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The Power of a Nigerian Court to Set Aside a Foreign Arbitral Award:

An X-ray of the Court of Appeal's Decision in Limak v. Sahelian Energy

~ O. A. Uka

Introduction

1. This paper examines a recent decision of the Nigerian Court of Appeal in Limak Yatirim Enerji Uretim Isletme Hizmetleri ve Insaat A. S. & ORS v. Sahelian Energy & Integrated Services Ltd (Limak v. Sahelian Energy) where the Court set aside a Final Arbitral Award published on 28 June 2018 by a Tribunal of the International Chamber of Commerce (ICC) International Court of Arbitration seated in Geneva, Switzerland.1 On the basis of the analysis contained below, the author is unable to justify the reasoning and conclusion of the Court of Appeal. Consequently, this paper aims to highlight what this writer believes is the error in the Court of Appeal's decision and to propose a better view that accords with applicable law.

Background to the arbitration proceedings

2. Sahelian Energy & Integrated Services Ltd (Sahelian Energy), a Nigerian company, needed a foreign technical partner with electricity distribution license in a foreign jurisdiction, which was part of the requirements for participating in the Federal Government of Nigeria privatisation process for the Kaduna Electricity Distribution Company (Kaduna DISCO).

3. For this reason, Sahelian Energy contacted Limak Yatirim Enerji Uretim Isletme Hizmetleri ve Insaat A. S. (Limak) to provide technical support and the parties' discussions culminated in the execution of a Cooperation Framework Agreement (CFA). Under the CFA, Sahelian Energy covenanted to pay Limak, the sum of USD 17.5 Million over a period of 5 years, through yearly instalments of USD 3.5 Million.

4. Although Limak applied to register the CFA with the National Office for Technology Acquisition and Promotion (NOTAP), the application was denied for being in violation of the NOTAP Act and the Regulations made thereunder. Nonetheless, Sahelian Energy successfully emerged the core investor in Kaduna DISCO in December 2014. Sometime in February 2015, Limak issued a demand letter to Sahelian Energy for payment of the annual fee of USD 3.5 Million. Sahelian Energy denied liability for any payment because the CFA, being a registrable instrument, was not registered with NOTAP and that any payment for the transfer of technology would be in contravention of Nigerian law.

5. After various attempts to amicably resolve their dispute failed, Limak commenced arbitration proceedings at the ICC to enforce the parties' arbitration agreement and to seek reliefs that the CFA was valid, and that Sahelian Energy was liable to paying the agreed consideration. On 28 June 2018, the Tribunal published its award and found in favour of Limak

The enforcement and set-aside proceedings

6. Subsequently, Limak sought to enforce the award in Nigeria before the High Court of the FCT. On the other hand, Sahelian Energy applied to the same court to set aside the award on grounds that the award was contrary to public policy and that there was an error on the face of the award. After hearing the parties, the High Court Coram Halilu J., delivered a consolidated ruling in respect of both the application to set aside and the application to enforce the award on 17 July 2020. In its ruling, the court set aside the award and consequently discountenanced the application to recognise and enforce the award. Aggrieved with the above decision, Limak approached the Court of Appeal, Abuja to reverse the ruling.

The Court of Appeal's decision

7. In a judgment delivered on 14 December 2021, the Court of Appeal per Ige JCA (with whom Yahaya and Williams-Dawodu JJCA agreed), dismissed the appeal and upheld the ruling of the FCT High Court which set aside the award.

Section 48 of the Arbitration and Conciliation Act

8. Counsel to Sahelian Energy argued, and both courts agreed, that since Section 48 of the Arbitration and Conciliation Act provides for setting aside a foreign award, a Nigerian court can indeed set aside an award, notwithstanding where it emanated from. In particular, the FCT High Court stated as follows in its ruling:

> *Permit me to state here and now that an award, foreign or local, can be set aside [by a Nigerian Court] in exceptional circumstances. Section 48 of ACA Cap A18 LFN (2004) and Order 19 Rule 12 (g) of the Rules of Court of the High Court of FCT are clear on this issue.*

