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29 February 2024

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TEMPLARS ThoughtLab

A Recap of 2023's Arbitration Highlights in Ghana & Nigeria: An Eye on the Future

Introduction

For many decades, arbitration has remained the mechanism of choice for the resolution of disputes between and among commercial parties. Owing to its well documented benefits – arbitration is perceived to be faster, more business-friendly, and efficient – countries have historically competed, and indeed continue to compete, through legislation, court decisions and policies to have their jurisdictions perceived as arbitration friendly.

Using Nigeria as an illustrative example, the need not to be left behind significantly accounted for the signing into law of the Arbitration and Mediation Act 2023 by former President, Muhammadu Buhari. The law, together with the decision of the Commercial Court of England & Wales in **The Federal Republic of Nigeria v Process & Industrial Developments Ltd**[1] which led to the setting aside of the now infamous US$6.6 billion arbitral award against Nigeria, constituted some of the biggest talking points in the arbitration community not just in Nigeria but all over the world.

There were also significant developments in the arbitration space in Ghana such as the US$275 million UNCITRAL claim against Ghana by an Australian gold mining company, Cassius Mining on 3 February, which came just 4 days after the State had defeated another UNCITRAL claim by a Chinese company over a cancelled contract to build an intelligent traffic management system.

In what follows, we discuss the above and other pertinent Arbitration-related developments in Ghana and Nigeria in the year ended 2023 while also predicting the themes that are likely to drive the conversation in 2024.

[1] [2023] EWHC 2638 (Comm)

Legislative Development

The Nigerian Arbitration and Mediation Act 2023

On 26 May 2023, former President Muhammadu Buhari signed into law the Arbitration and Mediation Act 2023 ("**AMA**") which repealed and replaced the Arbitration and Conciliation Act 1988. The signing into law of the Act marked the end of a long and arduous, but ultimately fruitful journey, that lasted more than a decade.

In a series of publications, the Templars Dispute Resolution team previously highlighted some of the innovative provisions of the AMA including the provisions on third-party funding[2]; the adoption of a liberal definition of arbitration agreement and the acknowledgment of the advances in technology by recognizing agreements contained in an electronic communication as meeting the 'in writing' requirement[3]; the abolition of the error of law on the face of the award defence[4]; the resolution of the controversy surrounding the application of limitation laws to the enforcement of arbitral awards, etc.[5]

Other notable provisions of the AMA include the introduction of the concept of emergency arbitration which is gaining currency in the developed world, and which permits parties in need of urgent reliefs to apply to the national courts or the designated arbitral institutions for an emergency arbitrator prior to the constitution of the arbitral tribunal.

Another innovation in the AMA is the introduction of the mechanism of award review. What the AMA has done in this regard is to provide parties with the option of approaching an award review tribunal as an alternative to national courts, to review arbitral awards.

The AMA has also eliminated what was arguably the most controversial aspect of the 1988 Act by discarding the provisions of sections 4 and 5 of the 1998 Act and replacing the two sections with a new Section 5. Just like most major national arbitral legislations, the 1988 Act provided for the powers of the national courts to stay their proceedings in respect of a dispute which is the subject of an arbitration agreement. For reasons no one was able to rationalize for 35 years, the 1988 Act made provisions for this in two separate sections, sections 4 and 5. Predictably, this was a recipe for confusion that the courts continue to grapple with to date. Thankfully, the AMA has now settled that controversy by simply adopting the language of Article II (3) of the New York Convention which simply provides that a court, before which an action is brought in a matter which is the subject of an arbitration agreement, shall refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

What this means is that the conditions in section 5 of the 1988 Act for the grant of the stay of proceedings, including the requirement that the applicant must be ready and willing to do all things necessary to the proper conduct of the arbitration, which the courts elevated to onerous levels in a number of cases[6] no longer form part of the new regime. This is also the case with the equally controversial phrase, "before taking any other step" which was the subject of judicial interpretation in many cases, which has also been discarded. It now remains to be seen how the courts will interpret these changes.

Case Law

Beijing Everyway Traffic and Lighting Tech Co v. Ghana

The 2023 arbitration year opened in Ghana with the news that Ghana had defeated a $55 million UNCITRAL claim by a Chinese company, Beijing Everyway Traffic and Lighting Tech Co over a cancelled contract to build an intelligent traffic management system.

The dispute arose from a US$100 million contract signed between Everyway and the Ghanian Ministry of Roads and Highways in 2012 under which Everyway was contracted to build and operate an intelligent traffic management system for the Accra Metropolitan Area including electronic traffic signals and video monitoring. In the course of the execution of the contract, Everyway allegedly issued two interim payment certificates worth US$22 million which the Ghanian government failed to pay.

