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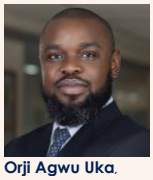

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TEMPLARS ThoughtLab

The Power of a Nigerian Court to Set Aside a Foreign Arbitral Award: *Where Do Things Stand?*

Introduction

Nigeria continues to express a strong aspiration to be seen as an arbitration-friendly jurisdiction and a leading hub for commercial arbitration in sub-Saharan Africa. In line with global trends, countries now increasingly compete through progressive legislation, judicial decisions, and policy reforms to position themselves as favourable seats of arbitration, owing to the well-recognised advantages of arbitration as a dispute resolution mechanism. However, one unresolved question continues to cast doubt on these efforts: can a Nigerian court set aside a foreign arbitral award or injunct foreign arbitral proceedings? This publication revisits that critical question in light of recent decisions from the Nigerian Court of Appeal and courts of first instance and considers the implications for Nigeria's broader arbitration ambitions.

Background

Article III of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), imposes an obligation on each contracting state to recognise foreign arbitral awards as binding and to enforce them. Nigeria is one of the State parties to the New York Convention.[1] Accordingly, where an arbitral award is delivered by an arbitral tribunal in accordance with the parties' agreement, and the award debtor fails or refuses to voluntarily comply with the terms of the award, the award creditor is at liberty to approach the national courts of any of the 172 Contracting States to the Convention (where the award debtor has assets) to enforce the award.

[1] Nigeria acceded to the New York Convention on 17 March 1970, and it entered into force in Nigeria on 15 June 1970.

There are, however, two options open to an award debtor, that is apart from voluntarily complying with the terms of the award. The award debtor may either request a court to refuse to recognise or enforce the award or may apply to a court to set aside the award in its entirety. As discussed below, these are two distinct concepts.

Under Article V of the New York Convention, there are seven grounds under which a court may lawfully refuse the recognition and enforcement of an award, and these include where the arbitral award arises from a dispute which is not capable of settlement by arbitration (arbitrability defence) or where the recognition or enforcement of such award would be contrary to the public policy of the enforcing country (public policy defence). The provisions of Section 58 of the Arbitration and Mediation Act 2023 (AMA) substantially mirror the New York Convention. One of the consequences 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.

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. This is because Article V (e) of the New York Convention states that one of the grounds on which a court may validly refuse recognition and enforcement of an award is where the award has been set aside or suspended "by a competent authority of the country in which, or under the law of which, that award was made." 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 anywhere else. 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 or the country under whose law, the award was made.