9. On appeal the Court of Appeal upheld this reasoning and held thus per Yahaya JCA:

> *A community reading of the Sections of the Arbitration and Conciliation Act shows clearly that Arbitration and Conciliation Act 2004 is very much applicable to the Arbitral Award made in favour of the Appellants notwithstanding that the seat of the arbitration is Switzerland. The municipal Court in Nigeria can refuse to recognize the award and it can prohibit the enforcement of the Arbitral Award if it is shown or proved to have contravened any of the provisions of Sections 48 and 52 of the said Arbitration and Conciliation Act, 2004. More importantly, Section 32 of the said Act expressly vests in the Nigerian Courts the jurisdiction and statutory powers to refuse recognition or enforcement of foreign or international arbitration award.*

10. His Lordship did not stop there but proceeded to state as follows:

> *It is curious that the Appellants could be approbating and reprobating. They contended that the lower Court has no jurisdiction to set aside award made outside the Country, yet they approached the lower Court pursuant to Sections 31 and 51 of the impugned Arbitration and Conciliation Act Cap A18, LFN 2004 seeking and order for registration, recognition and enforcement of the arbitral award published in Appellants favour on 28/6/2018.*

A critique of the Court of Appeal's decision

11. It is arguable that the FCT High Court and the Court of Appeal, were right to refuse the recognition and enforcement of the award on grounds of the award being contrary to Nigerian public policy in that the CFA was not registered with NOTAP with the resulting implication that no liability could have arisen therefrom. However, this writer strongly believes that the FCT High Court and the Court of Appeal were guilty of a fundamental error of law in setting aside the award. To appreciate the fundamental nature of the error, some prefatory remarks are imperative.

12. Arbitration is a private dispute resolution mechanism whereby two or more private parties agree in writing to have their dispute (present or future) resolved in a binding way, not through litigation in national courts, but by a person or group of persons called the arbitrator(s), whose decision is referred to an award and which is capable of being recognised and enforced in the same way as a judgment of a national court.

13. As noted above, the end product of arbitration, the whole essence of arbitral process, is the arbitral award. Thanks to the instrumentality of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention); upon the publication of an award, such award becomes potentially enforceable in any of the 170 Contracting States to the Convention. Thus, Article III of the New York Convention imposes an obligation on each Contracting State to recognise arbitral awards as binding and to enforce them.

14. Under Article V of the New York Convention, there is limited scope for an award debtor to resist the recognition and/or enforcement of an award. The circumstances under which a court may lawfully refuse the recognition and enforcement of an award include where the arbitral award arises from a dispute which is not capable of settlement by arbitration or where the recognition or enforcement of such award would be contrary to the public policy of the enforcing country. The consequence of refusing to recognise and/or enforce an award in one jurisdiction, is that the award remains valid and binding, and therefore potentially capable of being recognised and/or enforced in another jurisdiction.

15. Intrinsic in the same Article V of the New York Convention is the fact that an award may also be set aside in its entirety. Except in very few jurisdictions,[2] the consequence of setting aside an award is that the award ceases to be binding and therefore incapable of recognition or enforcement. It is for this reason, that the jurisdiction to set aside an award is not to be exercised lightly and indeed that honour is only reserved for the national courts of the country in which the award was made (i.e., the seat of the arbitration[3]) or the country under whose law, the award was made, if different.[4]

16. Against the foregoing backdrop, this writer considers it odd that (i) Sahelian Energy applied to the FCT High Court in Nigeria requesting it to set aside an award published by an arbitral tribunal seated in Geneva, Switzerland and (ii) that the FCT High Court and the Court of Appeal countenanced the application. For the three reasons outlined below, this writer believes that their Lordships were wrong.

17. One, a closer examination of the reasoning of Yahaya JCA reveals a wrongful conflation of the unrelated concepts of refusing to recognise an award and setting aside or annulment of an award. As explained above, the former is governed by the law of the place where recognition and enforcement are sought i.e., any of the 170 Contracting States to the New York Convention. The latter is governed by the law of the seat of the arbitration or the law of the country under whose law the award was made.[5] There is therefore nothing curious and certainly nothing inherently contradictory in contending that the Nigerian Courts have no jurisdiction to set aside an award – by a tribunal not seated in Nigeria – and requesting the same Nigerian courts to recognise or enforce that award. In a nutshell, that is the whole essence of the New York Convention. The dicta of Yahaya JCA quoted above is problematic, to say the least.

