

EVALUATING THE INTERNATIONAL ARBITRATION OF OIL AND GAS INVESTMENT DISPUTE SETTLEMENT IN NIGERIA

By

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Abstract

This paper examined international arbitration as a tool for resolving investment disputes in Nigeria's oil and gas sector, a critical industry that contributes significantly to Nigeria's Gross Domestic Product (GDP), foreign exchange earnings and government revenues. This sector is marked by high-risk investments and complexity and often faces disputes arising from regulatory changes, fluctuating global prices, environmental concerns and contractual breaches. Arbitration, particularly in cross-border investments, provides a neutral, efficient and flexible mechanism for resolving such disputes. Using a doctrinal research methodology, the study analysed statutes, case law, international treaties, and academic sources. Findings revealed that while arbitration offers benefits such as neutrality and enforceability, there are still some challenges that must be addressed as a matter of urgency. Issues include resistance to enforcement of arbitral awards by Nigerian courts on grounds of national interest, high arbitration costs and biases favouring foreign investors. Nigeria's legal framework, including the Arbitration and Mediation Act 2023 and the Petroleum Industry Act 2021, supports arbitration but lacks procedural clarity, leading to delays and inefficiencies. The paper concluded that legal reforms are essential to strengthen arbitration processes, enhance enforcement mechanisms and align Nigeria's framework with international standards. Such reforms would foster investment stability and improve Nigeria's attractiveness as an investment destination by reducing legal uncertainties. The paper recommended legislative and judicial improvements in order to achieve these goals.

Keywords: *International Arbitration, Oil and Gas Investment, Investment Dispute, Dispute Settlement*

Introduction

Disputes are generally inevitable in business relationships. That is why the law makes provisions for its settlement by mutual discussion and arbitration as alternative dispute settlement system.¹ This is to foster business relationship, investment opportunities and promote faster dispute settlement system in the country. Part of the highly sensitive industries in Nigeria is the oil and gas sector where there is a high likelihood of dispute due to the economic potentials and fluctuations of the sector. International arbitration has gained prominence in the oil and gas sector globally, and Nigeria is no exception.² It is often favoured over domestic court litigation because it offers a neutral forum, especially where parties come from different jurisdictions with varying legal systems.³ Arbitration is perceived as less susceptible to local biases and political influence, which can be a concern in countries with

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¹ Nigerian Investment Promotion Commission Act Cap N117 LFN 2004, s 26.

² A Faith, *Alternative Dispute Resolution in the Oil and Gas Sector* (Doctoral Dissertation, Institute of Petroleum Studies-Kampala 2022).

³ O O Brown, *Judicial Intervention in Arbitration: An Analysis of the Legal Regime for Annulment of Commercial Arbitral Awards in Nigeria* (Doctoral dissertation, University of South Wales 2021).

underdeveloped or politically influenced judicial systems. Furthermore, arbitration awards are generally easier to enforce internationally under the New York Convention of 1958, to which Nigeria is a signatory. This global recognition and enforcement framework make arbitration a preferred choice for international investors looking to safeguard their interests in Nigerian oil and gas projects.

Meaning of International Arbitration

International arbitration is one in which the parties have their places of business in different countries or the subject matter of the arbitration relates to more than one country or a substantial part of their agreement is to be outside their places of business.⁴ It has also been defined as an alternative method of resolving disputes between private parties arising out of commercial transactions conducted across national boundaries that allow the parties to avoid litigation in national courts.⁵

Arbitration Clause in Oil and Gas Contracts in Nigeria

The need for the insertion or incorporation of arbitration clause in oil and gas contracts cannot be overstated. In the case of *Nigeria National Petroleum Corporation v Clifco Nigeria Limited*,⁶ the national court failed to make a decision on the disputed matter for three years, but the same case lasted only for twelve months at arbitral tribunal. Thus, to encourage investment, save time and costs, parties to any agreement, including those in the oil and gas industry, are advised to include alternative dispute resolution clauses as part of the agreement. Arbitration clause is one significant aspect of the agreement that help parties to resolve disputes speedily without resorting to the court.

By way of definition, an arbitration clause is a contractual provision mandating arbitration – and thereby avoiding litigation – of disputes about the contracting parties' rights, duties and liabilities.⁷ In the case of *S.A. and Ind. Co. Ltd. v. Ministry of Finance Incorp.*,⁸ the Court of Appeal emphasised the purpose of an arbitration clause. According to the court, arbitration clause is intended to save both parties the time and expense of a lawsuit.⁹ It is for the parties to endeavour to settle the dispute that could arise from the agreement or any other agreement relating thereto outside the four walls of the court than resorting to litigation.¹⁰

A valid arbitration agreement is binding and cannot be revoked unilaterally. Courts will enforce it, and once a valid arbitration agreement exists, courts are precluded from assuming jurisdiction over disputes covered by the agreement. This position of the law has been made clear in the case of where it was stated as follows:

⁴ Domke, *Commercial Arbitration* (3rd edn, Lagos: Mbeyi Associates 1999) 23.

⁵ GeorgeTown Law, 'International Commercial Arbitration Research Guide'

<<https://www.interguides.ll.georgetown.edu/InternationalCommercialArbitration>> accessed 24 July 2021.

