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Key Contacts

Adewale Atake, SAN
Partner and Head,
Dispute Resolution
adewale.atake@templars-law.com

Orji Agwu Uka
Senior Associate
Dispute Resolution
orji.uka@templars-law.com

TEMPLARS ThoughtLab

Error of Law on the Face of the Award – the Arbitration and Mediation Act 2023 Comes to the Rescue

Introduction

One of the thorniest questions in the field of international arbitration is the question of whether, and to what extent, national courts, when called upon to set aside an arbitral award or to refuse its recognition and enforcement, can undertake a review of the arbitral award on the merit. The posterchild for this controversy is the oft-cited case of *Dallah v. Pakistan* where the UK Supreme Court[1] and the Paris Cour d'Appel[2], within three months of each other, arrived at two contradictory decisions on the enforceability of an arbitral award rendered against the Government of Pakistan. The conflicting decisions stemmed from the varying degree of review of arbitral awards permitted under both legal systems.

In the context of domestic or Nigeria-seated international arbitrations, this controversy finds expression in the phrase, ***"error of law on the face of the award"*** and has inhibited the growth and development of the field of commercial arbitration in Nigeria for decades. This article explores how the Arbitration and Mediation Act 2023 (the "AMA")[3] appears to have, in one stroke, laid the controversy to rest in Nigeria.

Recourse Against Arbitral Awards

There is no gainsaying the fact that the end-product of arbitration; the whole essence of the arbitral process, is the arbitral award. Thanks to the instrumentality of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention"), arbitral awards are potentially enforceable by the national courts of any of the 172 contracting States to the New York Convention.[4]

[1] Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan, UK Supreme Court, 3 November 2010 [2010] 3 WLR 1472.
[2] Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan, Cour d'Appel, Paris 17 February 2011.
[3] The AMA, which was enacted on 26 May 2023, repealed the Arbitration and Conciliation Act 1988 and inter alia provides a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation.
[4] See https://www.newyorkconvention.org/countries last assessed on 20 October 2023 at 13:14 hours. On 17 January 2023, Timor-Leste became the 172nd State to accede to the New York Convention.

Nonetheless, there is limited scope for an award debtor to resist the recognition and/or enforcement of arbitral awards or to even seek for the award to be set aside.

The New York Convention outlines seven broad grounds on which the recognition or enforcement of a foreign arbitral award may be refused.[5] The New York Convention also recognises[6] that an arbitral award may be set aside or suspended by the courts of the country in which, or under the law of which, that award was made.[7]

Two illustrative circumstances where an award may be set aside, or its enforcement successfully resisted are 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. Another, but more problematic instance, is where the award debtor invites the enforcing court to undertake a review of the award, akin to an appeal, with a view to setting aside such award. While most arbitration friendly jurisdictions do not permit this, a few do.[8]

The prevailing judicial attitude in Nigeria has always been that national courts generally have no power to re-open an arbitral tribunal's findings of fact and/or law.

There is a generally accepted saying that "parties take their arbitrator for better or for worse both as to decision of fact and decision of law."[9] Additionally, cases such as **Baker Marine v. Danos & Curole**[10] and **Triana Ltd v. UTB Plc**[11] are authorities for the view that having willingly agreed to resolve their dispute by arbitration and proceeded to choose their tribunal, parties are bound by the decision of such arbitrator(s) even when the tribunal comes to an erroneous decision in law, or his finding of fact is baseless.[12]

However, for the thirty-five years that the Arbitration and Conciliation Act ("ACA") remained in existence, the practice of arbitration in Nigerian was hampered by the tension between the principle that "parties take their arbitrator for better or for worse both as to decision of fact and decision of law" on the one hand and the rule that permitted courts to set aside awards on grounds of error of law on the face of the award on the other hand.

History of the "error on the face of the award" defence

It is notable that the phrase "error on the face of the award" was not contained in any part of ACA. Under sections 29 & 30 of the ACA, an award could be set aside where an arbitrator exceeded the scope of his jurisdiction or where an arbitrator misconducted himself. However, the Act was silent on the meaning of 'arbitrator misconduct' and the courts had to step in to fill that lacuna. It was against the foregoing background that the Court of Appeal in **Kano State Urban Development Board v. Fanz Limited**[13] and the Supreme Court in the case of **Taylor Woodrow (Nig) Ltd v. Suddeutsche Etna-Werk GmbH**[14] had to make recourse to the common law meaning of 'arbitrator misconduct' and extended it to include where there is an error in law on the face of the award.