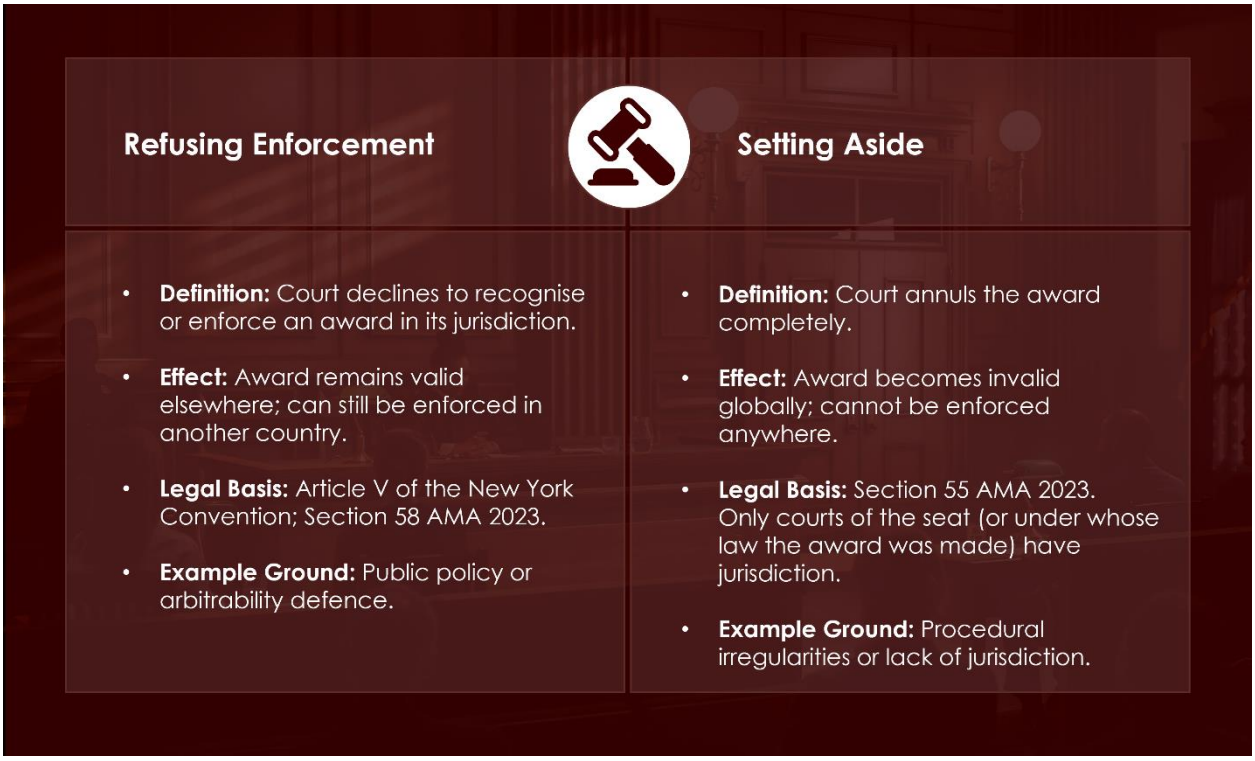
The phrase, "the country in which, or under the law of which, an award was made" simply refers to the seat of the arbitration or the country under whose law the award was made.[3] More often than not, these refer to the same country, although in rare cases, there may be a distinction between the two.[4]

This arbitral seat is the country that has primary or supervisory jurisdiction over the arbitration proceedings. It is the only country whose laws govern the procedure for the arbitration; whose courts, the parties may approach for reliefs in aid of arbitration; and whose courts have exclusive jurisdiction to set aside an award in deserving cases[5] or in rare cases, to injunct the arbitration proceedings.[6]

Admittedly, there have been attempts in the past to introduce the concept of 'delocalisation' which seeks to adopt a flexible or transnational approach to international commercial arbitration and to free the arbitration process from the procedural laws of any specific country. The best that can be said about the concept is that it has so far failed to take off especially in the common law world.

Before now, the question whether a Nigerian court has the power to set aside a foreign seated arbitral award has been without controversy; that Nigerian courts do not have the jurisdiction to set aside foreign arbitral awards. At best, a Nigerian court could refuse enforcement. In ***Adwork Ltd v. Nigeria Airways Limited***[7], an eminent panel of the Court of Appeal, Lagos Division[8] was asked whether a Nigerian court could set aside

[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] This distinction was highlighted 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)*.
[5] 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).
[6] An interesting scenario played out in the infamous *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria* arbitration that ultimately went under the radar. After the Tribunal published the liability award, Nigeria initially applied to set aside the award in England. However, having failed to apply within time, the English court refused the application. Thereafter, Nigeria approached the Federal High Court, Lagos and obtained an order purporting to set aside the entire proceedings and the award. Not being the court of the seat, the tribunal simply ignored the order of the Nigerian Court and proceeded to the quantum stage of the proceedings, with Nigeria fully participating.
[7] *[2002] 2 NWLR (Pt 645) 415 at 431 [D]*.
[8] Oguntade, Aderemi, Nzeako, JJCA.



an arbitral award rendered in London, United Kingdom. Oguntade, JCA (as he then was) made it clear that the High Court of Lagos State had no jurisdiction to sit on appeal over the decision of an arbitrator in England.

