The Journal of Sustainable Development Law and Policy

ISSN: 2467-8406 (Print) 2467-8392 (Online) Journal homepage: https://www.ajol.info/index.php/jsdlp

Recognition and Enforcement of Energy Arbitral Awards

Tolulope Aderemi

To cite this article: Tolulope Aderemi (2022). Recognition and Enforcement of Energy Arbitral Awards. The Journal of Sustainable Development, Law and Policy. Vol. 13:2, 125-145, DOI: 10.4314/jsdlp.v13i2.6

To link this article: DOI: 10.4314/jsdlp.v13i2.6

Published online: November 30, 2022.

RECOGNITION AND ENFORCEMENT OF ENERGY ARBITRAL AWARDS

Tolulope Aderemi*

Citation:
Tolulope Aderemi (2022). Recognition and Enforcement of Energy Arbitral Awards. The Journal of Sustainable Development, Law and Policy. Vol. 13:2.

Received: 30 July 2022
Final version received: 18 October 2022

ISSN: 2467-8406 (Print)
2467-8392 (Online)

ABSTRACT

Commercial disputes as with other facets of human interaction are inevitable. In the early oil and gas market era, unilateral action was the order of resolving disputes. With the exponential growth in the global energy market, disputes have consequently become more incremental and their resolution, more nuanced to ensure minimal or nil disruptions to operational activities. A mechanism that accommodates the character and resolution of such disputes is arbitration. This is so because it accommodates expert determinants in what has become a very technical and complex area, and which requires expert guidance for its resolution. However, the incursion of stringent regulations into settlement of disputes has become a point of challenge to arbitral awards in the energy sector, making the recognition and enforceability of energy awards more complex. This article examines how to effectively navigate the interstices of recognition and enforcement of energy arbitral awards. In particular, it examines the impact of section 50 of the National Power Sector Reform Act 2005 and section 11 of the Petroleum Act on adjudication of energy disputes in Nigeria, especially on the arbitrability of tax disputes in Production Sharing Contracts (PSCs). This article demonstrates that before arbitration clauses are inserted in contracts of parties in the energy sector, recourse should be had to the possible effect of statutory regulations on such disputes which may oust the jurisdiction of the arbitrator(s), and consequently make otiose the enforcement of the arbitral award made pursuant thereto.

Keywords: Energy Arbitration; Production Sharing Contracts; Arbitral Awards; Recognition; Enforcement.

1. INTRODUCTION

The energy industry is the foundation for sustainable socio-economic development in several countries, Nigeria included.[1] The energy market is subdivided into two broad parts: oil and gas, and electricity.[2] These sub-markets are globally and nationally regulated under different laws and regulations. The same goes for varying laws which regulate the contractual capacity of parties to resolve disputes. Investments in the energy sector of African economies are on the rise. The African Continent, and in particular destinations like Nigeria, is opening its economy and creating environments that attract and foster mixed energy investments in both renewable and non-renewable projects.[3] While the World Bank projects that about 47 percent of Nigerians still lack access to electricity,[4] investors are seeing huge opportunities in Nigeria's electric power value chain. The Nigerian government recently signed a six-year, 1.15 trillion Naira (about $3.8 billion) contract with Germany's Siemens AG for a three-phased electrification project aimed at increasing Nigeria's power generation capacity to 25,000 MW.[5] The global economic

---

* CIArb (UK), LL.M (Aberdeen), Partner, Perchstone & Graeys LP, Lagos, Nigeria; Visiting Professor, Afe Babalola University, Ado Ekiti, Nigeria. Email: tolulopeaderemi@perchstoneandgraeys.com

1 Damilola Olawuyi, Local Content and Sustainable Development in Global Energy Markets (Cambridge University Press, 2021) 1-25.

2 Damilola Olawuyi, Extractives Industry Law in Africa (Springer, 2018) 1-25.

3 United Nations report on the Africa Renewal Project reports the increasing drive for sustainable energy sources in its report. According to Raph Obonyo in 'Push for renewables: How Africa is building a different energy pathway', some African countries are already leading the way. He stated that "according to the International Renewable Energy Agency, countries like Egypt, Ethiopia, Kenya, Morocco and South Africa have shown firm commitment towards accelerated use of modern renewable energy and are leading energy transition efforts, while some of Africa's smaller countries including Cape Verde, Djibouti, Rwanda and Swaziland have also set ambitious renewable energy targets. Others are following suit, and renewable energy is on the rise across the continent." See Obono R, 'Push for renewables: How Africa is building a different energy pathway' available at https://www.un.org /africarenewal/magazine/january-2021/push-renewables-how-africa-building-diffe rent-energy-pathway accessed on July 8, 2021.

4 The World Bank, 'Nigeria to Keep the Lights on and Power its Economy', The World Bank Group (2020) available at https://www.worldbank.org/en/news/press -release/2020/06/23/nigeria-to-keep-the-lights-on-and-power-its-economy accessed on July, 8 2021.

