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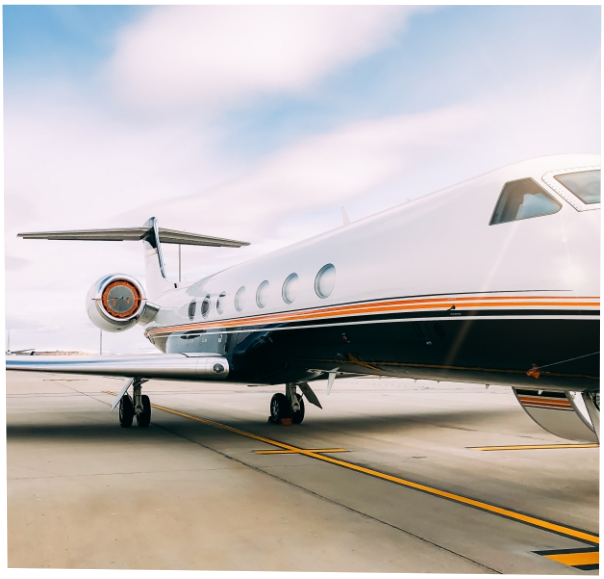
ASSESSING 'MISTAKE' AS A DEFENCE IN INTERNATIONAL ARBITRATION: THE OGUN FREE TRADE ZONE DISPUTE

INTRODUCTION

On August 14, 2024, Nigerians were confronted with the alarming news that a Chinese firm had seized three of the nation's presidential jets under the orders of a French court, a move that has significant implications for the nation.[1] Former Ogun State Governor Ibikunle Amosun, a key figure in this dispute, offered his account in response to the seizure. He alleged that the Chinese company, Zhongfu International Investment FXE (Zhongfu), misled the state government, leading to the contested management decision that has now culminated in Nigeria's assets being targeted abroad.

BACKGROUND: THE DISPUTE AND CLAIMS OF MISTAKE

Upon taking office in 2011, Governor Amosun inherited a conflict between two Chinese firms, China Africa Investment FXE (CIA FXE) and Zhongfu, laying claim to the Ogun State Free Trade Zone (OGFTZ) management rights. Amidst this dispute, Zhongfu International presented itself as a legitimate stakeholder. It provided what has now been alleged to be misleading information about the official representatives of CIA FXE, joint venture partners and lawful managers of the zone. This led the Ogun State Government to appoint Zhongfu as the interim manager on 15th March 2012, a decision Amosun later claimed was based on false information.



Unbeknownst to the Ogun State Government at the time, Zhongfu's intention, as later revealed in a diplomatic note dated 11th March 2016 from the Chinese government, was to oust its rival and take control of the zone. Following this revelation, the Ogun State Government terminated Zhongfu's appointment. Still, the damage had been done by then, leading to the treaty arbitration that has now resulted in a significant financial liability against the Federal Government of Nigeria.

Premised on the above, former Governor Amosun has invoked the concept of mistake and fraudulent misrepresentation in his defence of the ongoing fiasco. Mistakes and fraudulent misrepresentations have become complex legal principles under contract law. This article examines whether "mistake and fraudulent misrepresentation" are viable grounds under the applicable legal frameworks,