⁶ Suit No: SC.233/2003

⁷ *Sakamori Constr. (Nig.) Ltd. v. L.S.W.C.* (2022) 5 NWLR (Pt. 1823) 339; B A Garner (ed), *Black's Law Dictionary* (10th edn. Thomson Reuters 2021)127.

⁸ (2014) 10 NWLR (Pt. 1416) 515.

⁹ *Ibid.*

¹⁰ *Ibid.*

When parties enter into an agreement which contains an arbitration clause, they must first resort to arbitration before trial in a court of law. Thus, it is natural for the defendant in such circumstance, where the other party has filed a suit, to apply to the trial court for stay of proceedings pending arbitration.¹¹

The principle of resorting to arbitration first does not automatically oust the jurisdiction of the court in entertaining the subject matter of the dispute. This position of the law on the effect of an arbitration clause on the jurisdiction of the court is clear and unambiguous. The law is that the mere presence of an arbitration clause does not automatically oust the jurisdiction of a court of law.¹² Also, an arbitration clause does not warrant the grant of an order of proceedings.¹³ Therefore either party to such an agreement may, prior to when a submission to arbitration or award is made, commence legal proceedings regarding any claim or cause of action contained in the submission.¹⁴

At common law, the court has no jurisdiction to stay such proceedings. Where, however, there is provision in the agreement for submission to arbitration, the court has jurisdiction to stay proceedings by virtue of its powers under the AMA. Thus, if the defendant abstains from asking for stay or if the trial court in its discretion deems it expedient to refuse to stay action, then the court becomes duly seised of the dispute and it is by its decision alone that the rights of the respective parties ought to be settled.¹⁵

Furthermore, for an arbitration agreement to be valid and enforceable, certain legal requirements must be met, depending on the applicable arbitration law. One such requirement is that the agreement must be in writing. The Arbitration and Mediation Act (AMA) mandates that arbitration agreements be documented in writing as proof of the parties' intention to arbitrate. The ACA interprets this writing requirement broadly, allowing for arbitration agreements to be included in signed documents or communications like letters, telex or telegrams, as long as they provide a record of the agreement.

For an arbitration agreement to be valid, the parties involved must have the legal capacity to enter into such an agreement, as incapacity could be grounds for setting aside an arbitral award. The subject matter of the dispute must also be arbitrable under the applicable law, meaning it should involve commercial disputes. In other words, the dispute or difference which the parties to an arbitration agreement consent or agree to refer to an arbitrator must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction.¹⁶ Thus, an

¹¹*Fawehinmi Const. Co. Ltd v OAU* (1998) 6 NWLR (Pt. 553) 171.

¹²*Sakamori Constr. (Nig.) Ltd. v L.S.W.C.* (2022) 5 NWLR (Pt. 1823) 339

¹³*Ibid.*

¹⁴*Ibid.*

¹⁵*Obembe v. Wemabod Estates Ltd.* (1977) SC(Reprint) 70; *United World Inc. v. MTS Ltd.* (1998) 10 NWLR (Pt. 568) 106.

¹⁶*Sakamori Constr. (Nig.) Ltd. v LSWC* (2022) 5 NWLR (Pt. 1823) 339.

indictment for an offence of a public nature cannot be the subject of an arbitration agreement nor can disputes arising out of an illegal contract nor disputes arising under agreements.¹⁷

Also, conditions precedent, such as multi-tiered dispute resolution clauses that require negotiation or mediation before arbitration, must be fulfilled. If arbitration is initiated without exhausting the preliminary mechanisms, any resulting award may be challenged and potentially set aside. To ensure an arbitration agreement or clause is valid and enforceable, it must contain certain key elements. One of the most important is a clear intent to arbitrate. The agreement or clause must explicitly state that the parties have consented to resolve their disputes through binding arbitration. Without this clear expression of intent, courts cannot enforce the agreement. Another crucial element is defining the scope of the arbitration.

The arbitration agreement should specify the jurisdiction of the arbitral tribunal, typically using broad language to cover all potential disputes and claims arising from the contract. This may include not just contractual claims but also tortious and non-contractual claims, depending on the wording. In *Hi-Ferty Property Ltd v. Kiukiang Maritime Carriers Inc.*,¹⁸ the court ruled that only the contractual claims were subject to arbitration, while non-contractual claims had to be litigated. Broad terms like “all disputes arising out of or in connection with the contract” are often used to ensure a wide scope, covering various types of claims. The finality of the arbitral award is another essential aspect of an arbitration clause. Arbitration clauses generally include phrases like ‘finally settled by arbitration’ to reflect the parties’ intention to be bound by the arbitral decision. This finality implies that the award is enforceable in court, much like a court judgment. The use of such terms ensures that the arbitration process results in a binding and enforceable resolution to the dispute, leaving little room for further legal challenges once the award has been made.