5 International Trade Administration, 'Nigeria - Country Commercial Guide', avai lable at https://www.trade.gov/country-commercial-guides/nigeria-electricity-and -power-systems access on July 12, 2021/

downturn caused by the outbreak of the COVID-19 pandemic notwithstanding, Nigeria has continued to witness investment in its oil and gas sector.[6] It is also expected that the 2020 Marginal Oil Field bid rounds will further boost local and foreign investment in the sector.

Rise in energy investment creates a corresponding rise in related disputes. Bentham in 'Clause and effect – The Arbitration Backing Africa's Investment Boom,' traces the nexus between rise in investment and disputes in Africa and noted that:

> In 20 years, foreign direct investment (FDI) in Africa rose by 853% from just over $6 billion in 1994 to $57.2 billion in 2013, compared to a global average of 466% growth. It is unsurprising then that the increase in Africa-related arbitration has been robust. Where international investment goes, disputes invariably follow.[7]

In commercial interactions, disputes are unavoidable, and they arise in different shades and complexions. Large capital outlay for investments in the energy sector coupled with the long gestation period for return on investment (ROI) exacerbates the situation. Consequently, a key investment consideration is the availability of fora that guarantee quick access to justice when disputes arise. 'Access to justice' presupposes that there is an independent forum for adjudication of disputes and a guaranteed process of harvesting the fruits of the adjudication whether or not the adverse party is a state entity, a business entity, or an individual.

---

[6] Businesswire gave an overview of the oil and gas industry in Nigeria. It is reported that "there is a growth in the oil and gas sector. China National Offshore Oil Corporation has mobilized a USD 3 billion investment, in addition to the USD 14 billion already spent on its existing oil and gas operations in the West African country. A large share of this investment goes into the operations in Nigeria." Bussinesswire, 'Nigeria Oil & Gas Market Report 2020-2025: Growth, Trends, and Forecasts, available at https://www.businesswire.com/news/home/20201116005826/en/Nigeria-Oil-Gas-Market-Report-2020-2025-Growth-Trends-and-Forecasts---ResearchAndMarkets.com accessed on July 12, 2021.

[7] Jayne Bentham, 'Clause and effect – The Arbitration Backing Africa's investment boom', (2021) available at https://www.legal500.com/special-reports/clause-and-effect-the-arbitration-backing-africas-investment-boom/ accessed on July 2, 2021

Arbitration has become one of the most commonly used mechanisms for settlement of energy disputes.[8] Experts have attributed this preference to a number of factors; primarily, its speed. Energy producers are usually in the race to ensure that their supply of energy and its services are consistent enough to guarantee quick return on investment. Energy consumers on the other hand are often unable to sacrifice the basic comfort which access to energy brings to their lives irrespective of who may be in dispute.[9] Arbitration bears the potential to guarantee the speed that every actor, or potential disputant, within the value chain desires.

Energy disputes are often complex and require a level of expertise that conventional adjudicators in litigation may not be able to readily offer. While expert reports play a significant role in the resolution of energy disputes[10], arbitrators with the requisite expertise in the energy industry are better qualified to preside over such disputes than non-oil experts. In addition, arbitration guarantees confidentiality and flexibility in the schedule of hearing

---

[8] Experts are of the view that energy arbitrations are on the increase in Africa. Leading arbitrators who participated in the London Centre of International Law Practice third annual conference on energy arbitration and dispute resolution in the Middle East and Africa, hosted at Herbert Smith Freehills (HSF) in London in 2018 said: "Arbitration is growing in Africa and while there are many practical obstacles to overcome before there is a consistent arbitral picture across the continent, the ups and downs of the energy sector should provide plenty of practice over the coming years." See Andrew Mizner, 'Energy fuelling Africa's Arbitration Growth,' (2018) available at: https://iclg.com/alb/8015-fuelling-africa-s-arbitration-growth accessed on July 1, 201.

[9] This is one of the reasons why the government of the Federal Republic of Nigeria is usually under pressure of ensuring it quickly attends to any grievance of trade unions in the oil and gas sector of the economy. This is because when disputes arise, even if it is just an industrial action by unions in the sector, given that the disputes can potentially disrupt access to energy services, it may bring about a national upheaval.

[10] Gaitskell said "it is a common feature of energy arbitrations that experts and their reports play a significant role. There is a wide range of possible expert disciplines involved. Geologists may be concerned with the interpretation of seismic activity in the desert. Welding engineers may be called upon where pipe welding on oil rigs is in doubt. Geotechnical engineers may be crucial where a tunnel, for water feeding a hydroelectric turbine, has collapsed, and so on. An experienced energy arbitrator will have in mind a number of important considerations as regards the expert evidence." See Robert Gaitskell, 'Chapter 10: The Role of the Arbitrator in Energy Disputes', in Patricia Shaughnessy and Sherlin Tung (eds), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer,(Kluwer Law International; Kluwer Law International 2017) pp. 93 - 102

and determination of disputes submitted to arbitration; through procedural orders issued by the arbitrator with the concurrence of the parties.

