ETHICS

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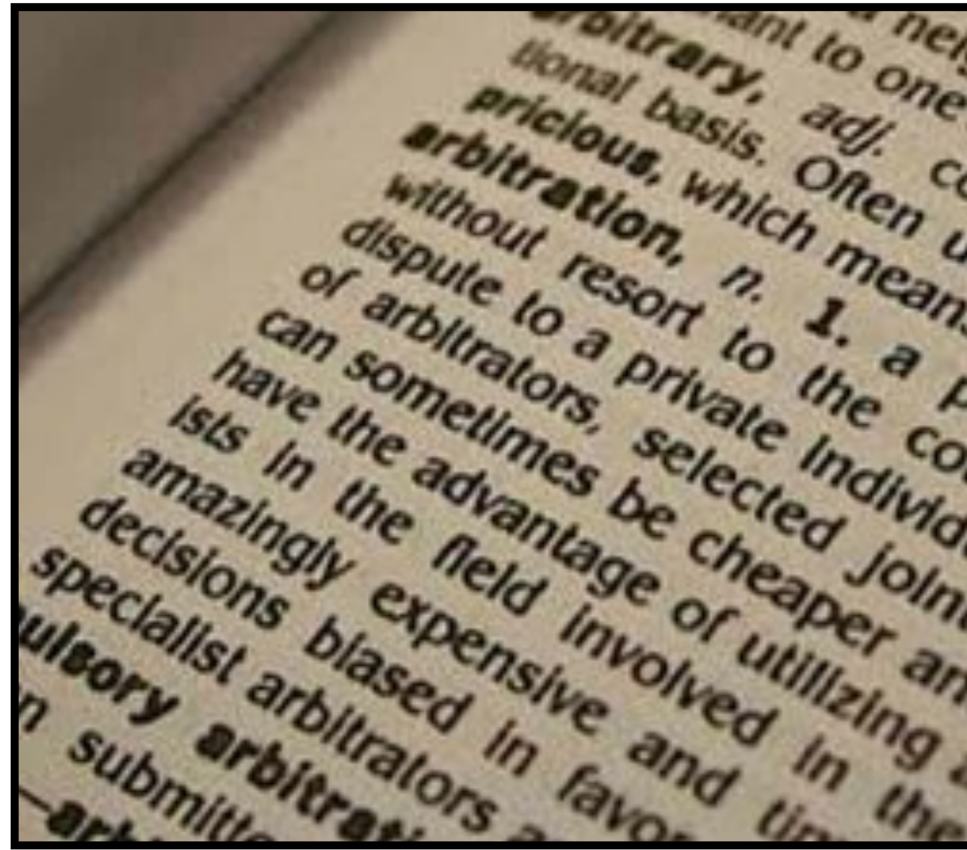
Challenging an Arbitral Award

Challenging an arbitral award covers any form of judicial recourse for the setting aside in whole or in part of an arbitral award.

The body of rules relating to the challenge of arbitral awards can be distilled from the following sources. The law of the lex arbitri that is the seat of the arbitration, which contains the procedural framework on which an award can be challenged, the arbitration agreement including any institutional references incorporated in the agreement, international treaties such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1961 European Convention on International Arbitration.



Should the court interfere with an Arbitral Award?

It has been advised that the court's involvement in the arbitration process should be minimal. Generally, Nigerian courts promote arbitration and are more likely to uphold the arbitration agreement and stay proceedings when a party mentions the existence of an arbitration agreement. Furthermore, Section 34 of the Arbitration and Conciliation Act provides that ***"a court shall not intervene in any matter governed by this Act except where so provided in this Act."***

Challenging an Arbitral Award in Nigeria

The grounds for challenging arbitral award can be found in part I and III of the Arbitration and Conciliation Act. While Part I deals with the grounds for challenging a domestic arbitration, part III deals with the grounds for challenging an international arbitration.

Concerning domestic awards there are three major grounds for challenging its validity under section 29 (2) which are that the tribunal exceeded its jurisdiction, misconduct of an arbitrator and procurement of an award.

Regarding international awards the provisions relating to the challenge of an award are contained in section 48 which provide that (i) that a party to the arbitration agreement was under some incapacity;(ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the laws of Nigeria;(iii) that the party challenging the award was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case;(iv) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or (v) that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (vi) that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate from.

Can a Third Party Challenge an Arbitral Award

This issue was dealt by the Court in the case of **STATOIL (NIGERIA) LIMITED & ANOR v FEDERAL INLAND REVENUE SERVICE & ANOR** (2014) LPELR-23144(CA). The court held that a third party could challenge an arbitration it was not a party to. The facts of the case are that Statoil and Texaco initiated arbitration proceedings against the NNPC. These arbitrations concerned the payment of "petroleum tax" on oil under production sharing contracts ("PSC") in 1993. Initially, the NNPC had obtained a court injunction against the arbitration proceedings on the grounds that tax disputes were not arbitrable under Nigerian law. However, the injunction was subsequently overturned by the Lagos Court of Appeal in July 2013.

The Federal Inland Revenue Service ("FIRS") applied to the courts to challenge the validity of the arbitration agreement between Statoil, Texaco and the NNPC. Counsel for the FIRS argued that the purpose of the arbitration was to avoid the proper computation of taxes accruable to its account, stating that:

"the whole game […] was to exclude the [FIRS] from the clandestine arrangement in the Arbitration Tribunal so that in the event the award is made, as it is evident that the tribunal is rail-roaded and programmed for that purpose, the [FIRS] as the Central and component part of the Government of the Federation, will be compelled to disgorge revenues already and severally collected, and allocated, which will form part of the awards to be eventually made by the Arbitral Tribunal."