Disputes in exploration projects arise even when the contracts are carefully drafted. The host states and transnational corporations should therefore, include arbitration clauses in their agreements to minimise the associated risks. If the breach is too costly, this mechanism can be relied upon to get a fair and final judgement. Final judgement reflects the binding effects of arbitration. Article 53 of the ICSID Convention states that an ICSID award is binding and final, it cannot be annulled or subject to any appeal unless the provisions under article 52 of ICSID are satisfied. The Convention further provides that the ICSID contracting member must recognise an award as final and binding; the obligations imposed by the award must also be enforced as the final judgement in member state’s court.¹⁹

A commercial contract should include an arbitration clause to reflect the parties’ agreement to resolve disputes through arbitration. Although arbitration clauses are connected to the main contract, they are independent and separate from the substantive contract. However, Lord Hoffman noted that the two are closely linked, so if the main contract is found void, the arbitration clause may also be rendered invalid. Parties can draft arbitration clauses allowing themselves or the tribunal to choose arbitrators, applicable

¹⁷*Ibid.*

¹⁸ (1999) 159 ALR 142.

¹⁹ ICSID Convention, art 54.

law, and substantive law.²⁰ These clauses should be drafted clearly and concisely rather than being overly long or complex, as this ensures they are effective without ambiguity.²¹

In arbitration, the choice of a seat implies that the law of that location governs the proceedings and the award. Any remedies sought during or after arbitration must be permitted by the law of the seat. Although host state law is often chosen as the substantive law, oil companies often avoid this due to concerns about stabilisation clauses. On the flip side, states often resist arbitration governed by foreign national laws to protect their sovereignty. Given the complexity and cost of the oil and gas industry, arbitration clauses must be drafted carefully to avoid deficiencies.²² While some parties prefer using pre-established institutional rules like those of the International Chamber of Commerce (ICC), these rules may not suit the specific needs of the contract or the parties.²³ Furthermore, institutional rules, like those of the ICC, cannot be easily altered without risking the institution's refusal to govern the arbitration.²⁴

International Arbitration as An ADR Tool To Resolving Oil and Gas Investment Disputes

Investment disputes in the oil and gas industry typically arise between foreign investors and host states under bilateral or multilateral investment treaties. These disputes are often linked to changes in government policies or regulations that negatively affect the investor's operations or profits. For example, sudden shifts in environmental policies, tax regimes or extraction regulations can result in substantial financial losses for investors, leading to claims for compensation. Such disputes may invoke provisions within investment treaties that guarantee investor protection and stable investment environments.

A key issue in these disputes is the claim for Fair and Equitable Treatment (FET), where foreign investors argue that the host state's actions, such as arbitrary policy changes or discriminatory regulations, violated their right to be treated fairly under the treaty. Investors may also bring claims under the Most-Favored Nation (MFN) principle, asserting that they were not granted the same benefits or protections as investors from other nations. National Treatment (NT) claims arise when investors allege discrimination, arguing that local competitors received more favourable terms or conditions than foreign investors, breaching the investment treaty's protections. Expropriation or nationalization claims are also common in the oil and gas sector. Host states may either directly seize foreign investments or impose policies that effectively expropriate profits by rendering operations financially unsustainable. In such cases, foreign investors may seek compensation for the loss of assets or revenues. These investment disputes can severely impact the relationship between host states and international investors, often requiring arbitration under international investment treaties to ensure a fair and binding resolution.

²⁰ Fiona Trust and Holding Corporation and Others v Yuri Privalov and Others

²¹ L A G Domínguez, 'Causes and Consequences of Faulty Arbitration Clauses' [2007](9) *Estudios Socio-Jurídicos*;111.

²² F Alshahwan, 'Oil & Gas Contracts and Arbitration Clauses' (LinkedIn 2020)

²³ *Ibid.*

²⁴ *Iran Aircraft Indus. v. Avco Corp.* (1992) 980 F2d 141.

Contractual disputes in the oil and arise over disagreements related to the clauses in a contract, such as the quality of work performed, timeliness of services or payments, and adherence to specific contractual obligations.²⁵ For example, a dispute might occur if one party alleges that the other did not meet the agreed-upon standards in the extraction process of an oil field, leading to lower production rates than contractually guaranteed. Joint venture and partnership disagreement disputes involve conflicts within joint ventures or partnerships, often about control over operations, decision-making processes and the distribution of profits or losses.²⁶ For example, a dispute might occur in a situation in which one partner alleges mismanagement or unfair profit distribution, impacting the overall output and revenue of a shared oil drilling project.

The flexibility of arbitration makes it an attractive option for oil and gas investment disputes. Parties have the autonomy to choose the rules, arbitrators, and governing law that best suit the specifics of their case. This flexibility allows them to customize the dispute resolution process, ensuring that it aligns with the technical and legal intricacies of oil and gas contracts, such as production sharing agreements, joint ventures, and licensing disputes. Also, arbitration offers a more streamlined and efficient process compared to protracted litigation, which can be crucial when delays might have severe financial and operational consequences.²⁷

Given the sensitive nature of commercial information, including proprietary technologies, business strategies, and contract terms, arbitration allows parties to keep proceedings and outcomes private. This is in stark contrast to public court trials where sensitive data could be exposed, potentially affecting market positions and competitiveness. The rise of international treaties like the New York Convention and ICSID further enhances arbitration's appeal by ensuring that arbitral awards are enforceable in over 160 jurisdictions, offering parties legal certainty across borders. When disagreements arise over terms in the oil and gas contracts such as pricing, delivery schedules or compliance with regulatory standards, arbitration offers a neutral, efficient and specialised forum for resolving these conflicts. Arbitrators with expertise in international trade, energy markets and specific legal frameworks can access the complex terms of these agreements and deliver enforceable decisions, providing a practical resolution mechanism that respects the global oil and gas industry's contractual relationships and business realities.