Instructively, in characterising error of law on the face of the award as a form of arbitrator misconduct in the *Kano State Urban Development Board* and *Taylor Woodrow* cases, and thereby elevating it to the status of a ground to set aside an arbitral award under the ACA, the Court of Appeal and the Supreme Court both relied on the views expressed in the 4th Edition of Halsbury's Laws of England, an

encyclopaedia of the laws of England and Wales, where the learned authors opined that an arbitrator's award may be set aside for error of law appearing on the face of it.

The learned authors of Halsbury's Laws of England obviously relied on the English law position where the English Arbitration Act provides for the challenge of an award on grounds of serious irregularity or for an appeal against a question of law arising out of an award.[15] Notably, such provisions were not contained in the ACA.

Further, Section 81 of the English Arbitration Act 1996 provides that nothing in the Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on ground of errors of fact or law on the face of the award, which is suggestive of the conclusion that there was a time under English law when courts had jurisdiction to set aside or remit an award on ground of error of fact or law on the face of the award, but such power no longer exists. It is therefore reasonable to conclude that the *Kano State Urban Development Board* and *Taylor Woodrow* decisions may have been reached *per incuriam* in that the courts wrongly relied on Halsbury's Laws of England to decide that a Nigerian court could set aside an award on the ground of error of law on the face of the award.

Admittedly, Nigerian courts consistently expressed the views that the jurisdiction to set aside an award on grounds of error of law appearing on the face of the award was not lightly to be exercised. For instance, the Court of Appeal in the *Kano State Urban Development Board* case at page 98 para. H per Akpata JCA (as he then was) stated, *"if every error of law would necessitate a reversal of the award, the consequences would be that the court would in almost every case be called upon to interfere, a consequence which would materially impair the usefulness of arbitration."* This did not prevent the error of law defence from growing to the status of an omnibus defence relied on by unscrupulous parties to challenge otherwise good awards.

Thus, for years, Nigerian courts were faced with the challenge of how to effectively prevent parties from re-opening a tribunal's findings of fact and law in the name of searching for an error of law on the face of the award, and more importantly, how to ensure that parties stopped unduly unburdening the courts with such requests. This was the state of affairs that existed until the enactment of the AMA.[16]

Innovations of the AMA

[5] Article V(1) & (2) of the New York Convention 1958.
[6] Article V(1)(e) of the New York Convention 1958. While the New York Convention does not expressly state the grounds for setting aside an arbitral award, Article 34 of the UNICTRAL Model Law 1985 (as amended in 2006) stipulates grounds for setting aside and these grounds mirror the grounds for resisting recognition or enforcement under Article V (1) & (2) of the New York Convention.
[7] This phrase refers to the procedural law of the arbitration, which almost always means the law of the Seat of the arbitration. On rare occasions, the parties may agree on a foreign procedural law as the law governing the arbitral process. Thus, this phrase can refer to the Law of the Seat or the law of the State under which the award was made. See the decision of the United States Court of Appeals in **Process & Indus. Dev. Ltd. v. Fed. Republic of Nigeria**, 962 F.3d 576 (D.C. Cir. 2020).
[8] An illustrative example is the English Arbitration Act 1996 which provides in Section 69 that a party to arbitral proceedings may appeal to the court on a question of law arising out of an award made in the proceedings.
[9] **Aye-Fenus Enterprise Ltd v. Saipem** [2009] 2 NWLR (Pt. 1126) 483; **Mutual Life & General Insurance Limited v. Kodi Iheme** [2013] 2 CLRN ...;
[10] [2001] 7 NWLR (Pt. 712), p. 355 para A.
[11] [2004] 12 NWLR (Pt. 1155) 313.
[12] The Supreme Court restated this in the case of **Mekwunye v. Imoukhuede** (2019) 13 NWLR (Pt. 1690) 439.
[13] (1986) 5 N.W.L.R. (Pt. 39) 74.
[14] (1993) 4 NWLR 127.
[15] Sections 68 & 69 of the English Arbitration Act 1996.
[16] Despite the enactment of the AMA, Nigerian courts are still grappling with the challenge of considering applications to set aside or refuse the enforcement of an arbitral award on grounds of error of law, especially in cases commenced under the ACA. In an unreported judgment in NICN/433/2022 **Mrs. Ike Oluchukwu v. Baker Hughes Company Limited** delivered on 12 October 2023, the National Industrial Court, Lagos *coram* Honourable Justice E.A. Oji, PhD refused to set aside an arbitral award, and part of the grounds on which the award debtor sought to have the award set aside was that the tribunal made an error of law on the face of the award.