Notwithstanding the advantage(s) of resolving energy disputes via arbitration, it is nonetheless an adjudicatory process that must be carefully thought through before parties submit to its jurisdiction. Contracting parties must satisfy themselves that the spectrum of issues to be submitted before a tribunal are matters that are arbitrable. Arbitrability concerns all factors which make a matter submitted to arbitration justiciable.[11] Where parties to an arbitration agree to subject a dispute that is not justiciable by arbitration and an award is rendered, the Court with supervisory jurisdiction or the one where the award is sought to be enforced may set aside the award. Such arbitral proceedings may end up being an effort in futility for want of jurisdiction over the subject matter.

The indispensability of energy to modern life has made its production and distribution a political issue globally.[12] Every aspect of energy production and distribution is typically controlled and regulated by domestic laws and international treaties. Public policies are therefore usually a reflection of the government's philosophy on how and the rate at which energy must be produced, processed, and sold to the final consumers. In the electric power sector of Nigeria, the National Power Sector Reform Act 2005, the Nigerian Electricity Management Services Agency Act, 2015 and their subsidiary legislations regulate the production and distribution of electric power from both renewable and non-renewable sources to final consumers. In the oil and gas sector, on the other hand, a host of legislations regulate the upstream and downstream sectors of the industry.[13] These

---

[11] Kano State Urban Development Board v Fanz Construction (1990) 4 NWLR (part 142) 1

[12] See Llewelyn Hughes and Phillip Y. Lipscy, The Politics of Energy (2013) available at https://www.annualreviews.org/doi/full/10.1146/annurev-polisci-072211143240 Thijs Van de Graaf and. Sovacool B K,Global Energy Politics. (2020) Pages 488-490.

[13] The Petroleum Profits Tax Act; The Nigerian National Petroleum Corporation Act; the Environmental Impact Assessment (EIA) Act; the Education Tax Act; the Niger Delta Development Commission (Establishment) Act; the Nigerian Oil and Gas Industry Content Development Act 2010; the Nigerian Oil and Gas Industry Content Development Act 2010; the Nigerian Extractive Industries Transparency

laws do not only regulate the business activities of participants in the industry, the laws also regulate their dispute resolution choices in certain instances. Where parties to energy arbitration ignore the provisions of these laws that touch on their autonomy to resolve their dispute, the award rendered thereby may be set aside.

The incursion of stringent regulations into settlement of disputes has become a point of challenge to arbitral awards in the sector. For example, the arbitrability of tax disputes in Production Sharing Contracts (PSCs) in the oil and gas sector has continued to remain unsettled as appellate Courts remain divided on this point. Arbitration panels have also taken different positions regarding the arbitrability of tax disputes. The Courts of first instance (the Federal High Court) have notably pronounced the danger in multiple interpretations to otherwise strictly applied Fiscal Laws. This has introduced different interpretations to the qualification of Investment Tax Credits/Allowances (ITC/ITA) in countries like Nigeria under its Deep Offshore and Inland Production Sharing Contract Act (Laws of the Federation of Nigeria, 2004). Sadly, the passage of the 2021 Petroleum Industry Bill (PIB[14]), did not in any appreciable respect address the unending interpretation challenge. In the power sector, the interpretation of Section 50 of the Electric Power Sector Reform Act (the principal legislation governing the sub-sector) as regards the autonomy of parties to arbitrate; absent an already-prescribed resolution mechanism by the Nigerian Electricity Regulatory Commission (NERC), presents its own bottlenecks in the Courts.

The focus of this article is to consider the autonomy of parties in energy arbitrations in Nigeria. In particular, it examines the impact of section 50 of the National Power Sector Reform Act 2005 and section 11 of the Petroleum Act on adjudication of energy disputes in Nigeria, especially on the arbitrability of tax disputes in Production Sharing Contracts (PSCs). The article proceeds in five sections. After this introduction, section 2

Initiative Act 2007; National Oil Spill Detection and Response Agency (Establishment) Act; and the Oil Pipelines Act and their subsidiary legislations. Note that the Petroleum Act was not repealed by the recently passed Petroleum Industry Bill (awaiting the assent of Nigeria's President Mohammadu Buhari) but saved pursuant to Section 311 of the Bill.

[14] The Nigerian Petroleum Industry Bill was passed on July 1, 2021, by the Nigerian Parliament and currently awaits the accent of the President to become law.

examines the nature and scope of energy disputes and the suitability of arbitration as a timely and efficient mechanism for resolution. It delineates the scope of arbitrable and non-arbitrable energy disputes. Section 3 discusses key trends and challenges in the recognition and enforcement of arbitral awards in the electricity sector. Section 4 focuses on the key trends and challenges in the recognition and enforcement of arbitral awards in the oil and gas sector. Section 5 is the concluding section.

2. ARBITRATION OF DISPUTES IN THE ENERGY SECTOR

One of the unique features of dispute resolution in the energy sector is its party-driven nature. The parties, to a large extent, determine the dispute resolution mechanism, presiding officers, issues and timelines for filing memorials, interrogatories, challenge(s) of an arbitrator and the issuance of awards.

Article IV to the 1st Schedule to the Arbitration Act[15] gives parties the liberty to determine representation. This is not without restriction. Only qualified legal practitioners may represent parties in arbitration; whereas in the United Kingdom[16], persons other than a legal practitioner[17] may act for a party. With the above in mind, this chapter will now focus on the dispute resolution mechanisms within the sub-sectors.

