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EVALUATING ARBITRATION AS A DISPUTE RESOLUTION MECHANISM IN THE NIGERIAN OIL AND GAS INDUSTRY

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Abstract

The oil and gas industry's wide international exposure and constantly changing landscape leaves it particularly vulnerable to disputes. The oil and gas sector is an important element in Nigeria's economic development. Thus, oil and gas is the mainstay of the country's financial sustenance. This paper will demonstrates, that the risks associated with the oil and gas disputes can be mitigated by parties utilizing governing law and dispute resolution clauses in contractual agreements within the sector .The authors argued that Arbitration being an important aspect of alternative dispute resolution method, has been globally recognized as an effective means of dispute resolution with numerous benefits over litigation. The authors then examined the Nigerian oil and gas legal regime, while proffereing guidance on the utilization of the most appropriate choice of law and form of dispute resolution forum for oil and gas contract; , analyzing the key issues and defining the legal contours involved. The authors further discussed the extant of legal frameworks on arbitration in the Nigerian oil and gas industry and reviewed the rationale for the use of arbitration in the oil and gas industry, which amongst others include speed, cost and the maintenance of long-standing relationships. The laws regulating arbitration in the Nigerian oil industry were ex-rayed. The Arbitration and Conciliation Act 2004, was pinpointed as the major legislation on arbitration in Nigeria, the need for amendment of this law was seriously advocated by the authors. The challenges and prospects of the use of arbitration were also sufficiently discussed. The authors therefore recommend a reform of the Arbitration and Conciliation Act, and stressed the need to bring it up- to- date with the Arbitration Laws of Lagos State 2009, which contains some important provisions that are not found in Arbitration and Conciliation Act. The authors further recommend that all other legislation relating to oil and gas in Nigeria should include arbitration as dispute settlement mechanism.

***KEYWORDS**: Arbitratin, Oil and Gas, Dispte Resolution Mechansims, and Nigeria*

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.1 Introduction

In any human relationship disputes cannot be completely ruled out. The oil and gas industry is no different. As is the case with every business transaction, there is the likelihood of disagreements. The oil and gas industry is one that involves heavy capital investment, thus giving rise to sophisticated contractual agreements. Essential features of such agreements are arbitration clauses. Whenever disputes arise in most business agreements, parties often resort to peaceful settlement either by means of adjudication or the use of alternative dispute resolution (ADR). A significant feature of which is arbitration for resolving these disputes.

Modern history of international arbitration dates back to the Jay Treaty of 1794 between the United States of America and Great Britain. This Treaty of Amity, Commerce and Navigation provided for the creation of mixed commissions. The commissions which was made up of American and British nationals had the task of settling a number of disagreements between the two countries which could not be resolved by means of negotiation[1]

A significant historical point in the history of arbitration is the Alabama Claims Arbitration of 1872 between the United Kingdom and the United States of America. Under the Treaty of Washington of 1871, the United States of America and the United Kingdom agreed to submit to arbitration claims by the United States of alleged breaches of neutrality by the United Kingdom during the American civil war. The two states agreed to an arbitral panel made up of five members to be appointed by the heads of states of Brazil, Italy, Switzerland, the United Kingdom and the United States. The arbitral award ordered the United Kingdom to pay compensation to the United States and this was complied with. The Alabama Claims Arbitration served to demonstrate the effectiveness of arbitration in the settlement of disputes and led the way in the years following, to the greater use of arbitration[2]

The use of arbitration at the international scene became popular towards the end of the 20th century just as colonialism was coming to an end, the engagement of guns and bombs to resolve disputes became very unattractive. Therefore, international rules were established over and against the use of force.[3]

At the early stages of the use of arbitration there was a lot of reluctance and suspicion by the host countries owing to the fact that they saw the practice and use of arbitration as solely advantageous to foreign investors. Host countries were again slow in accepting the use of arbitration as a means of dispute resolution because it was viewed as a system of bias in that majority of the arbitration panels were foreign based with a huge number of the representatives of the developed countries and with either few or no member from the developing countries. On the other hand, foreign investors with their heavy capital investments are usually unwilling to submit contractual disputes to the jurisdiction of the host country judicial system. Their worries include but not limited to the independence of the host countries judiciary, un-necessary delay in local judicial proceedings and unpopular local legislations. Generally, the limitations associated with litigations in courts gave rise to novel

[1] Enabulele A and Bazuaye B (2019) Teachings on Basic Topics in Public International law: Malthouse at 624
[2] ibid
[3] For example, the Hague Conventions of 1899 and 1907 both emphasized peaceful settlement of dispute and led to the formation of Permanent Court of Arbitration in the year 1899. The court is instrumental to the formulation of the Permanent Court of Arbitration Arbitration Rules (PCAAR) 2012 which finds relevance in most arbitral process

means of dispute settlement, such limitations include delay, high cost and unhealthy interference from political stakeholders. Parties to oil and gas contracts therefore gravitates towards a friendly and a civil resolution of disputes.

1.1 Non-Adjudication Schemes

Notwithstanding the core focus of this article being centered around arbitration, a brief look at other dispute resolution mechanisms is essential. They are intervention dispute resolution schemes agreed to by the disputants. They are schemes by which the disputants interact with one another and make an effort to settle their disputes without the intervention of the court. The schemes are as follows:

1.1.1 Negotiation

Negotiation allows the disputants to have the maximum control over the process and its outcome. It also involves discussion on dealing about a matter with a view to reconciling differences and establishing areas of agreement, settlement or compromise that would be mutually beneficial to the parties or that would satisfy the aspiration of each party to the negotiation. Negotiation has been widely embraced in resolving compensation disputes in Bayelsa State of Nigeria.

1.1.2 Mediation

With oil and gas industry, it has been argued that mediation ought to be successful as disputes within the industry by and large are purely commercial disputes between equally commercial parties. In this case, a mediator acts only as a facilitator and scrupulously avoids making any kind of evaluation and recommendation concerning either party's case during negotiation process (a facilitative mediator).