International oil companies often enter into commercial concession agreements with state authorities from other countries, where the arbitration forum and procedure are designed to ensure fairness. If an arbitrator fails to attend without valid notice, the arbitration process can still continue. This has been illustrated in the case of *Sedco Inc. v National Iranian Oil Company*,²⁸ where proceedings continued despite the absence of Justice Paris, who had been recalled by the Iranian government. Arbitration proceeded lawfully, even with a reduced quorum. Additionally, arbitration clauses confer significant rights, such as the ability to initiate arbitration and notify the other party to appoint arbitrators. These

²⁵ Youssef & Partners, 'Arbitration in Oil and Gas Dispute Resolution' <<https://youssef.law/insights/oil-gas-disputes/>> accessed 2 September 2024.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Award No. ITL 59-129-3

rights also transfer when there is a change in ownership, such as when a parent company transfers its shares to another entity. The new company inherits the rights and obligations under the arbitration clause, ensuring continuity in the dispute resolution process.

In the case of *Sapphire International Petroleum Ltd (S.I.P) v. National Iranian Oil Company (NIOC)*,²⁹ NIOC objected to appointing arbitrators when notified by SIP, arguing that the latter had been assigned rights by Sapphire International Petroleum Ltd. However, this objection was baseless, as rights under arbitration clauses are transferable. The assignment of benefits under arbitration clauses became widely recognized in the 1980s, especially as industrial structures evolved with nationalisation of private companies becoming common. In addition, restructuring efforts in some areas aimed at merging companies under regional bodies further highlighted the importance of transferable arbitration rights. One unique feature about arbitration as a preferred dispute settlement system is the freedom and autonomy it gives to the parties. In arbitration, party autonomy in disputes involving oil companies refers to the freedom granted to the parties in a contract to decide the specifics of the arbitration process, such as how, where, and when it will take place. A key aspect of party autonomy is the independence it provides to the parties in resolving disputes. This discussion covers the elements of party autonomy, noting that it can vary based on the arbitration mechanism chosen, whether from contracts or treaties.

Oil and gas companies often operate in environments that attract foreign investors, including multinational corporations or states interested in entering the oil sector. Concession agreements, which are granted under specific terms and conditions, can create a potential for disputes to arise. As a result, arbitration and treaty-based dispute resolution methods are commonly used in this industry. In developing countries, oil exploration and development are typically carried out by international oil companies rather than by the countries themselves. Agreements between international petroleum companies and host governments or agencies have certain consistent characteristics: they involve significant, complex, and high-risk investments, establish a relationship between a foreign private company and a host government or agency, and are often politically sensitive due to the strategic importance of petroleum. These factors explain why arbitration is almost always included as the preferred method of dispute resolution in international petroleum agreements.³⁰

Arbitration arrangements in oil and gas investment usually involve agreements between companies and states. The investors in such companies may include both states and multinational corporations. For example, the US-Moldova Bilateral Treaty defines a corporation as any type of legal entity, including corporations, companies, associations, enterprises, partnerships, or other organisations that are legally established under the laws and regulations of a party or its political subdivisions. This definition applies regardless of whether the entity is organised for profit or is privately or governmentally owned or controlled. It is important to recognize the significant interest in defining the status and liability of companies in states that actively promote investment in the oil industry. Interstate treaties are crafted with broad provisions to ensure they cover any company, from any location, operating within the scope

²⁹ (1963) 35 ILR 136.

³⁰ N Rubin and N S Kinsella, *International Political Risk and Dispute Resolution, A Practitioner's Guide* (Oxford University Press 2005 282).

of the oil sector. Investment protection agreements aim to address jurisdictional challenges between nations and allow for the initiation of national proceedings. The specific wording of these treaties can have substantial implications. For instance, the Switzerland-Botswana Bilateral Investment Treaty (SBBIT) defines a corporate investor from a contracting party in a particular manner, which influences how such agreements are interpreted and enforced.

Corporate veil is sometimes applied in arbitration involving oil companies. An example of this application can be seen in the case *Lockner v Cameroon*, where 51% of the shares were owned by a local subsidiary of K Lockner, and 49% were owned by the Cameroonian government. When K Lockner failed to subscribe to the remaining shares, the government transferred them to SOCAME, another state-owned entity, which affected the nationality of the company. Investor-based arbitration has gained prominence as investing states seek to provide special protection for their entities involved in oil companies. It is also argued that investment arbitration models have emerged due to the desire of oil companies to adopt risk-sharing petroleum fiscal policies. For instance, the Indonesian government leveraged such risk-sharing mechanisms to ensure a fair distribution of shares, securing 15%. However, such arrangements can often lead to conflicts between the parties as these interests may eventually clash.