2.0.1 The Nigerian Power Sector

Prior to 2005, the Nigerian electric power sector was regulated by the National Electric Power Authority Act (NEPA Act). Power generation, transmission, and distribution were the exclusive preserve of the Federal Government of Nigeria and the participatory right in the sector was under the control of the Honourable Minister of Power. There was no dispute resolution or independent grievance remedial provision under the old NEPA

---

15 Arbitration and Conciliation Act, CAP A18, Laws of the Federation (2004).

16 See the Arbitration Act, 1996. See also Article 12(9) of the new International Chamber of Commerce (ICC) Rules.

17 The UK Arbitration Act of 1996 prescribes that parties can be represented by a legal representative of choice.

Act. Section 20 of that Act provided that where the National Electric Power Authority (NEPA) took over any electricity undertaking, there must be payment of compensation in appropriate cases, as well as payment of all expenses related to the undertaking and other charges.[18] Clearly, the provision relates to Utilities generating and distributing power under the license of the Honourable Minister of Power.

2.0.2 Electric Power Sector Reform Act 2005

The enactment of the Electric Power Sector Reform Act 2005 (EPSRA/The Act) was revolutionary in Nigeria's drive to de-monopolize the production and distribution of electric power. The sector was partially privatized, and the National Electricity Regulatory Commission (NERC) was set up to regulate generation, transmission, and distribution of power. The EPSRA also provides for the powers of NERC to adjudicate over disputes between consumers, eligible customers, licensees, and other persons who are subject to the application of the EPSRA. The Act[19] also vests in NERC the powers to make regulations for its proceedings, including settlements of disputes.

For proper context, the above-referred sections of the EPSRA are now reproduced below:

Section. 45(2):

> "The Commission shall make regulations for the discharge of its functions and for the conduct of its proceedings, consultations and hearings, including procedures for the participation of licensees, consumers, eligible customers and other persons."

Section. 9

6(1)(2)(a):

> "The Commission may, make regulations prescribing all matters, which by this Act are required or permitted to be prescribed or which, in the opinion of the Commission, are

---

[18] section 20 National Electric Power Authority Act.

[19] Sections 45(2) and 96(1)(2)(a) of the EPSRA.

necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Without derogation from the generality of subsection (1) of this section, regulations made in terms of subsection (1) of this section may provide for any or all of the following:

(a) the administration of the affairs of the Commission, including, inter alia, the holding of meetings, hearings and proceedings, arbitration and mediation proceedings, the conduct of inquiries and investigations, becoming a party, the handling of information, the rules by which evidence shall be taken, and generally the conduct of its business…"

It is pertinent to consider the ambit of disputes that can be resolved by recourse to arbitration under the EPRSA.

Parties that are subject to the application of the EPSRA are encouraged to resolve their disputes through Alternative Dispute Resolution (ADR). This is clear from the provision of section 71(2)(c) of the EPSRA which provides that the terms and conditions of a license may require the licensee to refer its dispute "for arbitration, mediation, or determination by the Commission." EPSRA, s. 71(2)(c) provides as follows:

"Without derogation from subsection (1) of this section, the terms and conditions of a license may require the licensee to:

(b) refer disputes for arbitration, mediation, or determination by the Commission."

A licensee in the power sector may therefore be mandated by NERC to compulsorily subject its dispute resolution process to an ADR mechanism/forum provided by NERC, including arbitration.

NERC's Handbook on Dispute Resolution 2011 (Handbook) and the Consumer Complaint Standard and Procedure are subsidiary regulations made pursuant to the EPSRA for the resolution of disputes in the power sector. One of the overriding objectives stated in the Handbook is to reduce the cost of resolving disputes in the electricity sector by encouraging the utilization of cost-effective ADR mechanisms aimed at avoiding protracted and avoidable litigation thus enhancing a more efficient business

regime within the sector.[20] Arbitration is listed as one of the ADR mechanisms provided for in the Handbook on Dispute Resolution.[21]

The right of the parties to settle their disputes by arbitration entails the right to make provisions for the law of arbitration (*lex arbitri*), the seat of arbitration, the number and expertise of arbitrators, costs and the extent of interim powers that can be conferred on the tribunal. However, for statutory arbitration, parties are constrained to resolve their disputes (via arbitration) only within the confines of the requirements of the law. The NERC Handbook on Dispute Resolution 2011 provides for both mandatory arbitration under subsidiary legislations made by NERC and those under which parties agree to arbitrate their disputes voluntarily.

2.1Non-Arbitrable Issues in the Nigerian Power Sector Evidently, jurisdiction is a fundamental consideration for the use of a dispute resolution mechanism. It either confers (or strips) a tribunal of the right to sit over a dispute and inevitably, determines the validity of an award resulting from such reference. It is important for parties to note what disputes can be resolved via arbitration; whether *ad-hoc* or, institutional or statutory. The NERC has provided for a clear procedure for customer grievance remediation under the Consumer Complaint Handling Standard and Procedure; a procedure which is applicable to all distribution licensees.[22] Customer grievance remediation is not arbitrable.
In this instance, a customer will be required to submit a complaint to the Consumer Complaint Unit (CCU) of the Distribution Company (DISCO/Utility). The CCU then initiates investigation and action to deal with the customer's complaints, solve the problem, inform the customer, and notify NERC. If the customer is not satisfied, the customer is at liberty to appeal to the Forum.