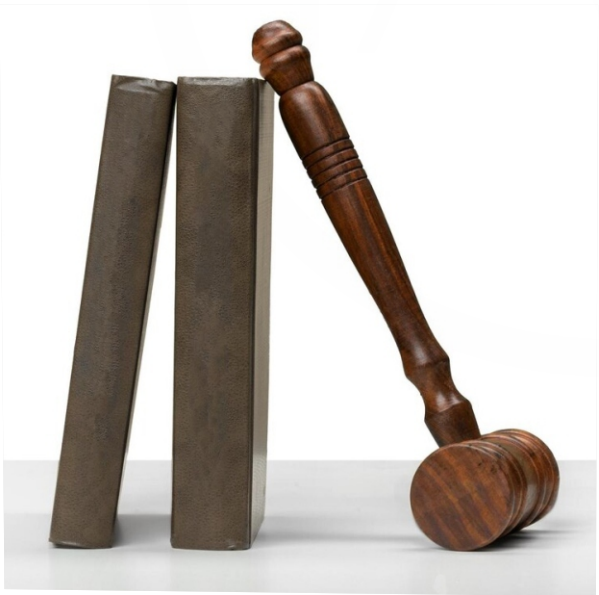
[1] https://www.premiumtimesng.com/news/724391-three-nigerian-presidential-jets-seized-abroad-as-ogun-state-chinese-firm-battle.html accessed on 20th August 2024.

specifically the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, to resist recognition and enforcement of foreign arbitral awards.

THE CONCEPT OF MISTAKE IN CONTRACT LAW

A contract is an agreement between two or more persons creating mutual obligations that are enforceable by law. The essential elements of a contract/agreement are a valid offer and acceptance, adequate consideration, capacity, and legality. For an agreement to be binding, there must be a meeting of the minds (consensus ad idem) between the parties. Without this, a contract is void.

In contract law, a mistake occurs when one or both parties have a false belief about a fundamental fact at the time of the agreement, which, if known, would have prevented the formation of the contract.[2] Therefore, a mistake in contract law could be common, mutual, or unilateral.



COMMON MISTAKE

Both parties share the same mistaken belief about a fundamental fact. For example, if both parties to a contract believe a painting to be an original, only to discover later that it is a replica, the contract may be void.

MUTUAL MISTAKE

Each party is mistaken about different fundamental facts, leading to no true meeting of the minds. For instance, if one party offers to sell a Bentley, and the other, thinking they are buying a Toyota, agrees, there is no contract as both parties are mistaken about the subject matter.

In ascertaining whether a contract existed despite the mistake, Courts rely on the objective test, i.e. what a reasonable third party, upon examining the transaction, would infer from the words or conduct of each party. If the court, from the totality of the evidence, presumes the existence of a contract, regardless of the fundamental mistake, it will hold the agreement binding on the parties.[3] Where the court cannot infer a contract without relying on speculation due to conflicting evidence, the court must, of necessity, declare that no contract exists between the parties.[4]

[2] See also THE VESSEL LEONA II v. FIRST FUELS LTD (2002) LPELR-1284(SC), and BELLO v. STATE (2016) LPELR-45601(CA).
[3] Wood v Scarth (1858) 1 F & F 293
[4] Scriven Bros & Co V, Hindley & Co. (1913) 3 KB 564

UNILATERAL MISTAKE

One party is mistaken about a fundamental fact, while the other party is or should be aware of the mistake. This type of mistake usually does not vitiate a contract unless the non-mistaken party knew or should have known about the mistake and took advantage of it.

A practical example of a unilateral mistake is when a seller mistakenly believes they are contracting with a well-known collector but contracts with an imposter; the contract may be void if the seller can prove the mistake and the imposter's knowledge of it. In cases of unilateral mistake, courts use a subjective test, requiring the mistaken party to demonstrate the impact of the error on their decision-making to void the contract. The court assumes a party knew what would have been evident to a reasonable person in the given circumstances.[5]

Within the context of the OGFTZ dispute, Amosun's claims point towards a unilateral mistake wherein Zhongfu allegedly misrepresented facts to the Ogun State Government, affecting its capacity to enter the contract. However, further particulars of the alleged mistake will be required to examine the extent and scope. Based on available information, we speculate that the mistake alleged by the former governor concerns Zhongfu's capacity and compliance with the relevant prequalification conditions such as financial competence to participate as a contractor in the OGFTZ project.