The involvement of state authorities and foreign contracting companies in oil-related disputes often engages elements of public international law, especially in investor-based arbitration. This is largely due to the foreign nature of many contracting companies with major shareholders or administrative bases located in more developed countries that provide financial and technological support. These foreign investors secure rights such as permits, concessions or leases in oil-rich countries, which may be described with various terminologies depending on the legal system of the country. Foreign companies' investment in oil exploration, as seen in the 1993 US discovery in Australia's Northwest shelf, demonstrates how fiscal policies influence investment decisions across different jurisdictions. However, developing countries, unlike their developed counterparts, tend to experience more investor-state arbitration disputes due to their reliance on foreign investment. This is evidenced by regulatory efforts like those of the United Kingdom Continental Shelf, which emphasizes local expertise and collaboration with governmental bodies like the Department of Trade and Industry (DTI).

Investor arbitration disputes in oil companies face challenges such as the dominant position of investor states and the political and economic instability of contracting states. Investor states, often in a financially stronger position, may influence the arbitration process to their advantage, especially when contracting states are eager to pursue oil exploration projects. Political changes, such as those seen in the Middle East in 2011, can severely disrupt commercial arbitration processes. Furthermore, new governments may introduce economic reforms or revoke provisions relevant to arbitration in the oil sector, as demonstrated by the Anglo-Iranian case and Libya's nationalization policies. Investor-oriented disputes are also hindered by enforcement difficulties, as arbitration awards may be subject to the willingness of the contracting state to comply, often influenced by international pressure. Issues such as sovereignty highlight the complexities of enforcing arbitration awards in investor-state

disputes.³¹ Challenges also arise from the specific scope of investment protection instruments, which may limit claims to certain legal entities or personalities as seen in the US-Moldova BIT. These complications further illustrate the challenges of determining applicable laws in investor-state disputes.

Recognition and Enforcement of Foreign Arbitral Awards in Nigeria

A foreign arbitral award is the outcome of an international arbitration, where the parties involved have their places of business in different countries, the subject matter spans multiple countries, or a significant portion of the agreement is performed outside their business locations. Also, parties can agree to treat any dispute arising from their commercial transaction as an international arbitration. Once such an award is issued, it is advisable for the successful party or their legal representative to first identify which legal instruments or enforcement systems are applicable for enforcing the award.³²

The enforcement of arbitral award under this New York Convention can be found in Article IV. Under the said Article, a party desiring to enforce an arbitral award under the Convention shall at the time of filing his application supply the appropriate court with the duly authenticated original award or a duly certified copy thereof and the original agreement referred to in Article II of the Convention or a duly certified copy of it.³³ The Convention goes further to state that where the said arbitral award is not made in an official language of the country in which the award is sought to be enforced, the party seeking to enforce it must obtain the translation of the award or the arbitration agreement in the official language of that country.³⁴ The party against whom the recognition and enforcement is sought may request the court to refuse recognition and enforcement of the award pursuant to the grounds set out in Article V of the Convention. However, note that the reciprocal treatment principle applies to the enforcement of arbitral award in Nigeria under the New York Convention.

Under the ICSID Convention, arbitral or ICSID award is enforced in Nigeria as if it were an award contained in a final judgment of the Supreme Court if a copy of such an award, duly certified by the Secretary General of the Centre is filed in the Supreme Court by the party seeking its recognition and enforcement.³⁵ Apart from the foregoing, foreign awards can also be enforced under Foreign Judgment (Reciprocal Enforcement) Act. This law provides a system for the enforcement of foreign arbitral awards and this is where the principle of reciprocal treatment comes to play. The award may be registered in a High Court within six years after the grant of the award.³⁶ To be enforceable under this Act, however, that foreign award must comply with the following conditions. First, it must satisfy the essential features of a judgment within the foreign country where it had been obtained. Second, the foreign award is capable of enforcement within the country of its origin. Finally, there must be proof of

³¹*BP v. Libya* (1974) 53 ILR 297.

³² A Tweeddale and K Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) 64.

³³ New York Convention 1958, art.IV(2)(a)and(b).

³⁴*Ibid*, art.IV(2).

³⁵ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1966 (ICSID Convention), art.54.

³⁶Foreign Judgment (Reciprocal Enforcement) Act 1961 Cap F35LFN 2004 ss.2 and 4.

reciprocity showing that the country from where the award originated treats Nigerian judgments and arbitral awards with equal level of respect and wouldn't hesitate to enforce same.

The Nigerian courts will not recognise or enforce an arbitral award if any of the following conditions apply: there is an ongoing appeal aimed at setting aside the award; the defendant was not properly notified of the arbitral proceedings; the award has already been fully satisfied or cannot be enforced in the jurisdiction of the original court; the court determines that the arbitral tribunal lacked jurisdiction to hear the case; the award was obtained through fraud, deceit, or illegal means; or enforcing the award would be against Nigeria's public policy.