---

[20] See paragraph 2.3 of the Handbook.

[21] See paragraph 4.0 of the Handbook. See also paragraph 4.2 which provides thus: The Commission encourages the use of multi-tier Dispute Resolution processes and parties shall not be restricted to the application of any single dispute resolution process for the resolution of the dispute but shall be encouraged to utilize a combination of ADR mechanisms, whether contained in this Handbook or not.

[22] See Paragraph 1(2) of the Consumer Complaint Handling Standard and Procedure.

The Forum considers the appeal. And where found to be unmeritorious, it will inform the customer, CCU, and notify NERC. Where the appeal has merit, the Forum will invite the distribution company and the customer to a hearing to attempt to reach a resolution of the customer's appeal. If the problem is resolved, the customer and the distribution company will be informed, and NERC will be notified. Otherwise, the customer may further appeal to NERC for adjudication. If the customer's appeal is favorably resolved, NERC notifies the Forum and the distribution company for appropriate action. If not favorably resolved, the customer is at liberty to escalate to litigation. It is in consequence of this that it can be concluded that arbitration does not apply to distribution disputes between consumers and companies.[23]

The Nigerian Court of Appeal in the case of Comag Steel Company Ltd. v. Enugu Electricity Distribution Plc.[24] held that the procedure stated above is a condition precedent to initiating a suit in Court. While the decision of the Court of Appeal remains the law on the subject in Nigeria until overruled, it is important to state that the decision appears incorrect or may be given a wrong interpretation. This is so because, as it would seem, the Court reached this decision without considering the provisions of paragraph 13 of the Consumer Complaint Handling Standard and Procedure, which provides as follows:

> "Nothing contained in these Regulations shall affect the rights and privileges of the customer under any law for the time being in force…"

The decision of the Court of Appeal above may have been different had the Court considered paragraph 13 of the Consumer Complaint Handling Standard and Procedure. The High Court of the Federal Capital Territory considered this provision in an interlocutory ruling in Oluwabiyi v. Abuja Electricity Distribution Company.[25] The Court held that there was no

---

[23] See paragraphs 3, 4, 7, 9, 10, 11, and 12 of the Consumer Complaint Handling Standard and Procedure.

[24] Unreported Suit No: CA/E/100/2020. Judgment delivered on November 4, 2020.

[25] Unreported Suit No. FCT/HC/CV/734/17. Ruling delivered on October 26, 2017.

provision in the Consumer Complaint Handling Standard and Procedure mandating a customer to exhaust the internal dispute resolution mechanism before commencing an action, as the Consumer Complaint Handling Standard and Procedure did not keep Courts' jurisdiction in abeyance. The customer is therefore free to enjoy the rights and privileges under any other law for the time being in force. Same was the decision in Orakul Resources Limited & Anor. v. Nigerian Communications Commission & Ors.,[26] where the Court of Appeal had earlier held that complying with the internal dispute resolution mechanism is not compulsory.

Issues that relate to the regulatory functions of NERC, issues covered under the Consumer Complaint Handling Standard and Procedure and other issues under NERC's market Rules also cannot be resolved by the dispute resolution procedures under the Handbook on Dispute Resolution 2011.[27]

It must be noted in conclusion that for administrative purposes, remedial mechanisms are not alien to our dispute resolution mechanisms. They however must not purport to oust the jurisdiction of a Court in their construct.

2.2 Arbitrable Disputes in the Nigerian Power Sector

There are two kinds of disputes that can be arbitrated under the EPSRA and subsidiary legislations. The first category is issues which are made subject to mandatory arbitration in the Market Rules, Grid Code, and other regulations of the NERC. This category has its special rules of arbitration under Appendix 2 to the Handbook on Dispute Resolution 2011. By Rule 2.1 of Appendix 2 to the Handbook on Dispute Resolution 2011, the Rules apply to the following disputes:

a. any dispute between the System Operator or the Market Operator or the TSP and any Participant which arises under, in connection, or in relation to these Rules or the Grid Code, including a dispute relating to any alleged violation or breach thereof by the System Operator and the Market Operator or the TSP or a Participant,

---

[26] (2007) LPELR -8913 (CA)

[27] See paragraph 8 of the Handbook on Dispute Resolution 2011.

whether or not specifically identified in these Rules as a dispute to which these Rules applies;

b. disputes relating to an order of denial by the Market Operator of authorization to any person to participate in the Market Operator Administered Market;

c. a dispute between the System Operator or the Market Operator or the TSP and a Participant specified in the Market Rules or the Grid Code as being subject to resolution in accordance with or pursuant to these Rules or otherwise agreed by the System Operator or the Market Operator or the TSP and a Participant to be resolved pursuant to these Rules;

d. any dispute between the System Operator or the TSP and a Participant, in connection with, in relation to or arising from the terms of any agreement, including an agreement between the TSP and such Participant for connection of the Facilities of such Participant to System Operator Controlled Grid, unless the applicable agreement or contract or the License of a party to the dispute either provides for an alternative dispute resolution mechanism or provides that the dispute resolution regime provided in these Rules shall not be applicable;

e. a dispute between the System Operator and the Market Operator and a Participant or between Participants regarding the interpretation of the Market Rules or the Grid Code; and

f. unless Rule.2.2 applies, any other disputes between Participants where all of the Participants which are parties to the dispute consent in writing to the application thereof.

