

## APPRAISING THE LEGAL VALUE OF ARBITRATION PROVISIONS IN NIGERIA STATUTES

### (1) **Introduction**

There exist arbitration provisions in some important investment statutes in Nigeria. This is actually not peculiar to Nigeria, but a common feature in the investment legal/regulatory framework of third world countries in contrast to developed countries.

Capital exporting countries have long considered third world capital importing countries high-risk investments climates and therefore seek to protect their investments by ensuring that the determination of disputes relating to such investments do not take place in the perceived high risk capital importing host country where the investments exist, but in forums outside the influence of such host countries. These investments are of such permanent nature that the economies are resoundingly affected - foreign capital is injected; technology is transferred and technical/management expertise is also added. Third world host countries, desperately in need of these investments to boost their economies, literally bend over backwards to demonstrate to prospective foreign investors that their investments are safe. Thus, arbitration, by which disputes are settled, not in the host third world countries courts, but outside them, is typically stipulated in contracts as the method of dispute settlement. But host governments go a step further by prescribing arbitration in investment laws, as the method of dispute settlement and Nigeria is not an exception. Afterall, legislations are not normally repealed on whims, as contracts are prone to cancellation and such arbitration provisions are perceived as more secure in legislation than in contracts.

### (2) **Statutes that contain arbitration provisions in Nigeria.**

#### (a) Petroleum Act

Regulation 41 (which is part of the subsidiary regulator to the Act) stipulates:

*“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 relates to a matter expressly excluded from arbitration or expected to be at the discretion of the Minister”*

#### (b) Public Enterprises (Privatisation and Commercialisation) Decree No. 28 1999 Section 270 of this law states:

*“There is hereby established under this Decree an ad-hoc body to be known as the Public Enterprises Arbitration Panel (in this Decree referred to as “the Panel”) which **shall** be responsible for effecting prompt settlement of any dispute arising between an enterprise and the Council or the Bureau”*

Section 28 (1) states:

“The Panel **shall have power to arbitrate** or

- (1) (a) *in any dispute raising questions as to the interpretation of any of the provisions of a Performance Agreement; or*
- (b) *in any dispute on the performance or non-performance by any enterprise of its undertakings under a Performance Agreement.*
- (2) *A dispute on the performance or non-performance by any of the parties to the Performance Agreement **shall** in the case of a Commercial Enterprise lie to that Panel provided that such reference may be made after all reasonable efforts to resolve the dispute have been made and have not been proved.*
- (3) *The ruling of the Panel shall be binding on the parties and no appeal shall lie from a decision of the Panel to any court of law or tribunal.”*

- (c) Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Decree 1990

Section 22 states:

*“In the event of any dispute in respect of a substantial matter arising from the provisions of the Decree, the aggrieved Shareholder(s) in the Company shall issue a letter of notification to Government formally notifying Government and the other shareholders of the dispute. The Government’s representatives and one or more of the Company’s Shareholders as the case may be, shall make serious efforts to resolve amicably such dispute.*

*In the event of failure to reach amicable settlement within 90 days of the date of the letter of notification mentioned above, such dispute **may** be submitted to arbitration before the International Centre for the settlement of Investment Disputes”*

- (d) Nigerian Investment Promotion Commission Decree 1999

Section 26 (2) states:

*“any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Decree applies which is not amicably settled through mutual discussions **may** be submitted at the option of the aggrieved party to arbitration as follows:*

- (a) ....
- (b) ....
- (c) ....

Section 26(3)

*“where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, International Centre for Settlement of Investment Dispute Bureau shall apply”.*

(3) **Legal Value of Arbitration Provisions in Nigerian Statutes**

The question that naturally calls for consideration is the legal value of an arbitration provision in a legislation.

A careful reading of the Arbitration and Conciliation Act Cap 19, Laws of the Federal, 1990 shows that in allowing for the arbitration procedure in Nigeria, that Act contemplates only of arbitrations agreed upon by parties which its Section 1 insists ought to be either signed by both parties or contained in an exchange of letters, telex, telegram, or other means of communication which provide a record of the arbitration agreement, or in an exchange of points of claim and of deference in which the existence of an arbitration agreement is charged by one party and not denied by another. This is only consistent with the fundamental and central jurisprudence that the principles of arbitration rest upon an arbitral tribunal can only assume jurisdiction in a dispute between parties where such parties have freely consented to this.

From the foregoing, we can safely conclude that arbitration provisions as they exist in our legislation are contrary to those very fundamental principles upon which arbitration thrives. The provisions are also incongruent with the Arbitration Act, the legislation that recognises arbitration proceedings in Nigeria.

But is it equally safe to suggest that arbitration provisions in legislations, as we have seen above, are not binding on parties they are directed at. For instance, in a dispute between Government and a foreign investor, where one of the parties invokes the arbitration provision on any of these provisions, can the other party legitimately refuse to go to arbitration? In answering this question, it is helpful to examine the decision in *SPP V. EGYPT* (1983) 22 ILM 752.