Mediation tends to be more successful when the mediator has knowledge of the industry or a technical process used within it. Mediation is a process of resolving dispute with the aid of a neutral third party.

1.1.3 Conciliation

Conciliation offers another opportunity for parties in oil gas industry resolve their disputes. Conciliation is the adjustment and settlement of disputes in a friendly non-antagonistic manner.

2. Literature Review

Arbitration is a process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator selected by them for a decision based on the evidence and arguments to be presented before the arbitral tribunal[4]. This means therefore that for any determination of dispute to qualify as arbitration, the essential constituents of the above definition must be present. According to Ezejiofor:

[4] Domke on *Commercial Arbitration* 3rd edn cited in Orojo & Ajomo (ed) *Law and Practice of Arbitration & Conciliation in Nigeria* (Lagos: Mbeyi Associates 1999) p. 37

> An exercise is not arbitration strictly so called if it does not answer to this definition, notwithstanding that it is described as arbitration.[5]

Hemuka defines arbitration as the simplified process of adjudication whereby the adjudicatory process or judicial role of the courts are kept in abeyance for the time being, while the parties try to settle the disputes between tem by a perfectly legal and statutorily sanctioned but extra- judicial means[6]. Arbitration has also been described as a private process which commences with the agreement of parties to an existing or potential, dispute to submit that dispute for decision by a tribunal of one or more arbitrators[7].

Arbitration can simply be defined as when dispute or difference between two parties or more is referred to an independent person for resolution. It is a device whereby the settlement of a question which is of interest for two or more parties, is entrusted to one or more persons – the arbitrator or arbitrators – who derive their powers from a private agreement, not from the authorities of a state, and who are to proceed and decide the case on the basis of such an agreement[8] The Arbitration and Conciliation Act[9] which is the governing statute for arbitration practice in Nigeria defines arbitration in Section 57 as:

> "Commercial arbitration whether or not administered by a permanent arbitral institution"

According to Obiozor,[10] he also defined arbitration as a process by which disputes or differences between not less than two parties are referred to a court of competent jurisdiction for determination in a judicial manner.

Orojo and Ajomo defined arbitration as: The procedure for settlement of dispute, under which parties agree to be bound by the decision of an arbitrator whose decision is in general, final and legally binding on both parties.[11]

Halsbury's laws of England define arbitration as the process by which a dispute or difference between two or more parties, as to their mutual legal rights and liabilities, is referred to and determined Judicially and with a binding effect by the application of law by one or more persons (the arbitral tribunal instead of by a court of law).[12] Also according to Ronald Berstein[13], Arbitration has also been referred to as:

> A private process whereby a private disinterested person called an arbitrator, chosen by the parties to fashion out, but without regards to legal technicalities, applying either

[5] *Ibid*
[6] N Hemuka, *The Nigerian Institution of Estate Surveyors and Valuers professional Examinations 1983-1988 Questions and Answers on Legal Studies* (Benin: Hemuka Real Estate Publishers, 1999) p. 33
[7] M Huleath & J N Gould, *International Commercial Arbitration*- A Handbook (London: LLP, 1996) p.3
[8] R David, "Arbitration in international trade", (Kluwer Law and Taxation Publishers, Netherlands, 1985, p. 5).
[9] CAP A10 Laws of the Federation 2004.
[10] C A Obiozor, *Nigerian Arbitration Jurisprudence* (Onitsha: Allied press & Co. 2010) p.1
[11] J O Orojo and M A Ajomo, *Law & Practice of Arbitration and Conciliation in Nigeria*, (Lagos: Mbeyi and Associates, 1999) p.3
[12] Halsbury's *Laws of England, 4th ed – vol. 2. Reprint,* (London: Butterworths 1986) p. 332 para. 601
[13] *Handbook of Arbitration Practice* (London: Sweet & Maxwell , 1987) p.8

> existing law or norms agreed by the parties and acting in accordance with equity, good conscience and the perceived merit of the dispute makes an award to resolve the dispute.[14]

Prof. J. Olakunle Orojo CON and Prof. M. Ayodele Ajomo defined the term as: "Arbitration is a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties"[15]

2.1 Types of Arbitration

There are however different types of arbitration. They include:

2.2 The Domestic Arbitration

This type of arbitration exists between persons who at the time of entering into the contract are carrying out business in the same country of which the subject matter of the contract is to be performed in the same country[16]

2.3 International Arbitration

This type of arbitration exists where you have parties to business transaction coming from different countries or the subject matter of the transaction is perfected in different counties. According to Uncitral Model Law on International Commercial Arbitration[17], an arbitration is international if:

a) The parties to an arbitration contract have at the very time of conclusion of the agreement, their places of business in different States

b) One of the following places is situated outside the state in which the parties have their places of business.

c) The parties have expressly agreed that the place the subject matter of the arbitration agreement relates to more than one country.

2.4 Ad Hoc Arbitration

This comes up when the parties in their contract do not make reference to any arbitration rules or which is to be administered by an institution or agency or body. Under this situation, the parties are to on their own make necessary arrangements for arbitrators, the parties are also expected to agree on the appropriate and applicable laws, rules and procedures to be adopted. Ad hoc arbitration is flexible in nature, faster and less expensive when compared to institutional arbitration. This system, seriously requires the cooperation of the parties together

[14] F Maxwell, *Commercial Alternative Dispute Resolution* (Sydney: The Law Book Co. Ltd., 1989) p.55; See also *Russell on Arbitration,* 18th edn., (London: Sweet and Maxwell, 1970) p.39.