The Arbitrability of Tax-Related Disputes in the Nigerian Oil and Gas Industry

Certain disputes, such as tax-related issues, are excluded from arbitration under Nigerian law. This was demonstrated in the case of *Federal Inland Revenue Service v Nigeria National Petroleum Corporation*,³⁷ where the FHC held that an arbitral award arising from a Joint Operating Agreement (JOA) between the Nigerian government and transnational corporations was voidable. The disputes involved the interpretation and application of laws like the Company Income Tax Act, Petroleum Profit Tax Act, Education Tax Act and the Deep Offshore Act. The court held that these were tax disputes, which fall under the exclusive jurisdiction of the Federal Inland Revenue Service (FIRS), and therefore could not be arbitrated. The court emphasized that taxation is a government function, and the arbitral tribunal lacked the authority to rule on such matters.³⁸ However, recent cases have shown that courts have taken differing views on the arbitrability of similar disputes, indicating a shift in legal interpretation.

In the cases of *Esso Petroleum and Production Nigeria Limited & Anor v. NNPC*³⁹ and *Shell Nigeria Exploration and Production & Ors v. FIRS & Anor*,⁴⁰ it was held that disputes arising from the parties' contractual rights and obligations were contractual in nature and, therefore, arbitrable, rather than being tax-related disputes. The Esso case involved a Production Sharing Agreement (PSA) between transnational corporations (Esso Exploration and Production Limited and Shell Exploration and Production Limited) and Nigeria's national oil company, the Nigeria National Petroleum Corporation (NNPC) for oil exploration. The PSA outlined how the petroleum produced from the oilfield would be allocated, specifying that the host state was responsible for lifting oil taxes and royalty taxes. The transnational corporations were to lift the cost oil, and both parties were responsible for lifting the profit oil according to an allocation prepared by the transnational corporations within the agreement. The PSA also granted the transnational corporations the exclusive right to prepare tax returns and submit them to the host state, which would then pass them on to the FIRS.

Despite the provisions of the PSA, the host state unilaterally lifted more oil and tax oil than was allocated to it by the transnational corporation according to the contract. This action was seen as a

³⁷ Unreported Suit No: FHC/ABJ/CS/774/2011.

³⁸ *Ibid.*

³⁹ Unreported Suit No: Nos. 19-3159 (L).

⁴⁰ Unreported Appeal No. CA/A/208/2012

fundamental breach of contract, prompting the transnational corporation to initiate arbitration. They sought a declaratory order that a breach had occurred, requesting that the host state be prohibited from further unauthorized over-lifting of oil cargoes and submitting fabricated tax returns that contradicted those prepared by the corporation. They also demanded that the host state be ordered to refund the over-lifted crude oil. However, the FIRS challenged the arbitration's jurisdiction, arguing that the case involved tax matters, which fell under the jurisdiction of the courts in Nigeria.

The FIRS sought a court declaration stating that an arbitral award could negatively impact its ability to collect taxes.⁴¹ It also requested that tax-related issues be excluded from the arbitration agreement. However, the transnational corporations argued that FIRS was not a party to the underlying exploration agreement and that the arbitration was directed at the transnational corporation, not FIRS. Therefore, FIRS had no *locus* to intervene. The FHC initially ruled in favour of FIRS, determining that the case involved tax matters and was therefore not arbitrable.⁴²

The transnational corporations appealed to the Court of Appeal, arguing that the arbitration claim was a contractual matter rather than a tax-related dispute.⁴³ They contended that the PSC clearly outlined how the produced oil was to be shared and that the arbitration was initiated because the host state had breached the PSC by unilaterally lifting more oil than allocated. The host state argued that the case was tax-related, pointing to the Petroleum Profit Tax Act (PPTA), which governs the filing of tax returns.⁴⁴ They claimed that the transnational corporations were essentially disputing over-taxation on royalty and tax oil. The Court of Appeal, however, held that the dispute primarily concerned the host state's breach of contractual obligations under the PSC, particularly in relation to its unilateral preparation of Petroleum Profit Tax returns. The court noted that while the case did involve some tax-related issues, not all claims were tax matters, and thus, not all were arbitrable. The court concluded that certain reliefs sought by the corporations, such as preventing the host state from filing tax returns, would interfere with the statutory duties of the FIRS under the PPTA.

This case established that disputes arising from petroleum exploration agreements, such as the PSC, can be referred to arbitration, contrasting with earlier rulings in *Esso v NNPC and SNEPCO v FIRS*,⁴⁵ where the courts deemed the disputes as tax-related and non-arbitrable. The ruling in this case offers hope to transnational corporations regarding arbitration clauses in Nigeria's PSCs, particularly when concerns about tax implications from oil allocations arise. It suggests that arbitral tribunals may be permitted to investigate disputes related to oil and gas contracts, even if they involve tax obligations. However, while tax disputes themselves remain non-arbitrable, this case was not purely a tax matter; it involved contractual obligations. As a result, the court was able to distinguish it from previous rulings and allow arbitration. This marks a shift from the earlier stance that tax-related disputes were entirely non-arbitrable.

⁴¹ *Esso* (n 39).

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Esso* (n 39).

⁴⁵ Unreported Suit No: Nos. 19-3159 (L).

