

THE DIALECTICS OF THE COURT OF APPEAL PRONOUNCEMENTS ON NON-ARBITRABILITY OF TAX DISPUTES IN NIGERIA: DRAWING A DISTINCTION BETWEEN TAX AND CONTRACTUAL DISPUTES IN NIGERIA

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Introduction

Party autonomy is the hallmark of arbitration - arbitration is a creature that owes its existence to the will of the parties alone.² The freedom to arbitrate is limited by various state laws such that disputes arising from specified subject-matters are not arbitrable.³ There is no codified law on arbitrability in Nigeria – this is also the case in some other jurisdictions.⁴ Thus, case law is a good source to draw upon when describing the arbitrability situation in Nigeria.⁵ For instance, in *Kano State Urban Development Board vs. Fanz Construction Limited*,⁶ the Supreme Court recognized categories of matters that are not arbitrable in Nigeria - they include: (a) indictment for an offence of a public nature; (b) dispute arising out of an illegal contract; (c) disputes arising under agreements void as being by way of gaming or wagering; (d) disputes leading to a change of status such as divorce petition; and (e) any agreement purporting to give an arbitrator the right to give judgment in *rem*.⁷

Recently, the Nigerian Court of Appeal has extended the scope of non-arbitrability in Nigeria to tax disputes by virtue of its recent pronouncements in *Esso Petroleum and Production Nigeria Ltd & SNEPCO vs. NNPC*⁸ [“*Esso*”] and *Shell (Nig.) Exploration and Production Ltd & 3 others vs. Federal Inland Revenue Service*⁹ [“*Shell*”]. The court found that the disputes submitted to arbitration in both cases are tax related and therefore not arbitrable in Nigeria on

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²Gary B. Born: *International Arbitration: Law and Practice* (2nd Edn: 2016) Wolters Kluwer, Page 3.

³ Alan Redfren and Martin Hunter: *Law and Practice of International Arbitration* (2nd, Edn: 1991) Sweet & Maxwell, page 138, noted that it is necessary to consider the types of dispute which states might consider capable of settlement by arbitration.

⁴ Sections 48 (b) (ii) and 52 (2) (ii) of the Arbitration and Conciliation Act, CAP A18, Laws of Federal Republic of Nigeria, 2004 (“ACA”) respectively provide that arbitral award may be set aside or refused recognition if the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or that the award is against public policy of Nigeria. Section 35 of ACA further provides that the Act shall not affect any other law by virtue of which certain disputes – (a) may not be submitted to arbitration; or (b) may be submitted to arbitration only in accordance with the provisions of that or another law. See also Section 1 (b) of the United Kingdom Arbitration Act, 1996; Article 177 (ii) (1) Swiss Private International Law Act 1987 (PIL Act), for arbitrability in international arbitration and Article 354 Part 3 of the Swiss Civil Procedure Code (CPC) for arbitrability in local arbitration; Section 2 of 9, US Code [Federal Arbitration Act]. These national laws left the issue of arbitrability in fluid states – in determining non-arbitrability in these jurisdictions and many others, recourse should be had to specific legislations and/or courts decisions on the point.

⁵Adebayo G. Adaralegbe: *Challenge in Enforcement of Arbitral Awards in Capital-Importing States-The Nigerian Experience*, *Journal of International Arbitration* 23(5), 401 (2006).

⁶(1990) 4 NWLR (Pt. 142) 1 at page 33 paragraphs A – B.

⁷ The Court further noted [at page 32 paragraph H] that depute or difference which the parties to an arbitration agreement agree to refer to arbitration must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction.

⁸Unreported Appeal No. CA/A/507/2012; delivered on 22nd July, 2016.

⁹Unreported Appeal No. CA/A/208/2012; delivered on 31st August 2016.

the basis of the exclusive jurisdiction of the Federal High Court on taxation. The author seeks to comment on the pronouncements that tax disputes are not arbitrable on the basis of the exclusive jurisdiction of the Federal High Court in tax disputes. The author also seeks to examine the findings of the court that the disputes in both cases are tax related and therefore not arbitrable.

