



## Power, Profits, and Pitfalls: *Managing Disputes in Nigerian Energy Transactions*

### Introduction

As reform efforts intensify within Nigeria's energy sector and divestments continue, especially in the hydrocarbons subsector—many involving foreign entities from diverse legal and economic backgrounds—the likelihood of disputes increases considerably. The complexity is heightened by the fact that these international stakeholders operate under different legal systems, regulatory frameworks, and commercial cultures.

Given the scale, complexity, and long-term nature of capital-intensive projects in the international energy sector, it is almost inevitable that key variables—such as market conditions, financial dynamics, and even the parties involved—will evolve over time. These shifts frequently create friction, which can escalate into disputes. This reality is echoed by the fact that international oil and gas industry disputes make up the largest portfolio of commercial and State investment disputes before international investment disputes settlement bodies and agencies.

Like it or not, Nigeria is no exception when it comes to high-stakes disputes in the energy sector. Conflicts frequently arise between international oil companies, independent operators, and even other national oil corporations on one side, and the Federal Government of Nigeria—along with its various agencies—on the other. These disputes often center around investment terms, regulatory compliance, and contractual obligations within the Nigerian energy landscape. It's a recurring pattern that underscores the importance of clear agreements and effective dispute resolution strategies from the outset.

The real challenge isn't whether a dispute will arise during a project—because, more often than not, one will. The critical question is how effectively business leaders and their advisors, especially legal counsel, are prepared to handle same. That's why the writer firmly believes in planning for conflict from the outset, even if it seems unlikely. By assuming a dispute will occur and preparing accordingly, businesses can significantly improve their ability to manage the fallout and reduce the risk's overall impact.

### Preparing for Disputes:

Expectedly, businessmen take the commercial decisions as far as their investments or commercial risk taking is involved. However, they employ in-house and external counsel with good transactional experience to help with the legal aspects of things in order not to run foul of law & regulation and in certain cases to help pre-empt or foresee any challenges with a proposed commercial approach or decision. A discerning lawyer should, at this juncture, review, draft and where necessary, negotiate the dispute resolution clauses of the relevant contracts or agreements relating to the project or transaction as a whole.

Though these clauses are typically treated as boiler plate provisions, the writer's view is that they are definitely, more important than these, as they lay an important role in determining how project agreements will be interpreted, understood, applied and enforced. Issues such as forum, law and process need to be given the utmost attention.



## Dispute Resolution Mechanisms:

There are several methods available for resolving disputes, each suited to different situations. Choosing the most appropriate approach depends largely on the specific context of the project or disagreement. Regardless of the method selected, it is crucial that the solicitor or legal advisor carefully and thoughtfully drafts the agreement to minimize complications if a dispute does occur. