TOPE ADEBAYO LP

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT CO. LTD. V. FEDERAL REPUBLIC OF NIGERIA – EXPLORING THE OPTIONS AVAILABLE TO RESIST THE ENFORCEMENT OF ARBITRAL AWARD

INTRODUCTION

It's a matter of public record that the Federal Republic of Nigeria's assets have been attached to enforce an arbitral award issued on 26 March 2021 by a UK tribunal. The circumstances leading to this are widely known and do not require further explanation. We have covered the case details in our previous instalment, "How the Concept of Attribution Applies in International Arbitration."[1]

In this piece, we explore the options available to the Federal Republic of Nigeria if she desires to resist recognition and enforcement of the arbitral award under the New York Convention of 1958. The New York Convention, a pivotal instrument in international arbitration, holds substantial influence over recognition and enforcement of an arbitral award, particularly in cases with cross-border implications.

WHAT HAS HAPPENED?

Since obtaining the arbitral award, Fucheng has aggressively pursued global enforcement actions against Nigeria's assets. This is evident in its successful attempts to ground three presidential jets in Europe and its plans to seize assets in the UK, the US, and six other countries, including Belgium, Canada, France, Singapore, and the British Virgin Islands.[2]

Other assets, such as landed properties belonging to the Federal Government of Nigeria, have also been confiscated. Fucheng is on the precipice of taking advantage of the £20 million cost awarded in favour of Nigeria against P&ID by a United Kingdom appeal court.[3]

The reason for the above development is clear to practitioners. In simple terms, it's what we would like to call "the dark side of arbitration" or any adjudicatory process where an award debtor, such as Nigeria in this case, refuses to comply with the terms of the award. We are witnessing a by-product of Fucheng's enforcement proceedings instituted in various jurisdictions. Through these proceedings, Fucheng aims to satisfy the award sum of $70,000,000 (Seventy Million United States Dollars) contained in the arbitral award.

The New York Convention

Let's begin by exploring the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the "New York Convention", a pivotal framework in international arbitration that sets the stage for our discussion. The United Nations adopted the New York Convention following a diplomatic conference held in May and June 1958 at the United Nations Headquarters in New York.[4] The New York Convention entered into force on 7 June 1959.[5]

Presently, 172 states are state parties or signatories to the New York Convention.[6] Under the convention, contracting states must recognise arbitral awards as binding. This is the purpose of Article III of the convention. However, no such obligation exists for states that are not parties to the convention.[7]

Several courts have referred to the general principle set forth by Article III as embodying the Convention's "pro-enforcement bias". For

[1] https://lnkd.in/d3svUgGq published 26 August 2024.
[2] https://punchng.com/ogun-ftz-deal-chinese-firm-targets-nigeria-assets-in-eight-countries/ accessed on 22 August 2024.
[3] https://www.arise.tv/nigeria-faces-asset-seizure-threat-as-chinese-firm-pursues-20-million-judgement-from-uk-court/ 22 August 2024.
[4] United Nations, Treaty Series, vol. 330, No. 4739; UN DOC E/CONF.26/SR. 1-25, Summary Records of the United Nations Conference on International Commercial Arbitration, New York, 20 May - 10 June 1958.
[5] New York Convention, article XII.
[6] https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 assessed on 22 August 2024.
[7] See The Attorney General of Belize v. BCB Holdings Limited and The Belize Bank Limited, Supreme Court, Belize, 8 August 2012, XXXVIII Y.B. Com. Arb. 324 (2013), in which the Belize Supreme Court ruled that it had no legal obligation to recognize and enforce arbitral awards under Article III because Belize was not a Contracting State.

example, a United States court stated that the Convention and its implementing legislation have a pro-enforcement bias, of which Article III of the Convention is illustrative.[8] The Court of Appeal of England and Wales also held that, under this principle, foreign arbitral awards are entitled to a "prima facie" right to recognition and enforcement.[9] Several other courts have expressed the same view.[10]

Nigeria, a state party to the convention, has even incorporated the convention as part of its Arbitration and Mediation Act 2023. Thus, where an international arbitral or investment award has been made against Nigeria, the award can be enforced in any state that is party to the convention. As mentioned above, there are 172 state parties to the convention. The implication is that Fucheng can initiate the proceedings to recognize and enforce the arbitral award in the 172 contracting states, including Nigeria if it is found that Nigeria has assets in these states.

Options available to Nigeria under the New York Convention to resist enforcement of the award.

We have examined the New York Convention's nature and applicability to Nigeria above. We shall now consider some of the possible options to resist the enforcement of the arbitral award under the convention. Usually, an award debtor can challenge the arbitral award by applying to set it aside on the relevant grounds.[11] Unfortunately, Nigeria no longer has this option, having failed to meet the deadlines for filing the appropriate applications at the seat of arbitration, the United Kingdom.[12]

The principal grounds for challenging an award under the convention are contained in Article V of the convention, and a cursory look at the

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wording of Article V shows that several grounds exist to resist the recognition and enforcement of an arbitral award successfully. In this instance, an award debtor just needs to furnish the enforcing court with evidence to justify any listed grounds in an application for the refusal to recognize and enforce the arbitral award.

The introductory sentence of article V (1) provides that recognition and enforcement may only be refused "at the request of the party against whom [the award] is invoked" and if that party "furnishes proof" of the grounds listed in that paragraph. By this wording, courts in the Contracting States have consistently recognised that the party opposing recognition and enforcement is burdened with raising and proving non-enforcement grounds under Article V (1).[13]

[8] Glencore Grain Rotterdam BV. v. Shivnath Rai Harnarain Company, Court of Appeals, Ninth Circuit, United States of America, 26 March 2002, 01-15539.
[9] See, e.g., Yukos Oil Co. v. Dardana Ltd., Court of Appeal, England and Wales, 18 April 2002, A3/2001/102.
[10] See, e.g., Gouvernement de la région de Kaliningrad (Fédération de Russie) v. République de Lituanie, Court of Appeals of Paris, France, 18 November 2010, 09/19535; Sojuznefteexport (SNE) (Russian Federation) v. Joc Oil Ltd. (Bermuda), Court of Appeal of Bermuda, Bermuda, 7 July 1989, XV Y.B. Com. Arb. 384 (1990); AO Techsnabexport (Russian Federation) v. Globe Nuclear Services and Supply, Limited (United States of America), District Court, District of Maryland, United States of America, 28 August 2009, AW-08-1521, XXXIV Y.B. Com. Arb. 1174 (2009).
[11] See Articles V (1) (e) & VI of the New York Convention. See also Continental Transfer Technique Ltd. v. Federal Government of Nigeria, High Court of Justice, England and Wales, 30 March 2010, [2010] EWHC 780 (Comm); IPCO v. Nigeria (NNPC), High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).
[12] https://www.thecable.ng/treaty-violation-uk-court-orders-nigeria-to-pay-chinese-firm-70m-dismisses-immunity-plea/#google_vignette accessed on 23 August 2024.
[13] See, Dutch Shipowner v. German Cattle and Meat Dealer, Bundesgerichtshof, Germany, 1 February 2001, XXIX Y.B. Com. Arb. 700 (2004); Trans World Film SpA v. Film Polski Import and Export of Films, Corte di Cassazione, Italy, 22 February 1992, XVIII Y.B. Com. Arb. 433 (1993).

Article V (2) provides that a court ex officio may observe the grounds under the second paragraph. Courts of the Contracting States have confirmed that the grounds for refusal under article V (2) do not have to be pleaded by the party opposing recognition and enforcement.[14] While Article V (2) does not explicitly allocate the burden of proof to either party, courts of the Contracting States have considered that the party opposing recognition and enforcement has the ultimate burden of proving such grounds.[15] Leading commentators on the Convention express the same view.[16]

Unfortunately, none of the grounds provided under Article V (1) (a – e) & (2) form the basis for Nigeria's resistance to the award thus far. Presently, in resisting the award, Nigeria has advanced the argument of sovereign immunity to prevent the seizure of its assets. However, this line of argument has been rejected by the Courts in England,[17] the United States[18] and France.[19] It remains to be seen whether these Courts were correct in rejecting Nigeria's argument on the applicability of the defence of sovereign immunity, seeing that the assets subject to the freezing orders of these Courts are sovereign assets that should been immune from enforcement.