According to the former governor, the mistake was a combination of misrepresented facts by Zhongfu, which, if the Ogun State Government were aware of it, would have impacted the company's capacity to enter the contract. However, to sustain this allegation and void the contract, Ogun State must prove several points. First, they must show that they intended to deal with CAI FXE, not Zhongfu, and demonstrate that confusion existed between these two distinct entities.[6] Second, Ogun State must establish that Zhongfu fraudulently misrepresented facts to secure their appointment as interim managers of the OGFTZ.[7] Third, they must prove that the identity of CAI FXE was crucial to the contracting decision by showing that they made this importance clear during negotiations, highlighting any

[5] Kin Chwee Keong v. Digilandmall Com Pte Ltd (2005) 1 SLR 502; ASA v. Louis Dreyfus Energy Services LP The Harriet N (2008) EWHC 2257
[6] Sowler v. Potter (1939) 4 All ER 478; King's Norton Metal Co Ltd v. Edridge, Merrett & Co Ltd (1897) 14 TLR 98 at 99
[7] Hardman v. Booth (1863) 1 H & C 803

particular attributes of CAI FXE that Zhongfu lacked.[8] Lastly, Ogun State must show that they took all reasonable steps to verify Zhongfu's identity before proceeding with the contract.[9]

COULD AN ALLEGATION OF MISTAKE CONSTITUTE GROUNDS FOR REFUSAL OF RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD?

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ('the New York Convention or the Convention"), to which Nigeria is a signatory, provides limited grounds for refusing the recognition and enforcement of arbitral awards. These grounds are exhaustive[10] and do not explicitly include "mistake" as a defence. They are called the "seven defences to enforcement" and are invoked after the award has been issued.[11] The defences allowed under Article V of the Convention include issues such as a party's incapacity, the arbitration agreement's invalidity, due process violations, and public policy considerations.

While our position is speculative and subject to further particulars that will require further evaluation, we believe that a claim of mistake by the Ogun State Government premised on Zhongfu's fraudulent misrepresentation of their identity, capacity, and prequalification to contract on the OGFTZ project could go to the root of the underlying contract procured under these circumstances. The implication here is that not only are parties, not consensus ad idem in terms of the underlying contract, but also the entirety of the contract ought to be rendered void and of no effect. Accordingly, the resultant arbitration agreement can also be said to be of no moment, although it is distinct and separable from the underlying contract. If this had been ventilated at the relevant arbitral tribunal (SIAC or LCIA), the arbitral proceedings might have been terminated in limine.

However, since the award is now at its enforcement stage and Zhongfu is utilizing the provisions of the New York Convention, we believe that the former governor's contention as to mistake premised on fraudulent misrepresentation may be situated under Article V (1) (a) and (2) (b) of the convention to resist recognition and enforcement of the arbitral award. Article V (1) (a) touches on any mitigating factor, be it law or fact, that could validly affect the capacity of a party to enter the underlying contract. Thus, having regard to the established position of the law vis a vis the former governor's contention, it cannot be said that the Zhongfu had the requisite capacity to enter the underlying contract with the Ogun State Government.

In assessing former Governor Amosun's statement under these defences, the Ogun State Government claims it intended to contract with CAI FXE, not Zhongfu, due to CAI FXE's financial competence. This claim may be based on Zhongfu's misrepresentation of CAI FXE as being bankrupt.

[8] Cundy v. Linday (1878) 3 App Cas 459
[9] Shotgun Finance Ltd v. Hudson (2003) UKHL 62, (2004) 1 All ER 215
[10] https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/enforcement-under-the-new-york-convention accessed on 29 August 2024
[11] Yusuf Ahmed Alghanim & Sons WLL v TOYS 'R' US Inc[1997] USCA2 518; , 126 F 3d 15 (2nd Cir, 1997)