In 2020, the Ghanian government informed Everyway that it had rescinded the contract and awarded the project to two other Chinese contractors, Huawei Technologies Company and the China National Import and Export Corporation. Aggrieved, Everyway filed an investment treaty claim under the auspices of UNCITRAL claiming in excess of US$55 million in damages for unlawful expropriation under the China-Ghana Bilateral Investment Treaty (BIT).

In an award issued on 30 January 2023, a three-man tribunal chaired by Greek national Stavros Brekoulakis declined to hear the claims on the basis that it lacked jurisdiction to determine the lawfulness of the alleged expropriation. The Tribunal also rejected Everyway's arguments that the Tribunal could import its jurisdiction under the most-favoured nation clauses in other treaties.

Cassius Mining Limited v. Ghana

The same week, Ghana was hit by an UNCITRAL claim brought by an Australian gold mining company, Cassius Mining Limited alleging breach of the fair and equitable treatment standard and claiming in excess of US$275 million as damages for breach, by the State, of the 2016 Large-Scale Prospecting License Agreement entered into with the company in the gold rich Talensi District in the Upper East Region of Ghana.

Ghana originally greeted the claim with an action before the Ghanian courts seeking to injunct the constitution of the arbitral tribunal. Although Ghana indeed obtained an injunction restraining the appointment of the tribunal, the State however proceeded to nominate its party-appointed arbitrator and the tribunal was constituted in October 2023 with the appointment of the presiding arbitrator.

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[2] See Breaking Barriers in Arbitration Funding: Third-Party Funding as a Risk Management tool under the Arbitration and Mediation Act 2023 | TEMPLARS Law (templars-law.com)
[3] See Discussing the "New How" – Examining the "In Writing" Requirement for Arbitration Agreements Under the Arbitration and Mediation Act 2023 | TEMPLARS Law (templars-law.com)
[4] Error of Law on the Face of the Award – the Arbitration and Mediation Act 2023 Comes to the Rescue | TEMPLARS Law (templars-law.com)
[5] See Limitation Laws for Arbitral Award Enforcement in Nigeria: The Arbitration and Mediation Act2023 Plugs A Major Loophole | TEMPLARS Law (templars-law.com)
[6] See for instance *The Owners of MV Lupex v Nigerian Overseas Chartering & Shipping Ltd (MV Lupex) (2003) 15 NWLR (Pt 844) 469* and *UBA PLC v. Triedent Consulting Ltd (2023) LPELR-60643(SC).*

The tribunal held a hearing on 4 December 2023 to determine certain preliminary issues concerning the tribunal's jurisdiction and the seat of arbitration. The tribunal's decision is now being awaited.

KNOC Nigeria v. Nigeria ICSID Arbitration

Next door, Nigeria was sometime in June 2023, served with a Notice of Arbitration registered with the International Centre for Settlement of Investment Disputes (ICSID) on 8 June 2023. The claim was brought by South Korean national oil and gas company, Korea National Oil Corporation (KNOC) and its Nigerian subsidiaries, KNOC Nigeria West Oil Company Limited and KNOC Nigeria East Oil Company Limited.

The claim arose from Nigeria's cancellation of the award of OPL 321 and OPL 323 to KNOC. On 8 September 2023, the Tribunal was constituted, and the Tribunal has since issued procedural order No. 1.

Before June 2023, there had been only six known ISDS cases against Nigeria. The first two of those cases[7] were settled but the terms were not made public. The third case[8] was heard on the merits and was subsequently decided in Nigeria's favour. In 2020 and 2021, two new claims against Nigeria were registered with ICSID, *Eni International B.V., Eni Oil Holdings B.V. and Nigerian Agip Exploration Limited v. Federal Republic of Nigeria (ICSID Case No. ARB/20/41)* as well as *Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v. Federal Republic of Nigeria (ICSID Case No. ARB/21/7)* respectively. The Shell claim has been withdrawn while the Eni claim is currently ongoing. On 26 March 2021, Nigeria got on the receiving end of her first adverse ISDS decision in *Zhongshan Fucheng Industrial Investment Co. Ltd v. Federal Republic of Nigeria*.

With the KNOC v. Nigeria claim and the discontinuance of the Shell claim, there are now two ongoing ICSID claims against Nigeria.

Process & Industrial Developments Ltd v Nigeria judgment

The biggest development in the Nigerian arbitration space in the last year, and perhaps this generation, occurred in far-away London on 23 October 2023, when a Commercial Court in England & Wales (UK High Court) presided over by Mr. Justice Robin Knowles CBE upheld Nigeria's challenge to a US$6.6 billion arbitral award obtained by Process & Industrial Development Limited (P&ID) on 31 January 2017[9], on grounds that the award was obtained by fraud and that the way in which the award was procured was contrary to public policy. Nigeria's challenge was brought pursuant to Section 68(3) of the English Arbitration Act 1996.

Sequel to the decision upholding Nigeria's challenge, the UK High Court conducted a hearing on 8 December 2023, to make consequential orders in relation to the award.