Whereas the New York Convention and other related conventions govern recognition and enforcement matters and were enacted to guarantee the international respect necessary for domestic courts to enforce private foreign arbitral awards, the situation is that international arbitral agreements admit certain exceptions under which the courts may legally refuse to enforce a foreign arbitral award. One such exemption is the public policy. The meaning of the public policy exception to the enforcement of arbitral awards depends heavily on the court's own notion of what composes "public policy". Accordingly, the New York Convention contains a public policy exception that permits domestic courts to refuse to enforce a foreign arbitral award if the award violates the nation's public policy where enforcement is sought. This ground of refusal is provided based on article V (2) (b) of the New York Convention.[20]

Notwithstanding the above, although it is a stretch, we hold a conservative opinion that Nigeria might be able to limit its exposure to the part of the award that concerns damages for breach of fundamental human rights or resist the recognition and enforcement of the award altogether. A cursory look at the award, the underlying contract, the consequent dispute and the arbitration framework forms the basis of our opinion here. One of the fundamental principles of arbitration is that an arbitral tribunal should not ignore or jettison mandatory provisions of the governing law of contract or rules of procedure.[21] However, under the China-Nigeria BIT, the tribunal shall adjudicate in accordance with the law of the Contracting Party to the dispute accepting the investment, including its rules on the conflict of laws, the provisions of this Agreement as well as the generally recognized principles of international law accepted by both Contracting Parties.[22]

Additionally, where mandatory rules are applicable, parties cannot derogate from them as it can circumscribe party autonomy. Further, where a state's mandatory rules or public policy make certain subjects unarbitrable, parties cannot adamantly ignore the prescription to confer jurisdiction on an arbitral tribunal. Even though mandatory rules apply more in commercial arbitration than investor-state arbitration, that said, a treaty claim in investor-state arbitration is subject to the terms of the treaty. Treaties are signed to promote and protect investment(s) of national or state parties in any of the states. Even where not clearly expressed,

[14] See, e.g Sovereign Participations International S.A. v. Chadmore Developments Ltd., Cour d'Appel, Luxembourg, 28 January 1999, XXIV Y.B. Com. Arb. 714 (1999).
[15] See NTT Docomo Inc. v. Ultra D.O.O., District Court, Southern District of New York, United States of America, 12 October 2010, 10 Civ. 3823 (RMB)(JCF). See also the chapter of Guide on article V (2)(b), para. 57.
[16] See e.g., Gary B. Born, International Commercial Arbitration 3418-19 (2014).
[17] , https://www.lexology.com/library/detail.aspx?g=fad649a9-7724-43d0-9fad-c93a76636660 accessed on 23 August 2024.
[18] https://www.arise.tv/us-court-rejects-nigerias-sovereign-immunity-defence-in-70m-arbitration-award-to-chinese-firm/#google_vignette accessed on 26 August 2024.
[19] https://businessday.ng/backpage/article/nigerias-sovereign-immunity-does-the-french-court-set-a-precedent/ accessed on 26 August 2024.
[20] https://www.scirp.org/journal/paperinformation?paperid=108187 accessed on 31 August 2024.
[21] For example, see Article 18 of the UNCITRAL Model law. See also Article 9 (7) of the China-Nigeria BIT.
[22] See Article 9 (7) of the China-Nigeria BIT

investments are to be made under the extant laws of a state. It is, therefore, arguable that since investments are made subject to the state's laws, mandatory rules of the state are intended to apply to both the investments and disputes arising therefrom.

We note that the underlying contract is governed by Nigerian law, which includes the 1999 constitution of the Federal Republic of Nigeria. The law governing arbitration often differs from the substantive law applicable to the contract. While the law governing the arbitration deals squarely with the arbitration itself, the law governing the agreement deals with the relevant law applicable to the substantive dispute. This is known as the doctrine of separability in arbitration.[23] Under Nigerian law, some claims have been held not to be arbitrable.[24]

Against the above backdrop, section 46 (1) & (2) of the constitution stipulates that only the State High Courts have exclusive jurisdiction when a person's fundamental rights are alleged to have been infringed upon in Nigeria. This isolates any claim in this regard from arbitration altogether. However, the tribunal awarded Mr Zhao and other employees of Zhongfu Nigeria moral damages of $75,000. Going by the general principle of international arbitration, the 1999 Constitution is an applicable law to the dispute from which parties cannot derogate. We opine that, as well-intended as the tribunal was in compensating for the alleged infringement of Mr Zhao's Fundamental Human Rights, the tribunal has acted in excess of its authority and powers, which is not now at variance with the 1999 Constitution. However, we note that the part of the award affected by this observation can be severed or bifurcated from other parts of the award for recognition and enforcement. See Article V (1) (c) of the New York Convention.