Facts of Esso

The appellants (“*the Contractors*”) and the Nigerian National Petroleum Corporation (“*NNPC*”) are partners to a Production Sharing Contract (“*PSC*”). The PSC provides that, any crude oil found should be allocated to the parties in accordance with the lifting allocation based on Royalty Oil, Cost Oil, Tax Oil, and Profit Oil. The Contractors are also to prepare Petroleum Profit Tax (“*PPT*”) returns on behalf of the parties for filing at the Federal Inland Revenue Service (“*FIRS*”). The Contractors contended that NNPC unilaterally nominated to lift more cargoes of crude oil than it was entitled. They also contended that NNPC unilaterally altered or submitted to FIRS, PPT returns it unilaterally prepared on behalf of the contract area. The Contractors consequently initiated arbitration against NNPC in line with the PSC arbitration clause.

Part of the reliefs sought was a declaration that NNPC cannot under the PSC submit its own unilateral PPT returns or alter tax returns prepared by the Contractors; and an order restraining NNPC from making or purporting to make tax payments that are inconsistent with tax returns prepared by the Contractors. The arbitral tribunal delivered its award on 24 October 2010, in favour of the Contractors. NNPC consequently applied to the Federal High Court to set aside the arbitral award on the ground that the arbitral tribunal acted without jurisdiction. It specifically contended that a tax dispute is not arbitrable under Nigeria law and that the dispute submitted to the tribunal was a tax dispute. The Federal High Court upheld this contention and set aside the arbitral award in 2012. The Contractors consequently appealed against the decision to the Court of Appeal. Both parties agreed that tax disputes are not arbitrable in Nigeria such that the question presented for determination by the Court of Appeal was whether the dispute submitted to arbitration was a tax dispute or a contractual dispute.

In its judgment, the court found that the dispute submitted was a tax dispute in the garb of a contractual dispute. The court observed that any grouse against tax assessments made by FIRS could only be addressed in the manner provided by Sections 38, 41 and 42 of the Petroleum Profit Tax Act (“*PPT Act*”). The court noted that the provisions do not permit arbitrating over tax disputes and that after exhausting the remedies provided under the Act, only the Federal High Court can exercise jurisdiction over tax disputes in the light of Section 251 of the Constitution of the Federal Republic of Nigeria, 1999, which provides for exclusive jurisdiction of the Federal High Court over tax disputes. The Court consequently severed the aspect of the claims before the arbitral tribunal that was not related to tax and consequently affirmed the decision of the Federal High Court which held that the dispute submitted to arbitration was a tax dispute and not arbitrable. The author is aware that the contractors are currently seeking leave to appeal against the decision to the Supreme Court.

Facts of Shell

The case has similar facts to Esso. The Contractors similarly contended that NNPC acted contrary to the PSC - by lifting crude oil in excess of its allotment and unilaterally computing and filing tax returns at the FIRS thereby inflating the Contractors' tax liability. The Contractors initiated arbitration against NNPC essentially seeking for reliefs that: under the PSC, the Contractors were entitled to compute and allocate Tax Oil returns they prepaid under the PPT Act. They also sought for an order restraining NNPC from submitting tax returns and making tax payments that are inconsistent with their returns. FIRS [a non-party to the arbitration] got wind of the ongoing proceeding, appeared and challenged the jurisdiction of the arbitral tribunal on the basis that the proceeding undermined its (FIRS) statutory functions and powers to assess, collect, and account for taxes under the various tax legislations in Nigeria, particularly the Petroleum Profit Tax and Education Tax.

