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Enforcing Arbitration Awards in Nigeria



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Enforcing Arbitration Awards in Nigeria: ‘Incapacity’ as a Ground for Refusing Recognition and Enforcement of an Arbitral Award Under Section 58(1) and (2)(a)(i) of the Arbitration and Mediation Act 2023 Does not Include Wilful Refusal or Failure by a Party to Participate in Arbitration Proceedings


The Nigerian Federal High Court, Lagos Judicial Division (the “FHC”), recently delivered a judgment in an application¹ brought by Armada Ship Management (S) PTE Limited (“ASMPL” or “the Award Creditor”) for the recognition and enforcement of a London Maritime Arbitration Association (LMAA) Award against Schiste Oil & Gas Nigeria Limited (“Schiste” or “the Award Debtor”). The Award Debtor resisted the enforcement of the award on the grounds that it was under some incapacity and could not participate in the arbitration proceedings due to the COVID-19 containment measures that were in place in Nigeria at the time the notice of arbitration was issued.

On the facts, the Court found that the lockdown and movement restriction measures that were put in place by the Nigerian government had, in fact, been lifted by the time the arbitration proceedings commenced in August 2020; the Award Debtor was given ample opportunity to participate in the proceedings (which were conducted on the basis of the documents submitted by the Award Creditor without any evidentiary hearings) and present its case but failed or refused to do so; incapacity as a ground for refusing recognition of an award under section 58(1) and (2)(a)(i) of the Arbitration and Mediation Act 2023 (the “AMA”) means some legal incapacity affecting the party's ability to enter into the arbitration agreement validly; and the Award Debtor’s wilful refusal to participate in the arbitration did not qualify as ‘incapacity’ contemplated under section 58(1) and (2)(a)(i) of the AMA.

Facts

The Award Creditor approached the FHC seeking an order recognising a final arbitral award granted in its favour in an arbitration conducted under the London Maritime

¹ In Suit No. FHC/L/CS/2322/2023: Armada Ship Management (S) PTE Limited v. Schiste Oil & Gas Nigeria Limited. Udo Udoma & Belo – Osagie acted for ASMPL.



Arbitration Association (LMAA) Rules 2017 (the “Final Award”) as binding between the parties and leave to enforce the Final Award as a judgment of the Court and to the same effect.

The Award Debtor opposed the application on several grounds, including that the arbitration clause contained in the charterparty between the parties envisaged a physical hearing at the seat of arbitration in London. However, the arbitration was conducted on a documents-only basis without a hearing or witness examination, contrary to the Award Debtor’s expectation of physical proceedings.

The Award Debtor also pleaded incapacity and inability to participate in the arbitration due to the coronavirus (COVID-19) pandemic and relied on the provisions of section 58(1) and (2)(a)(i) of the AMA to urge the Court not to recognise and enforce the award.

The Award Creditor’s Response

In its response to the Award Debtor’s objection, the Award Creditor contended that incapacity contemplated under section 58(1) and (2)(a)(i) of the AMA relates to legal incapacity, such as incapacity because of age, mental condition, or some legal disability and that concerning the Award Debtor which is a company, the issue of incapacity would be whether the Award Debtor is a juristic person with the capacity to sue or be sued in its corporate name, not operational or logistical difficulties affecting a party’s ability to participate in arbitration proceedings.

The Award Creditor further contended that the Award Debtor had ample opportunity to participate in the proceedings but chose not to do so and that assuming without conceding that incapacity encompassed a party’s inability to attend, participate or engage in the arbitral proceedings, the Award Debtor was not so incapacitated. The basis for the Award Creditor’s argument was that although by a Reference to Arbitration dated 20 April 2020 (“Reference to Arbitration”), the Award Creditor referred the dispute between the parties to arbitration under Clause 34 of the Charterparty, it was not until 26 August 2020 that the President of the London Maritime Arbitration Association (“LMAA”) appointed a sole arbitrator and the parties were informed of the appointment of the sole arbitrator by the President of the LMAA on 27 August 2020. By 27 August 2020, when the parties were informed of the appointment of the sole arbitrator, there were no longer COVID-19 lockdown or



restriction measures in Nigeria that could have hindered the Award Debtor from participating in the arbitral proceedings.

This was because although the Federal Government of Nigeria had imposed a nationwide total lockdown restricting movement from 30 March 2020, the total lockdown was lifted with effect from 4 May 2020. Thus, the Award Debtor was not incapacitated to attend, participate, or engage in the arbitral proceedings.

