Africa and Arbitration: Predicting the future through historical lenses

Enforcement of awards: challenges and practical considerations

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1. Introduction

The past 10 years have seen a significant increase in investment in Africa. From around US$15 billion in 2007, FDI is projected to rise to around US$150 billion by 2015.

With 7 African countries among the 10 fastest growing economies in the world[1], all the economic activity has resulted in a significant increase in commercial arbitrations seated locally or abroad. At my last count, there were around 30 local arbitration or ADR centres offering arbitration services.

On top of that, there are the international centres promoting their activities, and setting up regional bases. The LCIA and ICC estimate around 10% of their annual arbitrations are African related, and this figure will almost certainly grow. Looking at investment treaty arbitrations, African arbitrations as of 2013 made up over 20% of all ICSID claims.

In the past few years, a number of important decisions have been rendered by the Commercial Court and the Court of Appeal in London arising out of several cases where arbitration awards rendered in Africa have been registered in London, and attempts made to enforce those awards.

Such cases highlight the tensions between developing domestic arbitration regimes and the legal and practical difficulties faced when the winning party seeks to enforce that award abroad.

Enforcement is a vast topic, and I am going to concentrate only on the enforcement of African Awards in England under the New York Convention 1958.

2. Recognition and Enforcement of Awards

There are a number of relevant conventions and legislation when it comes to enforcement which are relevant in the African context and they are listed in the slide.

New York Convention 1958

ICSID Convention 1965 - Convention on Settlement of Investment Disputes Between States and Nationals of other states – International Centre for Settlement of Investment Disputes, Washington 1965.

Regional arrangements (OHADA – Organisation pour l'Harmonsation en Afrique du Droit des Affaires)

[1] Ethiopia, Mozambique, Tanzania, Democratic Republic of Congo, Ghana, Zambia, Nigeria (Ernst & Young 2012 Building Bridges).

Riyadh Convention on Judicial Cooperation 1983 [Tunisia, Algeria, Morocco, Mauritania, Somalia, Sudan]

Reciprocal enforcement legislation/ Treaties on judicial co-operation

New York Convention 1958

The New York Convention is widely recognised as a cornerstone of enforcement in international arbitration. It is the most commonly used tool by which awards made in Africa are enforced outside Africa.

33 of the 54 Africa states are part of the NYC.

In England, the New York Convention grounds are enacted in English law via sections 100 - 103 of the Arbitration Act 1996.

There is a pro-enforcement emphasis in the New York Convention which means that Courts should enforce awards unless the reasons for not doing so fall within limited grounds set out in the NYC. However, the court can still permit enforcement through its wide discretionary powers, even if one of the grounds to resist enforcement are made out.

The burden of proof rests on the respondent who is resisting enforcement to prove the existence of one of the grounds of refusal.

The resultant chess game between claimants and defendants can be complex, time consuming and expensive.

3. NYC Grounds

Under the NYC, enforcement of an award **may** be refused in the circumstances listed in Article V and VI. I don't want to spend time on reading the grounds, but I have set them out on the slide by way of recap. There are three I want to focus on.

- Where a party to the arbitration agreement was under some incapacity (under the law applicable to him) (Article V.1(a)).

- Where the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made (Article V.1(a)).

- Where a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case (Article V.1(b)).

- Where the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (Article V.1(c)).

- Where the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place (Article V. 1(d)).

- Where the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country which, or under the law of which, it was made (Article V.1(e)).

- Where the award is in respect of a matter not capable of settlement by arbitration (Article V.2(a)).

- Where it would be contrary to public policy of the country where enforcement is sought to recognise or enforce the award (Article V.2(b)).

- If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security (Article VI).

Examples of African cases in London

These provisions have given rise to a number of reported cases in London involving African parties and the next slide lists the cases.

I should say that my firm has been involved in a number of these cases, but whatever I say is in the public domain given that all the cases have been reported. In any case some of the tribunal members and my opponents are sitting in the audience!

- Soleh Boneh International Ltd v Government of the Republic of Uganda [1993] 2 Lloyd's Rep 208.

- IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation[2005] EWHC 726 (Comm) (per Mr Justice Gross)

-[2008] EWHC 797 (Comm) (per Mr Justice Tomlinson)

- [2008] EWCA Civ 1157

- EWHC 576 Comm – March 2014 (per Mr Justice Field)

- Continental Transfert Technique Ltd v Federal Government of Nigeria et al [2010] EWHC 780 (Comm) at Paras 16-17

- Sheltam Rail Company (Proprietary) Ltd v Mirabo Holdings Ltd & Anov [2008] EWHC 829 (comm).

- Dowans Holdings SA & Dowans Tanzania Ltd v Tanzania Electric Supply Co Ltd [2011] EWHC 1957 (comm).

Themes arising out of cases

Comity: the English courts are very keen to make sure that comity between countries is maintained and due deference is shown to the local courts where challenge proceedings may be taking place.

Adjournment: Although the English courts have, on occasion, made criticisms regarding delay in local proceedings in certain African countries, the courts have tended to favour adjournment of enforcement pending the local proceedings being resolved. This is so even when there is a second application to the English courts for enforcement despite the ongoing local proceedings.

Security: English courts tend to make substantial orders for security to be put up, when adjourning enforcement of awards.

Public Policy: It is virtually impossible to resist enforcement on public policy grounds.

Cautious approach: Even though the NYC has a pro-enforcement bias, and the courts have wide discretion to enforce awards in England, the courts have tended, almost without exception in relation to African enforcement cases, a cautious approach when it comes to enforcement.

All this delay in enforcement has a serious cost implication on parties.

Article V.1(e))/ AA s 103(2)(f): 'Not binding'

One of the grounds raised for resisting enforcement is that the award has not yet become binding on the parties…

It was raised in the case of **Dowans Holding SA& Dowans Tanzania Ltd v Tanzania Electric Supply Co Ltd [2011]**. In this case, there was an Emergency Power Off-take Agreement which was performed without complaint until TANESCO stated that the agreement was void.

The ICC tribunal found that the agreement was in fact valid and that TANESCO was liable to the Dowans in damages and debt.

The award was filed locally in the High Court of Tanzania. TANESCO sought to have the award set aside in the High Court of Tanzania whilst Dowans sought enforcement of the award in England under the NYC.

In London, TANESCO applied to set aside the order of the English court granting Dowans permission to enforce the award, on the ground that it had not yet become binding because there were pending petitions in Tanzania to set aside the award which meant the award was not yet enforceable in Tanzania.

The Commercial Court rejected this argument on the basis that:

- the parties had agreed for the award to be binding in the arbitration agreement.

- the ICC rules stated that awards were binding.

- the NYC had eliminated the double exequatur rule in the Geneva convention so that the winner does not have to show that award is final in the country where it is made.

- Other case law e.g. ONGC v Western Co of North America (1987) which held that the award was "lifeless" until enforced by the local court was not followed.

- It was for the loser to prove that the award was not binding and it had not done so.

- It was for the English court to determine whether a New York Convention award was binding, and not by reference to whether a Tanzanian court considered it binding. [cf. Diag Human v Czech Republic]

Art. V(2)(b)/ AA s 103(3) : 'Contrary to public policy'

Another ground for resisting enforcement which has cropped up a few times is the **contravention of the public policy of the country where enforcement is sought.**

The English courts have a very cautious approach to public policy arguments and apply a 'high threshold' before public policy is engaged.

In **IPCO (Nigeria) v Nigerian National Petroleum** [2005] the court acknowledged public policy should be approached with 'extreme caution', and that it is confined to the public policy of England in the context of enforcement proceedings in England.

In this case, the NNPC raised two points on public policy, both of which were rejected:

The first was the fact that the tribunal's errors (amounting to misconduct) had led to a massive award which if enforced against a State company, would be contrary to public policy.

The second point raised was the existence of a local Act setting up the NNPC and provisions in it providing protection against execution or attachment, and for sums to be paid from an identified fund. The argument was that it would be contrary to English public policy to circumvent the provisions of this local Act.

In the **Dowans v TANESCO** case (2011), one of the local challenges made by TANESCO in Tanzania against the award was that the underlying Emergency Power Off-Take Agreement between the parties was entered into in contravention of express prohibitions contained in the Tanzanian Public Procurement legislation.

This was rejected by - the Tribunal in the arbitration; by the Court in the London enforcement proceedings; and in Tanzania, the Court decided the Tribunal had addressed and resolved the questions of public policy and didn't interfere with their conclusions.

