THE EXTENT OF COURT’S INTERVENTION IN ARBITRATION PROCEEDINGS: A REVIEW OF THE DECISION IN NNPC VS. TOTAL E & P

INTRODUCTION

Over the years, the Nigerian courts have consistently maintained a friendly disposition towards arbitration, evinced by the courts’ attitude of limiting its interference in arbitration designated disputes, in accordance with Section 34 of the Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria 2004 (the Arbitration Act).

In the recent decision of the Federal High Court (the Court) coram Dimgba J., in Suit No. FHC/ABJ/CS/390/2018, Nigerian National Petroleum Corporation (NNPC) vs. Total E & P Nigeria Ltd & 3 Ors, (the Suit) delivered on 01 March 2019, the Court followed a long line of judicial authorities in declining jurisdiction to entertain an application which invited the Court to interfere with pending arbitral proceedings by disqualifying the Presiding Arbitrator and the Arbitral Tribunal. Within the context of the facts of the Suit, this newsletter provides an analysis of the Court’s decision, and examines the reasoning of the Court vis-à-vis the provisions of the Arbitration Act.

THE FACTS

The Applicant (NNPC) commenced the Suit by an originating motion before the Federal High Court (FHC) sitting in Abuja, seeking the principal relief, for an order disqualifying the Presiding Arbitrator and the Arbitral Panel (the Disqualification Application) in the ad hoc domestic arbitration commenced by Total E&P, Esso Exploration and Production Nigeria (Offshore East) Limited, Chevron Petroleum Nig. Ltd. and Nexen Petroleum Nig. Ltd (the Respondents in the Suit) against NNPC (the Arbitral Proceedings). In sum, the grounds upon which the Disqualification Application was brought were that (a) the impartiality of the Presiding Arbitrator (PA) was doubtful, having failed to disclose the extent of his representation of an international oil company against NNPC in an arbitration in 1997; and (b) the Arbitral Tribunal was biased and had acted fraudulently by (i) denying the Applicant an opportunity to present its case before the Tribunal, (ii) electing to hear the Applicant’s interlocutory objections on the appointment of the PA by videoconference in disregard of parties’ agreement to hold a physical hearing, and (iii) indicating ‘Lagos, Nigeria’ on the face of the Tribunal’s decision in a manner calculated to mislead parties on the venue of determination of the interlocutory objections.

Prior to the commencement of the Suit, the Respondents in 2014 alleged that NNPC had lifted crude oil in excess of its entitlement as contained in the Production Sharing Contract (the PSC) entered into between the Respondents and NNPC on 23 April 1993, thereby breaching the PSC terms. Following the alleged breach, the Respondents issued a Notice of Arbitration in 2015 and subsequently, parties appointed their respective arbitrators, who in turn appointed the PA (together, the Tribunal). It was also agreed that the venue of the hearing shall be Lagos, Nigeria. A procedural timetable was drawn to govern the arbitration and the guideline for the payment of deposit on cost. NNPC however failed to file its defence or pay arbitration costs in accordance with the procedural order.
THE DECISION

As a preliminary point, the Respondents contested the Court’s jurisdiction to determine the challenge of an arbitrator by a party. The Respondents argued that Section 34 of the Arbitration Act restricts the power of the Court to interfere in arbitral proceedings to instances permitted in the Arbitration Act; and that Section 9(3) of the Arbitration Act which provides for the challenge of an arbitrator by a party, confers jurisdiction to decide such arbitrator challenge on the Tribunal, not the court. On the other hand, the Applicant in urging the Court to assume jurisdiction, relied on Sections 8 and 9 of the Arbitration Act, and Article 12(1)(c) of the Arbitration Rules (the Rules) contained in the First Schedule to the Arbitration Act.

In considering whether it had jurisdiction to entertain the Suit to disqualify the PA and the entire arbitral tribunal, the Court construed all the aforementioned sections of the Arbitration Act and the parties’ agreement to arbitrate. The Court held that although Section 9(3) of the Arbitration Act does not conflict with Article 12(1)(c) of the Rules, if such conflict existed, the Arbitration Act would prevail as it is the principal legislation on the point. Further, the Court held that in the absence of an express agreement by the parties to apply the challenge procedure in Article 12 of the Rules, the applicable challenge procedure would be that contained in the Arbitration Act, particularly because the parties had set out the Arbitration Act as the governing law of the Arbitration in their Agreement. The Court went further to hold that having ruled out the applicability of Article 12 of the Arbitration Rules, the Arbitral Tribunal had the competence to determine or take a decision on the challenge to its authority pursuant to Section 9(3) of the Act.

