of Nigeria Limited & Ors v. Crestar Integrated Natural Resources Limited*** **(2016) 9 NWLR @ Page 300 (PT 1517) 193-416.**

## 2.0. BRIEF FACTS OF THE CASE

The parties entered into two separate Facility Agreements in the total sum of US$1,977,680,00 granted to Aiteo by the Lenders (i.e., Eco Bank Nigeria Limited and 11 others) and the Africa Finance Corporation (hereinafter referred to as ***"AFC"***) in respect of the Oil Mining Lease 29 (OML 29) and the Nembe Creek Truck Line. The Agreements contained provisions for the resolution of any disputes arising from the Agreements through arbitration. Subsequently, the exact outstanding amount on the loan became an issue between the parties and the Lenders issued a demand for the repayment of the outstanding sum.

Aiteo instituted an action against the Lenders to the Facility Agreements at the Nigerian Federal High Court. The court granted the prayers of Aiteo for an interim injunction restraining the Lenders from acting or taking any step to interfere with the res of the disputes, giving effect to the content of the Lenders' demand letter or taking any step to enforce any right in respect of the alleged indebtedness of Aiteo. Aggrieved by the injunction, the Lenders filed a Notice of Appeal and commenced ICC arbitration proceedings against Aiteo in accordance with the provisions of the arbitration clause in the Offshore Facility Agreement.

The Lenders had also successfully obtained ananti-suit interim injunction granted by the High Court of England and Wales, restraining Aiteo from participating in the suit at the Nigerian Federal High Court and initiating any other suit except the ICC arbitration proceedings in London.

Subsequently, Aiteo (the 1st Respondent in theappeal filed by the Lenders before the Nigerian Court of Appeal) filed an application praying the court for mandatory orders of injunction restraining the Lenders from giving effect to the interim order of anti-suit injunction issued by the English High Court and stopping the continuation of the ICC arbitration proceedings in London.

## 3.0. DECISION

The Nigerian Court of Appeal held that Aiteo's application for mandatory orders of injunction failed to take cognizance of the powers of the court, the propriety or otherwise of the orders and whether or not the orders are outside the scope, limits and jurisdiction of the court.

The court held that the judicial powers of the court, i.e., the Nigerian Court of Appeal, is for the Federal Republic of Nigeria. Consequently, that it may amount to going outside the court's jurisdiction where the court makes restraining orders against the Lenders from giving effect to the order made by an English Court, taking further steps in the proceedings on-going at the English Court, or compelling the Lenders to discontinue the claim before the English Court and the ICC arbitration proceedings, and restraining them from proceeding with the arbitration proceedings.

To the court, it would be making a different agreement for the parties should it compel and restrain the Lenders from participating in the ongoing ICC arbitration proceedings in view of the dispute resolution procedure in the Facility Agreements entered into by the parties. To the Court, no court is empowered to grant such a relief in the circumstances. Accordingly, Aiteo's application to restrain the Lenders from giving effect to the anti-suit order of the English Court and stopping the ongoing ICC arbitration proceedings was refused.

## 4.0. COMMENTARY

The Nigerian Court of Appeal in the Eco Bank case clearly protected the sanctity of the valid and subsisting arbitration agreements entered into by the parties as contained in the two Facility Agreements and abided by the principle of limited court intervention in arbitration proceedings.

The Court, in support of its reasoning cited Section 6(1) of the 1999 Constitution of the Federal Republic of Nigeria[3] which delineates the judicial power of the courts, including the Nigerian Court of Appeal as being applicable to the Federal Republic of Nigeria. The court considered it would be going outside its jurisdiction to issue an injunction to restrain the Lenders from giving effect to the order issued by an English Court.

The court referred and relied on the arbitration agreement entered into between the parties and refused Aiteo's application.The court reasoned thus:

> *"The Court would always with caution and knowledge of the necessary facts as presented to it interfere with the contractual terms and agreements between parties. It is the duty of this court to do justice and ensure fairness between all parties before it and also not act in vain..."*

The court relied on the principle of *pacta sunt servanda* obliging parties to respect agreements they have freely entered into. The reasoning follows earlier court decisions, including the decision of the Nigerian Court of Appeal in ***Neural Proprietary Limited V. Unic Insurance Plc*** **(2016) 5 NWLR (Pt. 1505) @ 374** where the court held thus:

> *"Where parties make provisions to an arbitration, the parties are bound to resort to arbitration before seeking any other remedy available. The court has a duty to decline jurisdiction as long as the arbitration clause is mandatory, precise and unequivocal."*[4]