In *Statoil (Nig) Ltd v Nigerian Petroleum Corporation*,⁴⁶ the Court of Appeal established a significant exception to previous rulings by affirming that the jurisdiction of arbitration is governed by the terms of the agreement between the parties and their mutual consent irrespective of whether the dispute pertains to tax matters. The court held that if both parties agreed to arbitration, their wishes should be respected. This position was further reinforced in the case of *Nigeria Agip Exploration Ltd v NNPC & Anor*,⁴⁷ where the appellant (Agip) and the respondent had a PSC with an arbitration clause. When disputes arose, the arbitration tribunal ruled in favour of Agip and issued a partial award. However, NNPC, dissatisfied with the ruling, sought to block further arbitral proceedings by applying for an injunction, which the court declined in reliance to the provision of section 34 of the ACA which prevents court interference in arbitral proceedings.

This decision has been seen as a positive step toward promoting arbitration as an alternative to litigation in Nigeria. However, recent rulings from the Court of Appeal have cast doubt on whether oil and gas investment disputes in Nigeria will consistently be subject to arbitration. In the case of *Statoil (Nigeria) Limited & Anor v. Federal Inland Revenue Service & Anor*, the Court of Appeal held that a third party, such as FIRS, had the right to challenge an arbitration award, even though it was not a party to the exploration agreement that contained the arbitration clause. The dispute in this present case centred on tax payments related to oil lifted under a PSA from 1993. Initially, NNPC obtained an injunction against the arbitration proceedings, arguing that tax disputes could not be arbitrated under Nigerian law. Although the injunction was later overturned by the Court of Appeal in Lagos, FIRS challenged the validity of the arbitration agreement between NNPC, Texaco and Statoil, claiming the arbitration sought to bypass proper tax calculations. The Court of Appeal in Abuja agreed with FIRS, thereby recognizing its right and *locus standi* to challenge the arbitration. The court clearly noted that any arbitral award could negatively impact FIRS's ability to collect taxes.

The decision of the court in this case highlighted a shift in judicial interpretation as it deviated from established principles by allowing third-party intervention in arbitration matters. This ruling appeared to contradict section 34 of the ACA, which explicitly limits court intervention in arbitration except where provided by law. The case also underscored the unpredictability of arbitration in Nigeria, particularly in tax-related disputes within the petroleum industry, where courts have historically ruled that such matters are not arbitrable. As a result, transnational corporations should be cautious of the risks associated with arbitration in Nigeria when negotiating exploration agreements, especially regarding arbitration clauses. The governing law of the contract plays a crucial role in determining the outcome of arbitration proceedings, making it essential to consider its implications carefully.

Grounds For Setting Aside Foreign Arbitral Awards

By the provision of section 58(1) of the AMA, a party to an arbitration agreement may apply to the court to refuse the recognition or enforcement of the arbitral award. Irrespective of the country in which the award was made, the court can only refuse recognition or enforcement of an award at the request of

⁴⁶ (2014) 14 NWLR (PT 1373) 1

⁴⁷ Suit No. CA/A/628/2011

the party against whom it is invoked if that party furnishes the proof that a party to the arbitration agreement was under some incapacity, the arbitration agreement is not valid under the law which the parties have indicated should be applied, or that the arbitration agreement is not valid under the law of the country where the award was made. There are various grounds for setting aside foreign arbitral awards in Nigeria. These grounds are set out below:

- i. that a party to the arbitration agreement was under some incapacity,⁴⁸
- 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 he 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,
- v. That the award contains decisions on matters which are beyond the scope of submission to arbitration, so however that if decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decision on matters not submitted to arbitration may be set aside,
- 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,
- vii. Where there is no agreement between the parties under subparagraph (vi) of this paragraph, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act
- viii. if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under laws of Nigeria; or that the award is against public policy of Nigeria.

From the foregoing appraisal, it is evidently clear that, to set aside an arbitral award, whether foreign or domestic, the rule of law is that the applicant must prove that substantial injustice has arisen or will arise as a result of the act or ground complained of. Note finally, that the grounds and procedure for setting aside an award also apply where a challenge to the award is brought by a court application to refuse recognition or enforcement of a foreign Award.

Settlement of Oil and Gas Investment Disputes in Foreign Jurisdictions

i. Norway

Norway is one of the world's leading oil and gas producers, and its legal framework for settling disputes in the petroleum sector is well-developed. Arbitration is a common method for resolving oil and gas investment disputes in Norway.⁴⁹ Like other jurisdictions, arbitration is often favoured in Norway due

⁴⁸ *Slade v Matrodent* (1953) 2 QB 112.

⁴⁹ T K Svensen, 'Oil and Gas - the Use and Benefit of Arbitration in the Cornerstone Industry' (Marius 2024).

to its confidentiality, efficiency, and the ability to select specialised arbitrators. The legal system in Norway, combined with international arbitration conventions, supports the use of arbitration for resolving these complex and high-value disputes. The country's arbitration regime is shaped by several key legal frameworks and influenced by case law, which guides how disputes are settled in the oil and gas industry.

