THE SEAT OF ARBITRATION IS MORE THAN WHERE YOU SIT

Introduction

In many respects, arbitration can be described as the pre-eminent mechanism for the resolution of international commercial disputes. A great deal of the agreements through which international commercial transactions are carried out today have arbitration clauses embedded in them. By reason of the fact that such international commercial agreements are typically made between parties from different jurisdictions and disciplines, there is inevitably an interaction of more than one legal framework in relation to any arbitration that may be conducted under the agreements. In this regard, there are generally three separate laws that may come into play concerning an international arbitration, which are the law of the substantive contract, the law of the arbitration and the internal procedural law of the arbitration. It is against the backdrop of this interplay of applicable laws that the determination of what is widely regarded as the 'seat' of the arbitration becomes of importance.

Importance of the Seat of Arbitration

In entering into an international commercial agreement, when parties agree on arbitration as the mechanism for the resolution of disputes under the agreement, a fundamental and critical decision that they ought to make is as to the 'seat' of the arbitration. Notwithstanding the meaning that the literal interpretation of the word 'seat' suggests, when it comes to international arbitration, the seat of arbitration does not necessarily refer to the physical location where arbitration hearings will be held, which is also often referred to as the 'venue' of the arbitration. It also does not necessarily reflect the law of a contract.

In simple terms and in the interplay of applicable laws in an arbitration, the seat of arbitration (also sometimes called the 'place' of arbitration[1]) is a legal construct that refers to the country or jurisdiction the laws of which mandatorily apply to the arbitration itself and will determine important matters relating to the arbitration. These include but are not limited to, arbitrability, appointment and removal of arbitrators, enforcement of the award, power of arbitrators to rule on their

[1] See section 16(1) of the Arbitration and Conciliation Act

jurisdiction, possible rights of appeal, availability of interim remedies before or during the arbitration and the extent to which the national courts of the seat will support or supervise the arbitration. Due to the fact that the arbitration laws of most jurisdictions typically relate to matters of public policy concerning arbitration in such jurisdictions, parties and tribunals are usually not allowed to circumvent these laws.

Where parties to an international commercial arbitration have expressly and unambiguously agreed on Nigeria as the seat of their arbitration or that the arbitration is to be conducted in accordance with Nigerian law, the law governing the arbitration will be Nigerian law. Accordingly, the law applicable to such an arbitration will be the Arbitration and Conciliation Act (The ACA), which is the principal arbitration statute in Nigeria. However, where the parties have made no agreement as to the law that is to be applicable to the arbitration or have entered into an agreement that is ambiguous as to the law of the arbitration and the substantive contract is governed by Nigerian law, section 16(1) of the ACA will apply for the purpose of determining the seat of arbitration. Section 16(1) of the ACA provides that:

> ***"Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties."***

Similarly, Article 16(1) of the Arbitration Rules in the First Schedule to the ACA provides that:

> ***"Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration."***

Based on the above mentioned provisions of the ACA and the Arbitration Rules, the failure of parties to be very clear in their selection of the seat of their arbitration invariably means that the determination of the seat is for the arbitrator(s) to make, having regard to both the circumstances of the case and the convenience of the parties. Such a scenario may present unexpected results for either one or both of the parties to the arbitration the consequences of which, in certain cases,

could be rather staggering. In this regard and for added context, it is worth taking a brief look at the ongoing dispute between the Federal Republic of Nigeria (FRN) and the company known as Process and Industrial Developments Limited (P & ID). In some respect, the FRN's travails following its dispute with P & ID is traceable to the issue of the identity of the seat of the arbitration that emanated from the agreement between both parties, by reason of which it is useful to have a look at the circumstances of that case here.

The P & ID V FRN Case

The dispute between the FRN and P & ID attained notoriety almost overnight, having dominated the news as a result of P & ID's efforts both in the United States and United Kingdom to enforce against the FRN an international arbitral award with a widely reported value of over **$9 billion.** This award is possibly the largest arbitral award ever made against the Nigerian state.

On 11th January, 2010 the FRN and P & ID entered into a Gas Supply and Processing Agreement (GSPA) by which both parties were to do a barter exchange of natural (wet) gas and natural gas liquids stripped from wet gas for a period of 20 years. However, when a dispute broke out under the GSPA, P & ID commenced arbitration proceedings against the FRN, pursuant to the dispute resolution provision in clause 20 of the GSPA, which stated (among other things) that:

> ***"The Parties agree that if any difference or dispute arises between them concerning the interpretation or performance of this Agreement and if they fail to settle such difference or dispute amicably, then a Party may serve on the other a notice of arbitration under the rules of the Nigerian Arbitration and Conciliation Act (Cap A18 LFN 2004) which, except as otherwise provided herein, shall apply to any dispute between such Parties under this Agreement…The venue of the arbitration shall be London, England or otherwise as agreed by the Parties."***

Upon the commencement of the arbitration and at its initial stage, the question of the seat of the arbitration was apparently not in issue or dispute between the parties. However, during the course

of the arbitration the question of the seat of arbitration arose, by reason of which the arbitral tribunal had cause to interpret clause 20 of the GSPA and give a determination of what it considered to be the seat of arbitration. Although in a Part Final Award made on 3rd July, 2014 the Tribunal had referred to England as the seat of arbitration in the determination of some other issues, a formal determination of the question of the seat of arbitration subsequently became of fundamental importance owing to the fact that the FRN had approached the Nigerian Federal High Court to seek injunctive relief in respect of and inimical to the arbitration. The FRN also subsequently approached the High Court of Lagos State for an Order setting aside an award that had been made on 17th July, 2015 on the liability of the FRN to P & ID (The Liability Award).

In determining that the seat of arbitration was England and not Nigeria, the arbitral tribunal held in its Procedural Order 12 that ***"…the parties' selection of London as 'the venue of the arbitration' rather than of any particular steps (such as hearings) in the arbitration indicates that London was selected under section 16(1) (of the ACA) as the place of the arbitration in the juridical sense, invoking the supervisory jurisdiction of the English court, rather than in relation to any particular events in the arbitration…the parties and the Tribunal have consistently acted upon the assumption that London was the seat of the arbitration…the Tribunal considers that the Government must be taken to have consented to this being the correct construction of the GSPA."*** Based on this determination of the seat by the tribunal, although the Nigerian courts had granted the FRN the injunctive reliefs earlier sought in respect of the arbitration and also set aside the liability award, the arbitral tribunal pointedly ignored the decisions of the Nigerian courts and in that regard stated that ***"… As the parties will be aware from Procedural Order No 12, the Tribunal has decided that the seat of the arbitration is England. It follows that the Federal Court of Nigeria had no jurisdiction to set aside its Award."***

The arbitral tribunal ultimately made a final award in favour of P & ID, which then sought to enforce the award in the same manner as a judgment or order of the High Court of England and Wales. In the enforcement proceedings, the issue of the seat of arbitration came up once again and fell for determination by Mr Justice Butcher of the High Court. In determining the issue, the court considered the position earlier taken by the tribunal as to the seat of the arbitration and affirmed

that position by concluding in the following terms that the seat of arbitration was England and not Nigeria:

> ***"…I conclude that the terms of Procedural Order No. 12, coupled with the fact that neither it nor the Final Award have been set aside by this or any court, determine the location of the seat of the arbitration as being London, England, and that that is not a matter which the FRN can now ask this court to revisit…I conclude that, while there are significant arguments the other way, the GSPA provides for the seat of the arbitration to be in England…It is significant that clause 20 refers to the venue "of the arbitration" as being London. The arbitration would continue up to and including the final award. Clause 20 does not refer to London as being the venue for some or all of the hearings. It does not use the language used in s. 16(2) ACA of where the tribunal may "meet" or may "hear witnesses, experts or the parties". I consider that the provision represented an anchoring of the entire arbitration to London rather than providing that the hearings should take place there…"***

For the foregoing, among other reasons, the English High Court granted P & ID's application by making an Order enforcing the final award of the arbitral tribunal in the same manner as a judgment or order of the court. The consequence of the decision of the English High Court, reported as **PROCESS AND INDUSTRIAL DEVELOPMENTS LIMITED V THE FEDERAL REPUBLIC OF NIGERIA [2019] EWHC 2241 (Comm),** is that the decision of the High Court of Lagos State setting aside the arbitral award has been rendered totally nugatory on the ground that Nigeria is not the seat of arbitration. Consequently, no Nigerian court can presently make any effective or binding order in respect of the award and the FRN cannot derive any tangible benefit from the decision of any Nigerian court in respect of the award.

The experience of the FRN so far in the P & ID case demonstrates just how critical the selection of the seat of an international arbitration is to the arbitration process. In practice and as Akinyemi J. rightly observed in the case of **ZENITH GLOBAL MERCHANT LTD V ZHONGFU INTERNATIONAL INVESTMENT FZE [2017] ALL FWLR 1837**, ***"parties do not usually consciously choose the law of the arbitration; what they often consciously choose is the seat. Once they choose the seat, they automatically become subject to the law of the seat."*** Also, the possible confusion inherent in the fact that the words "***place***", "***seat***" and "***venue***" of arbitration, which do not necessarily connote the same legal meaning but are often used interchangeably by parties, courts and even statutes, is an additional reason why the importance of a clear choice of the seat of arbitration cannot be emphasised. This point was keenly noted in the **ZENITH GLOBAL** case by Akinyemi J. in the following terms:

> "***While 'venue' is a feature of both domestic and international arbitration, 'seat' is obviously a peculiar phenomenon of international arbitration. Due to inelegant drafting, and use of non-specific terms in relevant legislation, there is often a collision between 'seat' and 'venue' in international arbitration disputes…Sometimes too, parties and even laws, use the word 'place' instead of 'venue', when actually referring to the physical forum where the proceedings will take place. Such is the case with the provision of Section 16 of the Arbitration and Conciliation Act of Nigeria."***

See also **NIGERIAN NATIONAL PETROLEUM CORPORATION V. LUTIN INVESTMENTS LTD (2006) 2 NWLR (PT. 965) 506**

In this case the FRN had ostensibly gone into the arbitration with P & ID in the belief that the seat of arbitration under the GSPA was Nigeria. However, by the turn of events occasioned by the tribunal's determination of the seat, notwithstanding that the court in Nigeria has held that the

award is unenforceable and has set it aside, the FRN is unable to take any benefit from the decision for the simple reason that the seat of arbitration is not Nigeria.

Final Word

The experience of the FRN in the P & ID V FRN Case is not entirely unique and is an example of a possible fallout of an arbitration agreement concerning an international arbitration that is silent or ambiguous as to the seat of arbitration. Failure of parties to an arbitration agreement to expressly agree on the seat of arbitration or make an ambiguous agreement can result in significant complications for the parties even before the arbitration can get off the ground. More often than not, such scenarios increase the risk of parallel court proceedings or leave open an avenue for the award to be challenged on broad grounds in the courts, which may not be reliable or may be in a jurisdiction where one of the parties is either well-connected or has a significant advantage over the other party.

The dispute between the FRN and P& ID continues to rumble on and may do so in the judicial system for some time yet. At the centre of it all and having regard, on one hand, to the decision of the Nigerian High Court setting aside the arbitral award and that of the English High Court giving leave to enforce it, the question of whether the FRN will be ultimately be able to break its over **$9 billion** yoke is traceable to the resolution of the issue of the seat of that arbitration.

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