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[3] **Section 6(1) of the 1999 Constitution of the Federal Republic of Nigeria** provides that: *"The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation."* **Section 318 (1)** of the Constitution defines *"Federation"* as *"the Federal Republic of Nigeria"*

[4] See also the case of **SCOA (Nig.) Plc V. Sterling Bank Plc (2016) LPELR-40566(CA)**where the court held that *"it is trite that where a clause in an agreement provides that any difference or dispute arising out of the agreement shall be referred to an arbitrator, both parties ought to honour and comply with the provisions of the clause."*In **CN Omuselogu Enterprises Ltd v. Afribank (Nig.) Ltd [2005] 11 NWLR (Pt. 940) 577 (CA) 585**Arbitration Agreement was defined as*"where two or more persons agree that a dispute or potential dispute*

The attitude of the Nigerian courts aligns with the attitude of courts in other jurisdictions in affirming the sanctity of arbitration agreements. In ***Henry Schein, Inc. v. Archer & White Sales, Inc. 586 U. S. (2019)*** the US Supreme Court opined that *"…arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms."*Also, the English Court of Appeal in ***Lifestyle Equities CV and another v Hornby Street (MCR) Ltd and others [2022] EWCA Civ. 51*** upheld the sanctity of the arbitration agreement between the parties by dismissing an appeal pertaining to an application to: (1) set-aside the decision of the lower court which had enforced the arbitration agreement and (2) discontinued the ongoing court proceedings in accordance with Section 9 of the Arbitration Act 1996.[5]

In ***CSY v CSZ [2022] SGCA 43***the Singaporean Court of Appeal highlighted the approach of the courts to promote arbitration and held thus: *"Where there is an applicable arbitration agreement that parties had freely entered into, the court will naturally seek to respect party autonomy and hold parties to their agreement, at least as a starting position. This is consistent with upholding Singapore's strong judicial policy of promoting and facilitating arbitration…"*

## 4.1. REVIEW OF THE COURT DECISION IN THE LIGHT OF SECTION 34 OF THE NIGERIAN ARBITRATION AND CONCILIATION ACT (ACA)

Section 34 of the Nigerian Arbitration and Conciliation Act adapted from Article 5 of the UNCITRAL Model Law on International Commercial Arbitration provides as follows:

> *"A court shall not intervene in any matter governed by this Act except where so provided in this Act."*[6]

Although there was no express referral to Section 34 of the ACA, the decision of the court indicates a non-interventionist approach in arbitration proceedings except as provided under the relevant law.

In ***Statoil (Nig.) Ltd. v. N.N.P.C. (2013) 14 NWLR (Pt. 1373) 1*** the provision of Section 34 was interpreted as a mandatory provision which must be complied with except in the circumstances provided by the Act. The Nigerian Court of Appeal pronounced thus:

> *"The provisions of Section 34 of the Arbitration and Conciliation Act is mandatory in that the word 'shall' is one that does not accommodate a flexible interpretation of the directives being given therein…from all the provisions therein, no enactment for the determination prematurely of the proceedings of an arbitral tribunal is provided…In the instant case, the issuance of ex-parte interim injunction does not fall under the exceptions to Section 34 of the Act. It is very clear from the intendment of the legislature that the court cannot intervene in arbitral proceeding outside of those specifically provided. Where there is no provision for intervention, this should not be done…The Federal High Court or any Court for that matter is*

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*between them shall be resolved and decided in a legally binding way by one or more impartial persons in a judicial manner, upon evidence put before him or them. The agreement is called arbitration agreement or a submission to an arbitral proceeding when after a dispute has arisen, it is put before such person or persons for decision."*

[5]Marine Berard& Erin Lee. March 3 2022 Court of Appeal rules that law of arbitration agreement determines who is bound by that agreement. Clifford Chance, Arbitration and ADR United Kingdom. International Law Office. Page 1.

[6] See also Section 1(c) of the United Kingdom Arbitration Act 1996.