The Abuja Court of Appeal decided that FIRS had locus standi to make such a challenge, regardless of the fact that it was not party to the agreement itself. In its decision, the Court of Appeal observed that if the claimants were successful with their claim, the FIRS would lose tax revenue and therefore would be affected by the outcome of the arbitration. Tine Tur J of the Abuja Court of Appeal stated:

"if a party to an arbitral agreement can challenge the jurisdiction of the Arbitration Tribunal, or that the arbitral agreement was ab initio, null and void, what about a person or authority, such as the [FIRS], who was not a party to the agreement but complains […] that the proceedings or subsequent award by an arbitral tribunal constitute an infringement of some provisions of the Constitution or the laws of the land or impede her constitutional and statutory functions or powers? Would the person be debarred from seeking declaratory remedies, or by originating summons? I do not think so. Where there is a proved wrong, there has to be a remedy."

This has generated controversy among members of the arbitration community because it allows a third party to intervene in arbitration proceedings without or an award to be rendered.

Conclusion

Inviting the court to review arbitration proceedings by challenging the arbitral award should only be done in very limited circumstances such as the circumstances stated in Section 29 and 48 of the Arbitration and Conciliation Act. As frequent recourse to the courts would gradually undermine the use of arbitration.

REGULATING GAS SUPPLY AND ELECTRICITY – ISSUES IN RESOLVING POWER SHORTAGES IN NIGERIA CONTINUED FROM PAGE 14

and electricity markets in both regulatory and operational dimensions in the manner that it now operates, to date.

Where are we in Nigeria, by comparison? The development of the regulatory framework for the gas – within the petroleum - sector in Nigeria has not evolved with the desired importance or even urgency. The key legislation regulating the oil and gas industry includes the Petroleum Act 1969, and all amendments, subsidiary legislation, regulations and instruments; the Nigerian Oil and Gas Industry Content Development Act 2010, the Oil Pipelines Act 1965; the Oil in Navigable Waters Act 1968; the Associated Gas Reinjection Act 1979; the Petroleum Profits Tax Act 1958 and the Environmental Impact Assessment Act 1992. The Federal Ministry of Petroleum Resources has primary supervisory oversight over the oil and gas industry. It is responsible for formulation, implementation and co-ordination of government policy for the industry. It also exercises its regulatory functions through the Department of Petroleum Resources (DPR). which is responsible for the day-to-day monitoring of the petroleum industry and for supervising all petroleum industry operations. Within the Ministry, the Department of Gas Resources (DGR), established under the National Gas Supply and Pricing Regulations is responsible for regulating the gas sector. All this space is heavily dominated by a crude oil theme. 2008 produced the National Gas Policy comprising, largely a downstream gas policy and giving rise to the much vaunted National Gas Master Plan. Emerging in a manner that portended hope, these fall woefully short when placed beside the examined comparisons.

The Federal Government of Nigeria's response, hitherto, has been captured in provisions set out in the much debated draft Petroleum Industry Bill (PIB), which, when enacted should improve the situation. An attempt to amalgamate under a single legislation, the various legislative, regulatory and fiscal policies, instruments, structures and institutions that govern the petroleum industry as a whole, it falls into the continuing error of seeking to administer gas as an appendage to petroleum. There are a number of reasons why this is wrong. It is common knowledge that Nigeria has the 7th largest Gas Reserves in the world in the region of 187 Trillion Cubic Feet of gas. A large proportion of this is largely unexploited. 90 Trillion Cubic feet of this is unassociated gas, namely gas isolated in natural gas fields alone. This is a multi-billion dollar industry of immense potential. To continue to consider gas an adjunct product to crude oil should present real concerns. The draft PIB contains, for gas, a number of key changes to the management of the country's vast resources. These include as part of the proposed unbundling of NNPC, hiving off the National Gas Company; carving out natural gas from the exploitation and exploration of crude such that a distinct licensing and authorization regime is put in place. All these are to be achieved by the enactment of separate legislation including a Downstream Gas Act (DGA). The DGA would establish a proposed Gas Regulatory Commission with functions including regulating the price of gas downstream as well as monitoring and imposing pricing restrictions on licensees.

Essentially therefore, with Nigeria, the landscape is still markedly different. The electricity market is really at this stage beset with so much fluidity if not uncertainty. This is largely because although the reform underpinned by the Electric Power Sector Reform Act 2005 is in advanced stages of implementation, its effect on the provision of regular electricity is still delivering limited visible impact especially the transition from public owned to private, privatization-driven ownership and control of electricity assets. The merging of the regulation of gas and electricity has occurred in other jurisdictions after years of sustained effort culminating in virtually settled markets emerging from those prolonged periods of high resource commitment. These features are decidedly absent here. Which is why, as inherently beneficial as a joint regulatory approach would be, this will be very premature.

Dr Amadi has, in dealing with a slightly narrower feature of conjoined regulation, flagged a situation of huge national significance. Critically, the development of the Gas Sector, given its staggering potential as a huge revenue earner, has been slower than would have been desirable. The causes of this situation are numerous, most of all Nigeria's historical dependence on crude oil alone and the effect of creating the one-dimensional economy that we have operated for the best part of the last century. The enormity of gas as a significant contributor to the country's revenue has been under valued for so long that, fundamentally, this approach must change. And this must begin to happen so much sooner than later.

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