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Arbitration in Nigeria: Latest News about the Arbitration Bill and an $8.9 Billion Award

Joseph Onele (The University of Adelaide) · Thursday, March 21st, 2019

Matters Arising on Proposed Changes to Arbitration Law in Nigeria

In February 2018, the Senate of the Federal Republic of Nigeria passed the much-anticipated Arbitration and Conciliation Act (Repeal and Re-Enactment) Bill 2017 ('Bill'). Since then, the Bill has been pending before the House of Representatives (HoR) of the Federal Republic of Nigeria, the second legislative chambers, and awaiting the passage. The Bill includes provisions which give the impression that Nigeria is ready to join the bandwagon of pro-arbitration legislative regimes for TPF. Other important provisions in the Bill concern the emergency arbitrator and the interim measures of protection, as well as emergency reliefs.

While the innovations in the Bill that relate to TPF have not yet fully addressed all concerns in this regard, the efforts made thus far are commendable. A cursory reading of the Bill will reveal that the Bill tacitly recognizes TPF in arbitration. Apart from defining the 'costs' in arbitration to include TPF in Article 41(2)(g) of the Bill, Article 50(1) empowers the arbitral tribunal to fix 'costs of arbitration' in its award and further defines the term 'costs' to include 'the costs of obtaining Third Party Funding.' Additionally, Article 83 defines TPF as an arrangement between an individual or corporate entity (the funder) and a party involved in the arbitration, whereby the funder agrees to finance some or all the party's legal fees in exchange for being remunerated from proceeds of the award.

Further to the foregoing, TPF enthusiasts could conveniently argue that the above-stated provisions impliedly recognize TPF in arbitration in Nigeria, to the extent that the provisions contemplate increasing access to justice and preventing a situation where a party is unable to arbitrate a dispute on account of costs associated with arbitration. However, it is quite instructive to note that the provisions of the Bill earlier alluded to, which give the impression that Nigeria is ready to join the moving train of nations that allow TPF in arbitration, are only limited to the implicit recognition of TPF in Arbitration in Article 41(2)(g) (Definition of Costs), Article 50(1) (Costs of the Arbitration), and the Definition Section of Article 83 but no more.

The foregoing in mind, it is strongly recommended, however, that the Bill goes beyond the definition of TPF and contain substantive provisions allowing TPF in arbitration in

Nigeria. Nigeria can draw ready-made examples from **Singapore** and **Hong-Kong** in this regard. The Singaporean Parliament, on 10 January 2017, passed the Civil Law (Amendment) Act (Bill No. 38/2016) (the Act), which entered into force in March 2017. The Act amends Singapore law to permit TPF for international arbitration and related court proceedings under certain conditions, with further regulations prescribing specific eligibility requirements for funders. Similarly, further inspiration can be drawn from the Hong-Kong Legislative Council which recently **adopted** a new law permitting the TPF of arbitration, bringing **Hong Kong** into line with other common law jurisdictions and further **strengthening** the position of the Hong Kong International Arbitration Center.

Taking into consideration the attraction of Nigeria as a preferred seat of arbitration and the potentials of such offer for the Nigerian economy, the Nigerian lawmakers, upon return to the National Assembly of the Federal Republic of Nigeria after the conclusion of the 2019 elections, must go beyond the tacit recognition of TPF in arbitration in Nigeria and enact substantive provisions allowing TPF in arbitration in Nigeria. Once this is done, the Bill, upon being passed to law, would have effectively overridden the **common law position** precluding **champerty and maintenance** in Nigeria. This is because it is a well-settled principle of Nigerian law that where a statutory provision is in conflict or differs from common law, the common law gives way to the statute. This much has equally been alluded to by the Supreme Court of Nigeria in *Patkun Industries Ltd v. Niger Shoes Ltd* (1988) NWLR (Pt. 93) 138; (1988) LPELR-2906(SC), Per Nnamani JSC.

Informal engagement with the arbitration community in Nigeria reveals the optimism in several quarters that the passage of the Bill will position Nigeria to become one of the preferred seats for arbitration. It remains, however, to be seen whether the HoR will pass the much-awaited Bill before the end of the second quarter of 2019, upon the conclusion of elections and resumption of legislative functions.

Matters Arising on the $8.9 Billion Arbitration Award Against the Nigerian Government

Another interesting development of 2018 and which has surfaced in 2019 is the $8.9 billion arbitration award issued against Nigeria. As it currently stands, Nigeria risks losing about $9 billion worth of assets in the UK to a British firm, Process and Industrial Developments Limited ("P&ID"). It remains to be seen whether P&ID, through the English Court, will seize Nigeria's commercial assets in England, in a bit to levy execution of the award earlier obtained.

By way of background, it will be recalled that the Nigerian government was accused of reneging on its obligation to supply gas to P&ID under an agreement to build and operate an Accelerated Gas Development Project (Gas Project) to be located in Cross River State, Nigeria. It was P&ID claim that the negligence of the Federal Government of Nigeria frustrated the construction of the Gas Project, and as a result, depriving P&ID the potential benefits expected from 20 years' worth of gas supplies. It is worth noting that the Award against Nigeria was about $6.59 billion but following the refusal by the Nigerian government to settle the Arbitral Award , the arbitral award attracted an accumulated interest at 7 per cent rate per annum, making the entire sum due

from the Nigerian government – $8.9 billion award.

The final award, notwithstanding an out-of-arbitration agreement for the payment of $850 million (about 9.6 per cent of the $8.9 billion award), was successfully reached with P&ID during the erstwhile President Goodluck Ebele Jonathan government. However, the responsibility for the disbursement of funds to P&ID was passed on to the then incoming administration of President Buhari. Rather than taking the recommended action, the President Buhari led administration opted to set aside the settlement agreement, directing its lawyers to return to the tribunal for renegotiation with the engineering firm, while seeking to set aside the award completely.

It remains to be seen, however, whether and how soon, the Nigerian government will leverage on this seemly little window of grace to work towards an amicable resolution of this matter with P&ID.

Final Remarks

Given the imminent change to the arbitration law in Nigeria, there is a good business case for foreign investors to invest in Nigeria after the 2019 general elections. More developments regarding enforcement of international arbitral awards are to be expected. Going forward, it augurs well for the Nigerian government to see to an amicable resolution of the $8.9 billion award. Such a lingering matter does no good to the "commercial attractiveness" of Nigeria.

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