[15] Orojo. J.O and Ajomo. M.A., "Law and practice of Arbitration and Conciliation in Nigeria", (Mbeyi & Associates (Nig). Ltd, Lagos, 1999, Pp.3)

[16] Kingston Kato and Nnadozie Eric (2017)'The Effects of International Commercial Arbitration on the Nigeria's National iInterest: A ViewPoint From The Crude Oil Sector' 1 (1) *Uniport Law Review* at 135

[17] Uncitral Model Law on International Commercial Arbitration, available at https://www.uncitra.org/pdf/english/texts/arbitration /ml-arb/06-54671-Ebook.pdf. [Accessed 5 December 2022]

with the arbitral tribunal for its success. To make this work, the parties may consent to engage internationally recognized set of arbitration rules in the arbitration process.[18]

2.5 Institutional Arbitration

This is a form of arbitration that is administered by an expert or specialized institution having its own rules of arbitral engagement. Such institution could either be international or national. Examples include the International Center for the Settlement of Investment Disputes (ICSID), the International Chambers of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Singapore International Arbitral Centre (SIAC). Sometimes, these specialized institutions make available a clear list of arbitrators from which disputing parties may choose from. An institutional arbitration is one which is administered by an institution agreed upon by the parties and conducted in accordance with that institution arbitration rules. The institution provides a framework and rules of procedures for the arbitral hearing. Institutional arbitration may also be referred to as administered arbitration[19]

2.6 Rationale for use of Arbitration in Oil and Gas Contracts

One major reason for the enactment of the laws on to regulate the resolution of disputes between the contracting parties is to ensure the Sanctity of their contract, in line with the principle of *Pacta Sunt Servanda* upholding contractual stability, whereby its impossible for one of the parties to the contract to modify or terminate the contract[20] Several factors contribute however to the use of arbitration in dispute resolution in the oil industry. Amongst others, is the technical nature oil the oil and gas industry, which strictly requires arbitrator (s) with special knowledge in the field, which knowledge may not be found in the regular court room. Again, there is the use of high degree sophisticated contract agreements specially drafted by professionals in the oil and gas industry, thereby requiring professional and expert interpretation as well as dispute resolution. Arbitration as a means of dispute resolution is attractive especially in Nigeria, owing to the fact that dispute settlement through litigation or court room exercise is bedeviled with undue delays resulting from court room congestion and unreasonable adjournment of cases. In this kind of situation, disputing parties can hardly predict or determine the duration or life span of their legal dispute. Most court cases could drag unnecessarily for as long as 15- 20yrs or even more, this ugly situation could also be attributed to large number of cases as well as the limited number of qualified judges to tackle the cases[21]

This is not in any way healthy for dispute resolution mechanism. Thus, where parties validly inserted an arbitration clause in their contract, they may opt to file a contractual dispute with any arbitration panel of their choice. Arbitration enhances expeditious hearing of disputes, leads to reduction of caseloads in court. Another rationale for the use of arbitration especially in the oil and gas industry is the fact that foreign international oil companies trust in the process a means of dispute resolution because they fell arbitration is more reliable and impartial in operation than domestic courts which to them can easily be subjected to manipulations. Arbitration is proven to be a faster and an efficient system of dispute

[18] ADGM Arbitration Center, available at https://www.adgmac.com/arbitration/what-is-arbitration. [Accessed 5 December 2022]
[19] International Chambers of Commerce: 'The ICC' available at http://iccwbo.org/ [Accessed 5 December 2022]
[20] ibid
[21] Parris J (1983) Arbitration, Principles and Practice: Granada Publishing Limited at 2.

settlement, arbitration mechanism ensures that no delay in the process of adjudication. Under the arbitration method of dispute resolution, confidence and information regarding the parties are protected from the knowledge of the general public. Confidentiality is guaranteed. The parties play important role in selecting the arbitrator (s) who will preside over their case. The parties also have the right to select a place for their arbitration which is neutral and independent of the nationalities of the parties.

Another important rationale for the use of arbitration is the fact that enforcement of court judgements across borders can be very challenging especially in a situation where there is no enforcement treaty in place, on the other hand, an arbitration award can be enforced in several countries through the application and regulation of the Washington Convention of 1965 which makes provision for the establishment of the International Centre For Settlement of Investment Disputes (ICSID), more than 150 countries are signatories to this Convention including Nigeria.[22]

Another reason for the preference of arbitration over court room litigation is the fact that it does not encourage any form of contest between the disputing parties. By all means, arbitration seeks the overall best interest of the parties to the dispute. Arbitration becomes very useful because of the overlapping commercial interests and longtime contractual relationships between international oil and gas companies and the host countries to avoid destroying long existing relationship. A major characteristic of arbitration as a method of dispute resolution is that the financial costs is undertaken by the disputing parties. Costs of venue, officiating, payment of the arbitrators, transportation as well as refreshment are all provided by the parties involved. Although some have argued that even in court room litigation, the parties also pay the costs. The truth is that the state to a large extent participates in the payment for litigation.[23]

In arbitration, the disputing parties completely for their own choice of justice. Arbitration therefore in this context be referred to as the privatization of justice. Arbitration as a dispute settlement mechanism is usually a lot less expensive compared to the cost of litigation. The fee that disputing parties pay the arbitrator in most cases, is far less than the payment of expert witnesses to appear and testify in a court trial. Often the disputing parties share the fee for the arbitrator (s) equally, by so doing, the financial burden is not too heavy on any of the parties. The financial expenses involved in preparing for arbitration is lower than the cost of preparing for legal trial, this is owing to the fact that the rules of evidence are usually more relaxed than in trial, thus, document in support of case could be submitted in place of calling witnesses to come testify physically in the court room. Where a plaintiff or defendant for instance has several medical doctors or expert witnesses who are outside the jurisdiction of the court, the cost of bringing them to testify could be very high, in arbitration however, the reports or records sent in by the experts can simply be admitted in evidence. One disadvantage of the use of arbitration in dispute settlement is the fact that arbitration award being binding on the parties, it makes the parties give up their right to appeal. In that case, they are not given the opportunity to correct what any of the parties may fell is an erroneous arbitral decision. Again, in terms of disadvantage, the rules of evidence is relaxed in

[22] National government's interference and influence over the judiciary cannot be down played. This is as a result of the fact in most states the judiciary is not independent of the executive. It is on record that judicial appointments are usually influenced by the executive arm of government., thus, the judiciary can easily do the bid of the executives

