Arbitral Award and the Defence of *Res Judicata*: Developments under Nigerian Law

Introduction

Res judicata is an equitable principle founded on public policy considerations and has been applied in the Nigerian justice system since its inception. It is predicated on the idea that a decision of a court of competent jurisdiction which has decided to finality the issues of law and facts raised by the parties involved in a certain dispute, constitutes a bar to subsequent or fresh litigation between the same parties or their privies on the same issues already resolved. It typically forms the basis for the plea of *estoppel per rem judicatam* in civil claims and the pleas of *autrefois convict* and *autrefois acquit* in criminal cases.

Historically, the concept of *res judicata* was associated with only judgments and rulings of conventional courts. However, with the increasing recognition and resort to some alternative dispute resolution mechanisms, most notably arbitration, which also involves the performance adjudicatory roles that end up in awards that determine the rights of the disputing parties, there have been corresponding increase in litigation where issues which have been decided to finality by arbitral tribunals are made subjects of fresh court actions between the same parties. A question

which this situation throws up is, if the choice of forum that underpins the concept of parties' autonomy is fully entrenched in our justice system, would it be out of place if the doctrine of *res judicata* is made applicable to arbitral awards?

This article considers the defence of *res judicata* in civil litigation context and highlights its basic elements. More importantly, it considers whether an arbitral award can be the basis of the plea of *res judicata* in a court action where the issues resolved in the award are raised in a subsequent court action between the same parties particularly where new facts have not emerged that will change the basis upon which such an award was rendered.

An overview of the principle of *res judicata*

Res judicata, also known as "claim preclusion", is a Latin term which when literally translated means "a matter adjudged". It is one of the oldest public policy concepts that derived from the overriding concept of judicial economy, consistency, and finality.[1] It is generally agreed that *res judicata* originated from the Roman law.[2] However, its earliest espousal under the common law was in the case of ***Duchess of Kingston*** in 1776.[3] It is through the English common law that the doctrine was introduced into the Nigerian legal jurisprudence.

The general idea underpinning the concept of *res judicata* is that a particular issue, once determined by a competent adjudicatory body one way or the other, cannot be re-litigated between the parties as the decision of such adjudicatory body becomes final, conclusive and binding on the parties.[4] *Res judicata*, viewed from the utilitarian perspective, seeks to avoid needless repetition of proceedings, waste of resources and more importantly, to eliminate the legal uncertainties that may be occasioned by inconsistent decisions. The decision to which *res judicata* will apply becomes both conclusive and preclusive once made. It is conclusive because it is final and binding on the parties involved in the proceedings in which it was made. This is referred to as positive *res judicata* effect. On the other hand, it is preclusive because it bars the re-litigation of a matter that has been finally decided in previous proceedings i.e. negative *res judicata* effect.[5]

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[1] Schaffstein, Silja, "The doctrine of Res Judicata before international arbitral tribunals" Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London and Faculty of Law, University of Geneva, 2012, para. 25

[2] ibid.

[3] [(1776) 20 Howell's State Trials 355].

[4] Schaffstein (n 1) para. 26

[5] ibid, para. 27.

The doctrine of *res judicata* is also generally viewed from the prism of public and private interests.[6] It is of public good that there be an end to litigation to ensure general security in the society. Public interest also requires that the adjudicatory institutions work in a way that is efficient and economical so that the institutions are not overburdened with needless proceedings. Furthermore, it is of public interest to avoid inconsistent judgments which may undermine the credibility of the justice system and diminish respect and obedience to judicial decisions.[7] The private interest, on the other hand, centres on the protection of the individual so that no individual is vexed or made to incur unnecessary expenses by repeated proceedings on the same claim or issue.

Essential elements of the defence of *res judicata*

Globally, for the plea of *res judicata* to apply in a civil action, certain elements must be shown by the party raising it. These elements include same parties, same claim or issue(s), and same subject matter (referred to as the prominent elements), on the one hand, and competence of court/ finality and validity of the first decision, on the other hand.[8] These two categories of the elements shall be discussed in turn.