[7] *Guadalupe Gas Products Corporation v. Nigeria (ICSID Case No. ARB/78/1)* and *Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria (ICSID Case No. ARB/07/18)*.
[8] Interocean Oil Development Company & Interocean Oil Exploration Company v. Federal Republic of Nigeria, ICSID Case No. ARB/13/20, Award (6 Oct. 2020).
[9] By the time Nigeria's challenge was upheld and the award was ultimately set aside in December 2023, the award sum had risen to US$11 billion inclusive of interests. This sum was more than Nigeria's most recent annual budget for health, education and justice combined.

This is because, under the English Arbitration Act, upon upholding a section 68 challenge, the court has three options: (a) to set aside the award, (b) to declare that the award should be of no effect, and (c) to remand the matter back to the tribunal for hearing. On its part, P&ID sought leave to appeal the October judgment.

On 21 December 2023, Mr. Justice Knowles delivered a ruling, in which the court set aside the award in whole and also refused to grant P&ID leave to appeal against the decision.

Subject to the right of P&ID to appeal the decisions to the English Court of Appeal, this marks the end of a decade long saga that had the entire Nigeria waiting with bated breath and captured the imagination of arbitration enthusiasts all over the world by reason of the humongous amount involved.

Lessons from the P&ID Saga

While Nigeria has ultimately escaped liability, the entire episode must serve as a wake-up call. Firstly, this was, frankly speaking, a close shave with disaster, and the government has now seen firsthand the tangible consequences of fraud and corruption. Hopefully, this case will serve as an example for subsequent governments on how not to manage transactions. Secondly, present and succeeding Nigerian governments must learn to place their best foot forward in their negotiation of contractual transactions and in the management of disputes that arise therefrom. As Knowles observed in the judgment, Nigeria was let down, and that is putting it mildly. Thirdly, the public sector workers have hopefully learnt that preparation is everything and that they must take their work seriously. Lastly, there is no substitute for merit and excellence.

Notable decisions of the Nigerian Supreme Court

On the domestic arbitration front, there were a couple of notable decisions from the Nigerian Supreme Court such as **NNPC v. Fung Tai Eng. Co. Ltd (2023) 15 NWLR (Pt. 1906) 117** where the Supreme Court reinforced the finality and bindingness of arbitral awards and restated the well-known position that courts do not sit on appeal over arbitral awards for the purpose of a re-hearing. Instructively, the Supreme Court also held in that case that *Section 12(1) & (2) of the Nigerian National Petroleum Corporation Act which requires prior service of pre-action notice on NNPC applies exclusively to lawsuits and not to arbitral proceedings*.

Prior to the judgment of the Supreme Court, it had always been the practice for parties involved in arbitration disputes with NNPC to first serve NNPC with a 30-day pre-action notice before issuing the notice of arbitration. This decision has finally laid that controversy to rest.

There is also the case of **UBA Plc v. Triedent Consulting Ltd (2023) 14 NWLR (Pt. 1903) 95** where the Supreme Court revisited the controversial question of the conditions to be fulfilled by an applicant seeking a stay of proceedings pending arbitration.

On the whole, Nigerian courts have, in the last year, continued their pro-arbitration approach in the determination of arbitration related cases by generally giving effect to parties' agreement by refusing to countenance actions in respect of which

there is an arbitration agreement and referring parties to arbitration in accordance with their agreement.

Conclusions And Outlook For 2024

All factors point to the fact that arbitration will remain the dispute resolution mechanism of choice for the foreseeable future.

One of the topical issues in the world today is the subject of the energy industry transition and the need for urgent action due to the impact of fossil fuels (Coal, Oil & Gas) on the environment. At the end of the 28th Conference of Parties of the United Nations Framework Convention Climate Change Climate Conference held in Dubai United Arab Emirates, a new climate deal approved by almost 200 countries which for the first time in the 28 years of the summits, explicitly made reference to the need to "transition away from all fossil fuels in energy systems, in a just, orderly and equitable manner in this critical decade to enable the world to reach net emissions by 2050, in keeping with the science."

From a dispute resolution perspective, this transition is likely to result in a deluge of new claims and the concomitant question of determining the dispute resolution mechanisms that is best equipped to handle the claims. This is one of the themes that is likely to dominate conversations in 2024 in both Nigeria and Ghana.

Another theme, from Nigeria's perspective, is the massive divestment by some of the major international oil corporations operating in the Niger Delta area of Nigeria. This is likely to result in, and has indeed, started to trigger, new disputes.

The year 2024, is also likely to provide the courts in Nigeria with the opportunity of interpreting the provisions of the Arbitration and Mediation Act.

In the end, as Ghana and Nigeria continue in their efforts to be seen by investors as arbitration friendly jurisdictions through legislation, court decisions and policies, stakeholders in both the public and the private sectors have a role to play to support these efforts.