Affirming the deferential approach of Nigerian courts to arbitration, the Court stated as follows:

“Where parties have elected to have their disputes resolved outside of the traditional dispute settlement mechanisms, the court must defer to the will and choice of the parties and should maintain a zero or minimalist intervention mode”.

On this basis, the Court struck out the Suit because it lacked the jurisdiction to entertain the Suit – given that the issue had been decided by the appropriate forum (the Tribunal); hence, the decision of the Tribunal on the point was final.

ANALYSIS

We agree that (i) the Court lacks the jurisdiction to determine a challenge on the appointment of an arbitrator, per the provisions of Section 9(3) of the Arbitration Act, and (ii) in the case of a conflict between the Arbitration Act and the Rules, the provision of the Arbitration Act shall prevail per Article 1 of the Rules. However, we disagree with the reasoning of the Court that parties had to have expressly agreed to the application of the Act for the Arbitration Rules to apply to domestic arbitration. Section 15 of the Arbitration Act provides that domestic arbitral proceedings shall be conducted in accordance with the Rules; thus, the Rules are automatically applicable to arbitration agreements governed by the Act. Therefore, the Court ought not to have excluded the applicability of Article 12(1)(c) of the Rules on the ground that the parties did not expressly agree to its applicability.

In our view, a better approach would have been to consider the conflicting provisions of Section 9(3) of the Arbitration Act and Article 12(1)(c) of the Rules. Section 9(3) of the Arbitration Act stipulates the arbitral tribunal as the appropriate forum to decide an arbitrator challenge, in the absence of a parties’ pre-determined procedure for the challenge of an arbitrator pursuant to Section 9(1) of the Arbitration Act.
Specifically, Section 9(3) of the Arbitration Act provides as follows "unless the arbitrator who has been challenged withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge".

On the other hand, Article 12(1)(c) of the Rules stipulates that where a party challenges an arbitrator, and the other party does not agree to the challenge or the challenged arbitrator does not withdraw, the decision on the challenge will be made (x) by the court, when the challenged arbitrator was appointed by the court, (y) by an appointing authority, when the challenged arbitrator was appointed by an appointing authority, and (z) in all other cases, by the court in accordance with the provisions of Article 6 of the Rules.

Clearly, both Section 9(3) of the Arbitration Act and Article 12(1)(c) of the Rules address the exercise of adjudicatory powers when an arbitrator challenge arises in the course of a domestic arbitration; and are contradictory in the conferment of the said adjudicatory powers. While Section 9(3) of the Arbitration Act confers jurisdiction on the arbitral tribunal, Article 12(1)(c) of the Rules confers jurisdiction on the court or an appointing authority, depending on the circumstance of the challenged arbitrator's appointment. As Article 1 of the Rules stipulate that the Arbitration Act shall prevail over the Rules, the court should have held that Article 12(1)(c) of the Rules were inapplicable due to the supremacy of the Arbitration Act over the Rules.

Given the provisions of Section 9(3) of the Arbitration Act, we are of the view that the powers exercisable by an arbitral tribunal in the removal of an arbitrator or the arbitral tribunal in a domestic arbitration has the flavor of kompetenz-kompetenz. This decision emphasizes the need for parties to be prudent in the appointment of arbitrators, as it appears from the state of the law, that barring (a) an express pre-determined procedure for an arbitrator challenge; (b) a voluntary withdrawal of the arbitrator(s); or (c) parties agreement to remove arbitrator(s), a party's desire to remove an arbitrator or the tribunal in the course of proceedings is subject to the decision of the arbitral tribunal, comprising one or all of the arbitrators sought to be removed by the party.

To avoid problems that may arise from challenge procedure, where parties intend to limit the power of the arbitral tribunal to determine an arbitrator challenge, it is suggested that, in accordance with Section 9(1) of the Arbitration Act, parties exercise the option of contracting out of Section 9(3) of the Arbitration Act by pre-determining a specific procedure for an arbitrator challenge. Parties may agree to a pre-determined procedure (which could be an adoption of Article 11 and 12 of the Rules or any other procedure parties desire) in their agreement to arbitrate or during the first procedural hearing for the arbitration.

CONCLUSION

The Court’s decision emphasizes the disposition of Nigerian courts to upholding the independence of arbitral proceedings, and highlights the need for a cautious approach in the appointment of arbitrators, as the procedure for challenge and removal of an arbitrator or the tribunal is largely within the remit of the arbitral tribunal, except where parties agree a pre-determined procedure.

Whist we agree with the court’s decision in large part, the court should have considered the conflicting provisions in the Arbitration Act and the Rules, instead of holding that there is no conflict in section 9(3) and Article 12.
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