Same Parties, same claim/issue and same subject matter

A plea of *res judicata* can only be relied on where the parties, issues and subject matter in the previous suit and those in the subsequent suit are the same.[9] Once it is made clear that the same question is substantially in issue in two suits having the same parties, the precise form in which either suit is brought or the fact that the claimant in the one case was the defendant in the other, is immaterial; the defence of *res judicata* will be successful by reason of the similarity of the issues in both suits. A prominent statutory recognition of this plea is Section 173 of the Evidence Act 2011 which provides as follows:

> *"Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based …"*

An important point worth noting from the above provision is that the parties named in the concluded suit are not the only persons caught in the web of the preclusive effect of *res judicata*.

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[7] ibid, para. 27.
8 ibid, para. 29.
[8] *AG Nasarawa State v AG Plateau State* (2012) 10 NWLR (Pt. 1309) 419 at 465, B-F (SC).
[9] *Archibong v Ita* (2004) 2 NWLR (Pt. 858) 590 at 649, paras. E-F (SC)

Where parties have privies, they are also barred from relitigating any issues that have resolved in a suit involving their principals.[10]

Also, the word 'issue' in the context of *res judicata* includes not only issues touching on the merit of the suit but also issues raised and resolved at the interlocutory stage of the suit. As such, where an interlocutory issue is raised and is determined with finality, in that the court which gave the decision cannot vary, re-open or set aside, notwithstanding that it is an issue which may not determine the main questions of rights and liabilities raised in the suit, there is no reason why the wider doctrine of *res judicata* should not apply so as to have a preclusive effect between the same parties and in respect of the same question.

Remarkably, the fact that the plaintiff seeks new reliefs in the later suit in addition to those resolved in the previous suit does not make *res judicata* inapplicable to the subsequent suit.[11] Even where an issue resolved in the previous suit is raised only as an ancillary issue in the subsequent suit, the subsequent suit will still not be saved because it contains principal reliefs which have not been raised and resolved in the previous suit. Nevertheless, the foregoing admits of one exception. Where the action is starting afresh (*de novo*) before a new judge of the same court, the issues already determined at an interlocutory stage may be raised again by the parties, notwithstanding that the matter is still before the same court.[12]

Competence of court/finality and validity of decision

To qualify for the application of *res judicata*, a decision must be valid and must have been delivered by a court of competent jurisdiction. A valid judgement must meet the following requirements: the parties must have been given adequate notice of the proceedings and opportunity to be heard, and the judgment must have been rendered by a well-constituted court with territorial and subject matter jurisdiction.

Furthermore, only a final decision can sustain the plea of *res judicata*. A final decision is not necessarily one that was made after a consideration of the main issues in the action on the merit. Rather, it is a decision that, even if made at an interlocutory stage, cannot be varied, reopened or set aside by the court that delivered it or by any other court of co-ordinate jurisdiction although it may be subject to an appeal to a court of higher jurisdiction. Better still, a decision is final when it leaves nothing to be judicially determined or ascertained thereafter in order to render it effective and capable of execution and is absolute, complete, and certain, and when it is not lawfully

[10] *AG Nasarawa State v AG Plateau State* (supra) at 456, para. G.
[11] *Oyebamiji v SCSC* (1997) 5 NWLR (Pt. 503) 113 at 120, para. H (CA).
[12] *Bakule v Tanerewa* (Nig.) Ltd. (1994) LPELR-14308 (CA)

subject to subsequent decision, review or modification by the court or tribunal that pronounced it.[13]

In a nutshell, to sustain the plea of *res judicata* all the elements discussed above must co-exist and a break in the link or chain will render the plea unsustainable.[14]