Norway's Arbitration Act, based on the UNCITRAL Model Law, governs both domestic and international arbitration within the country. This Act ensures that arbitration agreements are enforceable and provides a comprehensive framework for conducting arbitral proceedings. The Act covers procedural aspects such as the appointment of arbitrators, the conduct of proceedings, and the enforcement of awards. For oil and gas disputes, which often involve international parties, the Act's provisions on international arbitration are particularly relevant. It grants parties significant autonomy in determining the rules and procedures governing the arbitration, allowing them to tailor the process to the specific needs of complex oil and gas contracts.

On 5th July, the Norwegian Oil Industry Association (OLF) announced a lockout of over 6,500 workers from unions Industri Energi, SAFE, and Lederne, which would have completely halted oil and gas production in Norway.⁵⁰ As one of the world's largest oil and gas exporters, a full shutdown would have had significant global impacts, particularly for Western Europe's energy supply. Norway's oil and gas sectors contribute substantially to the country's GDP and exports. The strike, which began on June 24 with over 700 workers demanding the retention of a voluntary early retirement pension, initially affected around 11% of oil and 4% of gas production.⁵¹ The lockout threatened to stop all offshore activities, including those of major international companies like Total, ENI and Shell. The parties will appear before the national wage arbitration tribunal to resolve the labour dispute.

The President of Industri Energi has criticized the companies for pushing for compulsory arbitration, questioning the impact on the right to collective bargaining and striking. He emphasized that the dispute stemmed from the companies' unilateral decision to eliminate the voluntary early retirement scheme, which allowed workers to retire with a pension at 62, an option crucial for those facing the harsh and hazardous conditions of offshore work. Meanwhile, senior executives at Statoil still have access to early retirement at the same age, with the CEO entitled to a pension of over 4.5 million NOK.

b. United States of America

Arbitration in the USA is primarily regulated by the Federal Arbitration Act (FAA). The FAA mandates binding arbitration in contracts, where disputes are resolved by an arbitrator or panel, rather than a court. Once the arbitrator issues an award, it must be confirmed by a court to become an enforceable judgment. Under the FAA, arbitral awards must be confirmed within one year, and challenges to awards must be made within three months. Arbitration agreements can be preemptively included in contracts or entered

⁵⁰ Industriall, 'Norwegian Government enforces compulsory arbitration in oil and gas dispute' <<https://www.industriall-union.org/norwegian-government-enforces-compulsory-arbitration-in-oil-and-gas-dispute>> accessed 7 September 2024.

⁵¹ *Ibid.*

into after a dispute arises. This provides a streamlined resolution process without appeal on substantive grounds.

The US Supreme Court has reinforced the limited scope for judicial review of arbitration awards under the FAA. In *Hall Street Associates v. Mattel, Inc.*,⁵² the Supreme Court held that the grounds for review cannot be expanded even if both parties agree otherwise. The Court also upheld class action waivers in *American Express Co. v. Italian Colors Restaurant*,⁵³ thereby making them enforceable despite impractical individual claims.

A significant case illustrating arbitration in the US oil and gas sector is *Total Energies E&P USA, Inc. v. MP Gulf of Mexico, LLC*.⁵⁴ In this case, Total Energies sought to stay arbitration proceedings initiated by MP Gulf regarding a dispute over oil-and-gas leases. The Texas Supreme Court ultimately affirmed the lower court's decision to compel arbitration, emphasizing that the parties had clearly delegated the authority to determine arbitrability to the arbitrator. This case underscores the importance of well-drafted arbitration clauses and the enforceability of arbitration agreements in the oil and gas industry.

Conclusion

Arbitration serves as an essential tool for settling disputes in Nigeria's oil and gas industry due to its neutrality, flexibility, and global enforceability, especially in international investments. However, challenges such as inconsistent court rulings, delayed judicial processes, and third-party interventions have complicated the process, particularly in tax-related matters. To improve this, Nigeria needs to enhance its legal and institutional frameworks, strengthen judicial and arbitration expertise and streamline court involvement. This holistic approach seeks to attract both local and foreign investment in the Nigerian oil and gas industry and ensure that arbitration remains an effective and reliable mechanism for dispute resolution in the sector.

Recommendations

1. Nigeria should establish specialised courts or judges with expertise in international arbitration in the oil and gas sector. This is to ensure more consistent and efficient enforcement of arbitration awards and limit undue delays and political influence.
2. The government should strengthen the existing arbitration institutions (both local and international institutions in the country) and improve infrastructure.
3. The AMA should be amended to limit court's intervention in arbitration processes by codifying clear timelines and reducing grounds for setting aside awards, ensuring timely dispute resolution.

⁵² (2008) 552 US 576

⁵³ (2013) 570 US 228.

⁵⁴ No. 21-0028.



4. The PIA should be amended to encourage the use of arbitration as the primary mechanism for oil and gas disputes. This measure can guarantee its neutrality and global enforceability over domestic litigation.
5. The Nigerian government should introduce legislation similar to the US model to limit the grounds on which courts can review or overturn arbitration awards. Having a strong and effective arbitration system can boost investment in the Nigerian oil and gas industry as this gives foreign investors security of investment and confidence of neutrality and expediency in the event that dispute arise out of their investment in the industry.