18. As an author notes:

> *Despite the copiousness of academic literature on the enforcement of foreign arbitral awards a distinction that is not always fully recognised is the difference between refusal of enforcement and annulment of arbitral awards. Concisely, the supervisory court at the seat of arbitration has the power to annul an award made within its territory, while the enforcement court abroad has power only to consider granting or refusing the recognition and enforcement of an award in its territory. Frequently, in international arbitration jurisprudence, this distinction has been generally referred to as a segregation between "Primary Jurisdiction" and "Secondary Jurisdiction."*[6]

19. Two, His Lordship's characterisation of Limak's contention - that Nigerian courts cannot set aside a Swiss Arbitral Award - as impugning the Arbitration and Conciliation Act betrays an unfortunate nationalistic tendency that has been the bane of the development of the field of arbitration in Nigeria. If this decision is not clarified or reversed urgently, and as long as it remains binding precedent, it portends one of the greatest threats to the New York Convention and undermine the ongoing efforts to establish Nigeria as a veritable seat (and venue) for international arbitration in the West African sub-region.

20. Three, there is nothing in Section 48 of the Arbitration and Conciliation Act that empowers a Nigerian Court to set aside a foreign arbitral award *stricto sensu*. The said Section 48 indeed provides for the setting aside of an arbitral award and it is contained in Part III of the Act which deals with "international commercial arbitration." The purposive interpretation of Section 48 of the Act, especially when read in conjunction with Section 43 thereof, leads to the irresistible conclusion that what a Nigerian Court is empowered to set aside is an international arbitral award i.e., an award by an international arbitral tribunal seated in Nigeria, or an international arbitral award made under Nigerian law. The power does not extend to setting aside a foreign award by an arbitral panel seated abroad.

21. In ending, it is important to acknowledge that there were perhaps some procedural defects in the conduct of the appeal as highlighted by the Court of Appeal such as the fact of Limak abandoning one of the two appeals filed and therefore not, in fact, appealing against the decision to set aside the award. This critique is solely concerned with the pronouncements of the two Courts on the powers of Nigerian courts to set aside a foreign arbitral award.

22. It is also pertinent, for the sake of completeness, to note that it has been argued elsewhere[7] that by reason of Article V (1) (e) of the New York Convention, an award may be set aside or suspended by a court of the country in which the award was made (the court of the seat) or a court of the country under the law of which, that award was made. This is correct.[8] However, to the extent that this is offered as extrajudicial justification for the decision of the FCT High Court or the Court of Appeal, then that is, with respect, disingenuous for the following two reasons.

23. One, it is a well-established principle of the law practised in virtually all Common Law systems that every judgment is divided into two parts: ratio decidendi and obiter dictum, i.e., the binding and non-binding part of a judgment respectively. Nigerian courts have also described a judgment as a reasoned decision of a court and held that a judgment must show a clear resolution of all the issues that arise for decision in the case and end up with a verdict, which must flow logically from the facts of the case in issue.[9] There is nothing in the judgment of either the FCT High Court or the Court of Appeal that is even remotely suggestive of the fact that Nigerian courts can only set aside an award where the award emanated from a tribunal seated in Nigeria or where Nigerian law is the law under which the award was made. On the contrary, and as shown above, the erroneous position taken by the two courts was to issue a blanket statement that by reason of Section 48 of the Arbitration and Conciliation Act, a Nigerian Court has power to set aside any award, domestic or foreign.

24. Two, and perhaps more importantly, there is nothing in the judgment that suggests that Nigerian law is the law under which the award was made. In any case, it is not clear whether the phrase, "the law under which the award was made" refers to the law of the seat or the law governing the arbitration agreement.

25. In 2020 the UK Supreme Court in the case of Enka v. Chubb[10] correctly stated that when a dispute arises in relation to a cross border contract which contains an arbitration agreement, three different laws are potentially applicable – the law governing the substance of the parties' dispute; the law governing the arbitration process i.e., the lex arbitri (which is generally the law of the "seat" of the arbitration); and the law governing the arbitration agreement. The Court further held that where the parties express the choice of the law governing the substance of their dispute and the law of the seat, or where such choice(s) may be implied from the circumstances of the case, but they fail to expressly stipulate the law governing the arbitration agreement, then the governing law of the contract would, in the absence of any good reason to the contrary, apply to the arbitration agreement, which forms part of the contract.