Consequently, we believe our observation above may, in more detail, be canvassed at the Canadian court where the enforcement proceedings have commenced,[25] to resist the recognition and enforcement of the arbitral award under Article V (1) (c) and (2) (b). Accordingly, enforcement of the award sum, especially the relief on breach of fundamental rights, offends the mandatory rules in Nigeria and, by extension, is likely to offend the public policy of the jurisdiction of the enforcing court, which in most cases emphasizes mutual respect and reciprocal treatment of foreign laws.

For instance, Canada is a state party to the New York Convention. In the provinces of Quebec and Ontario, the grounds for resisting the recognition and enforcement of an international arbitral award are part materia with those listed in the New York Convention, which include public policy. When public policy is at issue, the Canadian court must examine the award as it relates to public policy without delving into the factual or legal findings.[26]

[23] https://www.twobirds.com/en/insights/2024/singapore/revisiting-the-doctrine-of-separability#:~:text=The%20doctrine%20of%20separability%20is%20a%20well%2Destablished%20legal%20doctrine,other%20terms%20of%20the%20contract. Accessed 31 August 2024.
[24] In Kano State Urban Development Board v. Fanz Construction Limited (1990) 4 NWLR (Pt. 142) 1, p 33, paras a-b, the Nigerian Supreme Court recognized categories of matters that are not arbitrable in Nigeria - they include: (i) indictment for an offence of a public nature; (ii) disputes arising out of an illegal contract; (iii) disputes arising under agreements void as being by way of gaming or wagering; (iv) disputes leading to a change of status such as divorce petition; and (v) any agreement purporting to give an arbitrator the right to give judgment in rem. Recently, the Nigerian Court of Appeal has extended the scope of non-arbitrability in Nigeria to tax disputes. In Esso Petroleum and Production Nigeria Ltd & SNEPCO v. NNPC (Unreported Appeal No. CA/A/507/2012; delivered on 22nd July, 2016) and Shell (Nig.) Exploration and Production Ltd & 3 others v. Federal Inland Revenue Service (Unreported Appeal No. CA/A/208/2012; delivered on 31st August 2016), the Court found that the disputes submitted to arbitration in both cases are tax-related and therefore not arbitrable in Nigeria.
[25] https://www.thecable.ng/canadian-court-orders-chinese-firm-to-seize-nigerian-jet-linked-to-opl245-saga/ accessed on 27 August 2024.
[26] https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/canada#:~:text=In%20Ontario%2C%20article%20V%20of,made%20by%20the%20arbitral%20tribunal. Accessed on 27 August 2024. [27] https://topeadebayolp.com/expropriation-of-investments-are-there-any-remedies-for-foreign-investors/ published on 1 July 2024.

CONCLUSION

In this article, we have examined the grounds for resisting recognition and enforcement of international arbitral awards under the New York Convention and explored the possible options available to Nigeria. However, given the nature of the award and the fact that the timeframe within which to set aside has since lapsed, resisting the recognition and enforcement of the award remains an arduous task for Nigeria in the circumstances of this case, particularly where the award creditor is working assiduously in the enforcement process.

However, this development urgently calls on all stakeholders to understand the far-reaching implications of international commercial contracts involving the Federal Government of Nigeria and its constituent units. In one of our other articles, "Expropriation of Investments: Are There Any Remedies for Foreign Investors," we examined some of the consequences of these contracts in the event of a breach by the Nigerian state.[27] One of the fundamental considerations is whether, beyond the optics, Nigeria is ready to be a state party to some of these international conventions.

[27] https://topeadebayolp.com/expropriation-of-investments-are-there-any-remedies-for-foreign-investors/ published on 1 July 2024.

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MEET THE AUTHORS

HARRISON OGALAGU
PARTNER
h.ogalagu@topeadebayolp.com

OLUDAYO AYENI
SENIOR ASSOCIATE

Brought to you by TALP's Dispute Resolution Department

For further enquiries, log onto www.topeadebayolp.com

Do you need to get in touch with us, to know more on how we can help you and your business? Kindly contact us by using any of the details provided below:

TOPEADEBAYO LP

25C Ladoke Akintola Street, G.R.A, Ikeja Lagos Nigeria
p: +234 (1) 628 4627
e: info@topeadebayolp.com
w: www.topeadebayolp.com