Decarbonisation pathways for Nigeria: Promoting sustainable renewable energy-related FDI and the role of ADR in promoting RE-related FDI

By:

Wale Olawoyin

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Context

In the quest to attain international respectability in the new world economic order, Nigeria is saddled with the enormous responsibility of balancing the freedom of transnational economic activities with the desirable need to exercise some measure of control and regulation of the operational dynamics of such activities. In recent times, through initiatives such as the Presidential Enabling Business Environment Council (PEBEC), amongst others, Nigeria has sought to reposition itself in the shop window for increased and sustainable foreign direct investment activities. The confidence of foreign investors in the

landscape for resolution of private international commercial disputes shorn of the intervention or oversight of domestic courts lies at the very heart of the intersection between enhancing foreign direct investment and the ease of doing business in developing countries such as Nigeria.

Alternative dispute resolution mechanisms generally, and arbitration in particular, have developed to bridge the gap between the expectations of resolution of commercial disputes based on acceptable international standards and the fear of the impartiality or incompetence of domestic courts. In highlighting the prospects and challenges of commercial dispute resolution in Nigeria through commercial arbitration as distinct from litigation, this article reviews the extant legal framework for arbitration, current initiatives to strengthen the building blocks of arbitration, and the challenges presented by transferring entrenched attitudinal values in litigation to ADR. It concludes that Nigeria is well placed to deal with conflict resolution issues that may arise in the context of the broader theme of decarbonisation pathways for Nigeria to promote sustainable renewable energy related foreign direct investment (FDI). Given the matrix of contracts (manufacture, transportation, installation and commissioning, operation and maintenance) leading up to the deployment of RE projects together with the post-installation legal issues that may arise with other stakeholders such as host Governments (Federal, State or Local Government) and host communities, the importance of ADR in this context cannot be over-emphasized.

Litigation/ADR Divide – Primacy of Arbitration

Historically, it has been contended that litigating in the courts of host states is not a desirable option. The reasons are protean and range from the perceived notion of impartiality of domestic courts, arguable incompetence or more accurately inexperience and lack of exposure of the judex in host countries, issues with administration of civil justice particularly inordinate delays, unknown applicable laws, and challenges with international recognition and enforceability of domestic judgments. Over time, ADR, and arbitration in particular, has risen in profile on the back of fundamental principles of party autonomy, control in the choice of adjudicator and process of adjudication, agreed seat for the resolution of disputes, agreed choice of law and overall flexibility of the process. However, the decision on the recipient state of FDI as

the seat of dispute resolution is dictated by broader considerations such as modern Arbitration Law and track record of enforcing arbitration agreements and arbitral awards (see here).

Extant Legal Framework for Arbitration of Disputes in Nigeria

The current Federal Act is the Arbitration and Conciliation Act (Cap A18) Laws of the Federation of Nigeria 2004 (ACA). However, some constituent States within the Federation also have Arbitration Laws in place such as the Lagos State Arbitration Law of 2009. The ACA was passed in 1988 and has been in force for over 30 years. The provenance of ACA is in the UNCITRAL Model Law on International Commercial Arbitration 1985. The Model Law was proposed as a vehicle of harmonisation given the diversity of national legislations on arbitration law and practice. The ACA has a dual purpose of (a) incorporating and codifying internationally accepted norms of arbitration law and practice, and (b) **d**omesticating the New York Convention on the Enforcement of Foreign Arbitral Awards 1958 (NYC). With the NYC being part of the corpus of Nigerian law, the critical comfort of portability of arbitral awards which foreign investors demand at a minimum is existent. *Overview of Sections* The ACA has a total of 58 sections in the main Act and 41 Articles in the Arbitration Rules (AR) (First Schedule). 52 sections in the ACA deal exclusively with arbitration while 6 sections deal solely with conciliation. There are no provisions on mediation. A substantial number of the 52 provisions on arbitration in the main Act and the Arbitration Rules are almost *ipsissma verba* of similar relevant provisions in the Model Law (ML) either in the exact form or in a rearranged manner. For example section 8 (Article 12 ML) deals with the basis of challenge of arbitrator, section 9 (Article 13 ML) deals with the procedure for challenge of arbitrator, section 11 (Article 15 ML) deals with termination of mandate of arbitrator, section 12(3)(B) and (4) (Article 16(2) and (3)) deals with jurisdictional challenge, section 13 (Article 17 ML) deals with the grant of interim measures of protection, section 16 (Article 20 ML) deals with the place of arbitration, section 17 (Article 21) deals with commencement of arbitration, section 21 (Article 25 ML) deals with proceedings in default by any of the parties, section 25 (Article 30 ML) deals with powers of tribunal to terminate, section 27 (Article 32 ML) deals with termination of proceedings, section 52 (Article 36 ML) deals with principles on refusal of recognition and enforcement of arbitral awards,

Article 2 (AR) (Article 3 ML) – service of notices and Article 33 (AR) (Article 28 ML) – law of arbitration. **Looking Over the Horizon – New Legislative Initiatives** A new Arbitration and Conciliation Bill was presented to the National Assembly in 2018 which was passed by the House of Representatives and the Senate with some problems. These problems related to the removal of certain important provisions without explanation. As a result of the unresolved problems with the Senate version, the Bill could not be presented to the President for Assent during the tenure of the 8th National Assembly. The Bill would now be presented again to the 9th National Assembly and this state of affairs provides the opportunity for addressing the rising profile of mediation rather than conciliation in any new legislation.

Overview of the Bill The underpinning drivers of the Bill are:

- Very international approach;
- Adoption of 2006 amendments to the Model Law;
- Introduction of additional novel provisions stemming from international arbitral practice;
- Emphasis on greater obeisance to the Model Law, and
- Addressing of some peculiar Nigerian nuances/problems.

Some highlights of the Bill include clause 2 (Article 7 ML – Option 1) – adoption of clearer definition of arbitration agreement, clause 5 of the Bill (Article 8 ML) - grounds for grant of stay of proceedings pending or in favour of arbitration now clarified, clause 9 of the Bill (Article 13(3) ML) – introduces provisions on review mechanism for tribunal decisions rejecting a jurisdictional challenge, clause 10 of the Bill (Article 14 ML) – includes the possibility of a referral to court of a question regarding termination of an arbitrator’s mandate by virtue of failure or impossibility to act, clause 13 of the Bill – immunity of arbitrators, clause 14 of the Bill (Article 16 ML) – a party may have recourse to the court against a decision on jurisdiction made as a preliminary question, clause 16 of the Bill – Emergency arbitrator proceedings, clause 19 -29 of the Bill (Article 17(A-J) ML) – interim measures of protection, preliminary orders of the Tribunal, and clause 55 of the Bill (Article 34 ML) – misconduct, error of law on the face of the Award and improper procurement no longer grounds for setting aside an arbitral award.

Challenges with rising profile of Arbitration

Despite the strengthening of the building blocks of arbitration, there are still some bugbears to contend with. These include attitudinal issues around introducing litigation instincts into arbitration – First step to litigation syndrome, frequency of challenging awards, imprecise grounds for challenging awards, and sometimes inconsistent and incomprehensible decisions where technicality takes precedence over substantial justice.

Conclusion

The combination of the Model Law backbone (both for extant and putative law) and the change in direction of judicial policy in favour of enforcement of arbitration agreements and arbitral awards makes Nigeria well suited for the receipt of FDI in Renewal Energy Projects.