In the **Dowans case,** the award of the ICC Tribunal was leaked to the press somehow, and the entire award was published in the national press, which in turn generated comments from the senior politicians. It also stirred up national sentiment, and a few NGOs filed lawsuits in the local courts asking the Tanzanian courts to set aside the award all of which were dismissed but it shows you the type of issues which awards can throw up.

Article VI/ S103 (5): Pending local challenge

The NYC states that where there are claims to set aside or suspend the award pending in a local court, the English court may "adjourn the decision on the recognition or enforcement of the award" until the challenge has been finally determined.

This is the most common ground to resisting enforcement I have come across where the respondent relies on its local challenge proceedings to ask the English court to adjourn its decision on enforcement.

Often there are multiple local proceedings with appeals and cross appeals. Parties also serve expert evidence from prominent local lawyers to comment on the merits or weakness in the local challenges and the time line for final resolution.

Second bites at the enforcement cherry? Where the court has already adjourned enforcement of the award, and a party wants to subsequently ask for enforcement again it

will have to demonstrate that there has been a sufficient change in circumstances and these must be causatively linked to the variation of the earlier order (see IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation in 2008 and 2014).

Court's Discretion : should a recognition/ enforcement order be made?

The courts have a wide discretion regarding the factors it is entitled to take into account when deciding whether to enforce or not. In **IPCO v NNPC** [2005] the Court noted 3 factors relevant to the exercise of its discretion when deciding whether to enforce or not:

☐ Whether the application challenging the award in the country of origin was brought bona fide, and not simply by way of delaying tactics.

☐ Whether the application challenging the award had a realistic prospect of success.

☐ The extent of the delay occasioned by an adjournment, and any resulting prejudice.. In the IPCO v NNPC case, the Judge inferred that any delay was likely to cause prejudice to IPCO due to the size of the award at US$150 million, and the delay in receiving the money.

S 103(5): security

The trend of the English courts has been to order substantial security in cases where the enforcement has been adjourned, and to top up security when the court adjourns enforcement for a second occasion.[2]

In the **IPCO (Nigeria) v NNPC** case, security of US$ 50 million was ordered at the first enforcement attempt in 2005, and an additional US$30 million was ordered at the second enforcement in 2008. The total award was around USD 150 million. [The judge accepted given its trading activities, NNPC was likely to have assets in London. On the other hand, the Judge thought there was a risk of enforcement in Nigeria becoming more complex by reason of the application of section 14 of the NNPC act (protection from attachment of assets and payments from a specific fund).

In the **Continental Transfert Technique Ltd v Federal Government of Nigeria** case, security in the amount of £100 million was ordered out of a total award of £140 million. Mr Justice Hamblen applied the sliding scale test set out in Soleh Boneh v Government of Uganda

[2] The Test - The case of Soleh Boneh v Government of Uganda in 1993 sets out the **sliding scale** test in relation to security.

The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security. If the award is manifestly valid, there should be an order for immediate enforcement, **or** else an order for substantial security.

The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult…if enforcement is delayed. If that is likely to occur, the case for security is stronger; if on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened.

and was not satisfied that the defendants (the Federal Government of Nigeria) had shown that there was a real prospect of success in their application to challenge the validity of the award. For instance, the only identified ground to challenge its validity was that the tribunal had no jurisdiction to deal with the claim for lost profits, but no evidence had been advanced to support the contention. Further, there was evidence to suggest that there was an element of delaying tactics to the application, which would have resulted in significant prejudice to CTTL.

In **Dowans v Tanesco** security of $5 million was ordered at the first enforcement attempt, in this case the Judge ordered security on the basis that there was evidence of assets in European countries, and by adjourning enforcement, there was a loss of opportunity to recover assets and/or a deterioration in the prospects of recovery. He even alluded to the fact that with the passage of time during the adjournment, it was possible for steps to be taken to make the assets secure from execution.

Cross-security: It is worth asking the court to order cross-security where an order for immediate enforcement is made, and there is evidence to suggest that there is a risk that monies being paid out would be irrecoverable if later the award was set aside. Evidence of the financial state of the party being paid is obviously helpful and it is worth bearing this in mind at an early stage.