The Limak Decisions

It was against the foregoing backdrop that in 2020, the FCT High Court was presented with a request to set aside an arbitral award by an ICC Tribunal seated in Switzerland in two consolidated suits with Nos CV481/18 CV/2443/18. In those cases, the respondent's counsel had argued that since Section 48 of the Arbitration and Conciliation Act (ACA) provided for setting aside an award, a Nigerian court could indeed set aside an award, regardless of its seat. In its ruling, the FCT High Court, Coram Halilu J. agreed with the respondent and held *inter alia:*

> *"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."*

The above decision resulted in two sister appeals to the Court of Appeal in Appeal Nos CA/A/CV/795/2020[9] and CA/A/CV/796/2020.[10] In its judgments, the Court of Appeal upheld the reasoning of the FCT High Court and held per Ige, JCA that by a community reading of sections 48, 51 and 52 of the ACA:

> *"Courts in Nigeria including the High Court of the Federal Capital Territory, the lower Court, are … expressly empowered and conferred with jurisdiction to set aside an arbitral award made outside Nigeria upon an application of a party to the arbitration irrespective of the Country in which it is made within the limited circumstances listed or enumerated in Sections 48 and 52 of the Arbitration and Conciliation Act…"*

[9] *Limak Yatirim Enerji Uretim Isletme Hizmetleri ve Insaat A. S. & ORS v. Sahelian Energy & Integrated Services Ltd* (2021) LPELR-58182.
[10] *Limak Yatirim Enerji Uretim Isletme Hizmetleri ve Insaat A. S. & ORS v. Sahelian Energy & Integrated Services Ltd* (2021) LPELR-56408.

In the CA/A/CV/796/2020 judgment, the Court of Appeal per Ige, JCA also stated 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."*

Clearly, the **Limak** decision is at variance with what obtains in other jurisdictions and, as noted earlier, it is also inconsistent with previous Nigerian case law on the point. Apart from ***Adwork Ltd v Nigeria Airways Limited***[11], Nigerian courts have consistently given effect to the provisions of section 34 of the ACA, which is *in pari materia* with section 64 of the AMA by holding that a court in Nigeria has no powers to intervene in the arbitral process except as provided under the Act.[12]It is for this reason that the Court of Appeal in ***Ecobank Nigeria Ltd v Aiteo Eastern E&P Limited & Ors***[13] held that a Nigerian court could not interfere with foreign proceedings by purporting to grant an injunction to restrain a London-seated ICC arbitration.

Oil & Industrial Services Limited v. Hempel Paints

The Port Harcourt Judicial Division of the Court of Appeal was recently presented with a golden opportunity to either reinforce its decision in **Limak** or overrule the same in the interest of legal certainty in the case of ***Oil & Industrial Services Limited v. Hempel Paints (South Africa) PTY Limited***).[14]

The respondent in the appeal had applied to the High Court of Rivers State to enforce an arbitral award by a London Court of International Arbitration (LCIA) tribunal. On its part, the appellant applied to the court to set aside the award. After hearing from both parties, the court declined to set aside the award on the basis that it lacked jurisdiction to set aside a London-seated arbitration. The court also proceeded to recognise and enforce the award. Aggrieved, the appellant appealed to the Court of Appeal.

In dismissing the appeal, the Court of Appeal per Williams-Dawodu, JCA held:

> *"Upon examining the application, the Court concluded and correctly that it had no jurisdiction to set aside the arbitral award rendered under the Rules of the London Court of International Arbitration, which venue was the seat of the arbitration."*

Tempo Energy Nigeria Limited v. Aiteo Eastern E&P Company Limited

Any faint hopes that the Court of Appeal has settled the controversy surrounding the question of the power or jurisdiction of a Nigerian court to set aside foreign arbitral awards were dashed by the FCT High Court once again in the recent case of ***Tempo Energy Nigeria Limited v. Aiteo Eastern E&P Company Limited & Co.***[15]

In that case, the FCT High Court had granted an interim order on 22 January 2021 restraining the defendants from continuing with arbitration proceedings before an ICC Tribunal seated in London comprising Geoffrey Ma, Mo Colin Edelman KC and the Rt Honourable Lord Neuberger of Abbotsbury. Not being the court with supervisory supervision i.e. the court of the seat, the ICC Tribunal ignored the order and proceeded with the arbitration. At the time of the ruling, the proceedings had been

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[11] *[Supra]*.