[23] ADGM Arbitration Center, Available at https://www.adgmac.com/arbitration/what-is-arbitration. [Accessed 7 December 2022]

arbitration process, evidence which ordinarily a judge would not consider, may be taken in evidence by an arbitrator. In this light, the decision of an arbitrator may be based on information that a judge would not take during trial. Where a witness present certain information by documents, the implication is that there is no opportunity to cross-examine the testimony of the witness.[24]

It must be noted that an arbitration award is final, and in some respects has the same capacity with a court judgment. In other words, whatever the decision of the arbitrator (s) is/are it is binding on the parties. In the case of ***United Insurance v. Stocco***[25] the court held that an arbitration award is binding on the parties and enforceable and prevents one of the parties in the dispute from filling an application to invalidate the arbitration clause. However, the parties could still make application to the court to revoke the award. This can be done under S. 2 of the Arbitration Act[26]

Arbitration as a matter of principle must of necessity arise from the express agreement of the parties as a condition precedent.[27] This position was stressed by the Supreme Court of Nigerian in the popular case of ***K.S.U.D.B v. Franz Construction Limited***[28] The court in this case held that it the existence of an express arbitration agreement between the disputing parties that makes arbitration decisions valid. Arbitration agreement is usually stated in the contract, and referred to as arbitration clause, flowing from the Arbitration and Conciliation Act 2004, an arbitration clause must be very clear and unambiguous.

2.7 Arbitration in the Oil and Gas Industry

There are a lot of factors that contributes to the wide use of arbitration in the world oil industry. These include the highly technical nature of the oil industry, the professional character of oil contracts, as well as other business interests together with the age-long business relationship between the international oil companies and the host countries.[29]

Regularly, International oil companies include arbitration agreements in their contractual dealings with host oil governments. In the past, host national government were reluctant to enter into arbitration agreements because they saw it as an infringement on their right as well as not being compatible with the principle of permanent sovereignty over natural resources as stipulated by the United Nations General Assembly Resolution 1803. But with the Washington Convention of 1965 providing for the International Centre for the Settlement of Investment Dispute (ICSID) this fear is laid to rest. It must be noted that the ICSID as an international organization provides services for the arbitration and settlement of investment disputes between international investors and host national governments.[30]

The parities to the dispute must unanimously consent in writing to surrender dispute to the ICSID. Consent may be evidenced in a treaty or in the contract itself.[31] As a result of the

[24] *Ibid.*
[25] (1973), 3 SC11
[26] Cap A18, Laws of the Federation of Nigeria, 2004
[27] Obiozor CA(2010) Courts and The Framework for domestic Arbitration under the Act in Nigeria: Allied Press at 38
[28] (1990), 4 NWLR (part 142) P.33
[29] JumokeAkinjide-Balogun , Oil and Gas Arbitration: " International Commercial Arbitration In The African Sub-Region, Meeting The User's Need. Being a paper presented at the Lagos Regional Centre For International Commercial Arbitration in Consort with Its Host Government on Tuesday April 27, 1999
[30] ibid
[31] ibid

general acceptance of the ICSID within the international community, Host Countries intending to receive foreign investors usually make public their willingness to settle foreign investment disputes through the engagement of the ICSID. On the other hand, international oil companies are attracted to put in investment knowing that it shall not be subjected to surrender dispute to an unpopular tribunal.[32]

Nigeria's example of this sort of willingness clearly seen in the Nigeria LNG Fiscal Incentives' Guaranties and Assurances Decree No. 39 of 1990, paragraph 22 of the decree states that in case of inability or failure to successfully settle any dispute within 90 days of the issuance of the letter of notification of the dispute to the government, such a dispute may be submitted for arbitration to the ICSID.[33] Arbitration agreements are also present in many joint venture and production sharing contracts between international oil companies and state owned oil companies, consent to arbitrate can as well be found in contracts between Oil and Gas Operators and Service Contractors.

3. Legal Framework for Arbitration in the Oil Industry in Nigeria

Several efforts have been made by the Nigerian government to establish arbitration as a mechanism for the settlement of disputes in various section of the country's economy including disputes arising from the oil and gas industry[34] The following are the relevant and extant laws in Nigeria for the settlement of oil and gas disputes.

3.1 The Arbitration and Conciliation Act[35]

This is the governing law on commercial arbitration in Nigeria. This law as it were, makes provision for methods by which parties may establish a legally binding arbitration agreement, it provides for how arbitration may begin and terminate together with clear procedure in constituting an arbitration tribunal. It must be noted that the arbitration and conciliation act makes available a solid legal platform for the settlement of commercial disputes by arbitration. The arbitration and conciliation is however applicable to the 36 States of the federation including the federal Capital territory Abuja. It is important to note that Section 34 of the Act[36] stresses the fact that the act does not affect other laws which provides for the settlement of dispute by arbitration. In essence, the Act recognizes validity of other laws relating to the settlement of dispute by use of arbitration. The Arbitration and Conciliation Act is modelled in line with the UNCITRAL model on arbitration though with minor adjustments.

3.2 The 1999 Constitution of the Federal Republic of Nigeria

Section 6 of the Constitution established the judicial arm of the government vested with the responsibility to preside over legal issues and disputes between persons, persons and government, as well as disputes between governments.[37] Other relevant provisions of the

[32] ibid
[33] ibid
[34] The Trade Dispute Act T8 Law of the Federation of Nigeria 2004 is a very good example of such effort by the Nigerian government. The trade dispute act makes provision for the use of arbitration in the settlement of trade disputes in the country.
[35] Cap A 18, Laws of the Federation of Nigeria, 2004
[36] ibid
[37] Section 272 (1) and 232 (1) of the 1999 Constitution of Federal Republic of Nigeria (as amended)

constitution that provides for judicial adjudication in oil and gas disputes include Section 251(1) it states that 'the federal high court shall have jurisdiction to the exclusion of other courts in civil cases And matters relating to mines and minerals (including oil fields, oil mining, geographical surveys and natural gas'[38] The Federal High Court has original jurisdiction over disputes arising within the oil and gas sector in Nigeria.