The arbitral tribunal overruled the objection. FIRS approached the Federal High Court, seeking for declarations that the Contractors' claims before the arbitral tribunal are not arbitrable. It specifically argued that tax claims are exclusively reserved for the Federal High Court under Section 251(1) of the Constitution and to that end, reference of such claims to arbitration was unconstitutional, null and void. The court upheld FIRS' contentions and granted orders sought which in effect, terminated the arbitral proceeding. Dissatisfied with the decision, the Contractors appealed to the Court of Appeal. On whether the claims submitted to arbitration were contractual matters or tax matters; and if so, whether tax matters are arbitrable in Nigeria, the Court of Appeal found the Contractors' claims to be tax disputes arising from the application of the PPT Act, and not contractual disputes. On arbitrability of tax disputes, the court relied on Section 251(1) of Constitution in holding that tax disputes are not arbitrable. The Contractors have appealed against the decision to the Supreme Court.¹⁰

Introductory Comments

It would be observed that both cases turned on the findings that: (1) Tax disputes fall within the exclusive jurisdiction of the Federal High Court and are therefore not arbitrable; (2) the disputes submitted to arbitration in both cases were tax related; and (3) Sections 38, 41 and 42 of the Petroleum Profit Tax Act, provide a strict mandatory procedure for out of court settlement of tax disputes before having recourse to the Federal High Court which has exclusive jurisdiction over tax disputes. As earlier observed parties in both cases never contested that tax disputes are not arbitrable in Nigeria. The Court of Appeal was specifically invited to determine whether the disputes between the parties were tax disputes or contractual disputes. The court respectively found that the disputes were tax disputes in the garb of contractual disputes. These later findings of the court would be appraised from the standpoints of NNPC and FIRS on one hand and the Contractors on the other hand. Before considering these varying standpoints, it is important to briefly address the pronouncement of the court on non-arbitrability of tax disputes in Nigeria.

¹⁰ Appeal No. SC/274/2017: SNEPCO & 3 Ors. vs. FIRS & Anor.

Arbitrability of Tax Disputes in Nigeria

Prior to the definite pronouncement of the Court of Appeal on non-arbitrability of tax disputes in Nigeria, it was fairly speculated that tax disputes would not be arbitrable on grounds of public policy given that a tax dispute would likely touch on revenue of the government and the statutory powers of FIRS. However, the aforesaid pronouncements of the court brought a twist to this rational basis for non-arbitrability of tax disputes – the court held that tax disputes are not arbitrable on the basis that tax falls within the exclusive jurisdiction of the Federal High Court. Whilst there may be some justification [as would be further discussed] for the holding that tax disputes are not arbitrable in the light of PPT Act, the author could not see any justification for reliance on the exclusive jurisdiction of the Federal High Court on tax matters as basis for a finding that tax disputes are not arbitrable in Nigeria.

It is arguable that by the pronouncements, the Honourable Court impliedly set a precedent to the effect that any matter that falls within the exclusive jurisdiction of the Federal High Court is not arbitrable. The Constitution grants exclusive jurisdiction to the Federal High Court on several matters e.g., oil and gas, maritime, banking, aviation and safety of aircrafts.¹¹ Many contracts arising from these matters have arbitration clauses. In fact, several arbitration proceedings have been conducted [and are being conducted] on these areas. Until the pronouncements of the Court of Appeal [that tax disputes are not arbitrable on the basis of exclusive jurisdiction of the Federal High Court] are reviewed and set aside by the apex court, it may not be out of place to see a challenge of an arbitration agreement or award on the basis of the exclusive jurisdiction of the Federal High Court on the subject matter of the underlining dispute. It is however doubtful whether the Supreme Court would be inclined to make a pronouncement on this important issue considering the fact that parties in both matters are simply contesting whether the disputes submitted to arbitration are tax or contractual disputes *simpliciter*.

Analysis: Tax and Contractual Disputes

It is conceivable that tax disputes may not be arbitrable on grounds of public policy. However, the finding of the Court that the disputes between the parties are tax related and within the exclusive preserve of government needs further consideration. Are the disputes really tax related and therefore falls within the exclusive jurisdiction of the Federal High Court? Parties agreed in PSCs in both cases that the Contractors were to prepare PPT returns on behalf of the parties for filing at the Federal Inland Revenue Service. Alleged breaches of this agreement essentially form the basis of the arbitration in both cases.

The Constitution prescribes the jurisdiction of the Federal High Court as follows – to have and exercise jurisdiction to the exclusion of any other court in civil causes and matters connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to the Federal Taxation.¹² PPT

¹¹See Section 251(1) of the Constitution.