That the AMA contains several innovative provisions is no longer news. Some of these provisions include the provisions on third-party funding; the suspension/tooling of limitation period during the pendency of arbitration proceedings; the introduction of the mechanism of award review; etc. These have formed the bases of various legal and academic interventions and will continue to do so for the foreseeable future. This publication is only concerned with the innovative provisions in the AMA relating to the recourse against arbitral awards, specifically the defence of error of law on the face of the award.

Sections 55 & 58 of the AMA contain the provisions that prescribe the recourse that may be made against an arbitral award. The AMA in Section 55(1) provides that recourse to a court against an arbitral award may be made only by an application for setting aside the award in accordance with subsections (3) and (4).

The purport of the foregoing is that the AMA has removed 'misconduct' as a ground for setting aside arbitral awards and as Bozimo and Rhodes-Vivour correctly argued[17], the 'misconduct' ground was "often being misused in many Nigerian cases due to its non-exhaustive definition – it was perceived as an ambiguous ground through which several frivolous challenges were being frequently raised with the aim of avoiding or delaying compliance with otherwise standard good awards."

More significantly, the AMA specifically provides as follows in Section 55(2):

> (2) An application for setting aside an arbitral award shall not be made on the ground of an error of law on the face of the award, or any other ground except those expressly stated in subsection (3).

On its part, Section 58 of the AMA provides that a party to an arbitration agreement may request the Court to refuse recognition or enforcement of an award and that the Court may, irrespective of the country in which the award was made, refuse recognition or enforcement of the award only if the party resisting the award furnishes the Court with proof that any of the exhaustive circumstances outlined in the Section has occurred.

In an arbitration survey published in 2021, the Templars Dispute Resolution team undertook a review of arbitration-related court decisions in Nigeria between 1990 and 2021, concerning the enforcement of arbitral awards, the challenge of arbitral awards, the challenge of arbitration agreements, and the challenges to arbitrator appointments. The survey revealed that the courts set aside, or refused to enforce, arbitral awards in 17.1% of the cases reviewed.[18] While the report did not contain a breakdown of the reasons or grounds on which the courts set aside or refused enforcement, it is not too difficult to hazard a guess that error on the face of the award constituted a significant portion of the reasons. It is in this light that we must appreciate the significance of Section 55(2) of the AMA which has barred the error of law on the face defence.

The only downside to the AMA is the difference between the language employed in relation to the set aside provisions under Section 55 of the AMA and that of the refusal of enforcement provisions under Section 58 of AMA. As noted above, after providing that the only grounds for setting aside an award are those in Section 55(3) and (4), the

[17] Isaiah Bozimo and Adedoyin Rhodes-Vivour, SAN, 'Nigeria: Aligning with global standards in arbitration and mediation' available at Nigeria: Aligning with global standards in arbitration and mediation | ALB Article (africanlawbusiness.com) last assessed on 12 October 2023.
[18] Templars, Arbitration Report on Nigeria available at TEMPLARS ARBITRATION REPORT ON NIGERIA 2020.cdr (templars-law.com) last assessed 20 October 2023 at 17:29 hours.

AMA went ahead to provide in Section 55(2) that application to set aside shall not be made on grounds of error of law on the face of the award. The AMA does not contain an equivalent provision in relation to Section 58 of AMA which concerns applications seeking to refuse recognition and enforcement of awards. Hopefully, unscrupulous parties do not rely on this to contend that while awards may not be set aside on grounds or error of law, the courts may however refuse recognition and enforcement of awards on grounds of error of law.

Conclusion

It has been stated elsewhere that owing to the well documented benefits of arbitration as a dispute resolution mechanism, different countries have increasingly come to compete through legislation and court decisions to have their jurisdictions perceived as arbitration friendly.

By taking away the powers of Nigerian courts to undertake a merit review of awards – which powers the courts had under the guise of considering whether there was an error of law on the face of the award – the AMA has largely preserved the sanctity of arbitral awards in Nigeria and enhanced Nigeria's quest to be perceived as an arbitration friendly jurisdiction.

It is for this reason that we take the view that Section 55(2) of the AMA is perhaps the most transformative of all the innovative provisions of the AMA.

As we continue to come to terms with the innovative provisions of the AMA, it is imperative to commend the lawmakers for this positive development and it is our hope that the practice of arbitration in Nigeria will significantly benefit from this innovation.