*not to exercise jurisdiction in arbitral causes and matters (except, where so provided for in this Act) according to the provision of section 34 of the Act."*

The Court of Appeal reaffirmed the above decision in ***Nigerian Agip Exploration Ltd v. Nigerian National Petroleum Corporation; Oando Oil 125 & 134 Ltd (2014) 6 CLRN 150 (CA) 176*** where it stated that: *"...except in special circumstances as prescribed by the law, it appears to me that the courts will not encourage the grant of injunction to prevent the conclusion of the proceedings of an arbitral panel especially when an aggrieved party has the right to seek redress in court to set aside the arbitral award as provided by Sections 29, 30 and 48 of the Act."*[7]

The reasoning of the Nigerian Court of Appeal in ***Statoil v NNPC supra*** however appears different from the subsequent reasoning of the court in ***Shell Petroleum Development Company of Nigeria Limited & Ors v. Crestar Integrated Natural Resources Limited (2016) 9 NWLR @ PAGE 300 (PT 1517) 193-416***. In Crestar's case, the Applicant sought an anti-arbitration injunction restraining the Appellant/Respondent from proceeding or continuing with or taking any further steps in the arbitration proceedings before the ICC Court of Arbitration on the premise that the arbitration agreement was null and void. However, the Appellants/Respondents filed a Notice of Preliminary Objection that the Court lacked jurisdiction to grant the relief sought by the Applicant/Respondent on the ground that (i) the motion seeks an injunction restraining the Appellants from taking any further steps in arbitral proceedings commenced against the Respondent and that (ii) by virtue of Section 34 of the Arbitration and Conciliation Act, Cap. A18, LFN 2004, the Honourable Court lacks jurisdiction to issue an injunction to restrain arbitral proceedings. Accordingly, the crux of the matter was whether the court could grant an anti-arbitration injunction restraining a foreign arbitral proceeding having regards to the facts and circumstances of the case.

In resolving the issue, the court held that Section 34 of the ACA does not apply to international arbitration and the court in such instance can interfere to issue an anti-arbitration injunction to enjoin a foreign arbitral tribunal. The court opined that Section 34 of the ACA is only applicable to matters *"governed by the Act"*, hence, if it is found in any proceeding that the particular facts and circumstances does not come within the purview of the Act, the provisions of Section 34 cannot apply with full force. The court considered Section 58 of ACA which to it provides that the Arbitration and Conciliation Act is only applicable within the Federal Republic of Nigeria.[8] Consequently, on the basis that the case pertains to an international arbitration, the court held that Section 34 and the principle laid down in the earlier cases[9] that the court should not interfere with arbitral proceedings except as stipulated by the law is not applicable to the case and on this basis went ahead to grant the anti-arbitration injunction.

The court referred to Article 5 of the UNCITRAL Model as an international arbitration law which is *impair materia* to Section 34 of ACA. In reaching its decision, the court relied on the submission of the learned author, Emmanuel Gaillard in his text, *"Anti-Suit Injunctions in International Arbitration"*, Juris Publishing Inc., 2005, p.111 where he stated thus:

*"...It is important to point out that Article 5 of the Model Law, is only applicable if the arbitration is taking place where Judicial intervention is sought; the prohibition on Nigerian Agip Exploration Limited & Judicial*

[8] **Section 58 ACA provides that:** *"This Act may be cited as the Arbitration and Conciliation Act and shall apply throughout the Federation"*

[9] See ***Statoil (Nig.) Ltd. v. N.N.P.C. (2013) 14 NWLR (Pt. 1373) 1*** and ***Nigerian Agip Exploration Ltd v. Nigerian National Petroleum Corporation; Oando Oil 125 & 134 Ltd (2014) 6 CLRN 150 (CA) 176.***

*intervention not provided for in the Model Law is therefore not applicable in connection with an arbitration taking place abroad or an arbitration the place of which has yet to be determined. This limit to the scope of Article 5 (matters), because Courts in many common law Jurisdictions construe their injunctive powers as also allowing them to enjoin foreign arbitral proceedings."*

In granting the anti-arbitration injunction, the court interpreted Section 34 as not affecting its power to grant anti-arbitration injunction in respect of an international arbitration. The court also relied on the persuasive authorities of the English Courts in ***Excalibur Ventures LLC v. Texas Keystone Inc. [2012] 1 ALL ER (Comm.) 933 at 947*** and ***Clakon Engineering Services Ltd v. TxmOlajesGazkutatoKFT (No 2) (2011) ALL ER (Comm.) 128 at 136***. In the above mentioned cases, the English Courts in granting anti-arbitration injunctions relied on Section 37 of the Senior Court Act of England which provides thus:

*"(1)The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.*

*(2)Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."*

The court in Excalibur's case particularly held that: *"it is clear that the English Courts have Jurisdiction under Section 37 of the Senior Courts Act 1981 Act to grant injunctions restraining arbitrations where the seat of the arbitration is a foreign jurisdiction, although it is a power that is only exercised in exceptional circumstances and with caution..."*