Rule 2.2 of Appendix 2 to the Handbook on Dispute Resolution 2011 to which Rule 2.1(f) refers states as follows:

> "A Participant that, pursuant to Rule 2.1(f), has consented to the application of the Dispute resolution procedure provided for in these Rules may prior to the date on which a party to the Dispute issues a Notice of Dispute pursuant to Rule 4.1, withdraw its consent in the event that a Respondent to a counterclaim or cross claim, other than such Participant, objects to the application of such procedure."

The second category of arbitrable disputes under the EPSRA are disputes to which parties submit to arbitration under NERC's Regulations. Arbitration of issues under the second category are meant to be in accordance with the provision of NERC's Arbitration Rules in Appendix 3 to the Handbook on Dispute

Resolution 2011.[28] The NERC Arbitration Rules represents a step to provide rules that are adapted to the peculiarities of power arbitrations. The subsidiary legislations however leave some gaps which will be highlighted in the paragraphs below. This second category of arbitrable disputes relates only to disputes arising between licensees under the EPSRA or in respect of matters arising from the provisions of the EPSRA between licensees and Consumers and third parties; including instances where parties have agreed to resolve their disputes under the arbitration Rules of the Commission. It does not apply to disputes arising from the operations of the Markets Rules or Grid Code.

3. RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN THE NIGERIAN POWER SECTOR

An important issue in arbitration references is the Court with supervisory jurisdiction. In both local and international arbitration, courts of the seat of arbitration typically have jurisdiction over arbitrations conducted within their jurisdiction. The Court with supervisory jurisdiction in arbitration must be identified because that is where parties to the arbitration can seek enforcement of interim reliefs and the arbitrator can seek judicial intervention on enforcement of interlocutory orders. The Handbook on Dispute Resolution 2011 is silent about which Court will have jurisdiction over arbitrations conducted by it. EPSRA, s. 49 provides thus:

(1) If any question of law arises from an order or decision of the Commission, the Commission may, on its own initiative or at the request of any person directly affected by such order, reserve that question for the decision of the High Court.

(2) Where a question has been reserved under subsection (1) of this section, the Commission shall state the question in the form of a special case and file it with the Registrar of the High Court.

---

[28] Paragraph 9.4 of the Handbook on Dispute Resolution 2011

These provisions appear to only provide jurisdiction to the High Court to entertain issues on cases stated to it, rather than to assume supervisory jurisdiction over NERC-sanctioned arbitrations. The impact of EPSRA, s. 50(g) on the enforcement of arbitral awards must also be highlighted. The section provides that anyone who is aggrieved by the outcome of any arbitration or mediation by the Commission of a dispute between licensees may apply to the NERC for review of the decision.

Rule 12.1 of Appendix 2 to the Handbook on Dispute Resolution, on the other hand, provides thus:

"Any award made by an Arbitrator pursuant to these Rules shall:

a. be final and binding on the parties;
b. be enforceable as an award in accordance with the provision of the Arbitration and Conciliation Act, Cap. A18, LFN 2004; and
c. if not complied with, constitute an Event of Default for the purposes of Rule 46.3.1(o)46.3.1(b) of the Market Rules and notwithstanding anything in these Rules to the contrary, any order passed by the Market Operator pursuant to Rule 46.3.10 of the Market Rules shall be effective immediately."

Rule 10 of Appendix 3 to the Handbook on Dispute Resolution 2011 provides that: "Where a party fails to abide by an arbitration award, the successful party shall apply to the High Court for enforcement of the award."

The philosophy underpinning arbitration is that awards rendered from a properly conducted arbitral proceeding must be final and binding on the parties. The popular exception is where the arbitrator misconducts himself, or where he lacks jurisdiction. These two broad grounds have been interpreted in a plethora of decided cases.[29] The provision of paragraph 12.1 which provides that awards of a tribunal set up under NERC Rules, will appear to

---

[29] Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. (2000) 12 NWLR (Pt. 681) 393 referred to.] (P. 493, paras. E-G); Araka v. Ejeagwu(2000) 15 NWLR (Pt. 692) 684; Taylor Woodrow (Nig.) Ltd. v. S.E. GMBH (1993) 4 NWLR (Pt. 286) 127; A. Savola Ltd. v. Sonubi (2000) 12 NWLR (Pt. 682) 539; K.S.U.D.B. v. Fanz Construction Company Ltd. [1990] 4 NWLR (Pt. 142) 1 referred to.] (P. 219, paras. C-G)

set itself against section 50(g) of the EPSRA which provides that anyone who is aggrieved by "*the outcome of any arbitration or mediation by the Commission of a dispute between licensees*" may apply to NERC for a review. Under the Arbitration and Conciliation Act referenced by the Handbook, only the High Courts (both Federal and States) have jurisdictions to enforce or set aside arbitral awards. Therefore, the provision of section 50(g) which gifts the NERC right to hear appeals on arbitral awards rendered under its rules will appear to unwittingly set up a concurrent or conflicting jurisdiction between Federal and States High Courts and the NERC.