The Award Creditor further argued that although the Award Debtor had in an email to the Award Creditor suggested that the proceedings be suspended until the Covid-19 situation improved, by the time the LMAA appointed an arbitrator over the reference over 4 months later, the situation had significantly improved, and restriction of movements and other measures to curtail the Covid- 10 pandemic had been lifted. Still, the Award Debtor abstained from the arbitral proceedings even though the procedure was documents-only and did not require the Award Debtor to travel. The Award Creditor contended that it was clear that the Award Debtor decided, for strategic reasons, to abstain from the arbitral proceedings with the aim of using the COVID-19 pandemic as a basis for urging the Court to refuse to enforce the resultant award.

The Court's Decision

The Court delivered a judgment in favour of the Award Creditor, recognising the Final Award for enforcement and granting leave to enforce the Final Award in the same manner as a judgment of the Court and to the same effect.

Key Findings of the Court

Interpretation of Incapacity: The Court upheld the Award Creditor's submission that the term "incapacity" as a ground for refusing enforcement of an arbitral award under section 58 of AMA means legal incapacity, such as age, mental condition, or other legal disability, not inability or unwillingness to participate in proceedings and that the Award Debtor, as a corporate entity, had no such legal incapacity.



Fair Opportunity to Participate: The Court found that the Award Debtor was given ample opportunity to participate in the arbitral proceedings and present its case, but it chose to abstain and noted that a party could not claim denial of fair hearing where it failed to utilise an opportunity provided to it to participate in proceedings and present its case.

Comments

In our view, the decision of the Court in this case is unassailable given the patently frivolous nature of the Award Debtor's objection to the application for the recognition and enforcement of the arbitral award. Section 58 of the AMA sets out the grounds for a court to refuse to recognise and enforce an arbitral award. Those grounds include where "a party to the arbitration agreement was under some incapacity" (section 58(2)(i)). It should be clear that the nature of incapacity contemplated under section 58 (2)(i) of AMA relates to forming the arbitration agreement and not being unable to participate in the proceedings. To be sure, an arbitral award could be set aside or refused recognition and enforcement where a party was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise not able to present his case (sections 55(3) (iii) and 58 (2) (iii) AMA).

In our view, the substance of the Award Debtor's grounds for objecting to the recognition and enforcement of the award would seem to fall more squarely within section 58 (2) (iii) (lack of proper notice and inability to present case) rather than 58 (2) (i) which deals with legal incapacity. However, the Award Debtor anchored its objection on section 58(2) (i) of AMA for whatever reason. To the extent that the Award Debtor characterised its objection as legal incapacity under section 58 (2) (i) AMA, the objection lacked legal basis because, as rightly held by the Court, incapacity contemplated under section 58(2)(i) AMA is legal incapacity.

In any event, it would not have made any difference if the Award Debtor had properly brought its objection under section 58 (2)(iii) AMA because, as the Court found, the Award Debtor was given ample opportunity to present its case, which opportunity it failed to take. For instance, the Court found that (i) as of 26 August 2020, when the LMAA appointed a sole arbitrator for the reference, there were no longer COVID-19 restrictions in Nigeria, (iii) the Points of Claim were submitted on 24 September 2020 and there was a direction by the tribunal that the Award Debtor serve its defence within

28 days which direction the Award Debtor failed to comply with, (iv) the tribunal made a peremptory order on 25 June 2021 directing the Award Debtor to submit its defence failing which the arbitration would proceed without the Award Debtor's defence, (v) on 15 July 2021 the tribunal issued direction on the mode of service of the peremptory order and the award (when issued) on the Award Debtor, and (vi) the tribunal's directions of 14 July 2021 were served on the Award Debtor with proof of service provided to the tribunal.

Consequently, the Court held that the Award Debtor was given ample opportunity to present its case, which opportunity it failed to take up and that a party who was given an opportunity to participate in judicial proceedings but failed or refused to take up such opportunity cannot turn around and complain of lack of fair hearing.

The fact that the Award Debtor could conjure up "incapacity" to participate in the arbitration as a ground for resisting the enforcement of the arbitral award despite evidence on record that it was afforded ample opportunity by the arbitral tribunal to participate in the arbitration proceedings reinforces the growing perception that arbitration has become a preliminary skirmish before litigation. Arbitration will only remain viable for settling commercial disputes to the extent that the parties are willing to accept the outcome in good faith. Arbitral awards should only be challenged in truly deserving circumstances, and a situation where parties conjure up all sorts of grounds to seek to set aside or resist the enforcement of arbitral awards does not augur well for arbitration as an alternative to litigation.

The only safeguard against this abusive challenge to enforcing an arbitral award is a judiciary that will hold the parties to their bargain. We are pleased that the Court was able to see through the Award Debtor's frivolous challenge to the award, thereby affirming the pro-arbitration stance of the Nigerian courts and signalling to the arbitration community that the Nigerian courts will not set aside or refuse to recognise an award except in truly deserving circumstances.

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