In Crestar's case, the Nigerian Court of Appeal held that the provisions of Section 37 of the Senior Courts Act is *im pari materia* with Section 13 of the Federal High Court Act (as the lower court from which the appeal was filed) which provides that:

*"(1) The Court may grant an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do.*

*(2) Any such order may be made either conditionally or on such terms and conditions as the Court thinks just...."*

Consequently, in reliance on the above decisions and provisions, the court granted the Applicant's prayer for an anti-arbitration injunction restraining the Respondent from continuing with the ICC arbitration proceedings on the ground that:

(i) pursuant to the provision of Section 15 of the Court of Appeal Act which empowers the court to make an interim order or grant any injunction which the lower court is authorized to issue[10] and Section 13 of the Federal High Court Act (as replicated above), the court can interfere in the ongoing ICC arbitration proceedings;

[10] Section 15 of the Court of Appeal Act Cap C37, LFN 2004 provides that:*"The Court of Appeal may, from time to time, make any order necessary for determining the real question incontroversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the courtbelow to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine beforefinal judgment in the appeal, and* ***may make an interim order or grant any injunction which the court below is authorized to make or grant*** *and may direct any necessary inquiries or accounts to be made or taken, and, generallyshall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court ofAppeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court*

(ii) it will be oppressive, vexatious or unconscionable to allow the arbitration proceeding to continue before the determination of the question on the validity of the relevant arbitration agreement.

It appears that the Nigerian Appellate Court in *Crestar* interpreted the scope of non-intervention by the Nigerian courts beyond the express provisions of Section 34 of the ACA by delimiting Section 34 to domestic arbitration seated in Nigeria. Respectfully, it appears that the court's interpretation of Section 34 of the ACA is incorrect and the decision has been criticized on the following grounds:

(i) Inadvertently declaring Part I of the Arbitration and Conciliation Act to be inapplicable to international arbitration, even if the seat of the arbitration is in Nigeria.

(ii) Creating two regimes i.e., the courts do not have jurisdiction to issue anti-arbitration injunction in domestic arbitration while the courts can issue such an injunction in international arbitration.[11]

The decision has also been criticized on the basis that it interfered with the arbitral tribunal's power to determine its jurisdiction. The application for the anti-arbitration injunction was brought on the ground that the arbitration agreement was null and void; however, the tribunal was not given the opportunity to determine the question on the validity of the arbitration agreement and the court proceeded to grant the injunction on the ground that it will be oppressive, vexatious and unconscionable to permit the arbitration proceedings to continue before the determination of the question.[12]

Similarly, it is also perceived that the decision may negatively impact the position of Nigeria as pro-arbitration friendly considering the negative perception of seats with reputation for granting anti-arbitration injunctions.

The grant of an anti-arbitration injunction in the Crestar case appears to have been corrected in the Eco Bank case in which the court refused to issue such an injunction or interfere with arbitral proceedings. Though, the court in Eco Bank's case did not expressly rely on Section 34 of ACA in reaching its decision, the court took a stringent pro-arbitration approach in its affirmation that *"no court is so empowered"* to interfere with ongoing international arbitration proceedings.

## 5.0. CLOSING REMARKS

The decision of the Nigerian Court of Appeal in Eco Bank's case exemplifies the pro-arbitration jurisprudence of the Nigerian courts in protecting the sanctity of arbitration agreements which parties have freely entered into. The court clearly refused to grant Aiteo's

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*below for thepurposes of such re-hearing or may give such other directions as to the manner in which the court below shall dealwith the case in accordance with the powers of that court, or, in the case of an appeal from the court below, in thatcourt's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction."*

[11] See Paul Idornigie & Isaiah Bozimo. *Attitude of Nigerian Courts Towards Arbitration.* by published in Emilia Onyema (ed.), Rethinking the Role of African National Courts in Arbitration (Wolters Kluwer International 2018) pp. 255-290; Chimezie Onuzulike. September, 2021. *An Appraisal of the Concept of Anti-Suit Injunction in International Arbitration.*The Gravitas Review of Business & Property Law, Vol.12, No.3.

[12] Ibid.

application to discontinue the ongoing ICC arbitration proceedings on the basis of the principle of *pacta sunt servanda* and deviated from its previous reasoning/decision in Crestar's case. The court's decision is considered a positive development in the jurisprudence of Nigerian courts, particularly considering the deviation from the much criticized Crestar case and further positions Nigeria as pro-arbitration friendly in the light of the application of the principle of limited court intervention in arbitration proceedings.