Going by the fact that jurisdiction to enforce awards referencing the Arbitration and Conciliation Act (ACA) is conferred on the Court pursuant to a subsidiary legislation, the provision of section 50(g) of the EPSRA will prevail. The powers of the NERC over licensee under the EPRSA is considerable and it would be able to enforce the decisions of arbitrators and order of its own appeal against licensees who settle for arbitration under its rules.

ACA, s. 31 provides as follows:

(1) An arbitral award shall be recognized as binding, and subject to this section and section 32 of this Act, shall, upon application in writing to the Court, be enforced by the Court.
(2) The party relying on an award or applying for its enforcement shall supply-
   (a) the duly authenticated original award or a duly certified copy thereof; and
   (b) the original arbitration agreement or a duly certified copy thereof.

On its face, Rule 12 of Appendix 2 to the Handbook on Dispute Resolution 2011 and Rule 10 of Appendix 3 to the Handbook on Dispute Resolution 2011, are to the effect that the High Court has jurisdiction to enforce arbitral awards in the Nigerian power sector, and to that extent, compliant with the provisions of ACA, s. 31. EPSRA, s. 50(g) on the other hand, seems a standalone legal provision, placing NERC on concurrent jurisdiction status with the High Court; at least in relation to reviewing an arbitral decision. The ACA, s.35 however provides that the ACA shall not affect any other law by virtue of which certain disputes- (a) may not be submitted to arbitration; or (b) may be submitted to

arbitration only in accordance with the provisions of that or another law, and by that section 50(g) may have some justification. It must however be stated that the NERC cannot exercise all the powers of enforcement of judgment by a Court such as issuing writ of fifa, sanctioning garnishee proceedings, etc. Parties to a NERC-sanctioned arbitration may therefore harvest arbitral award and still be denied the fruit thereof.

4. ARBITRATION OF DISPUTES IN THE OIL AND GAS SECTOR

4.01 Arbitrability of Oil and Gas Disputes

Arbitration is a preferred dispute resolution mechanism in the oil and gas industry globally. The Petroleum Act which regulates the oil and gas industry in Nigeria, makes provisions that mandate the settlement of oil and gas disputes by arbitration.[30] Petroleum Act, s. 11 provides as follows:

(1) Where by any provision of this Act or any regulations made thereunder a question or dispute is to be settled by arbitration, the question or dispute shall be settled in accordance with the law relating to arbitration in the appropriate State and the provision shall be treated as a submission to arbitration for the purposes of that law.

(2) In this section "the appropriate State" means the State agreed by all parties to a question or dispute to be appropriate in the circumstances or if there is no such agreement, the Federal Capital Territory, Abuja.

Paragraph 42 of the First Schedule to the Petroleum Act provides as follows:

> "If any question or dispute arises in connection with any licence or lease to which this Schedule applies between the Minister and the licensee or lessee (including a question or dispute as to the payment of any fee, rent or royalty), the question or dispute shall be settled by arbitration unless it

---

[30] Section 11, Petroleum Act.

relates to a matter expressly excluded from arbitration or expressed to be at the discretion of the Minister."

Paragraph 5 of the Second Schedule to the Petroleum Act provides as follows:

"Any dispute which may arise as to whether a delay is due to causes beyond the control of the licensee or lessee shall be settled by agreement between the Minister and the licensee or lessee or, in default of agreement, by arbitration."

Paragraph 6 of the Second Schedule to the Petroleum Act provides that:

"The price to be paid for petroleum or petroleum products taken by the Minister in exercise of his said right of pre-emption shall be-

a. the reasonable value at the port of delivery, less discounts to be agreed by both parties; or
b. if no such agreement has been entered into prior to the exercise of the right of pre-emption, a fair price at the port of delivery to be settled by agreement between the Minister and the licensee or lessee or, in default of agreement, by arbitration."

Paragraph 10 of the Second Schedule to the Petroleum Act states thus:

"Any compensation payable under paragraph 9 of this Schedule shall be settled by agreement between the Minister and the licensee or lessee or, in default of agreement, by arbitration."

Regulation 61(2) of the Petroleum (Drilling and Production) Regulations states thus:

(2) If any dispute arises as to the amount of royalty due for a quarter, the licensee or lessee-

a. shall pay within the time provided by or under paragraph (1) of this regulation whatever he admits to be due; and

b. where on the settlement of the dispute by agreement, arbitration or otherwise, any further amount is agreed or

found to be due, shall pay that further amount within seven days of the settlement.

