The Role of Arbitration in Renewable Energy in Nigeria

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Nigeria, Africa's most populous country,[1] is blessed with abundant energy resources both conventional and renewable.[2] In Nigeria, crude oil exports account for about 90 percent of foreign exchange earnings and 80 percent of government revenue, thus making the country's economy heavily reliant on oil revenue.[3] However, global economies of both developed and developing countries are now embarking on transitions to sustainable low carbon economy. Given the move towards sources of renewable energy, this has adversely affected oil revenue, consequently, it is very important that Nigeria diversify its economy.[4]

As natural resources are owned by the state, projects and investments in renewable energy will often involve the government and require contractual arrangements between governments or state-owned entities and private investors - both foreign and domestic companies. Given the huge investment

and the complexity of such contracts, the likelihood of disputes between parties is inevitable. Furthermore, considering that Nigeria's legal system[5] is predominately adversarial, various Alternative Dispute Resolution (ADR) mechanisms have long been recognised as offering a viable alternative to litigation.[6] Of the diverse ADR mechanisms available to facilitate the settlement of such disputes, international arbitration would normally be the preferred dispute settlement mechanism for any dispute that may arise involving foreign investors. International arbitration offers a suitable dispute mechanism as it provides an efficient and effective means of resolving international disputes. The attraction for parties involved in international arbitration lies in the efficiency and the freedom of the parties to tailor proceedings in accordance to the needs of a dispute. In addition, international arbitral awards are final, binding and enforceable.[7]

The extant law on arbitration in Nigeria is the Arbitration and Conciliation Act 2004 (ACA)[8] which is modelled on the UNCITRAL Model Law on arbitration but with some modifications. The ACA 2004 provides a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation and incorporates the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) 1958. Moreover, the Nigerian Constitution provides that foreign policy shall amongst other things show "respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication."[9]

Nigeria was the first African country to adopt the UNCITRAL Model in 1988,[10] which has since been modified to reflect the modern changes and development in 2006.[11] It is important to note that the ACA is comprehensive in addressing arbitration related disputes. However, owing to some deficiencies in the ACA 2004, it requires serious amendments.[12] For instance, sections 4 and 5 empowers the courts in Nigeria to grant anti- suit injunctions in matters subject to arbitration agreement. Nevertheless, the apparent contradictions between these two similar provisions have been susceptible to inconsistent judicial interpretations.[13] Parties to arbitral proceedings have often used the concept of 'misconduct' of arbitrators[14] as provided in the ACA to restrain arbitral proceedings.[15] The ACA 2004 also fails to provide for arbitrators'

immunity. A draft bill to amend the ACA 2004, Federal Arbitration Act and a Uniform States Arbitration and Conciliation Act (Repeal and Re-enactment) Bill 2017 [16] is currently pending before the Nigerian National Assembly.[17] However, Lagos State, often considered as the commercial centre of Nigeria and sub-Saharan region, enacted its own arbitration Law, Lagos State Arbitration Law (LSAL) 2009[18]. Though in some ways similar to the ACA 2004, as it is modelled after the Model Law.[19] The LSAL is credited for adopting modern arbitration trends and an improvement on some of the deficiencies of the ACA 2004. The LSAL made novel provisions in the legislation of arbitration in Nigeria, it contains detailed provision for interim measures and how such measures shall be enforced.[20] It also made provisions for consolidation of disputes and joinder of parties[21] and immunity of arbitrators.[22] The LSAL is applicable to all arbitration with Lagos as the seat, unless parties expressly agreed otherwise.[23]

The very efficacy of international commercial arbitration depends largely on the attitudes of the courts as well as the legislature. The key features of the ACA and the LSAL recognise the tenets of international arbitration such as party autonomy, separability competence/competence, the territorial principle, and enforceability of arbitral awards. The judiciary in Nigeria has, over time, been more open to supporting arbitration and enforcing arbitral awards.[24]However, there are cases that suggest that judicial intervention undermines arbitration in Nigeria.[25]

There is the need to address some notable arbitration challenges in Nigeria that seem to erode the potential advantages of arbitration as a more expeditious and cost-effective dispute resolution method. One major challenge is the inordinate delay of courts' processes in support of arbitration proceedings. These concerns were expressed by one of the experts called before the English courts in the case of *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation**[26]***, who stated that the"...mill of justice can grind very slowly in Nigeria. In particular, Nigeria is not yet geared towards arbitration in the manner, which meets the international standards it agreed to when adopting the New York Convention".