26. Although this writer did not have the privilege of reviewing the award, to determine the governing law of the contract, and by extension, the law governing the arbitration agreement, a reading of the ruling of the FCT High Court is suggestive, but not determinative of the fact that, the governing law of the contract is Turkish Law. If this is correct, the implication will be that the seat of the arbitration was Switzerland and the country under whose law the award was made was Turkey. Thus, the only two countries on earth, whose national courts can set aside the ICC Award at issue are Switzerland and Turkey. The only recourse legally available to the Nigerian courts, having found that the recognition and enforcement of the award would have been contrary to Nigerian public policy, was to refuse the recognition and enforcement.

Conclusion

27. As noted in a previous intervention[11], owing to well documented benefits of arbitration as a dispute resolution mechanism, countries have increasingly come to compete through legislation and court decisions to have their jurisdictions perceived as arbitration friendly. In 2017, the former Chief Justice of Nigeria, Walter Nkanu Onnoghen, issued a direction at the annual arbitration conference of the Nigerian Institute of Chartered Arbitrators, calling on judges to resist the temptation of assuming jurisdiction over commercial disputes arising from contracts with arbitration clauses and instead, to stay such proceedings in favour of arbitration as required by law. Nigerian courts have also used different occasions to restate the Nigerian judicial policy which is in favour of arbitration.

28. Consequently, when the national courts of any jurisdiction hands down a decision that appears incompatible with the above policy, arbitration enthusiasts in that jurisdiction have a bounden duty to critique such decision in the overall interest of the development of the field of arbitration. It is in this light that the present intervention should be considered. Further, there is nothing on record to suggest that the Limak decision has been appealed. This is therefore a neutral review of a decided case by a non-interested person and does not fall foul of the sub-judice rule. It is hoped that in the years ahead, this decision would be remembered as a mere blip and an exception to the general rule, and that we can quickly return to business as usual and to the more important task of establishing Nigeria as an arbitration friendly jurisdiction.

End Notes

[1] Limak Yatirim Enerji Uretim Isletme Hizmetleri ve Insaat A. S. & ORS v. Sahelian Energy & Integrated Services Ltd ICC Case No. 21617/ZF/AYZ The Tribunal comprised Prof. Dr. Nathalie Voser, Prof. Dr. Ziya Akinci and Dr. Michael W. Buhler.

[2] Such as France.

[3] G. Vial, 'Influence of the Arbitral Seat in the Outcome of an International Commercial Arbitration' in American Bar Association, The International Lawyer, 2017, Vol. 50, No. 2 (2017), pp. 329-346.

[4] Article V (1) (e) of the New York Convention. "Only courts in countries with primary jurisdiction may effectively vacate an arbitral award." Catherine A. Giambastiani, 'Lex Loci Arbitri and Annulment of Foreign Arbitral Awards in U.S. Courts', 20 AM. U. INT'L. L. Rev. 1101, 1101 (2005).

[5] See generally N. Blackaby and C. Partasides with A. Redfern and M. Hunter, Redfern and Hunter on International Arbitration, 6th edn (Oxford: Oxford University Press, 2015) p.570.

[6] K. S. Harisankar 'Annulment versus Enforcement of International Arbitral Awards: Does the New York Convention permit Issue Estoppel? Available at 3 INT'L. A.L.R., 47, 47 (2015), available at https://www.academia.edu/13638114/Annulment_versus_Enforcement_of_International_Arbitral_

[7] See Olaniwun Ajayi, Dispute Resolution Outlook 2021 available at https://www.olaniwunajayi.net/wp-content/uploads/2021/02/Dispute-Resolution-Outlook-2021-.pdf

[8] This view has been upheld by the United States Court of Appeals for the District of Columbia in Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria, 962F.3d 576, 586–87 (D.C. Cir. 2020).

[9] See Ojogbue v. Nnubia (1972) 1 All NLR (Pt. 2) 226.

[10] Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38.

[11] O. Shasore & O. Uka, 'Conditions for the Grant of Stay of Proceedings pending Arbitration under Nigerian Law: Revisiting Mekwunye v. Lotus Capital' available at https://www.alp.company/resources/arbitration/conditions-grant-stay-proceedings-pending-arbitration-under-nigerian-law

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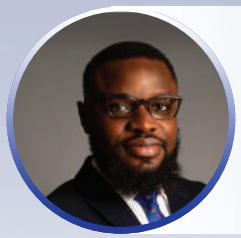

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