Establishment and legal effect of res judicata

Where the plea of *res judicata* is raised, the court in determining whether the issues, the subject matter of the two cases and the parties are the same is entitled to study the pleadings, the proceedings and the judgment in the previous proceedings. The court is also entitled to examine the reasons for the judgment and other relevant facts to discern what was in issue in the previous case. It is therefore a question of facts whether the parties and their privies, the fact in issue and the subject matter of the claim are the same in both the previous case and the present case.[15]

The plea of *res judicata* is a shield and not a sword. It therefore cannot be raised by the Claimant except in a defence to counter claim.[16] Also, as the general evidential duty requires, the burden of proof of *res judicata* is on the party relying on it.[17] Once the plea is successfully established, the jurisdiction of the court to entertain the subsequent matter is automatically ousted.[18] Such subsequent action may therefore be dismissed for being an abuse of judicial process.

Arbitral award as a bar to subsequent court action between the same parties within Nigeria

As arbitration has become a globally recognized means of resolving disputes, the plea of *res judicata* has also been widely accepted as applicable to arbitral awards. Nigeria is keeping tabs on developments and global best practices in this regard, in terms of the necessary legislative and judicial interventions.

Statutory provisions

From a careful consideration of statutory provisions, arbitral awards share all the qualities of a judgment of court and are therefore accorded the same status and respect. To begin with, by section 57(1) of the Arbitration and Mediation Act 2023 (AMA), an award, once made, is to be

[13] *Onyeabuchi v INEC* (supra) Pp. 438-439, paras. G-A.
[14] *Lawal v Salami* (2002) 2 NWLR (Pt. 752) 687 at 718, paras. C-G.
[15] *AG Nasarawa State v AG Plateau State* (supra), Pp. 465-466, paras. H-A.
[16] *Akoma v Osenwokwu* (2014) 11 NWLR (Pt. 1419) 462 at 490-491, paras. G-B (SC)
[17] *Aro v Aro* (2000) 3 NWLR (Pt. 649) 443 at 457. Para. E. (CA).
[18] *AG Nasarawa State v AG Plateau State* (2012) 10 NWLR (Pt. 1309) 419 at 465, para. G. (SC)

recognised as binding on the parties and enforceable by the court. Similarly, by section 48 of the AMA, an arbitral proceeding is terminated once the final award is made or when an order of the arbitral tribunal is issued. However, proceedings may be reopened only for the invocation of the 'slip rule' by the arbitrator or arbitral tribunal within 30 days to correct any error in computation, clerical, typographical or interpretation of specific points in the award pursuant to section 49(1) of AMA.

The legal effect of the above cited statutory provisions is that once a final award is made by an arbitrator or arbitral tribunal, regardless of the country or State where it was made, it will not only become binding on the parties and recognized for enforcement by the courts in Nigeria, the proceedings in which the award is made, are also terminated. The significance of this is that the award becomes conclusive as between the parties and the preclusive effect is also activated. This position was more succinctly captured by Court of Appeal in ***Mutual Life Gen. Ins. Ltd v. Iheme***[19] where the Court held that:

> *Arbitration is "a method of dispute resolution involving one or more neutral third parties, who are agreed to by the disputing parties, and whose decision is binding" – See Black's law Dictionary, 9th Ed. See also UNIC Ltd. V. Stocco (1973) 3 SC 11, where Elias, CJN, adopted the statement of Edmund Davies, LJ., in the English case of Middlemiss & Gould v. Hartepool Corp. (1972) 1 WLR 1643, as follows –*
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> > *"When parties to a dispute submit to having it decided by an arbitrator, two consequences flow from the making of his award. First, unless there is an express contrary provision in the arbitration submission or unless it is an interim award,* ***it operates as a final and conclusive Judgment*** *… The second …* ***is that the award constitutes a final Judgment upon all matters referred to the arbitrator****".*

However, it bears emphasising that, like the judgment of court, the arbitral award that will have *res judicata* effect need not be an award that had considered the merits of the substantive arbitral proceedings. Awards or orders made in the course of arbitral proceedings which have decided with finality the issues to which they relate, are also conclusive awards and qualify for the application of *res judicata*.[20] Therefore, whether the decision of an arbitrator or arbitral tribunal is made within or at the conclusion of arbitral proceedings, once it cannot be reopened for