¹²Section 251 (1) (b) of the Constitution.

Act defined tax to mean chargeable tax.¹³ Chargeable tax is further defined by the Act to mean chargeable tax ascertained under Section 22 of the Act and imposed under the Act.¹⁴ Section 22 essentially provides the manner of computing investment tax credit allowance and payable taxes in PSCs. On its part, the FIRS Act defined tax to include any duty, levy or revenue accruable to the Government in full or in part under the Act, the laws listed under the First Schedule to the Act or any other enactment or law.¹⁵

It may be argued that Section 251(1) (b) of the Constitution is broad and confers exclusive jurisdiction on the Federal High Court for resolution of any dispute with a tax element and that this jurisdiction can only be exercised upon exhaustion of statutory remedies provided under Sections 38, 41 and 42 of the Petroleum Profit Tax Act i.e., by first filing an objection to FIRS for review and revision of assessment and appealing to the Appeal Commissioners before ultimately appealing to the Federal High Court.¹⁶ In effect, agreement on the manner and procedure for preparing PPT returns relates to and is connected to taxation. Thus, such a dispute is not amenable to arbitration but rather falls within the exclusive jurisdiction of the Federal High Court after exhaustion of statutory remedies.

On the contrary, it is arguable that the finding of the Court of Appeal that the disputes are tax related and should be the exclusive preserve of government is not sustainable. One author¹⁷ noted that issues of taxation which are for the preserve of the Federal High Court may be distinguished from a dispute in relation to the interpretation of a commercial contract which may touch on taxation provisions rather than being an issue within the government's sole prerogative. Clearly, the disputes between the parties gravitate on NNPC's unilateral preparation and filing of tax returns to FIRS contrary to the PSC. The FIRS (Establishment) Act, 2007, created the Tax Appeal Tribunal ["TAT"]¹⁸ and vests it with power to adjudicate on disputes and controversies arising from listed tax legislations [including PPT Act].¹⁹ A person aggrieved by an assessment or demand notice made upon him by FIRS or aggrieved by any action or decision of FIRS under the provisions of the tax laws may appeal against such decision or assessment or demand notice to TAT.²⁰ Appeal lies against the decision of the TAT [on points of law] to the Federal High Court.²¹ It could therefore be argued that the disputes submitted to arbitration in Esso and Shell do not relate to assessments made by FIRS such that the jurisdictions of the TAT and the Federal Court could not be activated.

The contractors were aggrieved by NNPC's unilateral preparation and filing of tax returns to FIRS contrary to the PSC. Sections 26 and 27 of the FIRS Act, provides that tax assessment is based on tax returns prepared and filed at FIRS. FIRS has the power to demand for fuller and further returns to enable it make proper assessments. It is arguable therefore that the

¹³ See Section 2 PPT Act.

¹⁴ *Ibid.*

¹⁵ Section 69 FIRS Act.

¹⁶ Sections 38, 41 and 42 PPT Act.

¹⁷ Adedoyin Rhodes-Vivour: Commercial Arbitration Law and Practice through the Cases (1stEdn: 2016) LexisNexis Page 67.

¹⁸ Section 59(1) of FIRS Act.

¹⁹ See item 11 of the FIRS Act.

²⁰ Paragraph 13(1) of FIRS Act.

²¹ Paragraph 17(1) of the FIRS Act.

agreed contractual terms for preparing and filing the tax returns is not a tax dispute *per se* that could activate the dispute resolution procedure highlighted under Sections 38, 41 and 42 of the PPT Act or the FIRS Act.

Conclusions

Tax disputes are currently not arbitrable in Nigeria in the light of the Court of Appeal decisions. The rationale for the pronouncements on non-arbitrability needs further consideration. In the light of pending appeals in Esso and Shell, it is not certain whether disputes arising from agreements on procedure for preparing and filing tax returns to FIRS qualify as tax disputes that fall within the exclusive jurisdiction of the Federal High Court. It is therefore expected that the apex court would examine the appeals against both decisions and pronounce on the issues considering their importance in international arbitration and the Nigerian economy.