3.3 The Nigerian Investment Promotion Act[39]

This legislation governs all forms of foreign investments. Section 26 of the Act provides that in the event of a dispute between an investor and any government of Nigeria to which this law applies, shall be settled via mutual understanding. By Section 26(1) where the mutual discussion fails, the matter then can be tendered for arbitration.[40] Section 26 (3) on the other hand encourages the settlement of disputes in the field of oil and gas in Nigeria by arbitration. The section provides that where a dispute or disagreement arises between an investor and the federal government in respect to mechanism of settlement to used, in that case, the international Centre for the settlement of investment disputes rules shall be applicable[41]

3.4 The Petroleum Act[42]

It must be noted that the Petroleum Act is an important piece of legislation which regulates the oil sector in Nigeria. The act provides that questions or dispute relating to it shall be settled by arbitration. However, Section 11 of the Act clearly provides for arbitration as a system of dispute settlement. Dispute relating to the Minister of petroleum and a licensee shall be submitted to arbitration.

3.5 The Petroleum Industry Act 2021

On 16th August 2021, the PIA was enacted and it repealed the existing PA 2004[43.] The PIA stipulates an array of provisions and innovations that influence the status of the private, and public sectors, as well as stakeholders in the oil and gas industry. The PIA was enacted after several attempts of the Nigerian government at developing a new legal, governance, regulatory, and fiscal framework for the Nigerian Petroleum Industry[44] Significantly, the new Act does not provide an equivalent provision to section 11 of the repealed PA. However, there are provisions in relation to arbitration in the PIA. We highlight below most of the provisions setting the background for arbitration or relating to arbitration or the consequences of arbitration or its awards on stakeholders in the Oil and Gas industry below.

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[38] Section 251(1) 1999 Constitution of Federal Republic of Nigeria (as amended)
[39] Cap N117 LFN, 2004
[40] international oil companies feel more comfortable submitting their dispute to arbitration than the domestic courts
[41] The Nigerian investment and Promotion Commission Act, Cap N117 LFN, 2004
[42] Petroleum Act, Cap P10 LFN 1990
[43] Section 317 of the Petroleum Industry Act.
[44] See Nigeria: "Behold The Brand New Nigerian Petroleum Industry Act, 2021" at https://www.mondaq.com/nigeria/oil-gas-electricity/1103114/behold-the-brand-new-nigerian-petroleum-industry-act-2021. See also "Nigeria: Overview Of The New Petroleum Industry Act 2021" at https://www.mondaq.com/nigeria/oil-gas-electricity/1113104/overview-of-the-new-petroleum-industry-act-2021#:~:text=The%20new%20Petroleum%20Industry%20Act%202021%20which%20was%20recently%20assented,and%20stakeholders%20in%20the%20oil accessed on 5th December 2022.

a. Under the PIA, the Nigerian Midstream and Downstream Petroleum Regulatory Authority is charged with the duty of making regulations concerning dispute resolution. This is provided for in Section 33 (t) of the Act as follows: 'subject to section 216, the Authority shall make regulations concerning dispute resolution and customer protection'

b. Alongside the description of the acreage and the term and conditions of the licence and lease, section 76(1)(f) of the PIA mandates that the model licence or model lease for each bid round should include a clause containing the rules for the resolution of disputes including arbitration, mediation, conciliation or expert determination. The provision states thus:

> The model licence or model lease for each bid round shall reflect the conditions of the licensing round guidelines for the bid round and shall in all circumstances include the following clauses: rules for the resolution of disputes including arbitration, mediation, conciliation, or expert determination.

c. Section 96 of the PIA provides for the revocation of a license or lease where the licensee or lessee fails to abide by an arbitration award set forth in the licence, lease or the Act. Section 96(1) (l) stipulates that:

> "...upon receipt of the written recommendation of the Commission for revocation, the minister may revoke a petroleum prospecting license or petroleum mining lease, where the applicable licensee or lessee: fails to abide by any expert determination, arbitration award or judgment arising from the dispute resolution provisions set forth in a licence, lease or this Act."

d. Similarly, Section 120 (1) (j) of the PIA provides for the revocation of a licence or permit in midstream and downstream petroleum operations where the holder does not abide by an arbitration award set forth in the licence or the Act. The section states thus:

> "Notwithstanding the provisions of Chapter 2 of this Act related to midstream and downstream petroleum operations, a licence or permit may be revoked where the holder fails to abide by any expert determination, arbitration award, or judgment arising from the dispute resolution provisions set forth in a licence or this Act".

e. Section 4 of the First Schedule to the PIA made pursuant to section 3(3) of the PIA also provides that:

> "any disputes as to whether a delay was due to causes beyond the control of licensee/lessee shall be settled by agreement between the Minister and the licensee/lessee or in default of agreement by arbitration"

f. Section 5 (b) of the First Schedule to the PIA made pursuant to section 3(3) of the PIA also provides that:

> "Dispute as to price of petroleum products taken by the Minister at port of delivery pursuant to his preemptive right is to be settled by agreement between the Minister and the licensee/lessee or in default of agreement by arbitration**.**"

g. Section 7 of the First Schedule to the PIA made pursuant to section **3(3)** of the PIA also stipulates that:

> "Any arbitration under the First Schedule shall take place after the petroleum or petroleum products have been delivered."

h. Section 16 (Grievance Mechanism) of the Petroleum Host Community (Commission) Regulations made pursuant to Section 235 PIA provides that grievances should be referred to the National Oil and Gas Excellence Centre (NOGEC) – the Alternative Dispute Resolution Centre (ADRC) established for the resolution of disputes through mediation, reconciliation and arbitration by the Department of Petroleum Resources (DPR) now (the Nigerian Upstream Regulatory Commission). The ADRC was established and inaugurated in April 2021[45] The section provides for grievances to be resolved by arbitration after the host community and the settlor (and failing that, the mediator), have failed to resolve the dispute.

