Oil and gas - International commercial arbitration and Nigeria's national interests

By Richard Akinjide

OIL and gas are the oxygen and life-blood of the economy of Nigeria. They are sine qua non to our national interests. Many of the disputes arising in petroleum and gas industries are settled through International Commercial Arbitration. In order to give us easy access, user-friendly and fair financial terms for dispute resolution, the international community designated Lagos as the International Commercial Arbitration Centre for West Africa.

Nigeria has accepted and ratified all and every international conventions and rules pertaining to international commercial arbitration. We now use the 1998 version of the International Chamber of Commerce (ICC) Rules. International commercial arbitration is linked to the law of the seat of the arbitration. Our Arbitration and Conciliation Act is derived from the UNCITRAL Model Law - an international convention sponsored by the United Nations. Nigeria has also adopted and ratified the New York Convention, principally for the enforcement of arbitral awards. The judgments of the Nigerian courts are as good as those of any other courts in the English speaking world such as Britain, United States of America (USA), Canada, India, South Africa, Ghana, Australia, New Zealand, Kenya, among others, as I will demonstrate in this paper with unassailable evidence.

The case of IPCO (Nigeria) v. Nigerian National Petroleum Corporation (2005) 2 Lloyd's Report 326 was an effort to enforce the international commercial arbitration award made in Lagos, Nigeria on March 14, 1994, in favour of IPCO (Nigeria) Ltd against Nigerian National Petroleum Corporation (NNPC). IPCO is a Nigerian company specialising in the construction of oil and gas facilities. It entered into a turn-key contract with NNPC, the State Oil Corporation of Nigeria for the design and construction of a petroleum terminal in the Port-Harcourt area of Nigeria.

The contract and the arbitration clause in the contract were governed by the laws of Nigeria, and in the event of disputes which could not otherwise be resolved provided Lagos as the seat of the arbitration in accordance with the provisions of the Nigerian Arbitration and Conciliation Act 1990. IPCO is a Nigerian subsidiary of a Hong Kong registered company. IPCO applied to the High Court in London to enforce the Lagos award, which was a net amount of USD 152, 195, 971.55 invoking the New York Convention. For those who may be interested in those post-award London enforcement proceedings, see the following Judgments:

IPCO (Nigeria) Ltd. v. NNPC (2005) 2 Lloyd's Report 326

IPCO (Nigeria) Ltd. v. NNPC (2008) 2 Lloyd's Report 59 NNPC v. IPCO (2009) 1 Lloyd's Report 89.

Both the High Court and the Court of Appeal in London held that partial enforcement of an arbitration award is possible. The Court of Appeal held:

"The judge had been entitled to order part enforcement of the award in the way that he had. It was unlikely that the New York Convention and the 1996 Act prevented

part enforcement because the purpose of the convention was to ensure the effective and speedy enforcement of international arbitration awards.

An all or nothing approach to the enforcement of an award was inconsistent with that purpose and unnecessarily technical. There was no objection in principle to enforcement of part of an award provided the part to be enforced could be ascertained from the face of the award and judgment could be given in the same terms as those in the award. The word "award" in part II of the Arbitration Act 1996 Act should be construed to mean the award or part of it."

As regards the respect due to the Nigerian courts, the High Court in England put it thus in IPCO (Nigeria) v NNPC (2005) 2 Lloyd's Report 326 at 331: "With regard to section 30 and misconduct, for my part, I would venture the following working summary (which is in no way intended to be exhaustive):

- The Nigerian court is here exercising a limited supervisory rather than appellate jurisdiction;

- The rationale was, with respect, engagingly expressed by Oguntade JCA, in Baker Marina (supra), at page 355, as follows: When parties make a submission (to arbitration), they do so for a number of reasons. These include simplicity of the arbitral process, the speed, and sometimes an understanding or technical knowledge of the subject-matter. It is usually not because it was believed the arbitrator could not make an error of law. The parties' submission is, therefore, for better or for worse as in the marriage vow.

  An award cannot be set aside for misconduct simply because the arbitrators have made an error of fact or law. An error of law on the face of the award will be such that can be found in the award or in a document actually incorporated with it, or in some legal proposition which is the basis of the award and which is erroneous: Baker Marina (supra), at page 353; see too Taylor Woodrow v Etina-Werk (1993) 1 NSCC 415. Plainly, the jurisdiction is not intended to permit a disappointed party to re-run the arbitration.

  On questions of construction, an arbitration award cannot be set aside for misconduct simply because the court would have come to a different view.