What is discernible from the provisions of the Petroleum Act, its Schedules, and the Petroleum (Drilling and Production) Regulations is that arbitration is a preferred mode of settling disputes in the Nigerian oil and gas industry. In some instances, it is mandatory, and in others it is a condition subsequent, after parties have tried to settle their disputes by agreement.

4.02 Arbitrability Matters in Oil & Gas Disputes

Historically, disputes are settled in the oil & gas industry by unilateral action; no action at all when there is a dispute. However, with the development and expansion of the industry, there have been incremental cases of commercial disputes in the Sector. One of the most prominent will include tax disputes. In other words, disputes arising from the Petroleum Profit Tax Act (PPTA). Arguments have been made as to whether tax disputes in Production Sharing Contracts (PSCs) can be severed from other issues and subject to bifurcated arbitral proceedings. The author will now attempt to unpack this vexed issue.

PSCs are oil exploration and exploitation arrangements between Nigeria and international oil companies (IOCs). PSCs are made pursuant to the Deep Offshore and Inland Basin Production Sharing Contract (Amendment) Act, 2019. The philosophy that guides production sharing arrangement is that IOCs invest in both onshore and deep-water oil assets (and of recent, gas) for a right to lift oil in lieu of repayment for their investment and accruable profits thereto. It is further to this arrangement that parties to the PSCs, will be permitted to lift tax oil, cost oil, royalty oil, etc. In the event of a disagreement (usually as to tax computation), the PSCs would normally make provision for a mechanism-arbitration.

Tax obligations of oil companies in petroleum operations are usually determined by recourse to the provision of the PPTA and the DOA. The PPTA provides for taxes payable by oil companies and deductions permissible thereto. The following are the deductions which must be considered in the assessment of taxes payable by oil companies under PSCs:

a. all royalties not deductible under section 10(1)(b) of PPTA;
b. all non-productive rents, the liability for which was incurred by the company during that period;

c. the amount of investment tax credit due for the period to the company; and
d. all sums incurred by the company during that period as custom or excise duty or other charges levied for facilities used by the company in its operations.

The determination of deductibles and the implication of the provisions of the PPTA, s.10 on operations of IOCs, remains a bone of contention. The Federal Internal Revenue Service (FIRS) has the obligation under the PPT to calculate all the taxes payable by the IOCs. The obligations of parties to the PSCs are set out therein. In most PSCs, the NOC pays taxes on behalf of the parties to a PSC but obtains tax receipts for and on behalf of the respective parties. What has often become litigious is the matter of computation and what appears to be the duty of care on the part of the NOC towards other contracting parties. Disputes as to what should be paid to the FIRS has always been a matter of debate and this has led to several multi-billion arbitral proceedings.

Victoria E. Kalu in 'Nigeria's Petroleum Profits Tax Act: An Assessment' notes that Sections 10, 11 and 12 of the Act, are controversial, in that oil companies and the FIRS are always at loggerheads over the correct interpretation of these sections particularly section 11. The provision that deductible expenditure must have been "wholly, exclusively and necessarily incurred in petroleum operations" is contentious and a subject of disagreement between the Regulator and the oil companies.'[31] The determination of the chargeable tax(es) has always been highly contentious between the NNPC, the FIRS and the oil companies.

In the landmark case of Statoil (Nigeria) Limited & Anor v. Federal Inland Revenue Service & Anor.,[32] the Court of Appeal upheld the injunction of a Federal High Court to the effect that the arbitration of the parties thereto to determine the tax payable under their PSC arrangement is a statutory obligation vested in the FIRS and it must be involved in the determination of such

---

[31] Kalu V. E. Nigeria's Petroleum Profits Tax Act: An Assessment', available at

[32] (2014) LPELR-23144(CA) https://pdf4pro.com/amp/view/nigeria-s-petroleum -profits -tax-act-an-assessment-562f69.html accessed on July 12,

issues. The Court took the view that tax as a public policy issue cannot be arbitrated outside the statutory role of the FIRS.

Since the decision of the Court of Appeal in the *Statoil* case, a wave of cases to set aside arbitral award on PSCs solely on the ground that the non-inclusion of the FIRS in the determination of taxes payable under the PSC rendered the arbitral proceedings void. In the case of *Statoil v NNPC*[33], Buba J of the Federal High Court held that tax issues are not arbitrable and that robs the arbitral tribunal of the jurisdiction to determine disputes between the parties. The Court found the arbitration to have been beyond the jurisdiction of the arbitrator when it held that the issue submitted to arbitration was a tax dispute that could not be resolved by accord and satisfaction.

5. CONCLUSION

The essence of every arbitration is to ensure a forum of timely, impartial, and enforceable determination of commercial disputes in a way that affords all the parties involved a level playing field to ventilate their respective grievances. The philosophy that underpins arbitration is that parties get their fair dues under the rules that they subject themselves to. Power arbitration appears to limit the capacity of parties to freely choose their arbitration. The framework of the NERC's arbitration will need to be urgently reviewed in line with international best practices to ensure that parties who choose to arbitrate under its rules are not locked in a dead end. Furthermore, the PPTA should be amended to ensure greater clarity in determining taxes payable by oil companies.

---

[33] Unreported suit FHC/L/CS/638, judgement delivered by Buba J.