It should be noted that some of the disputes in the industry can still be referred to the local courts without exploring ADR first. For instance, Section 101 (d) provides that disputes between a licensee/lessee and owner of privately owned or legally occupied land as to compensation payment should be decided by the Federal High Court while section 163 provides that the Authority may mediate disputes in relation to third party access to gas transportation pipeline and networks. Further, sections 307, 308 and 309 are in relation to the 3 months Public Officers Protection limitation, 1-month pre-action notice and consequential amendment of certain provisions of any other enactments to the extent of their inconsistency with the Constitution and the PIA, respectively.

h. Saving/Transition Provisions of the PIA Preserving Arbitration as a means of Dispute Resolution in the Oil and Gas Sector.

The above highlighted provisions in, or made pursuant to, the PIA provide context for arbitration in the Nigerian oil and gas industry. Although, arbitration is not directly provided

[45] See https://www.nuprc.gov.ng/department-of-petroleum-resources-flags-off-of-alternative-dispute-resolution-centre-adrc/ accessed on 5th December 2022.

for in the same manner as under section 11 of the repealed PA, the sections highlighted above show that the provisions of paragraph 42 of the First Schedule to the PA made pursuant to section 2(3) of the PA, paragraph 5 of the Pre-emptive rights in the Second Schedule made pursuant to section 7(2) of the PA are all saved and become part of the extant law by the PIA given that paragraph 42 of the First Schedule to the PA is not inconsistent with the provisions of the PIA.

Section 309 of the PIA (Consequential Amendments) provides that:

> 'subject to the provisions of the Constitution, upon the coming into force of this Act, where the provisions of any other enactment or law are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other enactment or law shall, to the extent of that inconsistency, be void in relation to matters provided for in this Act.'

PA is not expressly repealed but some of its provisions are impliedly modified by the PIA.The PA itself, and particularly its First Schedule, is not listed in section 310 of the PIA (**Repeals**) as one of the laws and regulations repealed.

Section 311 of the PIA (Saving provisions) in its subsections 1 and 2 provide that:

> "(1) Any Act, subsidiary legislation or regulation, guideline, directive and order made pursuant to any principal legislation repealed or amended by this Act, shall, in so far as it is not inconsistent with this Act, continue in force mutatis mutandis as if they had been issued by the Commission or Authority under this Act until revoked or replaced by an amendment to this Act or by subsidiary legislation made under this Act and shall be deemed for all purposes to have been made under this Act.[46]
>
> (2) Any oil prospecting licence or oil mining lease granted under the Petroleum Act, 1969 that is subsisting as at the effective date of this Act shall continue to have effect, subject to the following terms and conditions ...."[47]

The 'terms and conditions' referred to above relate to when the licenses and leases terminate and how to renegotiate renewals in conformity with the PIA, while the conditions of issuance of the licenses and leases continue to be applicable until converted or made to be in conformity with the PIA, as long as their provisions do not conflict with the PIA.

Section 311 (9) of the PIA specifically saves the provisions of the PA with respect to extant licenses and leases, only making them renewable/renegotiable pursuant to the PIA. The PA is

[46] Emphasis supplied
[47] ibid

not expressly repealed but any of its provisions that conflict with the provisions of PIA is void to the extent of the conflict. Thus, the provisions of section 11 of the PA have been saved by the PIA, particularly with respect to disputes in respect of the licenses and leases etc. issued under the PA, and its provisions are applicable to arbitrations under the current regime. This also applies to the Alternative Dispute Resolution Centre ("ADRC") set up by the erstwhile Department of Petroleum Resources ("DPR") now Nigerian Upstream Petroleum Regulatory Commission ("NUPRC"), in consonance with the provisions of the PA, as it aligns with the provisions of the PIA highlighted above for dispute resolution via ADR means. The ADRC emphasizes the settlement of disputes through ADR mechanisms (mediation, conciliation and arbitration) without recourse to litigation. With a six-member Advisory Council and a 20-member Body of Neutrals to mediate on disputes between players in the oil and gas value chain, the ADRC has recorded significant successes via mediation of disputes within its short existence.

3.6 International Center for Settlement of Industrial Disputes

This international organization was established to regulate foreign investment, particularly dispute resolution. It is important to note that Nigeria is one of the first countries to sign up this agreement and has gone further to adopt ICSID investment code into the nation's Investment Promotion Commission Act. A look at Section 26 (3) of the Investment Promotion Commission Act show that the ICSID rules shall be applied in the case of dispute between the foreign investor(s) and the federal government. The reason for this is to provide an alternative method of dispute settlement outside of the Nigerian laws. The government submitting to the ICSID gives some form of confidence to the international investors in having dealings with the national government. It assures the international investors that there is in place a recognized dispute settlement mechanism which would be the same with the legal rules that they are used to.

3.7 The Oil Pipelines Act[48]

The Act provides that where there is a dispute between the minister of petroleum and licencee and such dispute can not be settled by mutual agreement the dispute can be referred to arbitration, this is pursuant to Section 17 (5) of the Act. The Act did not in any away consider litigation as an option in the settlement of dispute in the oil and gas industry.

3.8 The Nigeria Liquified Natural Gas (Fiscal Incentives, Guarantees and Assurances) Act[49]

With the enactment of this Act, the Nigerian government showed it readiness to attract foreign investors in the oil and gas industry for its overall development. By Section 22 of the Act, where there is a dispute foreign investor (s) and the Nigerian government, such dispute is expected to be settled amicably, if settlement fails, it shall be submitted to ICSID arbitration within 90 days in which the parties failed to have an amicable settlement of the dispute.[50] This provision as it where clearly recognizes the place of arbitration in the Nigerian oil industry.

[48] Oil Pipelines Act, Cap) 07 LFN 2004
[49] Cap N38 LFN, 2004
[50] Section 22 of the Act

Haven examined some of the laws regulating arbitration in Nigeria it is important to note that some of the legislations like the Arbitration and Conciliation Act need to be amended. The (ACA) being the major legislation on arbitration in the country need to be amended to meet the present day reality. Section 4 and 5 of the Act for example provides that courts can grant injunctions in respect of arbitration agreement on the grounds perceived "misconduct" of the arbitrator (s)[51] as a result however, parties involved in arbitration matters now use the phrase misconduct of the arbitrator as enacted in the act to either stop or slow down arbitral process.