  While, as foreshadowed, to the eyes of an English lawyer much of this is familiar territory from the "old" English law on arbitration, the application of these principles in a Nigerian setting is a matter on which a decision of the Nigerian court would inevitably be valuable. Moreover, questions of degree may arise, for example, as to the detail of reasoning to be expected of an essentially domestic Nigerian award; on matters such as this, nuanced decisions, founded in experience of Nigerian practice may well be desirable - thus again emphasising the respect due to any consideration of the dispute by the Nigerian court."

  Since our judiciary enjoys such excellent reputation abroad in dispute resolution, why then that in very many matters relating to oil and gas and the construction works, the parties, perhaps unconsciously, take such matters to foreign countries for dispute resolution at foreign venue, foreign law and by foreign court? When the matters do not relate to arbitral award enforcement

under the New York Convention? It is a very serious matter touching on our sovereignty, national interests and self-esteem. There are many examples of arbitral disputes involving Nigeria oil and gas matter or Nigerian oil blocks disputes where the arbitral clause unbelievably states as follows:

Applicable law - English (England)

Applicable Rules - ICC Paris (France)

Venue - Geneva (Switzerland).

Whereas all these could be done appropriately and cheaply in Nigeria.

Even if the law of the main contract is the Nigerian law, because the English law governs the arbitration clause, the dispute resolution touching our crucial economic and national interests are taken overseas for resolution. Why? These are bizarre and absurd if not crazy. I am not aware of any other nation that accepts such bizarre situation in matters of national interest. All these make our shame more glaring.

Lord Justice Kerr in Naviera Amazonica Peruana SA v Cia International De Seguros Del Peru (1988) 1 Lloyd's Rep 116, 119 - 120 put the matter beyond doubt when that English judge said:

"B. English law does not recognise the concept of a 'delocalised' arbitration ... or of 'arbitral procedures in the transnational firmament unconnected with any municipal system of law' (Bank Mellat v Helliniki Techniki SA (1984) QB 291, 301 (Court of Appeal)).

Accordingly, every arbitration must have a 'seat' or locus arbitri or forum which subjects its procedural rules to the municipal law there in force. This is what I have termed law (3).

"C..... 'Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings ....'See Dicey & Morris, (The Conflict of Laws, 11th ed (1987)) and the references to the approval of this classic statement by the House of Lords in Whitworth Street Estates (Manchester) Ltd v James Miller Ltd (1970) AC 583, 607, 612, 616. Or, to quote the words of Mustill J in Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG (1981) 2 Lloyds's Rep 446, 453 where he characterized law (3) as 'The law of the place where the reference is conducted: the lex fori'.

Although Mr. Milligan contested this, I cannot see any reason for doubting that the converse is equally true. Prima facie, that is, in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also to be the 'seat' of the arbitration. The lex fori is then the law of X, and accordingly X is the agreed forum of the arbitration. A

further consequence is then that the courts which are competent to control or assist the arbitration are the courts exercising jurisdiction at X..."

"E. There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y...."

"F. Finally ... it seems clear that the submission advanced below confused the legal 'seat', among others, of an arbitration with the geographically convenient place or places for holding hearings..."

Therefore, as a matter of our national interests -financial, honour and security, our government must stipulate that in all matters of oil and gas contracts, it must be stated and in mandatory terms that the laws of Nigeria must govern the contract; the arbitration clause in the contract; and

the seat of the arbitration must be in Nigeria.

We make ourselves a laughing stock when the international community made Lagos the Centre for International Commercial Arbitration, but sheepishly, we choose to take our International Commercial Arbitration proceedings abroad save that IPCO (Nigeria) v NNPC which took place in Lagos and the only thing that properly went abroad was the award enforcement proceedings under the New York Convention.

I create below, a model arbitration clause, I suggest, could be used in our commercial contracts, particularly in oil and gas related contracts:

"All or any dispute relating to or arising between the parties from the main contract, and including the arbitration clause, and any question relating to its existence, validity or termination which cannot be amicably resolved between the parties shall be settled by arbitration in accordance with the Arbitration and Conciliation Act and the applicable rules by three arbitrators.

The arbitration shall be held in Lagos, Nigeria in English language. The arbitration award shall be final and binding upon the parties and judgment upon the award rendered may be entered in any court having jurisdiction. A dispute shall be deemed to have arisen when a party notifies the other party in writing to that effect. All other contracts and sub-contracts between the parties shall be deemed to contain a similar provision."

It is totally unthinkable that any oil and gas dispute relating to the North Sea Britain and Norway will be taken to Lagos for arbitral proceedings or that the oil and gas dispute in Texas or in the Gulf of Mexico, USA, will be taken to New Delhi (India) or Lagos (Nigeria) for settlement. With all our excellent talents and facilities, why should our oil and gas disputes be ferried overseas for resolution? They must be stopped now by legislation.

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