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Nigeria's $10 Billion Article V(1)(e) Off-Ramp and the Niggling Issue of Set-Aside or Annulled Awards

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The permissive language of Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") continues to tease parties challenging recognition and enforcement of arbitral awards with the prospects of success. That is the case for Nigeria in its latest efforts to fend off the confirmation of a $10 billion arbitral award that has spurred parallel litigations in the United States and England, and criminal investigation proceedings in Nigeria. As discussed below, Nigeria has had some success invoking Article V(1)(e) when resisting the confirmation of an arbitral award, but it remains to be seen what vagaries lie ahead for it this time.

On March 11, 2022, the D.C. Circuit affirmed a 2020 ruling of the United States District Court for the District of Columbia permitting the confirmation of a $10 billion arbitral award against Nigeria to proceed over Nigeria's jurisdictional objections. The action against Nigeria was filed in the district court by Process and Industrial Developments, Ltd ("P&ID") following an arbitration held in London. *Process & Indus. Developments Ltd. v. Fed. Republic of Nigeria*, 18-CV-594 (CRC), 2020 WL 7122896 (D.D.C. Dec. 4, 2020), aff'd on other grounds, 21-7003, 2022 WL 727292 (D.C. Cir. Mar. 11, 2022). Nigeria moved to dismiss, arguing that it was immune from the jurisdiction of U.S. courts under the Foreign Sovereign Immunities Act ("FSIA"). In response, P&ID argued that the case fell under the FSIA's arbitration exception and its waiver exception to sovereign immunity.

The FSIA's Waiver and Arbitration Exceptions

The waiver exception applies to any action "in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." 28 U.S.C. § 1605(a)(1).

The FSIA's arbitration exception provides that "a foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case … in which the action is brought … to confirm an award made pursuant to … an agreement to arbitrate, if … the agreement or award is or may be governed by a treaty or other international agreement in force … calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6).

The District Court's Ruling

The district court agreed with P&ID that the waiver exception applied, holding that Nigeria impliedly waived sovereign immunity by joining the New York Convention. In so holding, the district court relied on the Second Circuit's decision in *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572 (2d Cir. 1993)*. In *Seetransport*, the Second Circuit held that the FSIA's waiver exception applies if the foreign sovereign is a party to the New York Convention and has agreed to arbitrate in a Convention state. The district court declined to resolve whether the arbitration exception applied given the plausible argument by Nigeria that the arbitration exception did not apply because P&ID lacked a valid and enforceable arbitral award. Nigeria argued that the award was not valid and enforceable because a Federal High Court of Nigeria (a first instance court) set aside the award.

The D.C. Circuit's Ruling

On appeal, the D.C. Circuit affirmed the district court's ruling based on the arbitration exception instead of the waiver exception. In response to Nigeria's argument that the arbitration exception could not apply because the award had been set aside, the D.C. Circuit held that the validity or enforceability of an arbitral award was a merits question that did not affect the district court's subject matter jurisdiction under the FSIA.

Commentary

The D.C. Circuit's ruling that the validity or enforceability of an arbitral award is a merits question that does not affect the district court's subject matter jurisdiction under the FSIA potentially improves the speed of adjudication of confirmation proceedings.

Under the New York Convention, recognition and enforcement of an award may be refused if 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." Article V (1)(e) of the New York Convention. While the arbitration took place in London, the agreement between Nigeria and P&ID provided that the Nigerian Arbitration and Conciliation Act would apply to any dispute between the parties. Nigeria's arguments against the application of the arbitration exception were predicated on the premise that Nigerian courts had the power to set aside the award (as the award was "made" under the Nigerian Arbitration and Conciliation Act) and that an award validly set aside at the seat of arbitration ceases to have legal effect and could not be confirmed. (It is probable that Nigeria will also raise this as a defense to the merits of the enforcement action by P&ID under Article V(1)(e).)

P&ID's counterargument was that England, not Nigeria, was the seat of the arbitration, and thus only English courts may set aside the award. On this point, P&ID relied on Nigeria's prior admission, in a previous application to an English High Court, that an action challenging the arbitration award would have to be before the English courts. In addition, P&ID relied on the fact that the tribunal that handed down the award had previously recognized England as the arbitral

seat. The award has neither been confirmed nor set aside in England because Nigeria secured an unprecedented extension of time to challenge the award on grounds that the arbitration agreement and the underlying agreement were procured by fraud. *Federal Republic of Nigeria v. Process & Industrial Development Ltd.* [2020] EWHC 2379 (Comm) [¶¶274–77] (Eng.).

Would Crystal-Gazing the Outcome of the Merits Stage be Misleading?

Now that the confirmation action is set to proceed to the merits stage, it is worth considering what, if any, chances exist for Nigeria to successfully resist confirmation on the grounds that the award has been set aside in Nigeria. While neither the D.C. Circuit nor the district court has ruled on the merits of P&ID's confirmation action, it is notable that the D.C. Circuit has remarked, in a separate but related proceeding, that Nigerian courts were probably competent to set aside the award. *Process & Indus. Developments Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 584 (D.C. Cir. 2020). And the district court has noted that "it appears likely that both English and Nigerian courts had the power to set aside the award." *Process & Indus. Developments Ltd. v. Fed. Republic of Nigeria* (District Court, District of Columbia 1:18-cv-00594).

In any case, the D.C. Circuit has dealt with a similar question of whether to confirm an award that had been set aside at the seat. In 2007, the D.C. Circuit issued its opinion in *TermoRio v. Electranta*, holding that the New York Convention "does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary." *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 937 (D.C. Cir. 2007). Although the D.C. Circuit is "very careful in weighing notions of 'public policy' in determining whether to credit the judgment of a court in the primary State vacating an arbitration award," it declined to confirm an award that had been set aside in Colombia, because nothing in the record indicated that the Colombian proceedings were fatally flawed or unauthentic. *Id.* at 937, 941.

Similarly, Nigeria has had some success in other courts arguing against the confirmation of an award set aside by a court in Nigeria. In *Esso Exploration*, the Southern District of New York refused to confirm an award that had been set aside in Nigeria because a final judgment obtained through sound procedures in a foreign country is generally conclusive, and the public policy exception is narrow. The standard is high, and infrequently met. *Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petroleum Corp.*, 397 F. Supp. 3d 323, 355 (S.D.N.Y. 2019). This case is currently on appeal to the Second Circuit.

Conclusion

Both *TermoRio* and *Esso Exploration* might be indicative of how the courts would treat Nigeria's set-aside arguments at the merits stage. However, it remains to be seen how P&ID's counterargument – that England is the seat of the arbitration – impacts the district court's analysis. Therefore, it is unclear whether Article V(1)(e) will provide Nigeria with the off-ramp from enforcement of the award that it is seeking.

Regardless of the outcome, a decision on Nigeria's set-aside arguments will likely rekindle the debates about comity (or the lack thereof) in the review of set-aside awards and the lack of

uniformity in the approach towards set-aside awards among parties to the New York Convention.

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