[12] See *Nigerian Agip Exploration Limited & Anor v N.N.P.C (Unreported Judgement of the Court of Appeal in CA/A/628/2011); The Shell Petroleum Development Company Limited v. Crestar Integrated Natural Resources Ltd (2015) LPELR-40034(CA)*. See also the Unreported Ruling of the Federal High Court, Lagos in Suit No. FHC/L/CS/1467/2023 *Niger Deta Petroleum Resources Limited v. The Shell Petroleum Development Company Limited* delivered on 1 November 2024 where the Court Coram Bogoro J set aside an interim order of injunction and also dismissed an application for interlocutory injunction seeking to restrain arbitration proceedings.

[13] [2022] LPELR-56994 (CA).

[14] *Unreported Judgment of the Court of Appeal in Appeal No. CA/PH/177/2020 delivered on 24 January 2025.*

[15] *Unreported Judgment of the High Court of the Federal Capital Territory in Suit No. FCT/HC/CV/079/2021 delivered on 8 July 2025 Coram Belgore J.*

concluded, and the parties were awaiting the arbitral award. The applicant applied to the court to nullify the entire proceedings in the ICC arbitration for having been continued in breach of the FCT High Court's interim order and the court agreed, granted the application and declared the arbitration as null and void, "including any purported award arising from such null proceedings."[16]

Analysis of the Decisions and Where Things Stand

For the reasons already set out above, we believe that the **Limak** appeals were wrongly decided. Clearly, the Court of Appeal conflated the distinct concepts of *refusing to recognise an award* and *setting aside or annulment of an award*.

There is nothing in Section 48 of the old ACA [under which the **Limak** appeals were decided] that empowers a Nigerian Court to set aside a foreign arbitral award. The fact that the said Section 48 was contained in Part III of the ACA which dealt with "international commercial arbitration" does not alter this analysis. Instead, the section merely empowered Nigerian courts to set aside 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.[17]

Another point which the Court of Appeal apparently missed in the **Limak** appeals is that the phrase, "irrespective of the country in which the award is made" was contained in section 52(2) of the ACA which dealt with refusal to recognise or enforce an award. This is wrong. There was no such phrase in section 48 which dealt with setting aside an arbitral award.

Interestingly, Williams-Dawodu, JCA who delivered the judgment of the Court of Appeal in **Hempel Paints** was one of the Justices that heard the **Limak** appeals. It is therefore somewhat surprising that the judgment made no reference whatsoever to the **Limak** decisions even though they were brought to the attention of the Court by counsel. Further, in view of the importance of the issue and controversy raised by **Limak**, the issue certainly merited more analysis than what was ultimately offered by the Court of Appeal.

In the circumstances, since the "latter in time" rule does not apply to decisions of the Court of Appeal, both **Limak** and **Hempel Paints** remain good law albeit in conflict, and it is now left for the Supreme Court to resolve the question.

As for the FCT High Court ruling in **Tempo Energy**, the basis on which the court nullified the proceedings was that its interim order of 22 January 2021 was disobeyed by the respondents. With respect, this is no justification for exercising the powers that the court does not possess. Nigerian adjectival law has adequate provisions for dealing with a party who disobeys an order of court.

Conclusion

When the Court of Appeal handed down the **Limak** judgments, it was hoped that the decisions would be remembered as a mere blip and an exception to the general rule, and that given the opportunity, the Court of Appeal would promptly set the record straight and restore matters to business as usual. While the **Hempel Paints** decision is certainly a welcome development, the Court of Appeal should not have passed on the opportunity to overrule **Limak.** In doing so, the court paved the way for a decision such as **Tempo Energy** and potentially similar decisions from other first instance courts that we may not even be aware of. The confusion and uncertainty generated by these decisions will linger until such a time as the Supreme Court is presented with the opposition to clarify the position. We hope that the apex court will seize the moment and rise to the occasion if called upon to do so.

If you require any further clarification, do not hesitate to contact us.

[16] Curiously, neither **Limak** nor **Hempel Paints** was considered by the FCT High Court in this case.
[17] This is also the position under section 55 of the AMA.