

Dispute Resolution Perspectives

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Overview: A New Dispute Regime?

In this concluding piece of our PIB 2012 Newsletter Series, we review specific provisions that address disputes between industry participants and regulatory institutions as well as the PIB's attempt to establish new dispute resolution procedures. Players need to take account of PIB 2012's 'dispute potential' regarding their business strategies in Nigeria. This part of our series discusses the main provisions that have the potential to impact business and change current procedures.

Proceedings Involving the National Oil Company (NOC)

The NOC is one of the successor entities to the NNPC, and is to hold assets currently held by NNPC on behalf of the Federal Government except interests in the unincorporated JVs and Nigerian Gas Company. Such will include interests under PSCs where NNPC as leaseholder is counterparty to Contractors. By *section 152 PIB 2012*, actions relating to assets or obligations which are to be transferred

obligates the NOC to take over pending legal proceedings involving the NNPC.

Underlining the commercial nature of NOC as a limited liability company incorporated under the *Companies and Allied Matters Act* (CAMA) is that it will no longer enjoy the statutory protection which the NNPC currently does on disputes. These include pre-action notice and the twelve month limitation of actions provisions, restriction on execution and attachment of NNPC's property and funds.¹ The cumulative effect is that there is a 'level playing field' between NOC and counterparties, which could help increase such counterparties' comfort level on prospective transactions with the NOC.

¹ For example, PIB 2012 does not require filing a pre-action notice when instituting action against the NOC, whereas NNPC currently enjoys such protection under *section 12 NNPC Act*. Also, protection accorded NNPC's property and funds under *section 14 NNPC Act* will not apply under the PIB. Consequently, enforcement or execution may be levied against assets of the NOC in the regular manner without additional formalities.

Proceedings against Regulatory Agencies

Other regulatory agencies such as the Upstream Petroleum Inspectorate (the Inspectorate) and the Downstream Petroleum Regulatory Agency (DPRA), however still enjoy statutory protection, such as provisions of the *Public Officers Protection Act (POPA)*.² Also, they enjoy protection against attachment or execution against their physical property.³ However, the Bill permits judgments to be enforced against them through garnishee proceedings, provided at least three months notice of intention to commence such proceedings is given.

This is odd, given that garnishee proceedings are usually commenced *ex parte* (i.e. without notice to the judgment debtor) and thereby prevent dissipation of assets.

Proceedings Involving the Nigerian Petroleum Asset Management Corporation Limited (NPAML)

Though the NPAML is to be incorporated under CAMA, *section 143(3) PIB 2012* provides for at least a one month pre-

action notice to be issued and served on it before actions are instituted against it.

Further, *section 145(1)* provides that there shall be no execution against the corporation's property except a three month notice of intention to execute or attach has been given to NPAML. *Section 145(2)* mirrors section 14 NNPC Act by providing that where no notice of appeal has been lodged against the judgment of a court, any judgment debt owed by the company shall, subject to directions of the court, be paid from the fund of the corporation.

This provision, like its section 14 of the NNPC Act counterpart, is unclear, raising a number of questions. For example, can the Court direct that a judgment debt be paid by any other means other than from the NPAML's funds? Where the Court directs that judgment debt be offset through other means such as attachment of the company's asset, will the three months notice to execute or attach under *section 145 (1)* still be required?

Judicial Review - Abuse of Public Office

Under *section 195(1)(j)* the Honorable Minister of Petroleum Resources (HMPR), is empowered, on the advice of the Inspectorate, to revoke licenses or leases of a company owned or controlled by a former or present public office holder,

² Actions cannot be brought against officers and employees for conducts carried out in the course of their employment more than three months after the acts or six months after a continuing injury. See *sections 37 and 67 PIB 2012; section 2 POPA, Cap. P.42, LFN 2004.*

³ *Sections 39 and 69 PIB 2012.*

who has "obtained the license or lease through misuse of public office". Some clarity is required here as to what amounts to misuse of public office and how this quasi judicial function is to be exercised. For example, what hearing procedure is the Minister to adopt in such situations? If there is no judicial participation in the process, it is likely that affected individuals may resort to court for judicial review, for example because of non-compliance with rules of natural justice.