Again, the Arbitration and Conciliation Act of 2004 did not make provision for the immunity of arbitrators. This deficiency in the act as a matter of urgency need to be attended to through an amendment. In this respect, the Lagos State Arbitration Law 2009[52] has been applauded for introducing and incorporating Arbitration methods which are present the Arbitration and Conciliation Act. Aside from providing for the immunity of arbitrators,[53] the Lagos State Arbitration Law also provides for the joinder of parties and consolidation of parties[54]. It is important to note that Lagos State Arbitration Law applies to all arbitration issues within the State of Lagos.

4. Challenges of use of Arbitration in the Oil Industry in Nigeria

There are a lot of challenges confronting the use of arbitration in the oil and gas industry in Nigeria. These challenges need to be urgently addressed in other not to further discourage disputing parties in the oil and gas industry from the use of arbitration as a mechanism for dispute settlement.

1. First is the challenge of Place of Arbitration, in arbitration the venue or place of arbitration is usually not fixed unlike in litigation where the venue is determined by law.[55] It is usually the parties to arbitration that determine the place of arbitration. In most cases, it is difficult for one to travel outside Nigeria to be a part of an arbitration proceeding, some time because parties are unable to come to a compromise as to the place of arbitration they may be forced to go to court to decide for them the modalities to choose a place of arbitration.[56]
2. Secondly, there is the unfriendly attitude of the Nigerian courts towards arbitration: there is usually the issue of delay of court's processes in support of arbitration matters. This worrisome situation was demonstrated in the case of IPCO (Nigeria) Ltd v. Nigeria National Petroleum Corporation[57] where an expert witness stressed that the process of justice in Nigeria is very slow, stating that Nigeria is yet to come to terms with arbitration as mechanism for dispute settlement and yet to come up to speed with international standards.
3. Another challenge is the setting aside of arbitration award by the un-favoured party. At conclusion of the arbitration process, the aggrieved party may seek a court order to

[51] Section 30 of the Arbitration and Conciliation Act clearly states that an arbitral award may be set aside as a result of misconduct of the arbitrator, however, the act did not go further to define what constitutes misconduct within the Act
[52] Lagos State Arbitration Law No.18, Chapter A342
[53] See Section 18 LSAL 2009
[54] See Section 40 LSAL 2009
[55] A good example here is Order 9 of the High Court of Federal Capital Territory Abuja (civil Procedure Rules) 2004
[56] In the case of NNPC v. Lutin Investment the parties where unable to decide on the place of arbitration , the parties then went to court to determine the place or venue of arbitration.
[57] IPCO v Nigeria National Petroleum Corporation (2017) UKSC, 16

set aside an arbitral award. It was held in the case of Triana Ltd v. UTB PLC[58] that by virtue of Section 30 (1) of the arbitration and Conciliation Act, the court is empowered to lay aside an arbitration award given by an arbitrator (s) on the basis of misconduct of the arbitrator. Even in the oil industry it is possible to have an aggrieved party acting under section 30 (1) of the Act to lay aside an earlier arbitration award. This situation would usually result to serious legal battle in court thus defeating the whole essence of arbitration.

4. There is also the challenge of bringing in unneeded litigation into arbitration cases by legal practitioners. In the case of NNPC v. Lutin Investment Ltd[59] one of the parties to the arbitration went to court to determine whether an arbitrator is entitled to consider proceeding abroad. Thus, the arbitration process in this case was delayed for about 12years as a result of an interlocutory injunction. Sometimes a party to arbitration who foresees an unfavourable award may decide to frustrate the process by heading to court to get an injunction to stop the arbitration. This is considered a major challenge in adopting arbitration as a method of dispute solution.
5. Yet again is the challenge of inability to enforce arbitration award; where an arbitration award is issued against a party and such party is not willing to carry out or perform his responsibility as awarded by the arbitrator, the party in whose favour the award was made would be compelled to go to court to ask for help to enforce the award, when this is done the litigation being avoided would automatically be introduced.

4.1 Severability of Arbitration Clause

This doctrine is to the effect that an arbitration clause ought to have a life span of its own different from the main contract into which it was inserted. There has been a lot debate as to whether or not an arbitration clause should be terminated together with the main contract or whether it should have a life of its own. To a particular school of thought, an arbitration clause need not end with the main contract.[60]

It survives even after the main contract is destroyed. It is possible to find a find legislative house of the country unilaterally terminating a contract, but an arbitration clause must have an ability to survive independently and separately from the determined contract.[61] Without any arbitration clause inserted into the contract, there would be no legal authority to arbitrate.[62]

However, another school of thought postulates that arbitration clause should die at the same time with the main contract. To them, there is no reason an arbitration should continue to exist when the main contract has been terminated.[63] Thus, the intention to submit to arbitration disappears it is a part of. In the view of Sornarajah, a valid law that destroys a contract would as well have the force of destroying of destroying all its clauses.[64] Today

[58] (2009) 12 NWLR (Pt 1155) 319
[59] (2006) 12 NWLR (96), 504
[60] Rubino-Sammartano M (1990) International Arbitration Law: Netherlands: Kluwer and Taxation Publishers at 136.
[61] Redfern A and Hunter M (1986)The Law and Practice of International Commercial Arbitration: Sweet & Maxwell9
[62] ibid
[63] ibid
[64] M Sornarajah (1990) International Commercial Arbitration: The Protection of State Contracts: Longman at 1.

however, the doctrine of severability of arbitration clause has become a major pillar of arbitration within the domestic and international arena.[65]

One of the reasons for the support of the doctrine of severability of arbitration clause is the fact that the initial intention of the contracting parties was to surrender themselves to arbitration in the case of dispute.