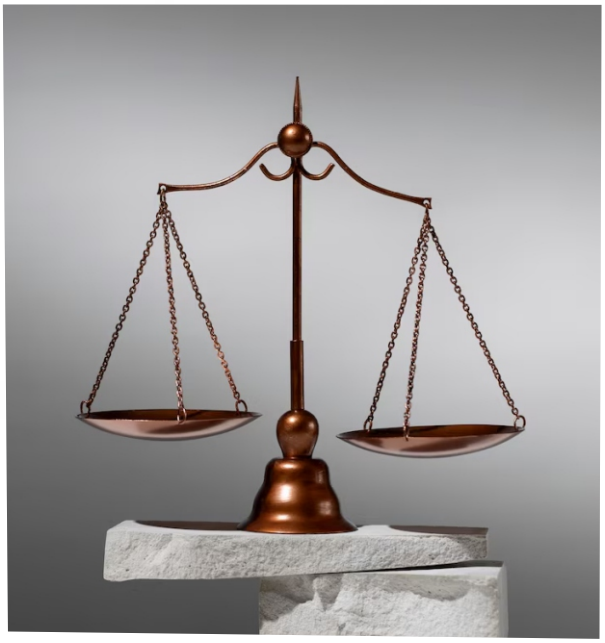
If Ogun State can establish that it mistakenly contracted with Zhongfu, believing it to be CAI FXE, this could demonstrate Zhongfu's lack of qualification and capacity to enter into the contract. Capacity in this context could refer to pre-qualification requirements and core competencies.

While public policy under Article V(2)(b) might appear as a potential ground for invoking "mistake" characterised in fraudulent misrepresentation, given its nature of being treated as a catch-all defence comprehending grounds of resistance to enforcement not explicitly enumerated in the preceding clauses in Article 5, the New York Convention is designed to uphold the finality and enforceability of arbitral awards, with narrowly defined grounds for refusal, applying only in cases where enforcement of the award would violate the most basic notions of morality and justice.[12]

Moreover, the distinction between domestic and international public policy limits the applicability of "mistake" in challenging an arbitral award under the Convention. What pertains to public policy in domestic relations does not necessarily pertain to public policy in international relations, justifying the differing purposes of domestic and international relations.[13] Therefore, in international commercial arbitration, where conflict ensues between the domestic law of the forum state and international law, international law prevails. Ultimately, the public policy consideration here would be whether it would be appropriate to enforce an arbitral award based on a contract procured by mistake and fraudulent misrepresentation.

MISTAKE AND THE ENGLISH ARBITRATION ACT 1996

A UK-seated arbitral tribunal issued the award. Consequently, an application to set aside or annul the award can only be made before the UK court (court of primary jurisdiction). Under the English Arbitration Act 1996, which governs the arbitration that resulted in the award against Nigeria, "mistake" is also not a recognized ground for challenging an arbitral award. The Act permits challenges based on the tribunal's lack of substantive jurisdiction, serious irregularity affecting the tribunal or proceedings, and questions of law arising out of the award.[14]



[12] Parsons & Whittemore Overseas Co Inc v Société Generale de L'Industrie Du Papier (RAKTA)[1974] USCA2 836; Sei Societa Esplosivi Industriali SPA v. L–3 Fuzing and Ordnance Systems, INC 11–149–RGA

[13] Albert Jan van den Berg 'The New York Convention of 1958: An Overview' https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012125884227980new_york_convention_of_1958_overview.pdf, accessed 29th August 2024.

[14] See Sections 67, 68 & 69 of the Act

Under the Act, 'substantive jurisdiction' refers to whether (1) there is a valid arbitration agreement, (2) the tribunal is properly constituted, and (3) the matters are in accordance with the agreement.[15] A challenge to an award under section 67 can be pursued after the tribunal's jurisdictional or final award. If successful, the court may confirm, vary, set aside the award, or declare the award to be of no effect.[16]

Challenges must be raised within the time limits set by section 31, typically 28 days from the award or notification of any arbitral appeal or correction.[17] An exception applies if the grounds for objection were unknown and could not have been discovered with reasonable diligence.[18] The court may grant an extension[19] but on "cogent reasons" and must be requested promptly.[20]

A challenge under section 67 involves a full rehearing on jurisdiction, with the court not deferring to the tribunal's findings.[21] An arbitral award may also be challenged in court for serious irregularities affecting the tribunal, proceedings, or the award itself, as outlined in Section 68 of the Act. These grounds, like Article V of the New York Convention and section 67 of the Act herein are mandatory, exhaustive, and cannot be waived by the parties.