Nigerian Hydrocarbon Tax – Federal High Court (FHC) Vested with Jurisdiction over Appeals

PIB 2012 has clearly ousted the jurisdiction of the Tax Appeal Tribunal (TAT) established pursuant to the Federal Inland Revenue Service (Establishment) Act 2007 (FIRSA) over NHT disputes. Thus, any upstream petroleum company aggrieved by the decision of the FIRS regarding its NHT liability may seek redress at the FHC within 30 days of receipt of notice of such action or decision from the FIRS.

Section 334 PIB 2012⁴ is remarkable because it widens the parties against

whom an aggrieved company seeks relief in respect of its NHT dispute with the FIRS to include FIRS and "any other taxable person or government agency." Whilst this provision may unwittingly restrict resort to arbitration by taxpayers (petroleum companies) *inter se* where the matter in issue would ordinarily not have approximated to 'tax dispute' involving the FIRS; by virtue of section 251(1) 1999 Constitution, the FHC has exclusive jurisdiction on disputes with Federal Government agencies.

Given the specific provision that permits access to FHC on appeal from FIRS decisions on NHT, tax appeals regarding companies' income tax (CIT) under PIB will continue to be administered by the TAT, under the FIRS Act, with appeals therefrom to the FHC. It is however not apparent what purpose the bifurcation of tax appeal fora for NHT and CIT is meant to serve. If both NHT and CIT appeals could be heard at the TAT that could make for efficiency, given the potential to consolidate tax appeals, the possibility of some disputes being resolved at the TAT level, leverage of TAT's specialist bent on tax disputes, and likely delays that may attend proceedings at the FHC.

DISPUTE RESOLUTION MODES

Judicial Review

⁴ There are currently two *sections 334* and this first one appears to be intended to be *section 333(4)*.

It is noteworthy that the PIB 2012 gives discretionary powers to the Minister and to other institutions to be created under the Bill. For example, the Minister is required to consent to any assignment of a PPL or PML interest. Also the Minister may reduce the duration of a license when she is satisfied that the holder is not meeting license terms. License holders are however not without recourse. Where the Minister makes such decisions, licensees will have recourse to the Nigerian courts for a judicial review of the decision, for example by seeking declarations, mandatory or prohibitory injunctions..

Mediation - Downstream Sector

PIB 2012 appears to encourage an initial mediation of all disputes that arise in the downstream sector. **Section 229** provides that the DPRA will mediate all disputes in the sector: between operators or between operators and consumers.⁵ The Bill is not specific about the mediation modalities; the DPRA will therefore have to institutionalize a dispute resolution department and take other steps to fill the gap, such as rules of engagement to fulfill the mediation mandate.

⁵ An example is *section 251* which provides that disputes with respect to Third Party Access will be mediated by the DPRA.

Section 45(1)(s) PIB 2012 empowers the DPRA to establish and implement appropriate dispute settlement mechanisms relating to downstream operations. The DPRA may therefore choose to include a provision to mediate disputes with it as license term.

How effective will this provision be, since it is apparently not mandatory on industry players? Can parties be restrained from going to court if they have not first explored mediation? Since the 'mediatory' outcome is not binding, what is the incentive for parties to comply with the provision?

Arbitration

Section 115 PIB 2012 specifically provides for *arbitration* of disputes between companies and the Equalisation Fund. All such disputes are to be referred to the DPRA. While it is unclear what role the DPRA is to play under section 115, it appears to be the mediating role accorded to it under **section 229**.

It is noteworthy that **section 115(2)** provides that a dispute involving the Equalisation Fund is to be arbitrated under the provisions of the Arbitration and Conciliation Act (ACA).⁶

Treaty Arbitration

⁶ *Cap A18 LFN 2004*.