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[19] (2014) 1 NWLR (Pt. 1389) 670 at 691H- 692A-E

[20] *Environmental Dev. Const. v Umara Assoc*. (supra) at page 302, paras. D-E; page 305, paras. D -E. In this case, the Court held that the plea of res judicata availed the parties in respect of the interim award of the Dispute Resolution Sub-Committee on the return of the project vehicles.

consideration of the same issues or cannot be set aside by the same arbitrator or arbitral tribunal, it is a conclusive decision and can sustain the plea of *res judicata*.

Judicial pronouncements

The first judicial pronouncement in Nigeria extending the virtues of *res judicata* to arbitral awards was made in *Environmental Dev. Const. v Umara Assoc*.[21] In that case, the Court of Appeal affirmed that the conclusive determination of an issue by arbitration serves to bar the subsequent re-litigation of the same issue based on the doctrine of *res judicata*. In arriving at this decision, the Court took the view that the decision arrived at by an arbitrator or arbitral tribunal is conclusive between the parties and as unimpeachable as the decision of a competent court of law.[22] However, this is subject to the condition that the decision must be conclusive. The Court of Appeal gave a strong emphasis on this when it says:

> "*It is only when the decision of an arbitration is conclusive that it constitutes a bar to the re-litigation of the issues decided and therefore is res judicata.*"[23]

As it stands, a conclusive arbitral award, whether final or interim, can sustain a plea of *res judicata* in any subsequent court action between the same parties over the same claim/issue/subject matter.

Perhaps a final point to highlight is that the extension of the plea of *res judicata* to arbitral awards in Nigeria makes no distinction between international and domestic arbitration. It will therefore not matter that the arbitral award with *res judicata* effect was not delivered in the country where the subsequent court action is instituted. For instance, the resolution of an issue by an arbitral tribunal which sat in the United Kingdom constitutes a bar to the re-litigation of the same issue in any court in Nigeria.[24] This much has been decided in *Fenog Nigeria Limited v Nigerian Agip Oil Company Limited*,[25] though a High Court decision which is currently on appeal at the Court of Appeal sitting in Port Harcourt.

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[21](2000) 4 NWLR (Pt. 652) 293 (CA).

[22] *Environmental Dev. Const. v Umara Assoc*. (supra) at page 305, para. A.

[23] *Environmental Dev. Const. v Umara Assoc.* (supra) at page 305, paras. B-D.

[24] By Section 57 of AMA, arbitral awards are recognized as binding and can be enforced by a court in Nigeria irrespective of the country they are made.

[25] The ruling was delivered by the Honourable Justice B.G. Diepiri of the High Court of Rivers State in Suit No. PHC/1802/CS/2022.

Conclusion

Respect for judicial decisions is inextricably tied to the finality and consistency of the decisions. To continue to maintain public confidence in the adjudicatory process, there has to be a definite end to the process. One tool that has proven very effective in sustaining respect for judicial decisions is *res judicata*. The plea of *res judicata* is generally invoked when a given issue is likely to be the subject matter of another decision within one and the same legal context. This concept has for decades performed a preclusive role barring the reconsideration of disputes that have been conclusively determined by competent adjudicatory bodies. Arbitration, having gained global prominence as a dispute resolution mechanism, has joined the league of decisions which have been accorded the *res judicata* effect. Therefore, once the arbitral award, interim or final, can tick all the boxes with respect to the essential elements of *res judicata*, it qualifies for the application of *res judicata* regardless of the seat of arbitration, in that the issues determined cannot be the subject of any fresh litigation between the same parties and their privies in a conventional court.

Note: This article does not constitute a legal advice. For proper legal advice or inquiries on the issues raised in this article or general enquiries relating to Arbitration in Nigeria, please contact Aret & Bret LLP at ab@aret-bret.com. You can also reach out to the author:

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