Where a serious irregularity claim succeeds, the court may remit the award for reconsideration, set it aside, or declare it void, in whole or in part.[22]. In this instance, the tribunal must issue a new award within three months, or the time specified by the court.[23]

Additionally, objections to the award based on serious irregularity must be raised promptly with the tribunal to avoid losing the right to challenge it.[24]

Moreover, Section 73(1) aims to prevent parties from using tactics to delay enforcement by withholding arguments or evidence in an attempt to secure a rehearing. Courts have expressed a desire to control the procedure in Section 67 to prevent unfairness or prejudice to the other party,[25] by limiting the admissibility of late evidence and potentially awarding costs.

The Law Commission of England and Wales has recommended new court rules to:

1. Restrict challenging an award under Section 67 with new jurisdictional objections or evidence not presented to the tribunal, unless it could not reasonably have been raised earlier.

2. Limit the rehearing of evidence unless necessary for justice.

Currently under consideration by the UK Parliament, these recommendations could impact cases where new evidence might be crucial. For example, if evidence previously excluded by the tribunal is deemed appropriate for the court to hear,[26] Allowing the introduction of that evidence under

[15] See sections 82(1) and 30(1).
[16] See Section 67(3) of the Act
[17] See Section 70(3) of the Act
[18] See Section 73(1) of the Act
[19] Civil Procedure Rules of 1998. Rule 62.9(1) addresses the extension of time in the context of arbitration-related challenges.
[20] Section O9.2 of The Commercial Court Guide, 11th Edition, (2022) which guides the procedure for seeking extensions of time in arbitration-related matters
[21] See Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46, per Lord Mance SCJ at para 26.
[22] See Section 68 (3) of the Act
[23] See Section 71(3) of the Act
[24] See Section 73(1) of the Act
[25] See Central Trading v Fioralba [2014] EWHC 2397 (Comm), para. 32),
[26] Kalmneft v Glencore International [2001] 2 All E.R. (Comm) 577, para. 91

section 67 while challenging the arbitrator's ruling may alleviate any prejudice to the losing party. This would enable the use of new documents available during court proceedings but not during the arbitration.[27]

Therefore, even if "mistake" were recognized as a ground for challenge, the failure to raise it during the arbitration proceedings would likely preclude its use in subsequent proceedings. Furthermore, Nigeria has since failed to comply with the time within which to apply to set aside the arbitral award and its appeal for an extension of time was also dismissed.

CONCLUSION

In the final analysis, our proposition is that mistake and fraudulent misrepresentation may serve as a bar to the recognition and enforcement of the arbitral award against Nigeria under the relevant articles of the New York Convention 1958.

However, given the complexities of international arbitration and the stringent standards for challenging arbitral awards, government entities and other parties must ensure thorough due diligence and legal scrutiny before entering into international agreements. It is also imperative to raise any available defence promptly during arbitration proceedings to preserve the right to challenge the award.

Consequently, Nigerian authorities should be mindful of preventing similar disputes and ensuring that all contractual engagements, especially those involving foreign entities, are subjected to rigorous oversight and verification processes. This approach would help mitigate the risks of costly international arbitration and protect the nation's assets from future enforcement proceedings.

[27] Jiangsu Shagang Group v Loki Owning Company [2018] EWHC 330 (Comm), paras. 13-14)

PLEASE NOTE THAT THIS ARTICLE IS FOR INFORMATION PURPOSES ONLY AND DOES NOT CONSTITUTE LEGAL ADVICE

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