Secondly, the doctrine gains support because it protects parties to the contract and ensures that one of the parties does not unilaterally destroy or terminate the contract.[66]

Thirdly that the failure to respect the doctrine of severability of arbitration Clause in a contract is a clear attempt at bringing in the court and introducing litigation thereby loosing out on the original benefits of arbitration which includes speed, cost, non- destruction of long standing relationships amongst others.[67]

It is important to note that the doctrine of severability of arbitration clause have now received universal acceptance and it is believed that the absence of it makes arbitral process non-effective.[68] It has become an established principle that arbitration clause is distinct and separate from the main contract. The principle also has in several cases received judicial support. In the case of **Sapphire International Petroleum Ltd v. National Iranian Oil Company**[69] the court held that the termination of the contract did not in any way stop the initiation of arbitral process. In **Libyan American Oil Company v. Libya**[70] the court stressed that arbitration clause survives the unilateral determination of a contract by a state. And that the clause continues to live long after the contract is terminated.

Again, in the case of **Reliance Industry Ltd v. Union of India**, here the supreme court of India refused to consider an application brought by one of the parties, re-affirming the principle that an agreement to arbitrate is a different contract from the main contract entered into by the parties. However, the doctrine although it is widely accepted a general principle of arbitration both at national and international levels it would be regarded as ineffective in the following circumstances:

(a) where the arbitration clause was inserted into the contract by fraud by one of the parties to the contract without the knowledge of the other.

(b) where no valid contract exists in the first between the parties.

(c) where the use of arbitration is not recognized under the law which the parties have chosen to regulate their contract.

4.2 Prospects

Despite the problems associated with arbitration in the oil industry in Nigeria, we can however look forward to a lot of prospects in using arbitration for dispute settlement in the oil

[65] ibid
[66] ibid
[67] ibid
[68] ibid
[69] (1960) 35 ILR, 137
[70] (1981) 62, ILR at 178

industry in Nigeria. A sound rear of hope for arbitration in the oil and gas sector in Nigeria is naming of Lagos by the international community as the Venue of Arbitration in international commercial arbitration for the West African States. Sitting Lagos as the seat of commercial arbitration in Africa automatically dispenses with the difficulty of travelling abroad to settle disputes between international oil companies within the region and Nigerian oil companies, the center therefore makes for to have effective arbitration in Nigeria. Similarly, there is also a great encouragement found in the domestication of the ICSID Convention by Nigeria, the convention is affected in Nigeria through the ICSID enforcement award act66 by virtue of this act, the ICSID awards are directly enforced by the Nigerian Supreme Court. Thus, oil and gas disputes are accommodated within the ICSID Convention, and whatever awards made can be sought at the supreme court of Nigeria. By way of recommendation, it would be necessary to reform the Nigerian's Arbitration laws particularly the Arbitration and Conciliation Act which appears to the nation's major legislation on arbitration. The ACA need to be amended to reflect some of the innovations introduced by the Arbitration Law of Lagos State 2009 such as the consolidated and joinder of parties as well as the provision for the immunity of arbitrators. Again, a look at Section 4 and 5 of the Arbitration and Conciliation Act which talks about setting aside arbitral decision as a result of misconduct of the arbitrator, it is my view that the Act should be amended to exactly what constitutes misconduct of the arbitrator., the amendment importantly must also include the consolidation of actions or joinder of interested parties in arbitration settlement. Generally, the jurisdiction of arbitration needs to be widened to include resolution of disputes concerning fundamental human rights and constitutional matters. Governments at federal and state level should put up mandatory professional training for lawyers and judges in arbitration and other forms of alternative dispute resolution mechanisms. It also important that all legislation relating to oil and gas in Nigeria should include arbitration as a dispute settlement method.

5. Conclusion

From the analysis so far, it is obvious that there exist a legal framework for a successful arbitration in oil and gas industry in Nigeria. It is also discovered that despite, these legal framework, arbitration has not been utilized effectively as it ought to be. This is as a result of some challenges inherent in the choice of arbitration as an effective mechanism for settlement of dispute in oil and gas industry in Nigeria. However, we conclude that no matter the challenges that exist in the choice of arbitration, arbitration has acquired greater prospects in oil and gas industry and parties in dispute should employ arbitration in the settlement of their dispute.

6. Recommendations

Having analyzed the nature of disputes in the Nigerian Petroleum industry and the way such disputes are settled by arbitration following recommendations are paramount.

a. Firstly, there is a need to make good use of 'expert determination' in settling a number of disputes that arise from the Petroleum industry. The basis for this is due to the enormous sums involved, the technical nature of many disputes and the need to preserve a long term relationship between the disputing parties. Another reason why expert determination would help in resolving certain Petroleum disputes is based on the fact that the person presiding over such dispute is one who is an expert in the field

of dispute and as such his decision would be seen as automatic based on his knowledge in the area under dispute.

b. Secondly, there is a great need for the use of partnering agreement between Petroleum companies and service companies, where attempts are made to reconcile strict business relationships with the conduct and will of the parties. Partnering agreement recognizes that: "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[71]
c. This partnering contract will save costs by minimizing disputes, using gain sharing and risk sharing mechanisms, reducing adversarial contracts clauses and forging close work relationship and team work. Where partnering contract is well stated, it will produce the effect of avoiding disputes and, at the very least, minimize the negative consequences of disagreement.
d. Thirdly, there is a need to improve the arbitration institutes. The importance of institutional arbitration centres cannot be overemphasized as it is the most used form of arbitration for example ICSID, LCIA, etc. Once Nigeria can have well established institutional arbitration centre it would help in boosting the economy of the nation, and different persons from various parts of the world would subject their resolution of disputes to the Nigerian institutional arbitration centres.
e. Finally, there needs to be an inclusion of provision on arbitration in all statutes that deal with the Petroleum Industry excluding the Petroleum Act which already has a provision on Arbitration, to create easy access for Arbitration and mutual way of resolving disputes.

[71] 1981, Restatement (Second) of Contracts, American Law Institute.