IADC COMMITTEE NEWSLETTER

INTERNATIONAL ARBITRATION

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IN THIS ISSUE

Arbitration has become attractive particularly for large commercial and investment treaty disputes in Nigeria. Arbitration can resolve the disputes relatively quickly, efficiently, and confidentially with the arbitral tribunal's commercial law expertise and neutrality while national courts often delay the proceedings due to under-resourced and congested. The author will walk through the recent developments of arbitration in Nigeria.

Nigerian Arbitration Today: Some Developments

ABOUT THE AUTHOR

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ABOUT THE COMMITTEE

The International Arbitration Committee serves all members involved or interested in international arbitration as in-house and outside counsel and/or as arbitrators. This extends to actions for or against the enforcement of arbitral awards in their jurisdiction and actions aiming at setting aside arbitral awards. Members publish newsletters and journal articles and present educational seminars for the IADC membership-at-large, offering expertise on drafting arbitration provisions, choosing arbitral institutions and rules, and the do's and don'ts in international arbitration. The Committee presents significant opportunities for networking and business referrals. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Is arbitration widely used in Nigeria?

Arbitration has become attractive particularly for large Nigerian commercial and investment treaty disputes. Arbitral tribunals can be and are well-resourced by the parties, with audio-visual and other facilities, and can be and are comprised of members that have experience, expertise, and neutrality. Arbitral tribunals can and do work relatively quickly, efficiently, and confidentially. A major commercial trial that could take 12-18 months in arbitration would likely take more than twice as long in the court system.

Nigerian courts are under-resourced and congested. There are not enough judges, and they do not have many of the facilities that they need. Many of the current generation of Nigerian judges do not have a commercial law background.

What is the legal background to Nigerian arbitration?

English is the language of Nigeria's commercial courts. We were a British colony up to 1960 and we have always been a large and diverse country. Our business law is largely inherited from the United Kingdom. Our constitutional structure is copied from the USA. We have a federal system of government with 36 states and an executive presidency. By statute and by practice, our courts look to the English system where our law is silent or unclear.

There are no differences in initiating or prosecuting arbitral proceedings or enforcing awards based on one's geography within the country. We have 36 states, we have both state and federal court systems. Appeals from both States and Federal trial courts go to the Federal court of appeal system. It has long been debated exactly how far a state arbitration statute can prevail over a federal one. Lagos State (the nation's commercial capital) has a 2012 arbitration statute.

That statute was more favourable to arbitration than the then Federal statute as to, for example, the ease with which arbitral awards can be challenged for errors of law. The 2023 Federal statute is even more favourable to arbitration than the Lagos 2012 one was. There is still some debate about the extent to which lawyers not licensed to practise in Nigeria can work as counsel or tribunal members in arbitrations in Nigeria. Most experienced observers think that foreign lawyers can work in Nigerian arbitration.

What resources does Nigerian arbitration have?

The Lagos Court of Arbitration and other arbitration centres are equipped with audio-visual facilities that allow major arbitral proceedings to be held with the participation of parties and witnesses located abroad. Some hotels and law offices also have conference facilities that can serve the same purpose.

There are over 100 lawyers in Nigeria today who have been either arbitrators or counsel in at least three arbitrations in each of which more than USD5M was at stake. The sectors with the largest arbitrations have been energy, (non-energy) projects, telecommunications, and financial services.

Dozens of Nigerian lawyers are active in international arbitration organizations (such as the CIArb., ICC and ICCA). They attend events, and they serve on both standing and *ad hoc* committees of these organizations. The ICC has held an annual Africa arbitration event in Lagos for nearly a decade. More than 300 people have attended the event every year for the past seven years (the COVID years excepted).

Have the courts used their powers and the law to support arbitration?

We have long had encouraging statutes, court rules and judicial decisions. Nigeria is a party to both the New York Convention (1958) and the ICSID Convention (1965). A Federal arbitration statute was passed in 1988 based on the UNICITRAL rules. An improved, up-to-date version was re-enacted in 2023. After many years of ambiguity about, and occasional hostility to, arbitration, there have been recent helpful influential judicial decisions. Among other points, these decisions discourage (a) challenges to arbitrator appointments alleging bias and (b) claims for anti-suit/anti-arbitration injunctions.

The Chief Justice of the Federation [in 2017] even issued a practice direction discouraging judges from interfering with arbitration proceedings. The propriety and legal efficacy of doing so by issuing a practice direction may be debated, but most lawyers welcomed it.

The largest arbitrations have tended to have at least one foreign party. More than half of the arbitrations where more than USD50M was at stake have involved at least one party headquartered outside Nigeria. The notorious P&ID arbitration award was for a sum higher than USD1B plus interest. I have been counsel in three arbitrations wherein more than USD50M was awarded.

Are foreign arbitration awards more difficult to enforce than court judgments?

Today, arbitral awards have become no more difficult to enforce than comparable judgments. Foreign awards used to take longer to enforce than domestic ones because the law on the former developed more recently than the law on the latter, but the anecdotal and other evidence suggests that there is no longer a significant time difference.

If there is a key challenge, it is in enforcing awards against governmental defendants. A controversial provision in our Constitution tends to protect the assets of governmental bodies against judicial attachment except with the fiat of the Attorney-General of the State in issue or, in judgments against the Federation, of the Federal Attorney-General.

The ostensible aim is to minimize the risks to the respective government exchequers and of embarrassment to governmental bodies stemming from bad faith claims against them. But these challenges arise in all dispute contexts, from domestic litigation to foreign arbitration.

There is some history of enforcing arbitral awards against governmental assets abroad, especially national oil company assets and central bank cash. These opportunities have been shrinking over time. The assets that were once most available and vulnerable are now typically explicitly carved out in advance by recent prevailing government contractual structures and confidentiality-pursuing asset custody practices.

Are there any tasty "chestnuts" on Nigerian arbitration?

The delays associated with the *Lutin Investment* saga (1992-2005?) stand out. They are dramatic and not likely to be repeated. The arbitration started in 1992. A BVI company sued the NNPC (the national oil company) for wrongfully terminating a huge vessel charter. An arbitrator was appointed. The NNPC then asked that the arbitrator be removed for bias because the arbitrator had allowed the entity's chief executive officer to be examined as a witness outside Nigeria.

The witness had pleaded that his life would be in danger in Nigeria if he were to come back to be examined. He had been arrested and detained in the early days of the dispute. The challenge for bias went all the way up from the trial court through the Court of Appeal to the Supreme Court. It took nearly a decade to resolve it. The Supreme Court eventually dismissed the allegation of bias.

The trial then continued. The BVI company won a large award. It has pursued enforcement in four countries (Senegal, the UK, France, and the USA) at different times for many years and had recovered a significant part of the money by 2015. It argues that it is still owed some of the money today, but the NNPC disputes that claim.

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