Another area of concern is the introduction of unnecessary litigation into

arbitration matters by lawyers. For instance, on one occasion arbitration proceedings were stalled for twelve years because an interlocutory issue (whether an arbitrator could hold proceedings abroad) went through the high court and up to the Supreme Court.[27]

Notwithstanding the challenges discussed above, international arbitration continues to gain prominence in Nigeria. Similarly, while the Nigerian courts are positioned to encourage arbitration,[28] there has also been considerable drive to reform the administration of justice.[29] These reforms are generally seen as a step in the right direction to encourage and assure foreign investors in Renewable Energy projects that disputes can be efficiently resolved in Nigeria through arbitration.

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[1] Nigeria's population as at 2017 was estimated at 190.9 million seen at https://data.worldbank.org last accessed 21 August 2019.

[2] Nigeria is rich in crude oil, natural gas and coal, and one of Africa's largest exporter of Liquefied Natural Gas (LNG) seen at https://www.worldbank.org/en/country/nigeria/overview

[3] Nigeria is the world's 12 largest producer of petroleum and the 8th largest exporter.

[4] In 2018 $2.1 Million, a four-year Renewable Energy and Energy Efficiency Project (REEEP) was concluded in Nigeria. Seen http://www.esi-africa.com accessed 21 August 2019.

[5]Nigeria is a Constitutional Republic, the legal system is based on the English Common Law. Other sources of Nigerian Law are, Customary Law and Sharia Law. The political structure is made of three tiers of government: the federal, state and local government. Each tier has legislative competency.

[6] The administration of justice through the regular courts in Nigeria is usually beleaguered with protracted delays for diverse reasons.

[7] The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 is the most widely accepted international treaty with over 157 countries party to the convention. The convention facilitates the

recognition and enforcement of both arbitration agreements and awards

[8] Cap A18, Laws of the Federation of Nigeria, 2004.

[9] Section 19(d) Constitution of the Federal Republic of Nigeria.

[10] Nigeria was the first African country to adopt the UNCITRAL Model in 1988 as a Military Decree, it became an Act of the National Assembly on the return to Democracy in 1999 and was re-enacted in 2004.

[11] Nigeria has not yet amended the ACA to incorporate the revised provisions of the Model Law

[12] A National Committee, the National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria, was set up to look at the deficiencies and recommend reforms of the ACA as far back as 2007 see Report of National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria, (2008) 7 www.aluko-oyebode.com/.../national-committee-on-the-reform-and-harmonisation-of accessed 25 August 2019.

[13] See *M. V. Lupex v. N. O. C. (2003) 15 NWLR (Pt. 844) 469; Onward Enterprises Ltd. v. MV Matrix & Ors (2010) 2 NWLR (Pt. 1179) 530*

[14] S.30 ACA provides that 'an arbitral award may be set aside on ground of misconduct by the arbitrator; the ACA did not define 'misconduct'.

[15] See, *Guinness Nigeria Plc. v. NIBOL Properties Ltd (2015) 5 CLRN 65; Baker Marine Nigeria Ltd v Chevron Nigeria Limited [2003]13 NWLR (Pt. 997)276;*

[16]Arbitration and Conciliation Act (Repeal and Re-Enactment) Bill 2017 ('Bill').

[17] The Senate arm of the National Assembly passed the Bill in February 2018, but yet to be assented to and enacted into law.

[18] Lagos State Arbitration Law No. 18, Chapter A342, Lagos State Arbitration Law is also a re-enactment of the UNICITRAL Model Law, incorporating the 2006 amendments.

[19] The ACA 2004 is an adoption of model 1985 version but LSAL adopts the Model Law as amended in 2006

[20] Ss. 6(3) and 21 LSAL 2009

[21] S.40 LSAL 2009

[22] S.18 LSAL 2009

[23] S.2 LSAL 2009

[24] *Baker Marine Nigeria Ltd v Chevron Nigeria Limited [2003]13 NWLR (Pt. 997)276; Tulip (Nig.) Ltd v N.T.M.A.S.A.S (2011)4 NWLR (1237)254.*

[25] *IPCO v NNPC [2017] UKSC 16; Statoil (Nigeria) Limited v Nigeria National Petroleum Corporation [2013]14 NWLR (Pt.1373)1; Sonovia v Sonubi [2007] 7 SC 1.*

[26] Ibid.

[27] See *NNPC v Lutin Investment Ltd [2006] 12 NWLR (96) 504*

[28] The Supreme Court of Nigeria, in setting aside the Court of Appeal decision, upheld an arbitral award by reasoning that parties are bound by the arbitration agreement they entered into, including the mistakes contained which they have condoned, see *Charles Mekwunye V Christian Imoukhuede, (unreported) [2019] No. SC/851/2014; [2015] 1CLRN 30.*

[29] The Lagos State judiciary handles the bulk of commercial disputes and in recent times introduced reforms such as fast track for high volume disputes; it amended its High Court Civil Procedure Rules see High Court of Lagos State (Civil Procedure) Rules 2019.

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