Where an operator is affiliated to a country which has a Bilateral Investment Treaty (BIT) with Nigeria, the operator may be able to bring BIT arbitration against Nigeria if purported regulatory or official acts pursuant to PIB 2012 results in breach(es) of any BIT provision. Such a breach could, for example be actions that frustrate a successful stabilization claim, or the obligation to afford investors from a particular BIT country fair and equitable treatment.

Stabilisation Claims

The impact of PIB 2012 fiscal tax provisions may trigger stabilisation claims under relevant industry contracts, especially PSCs *if* the Contractor's economic benefits are materially and adversely affected thereby, and parties are unable to agree modifications to the contracts which restore pre-PIB economic equilibrium between the parties.

Operators will have to undertake comprehensive modelling to assess the differential pre/post PIB on their overall take *vis a vis* government's take. The areas of attention will include volume and price based royalty regime, rentals, disallowable expenses (restrictions on tax deductibles), removal of investment tax credits/allowances *vis a vis* PIB's general production allowances, tightening of tax incentives (e.g. on gas utilisation), 10%

net profit contributions to the Petroleum Host Community Fund, etc.

BIT claims may be triggered if the NOC (citing inability to do so by virtue of the PIB), refuses to give effect to any successful stabilization claim or the Government instigating frustration of enforcement of award.

ICSID Arbitration

The International Centre for the Settlement of Investment Disputes (ICSID) provides certain advantages to litigants. The Centre has jurisdiction where a contracting state party and a national of another contracting state party have a dispute which the parties consent in writing to submit to the Centre.⁷ An advantage of ICSID arbitration is the structure for enforcement in Nigeria. The *ICSID (Enforcement of Award) Act*⁸ provides that where a copy of an award made by the ICSID is filed at the Supreme Court of Nigeria, such award will have effect as if it were an award contained in a final judgment of the Supreme Court and shall be enforced accordingly.

This will significantly obviate delays that could attend enforcement proceedings

⁷ See Article 25 of the *Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States*.

⁸ *Cap. 120, LFN 2004*.

of regular arbitration awards at the High Courts; in the event that the award is challenged and the outcome thereof going through the entire appellate chain.

Section 26(2) Nigerian Investment Promotion Commission NIPC Act⁹

Section 26(2) NIPC Act provides that where a dispute arises between a foreign investor and the Federal or State Government in respect of an investment to which the Act applies, parties will seek an amicable settlement failing which the aggrieved party may submit it to arbitration within the framework of any bilateral or multilateral investment protection agreement to which the Federal Government and the foreign investor's Country are parties.¹⁰

Where the Government and the investor fail to agree on applicable rules, the arbitration will be governed by ICSID Rules. To take advantage of this provision (i.e. provide additional layer of protection), the relevant investment must be registered with the NIPC under the NIPC Act.

⁹ *Cap. N117, LFN 2004*

¹⁰ Where the aggrieved party is a Nigerian investor, the ACA will apply.

Practical Considerations - Jurisdictional Issues

Experience has shown that statutory corporations/government agencies (most recently the NNPC in crude entitlement disputes with PSC Contractors) raise procedural or jurisdictional objections to arbitrating matters that border on fiscal/tax issues. In some recent cases, the Nigerian courts have taken a strict view of the jurisdiction of the FHC. By holding that contractual dispute with tax dimensions are caught, because they deal with "*revenue accruing to the Federal Government of Nigeria*" or they are essentially tax disputes,¹¹ the courts have tried to limit the scope for referring contractual disputes to arbitration.

CONCLUSION

In the foregoing, we have highlighted the evolving petroleum industry dispute resolution landscape, if PIB 2012 is enacted in its current form. The PIB envisages that the Nigerian petroleum industry would witness its most profound change in its 123 year legislative history. These changes aim, amongst others, at due process and more effective

¹¹ *Section 251(1) 1999 Constitution* provides that disputes relating to or arising from companies' taxation or revenue accruing to the Federal Government are within the exclusive jurisdiction of the FHC.

regulation that provide positive signal to investors. However, the resultant fiscal impact on existing contracts could be a veritable source of disputes, and operators need to have ready strategy to deal with same.

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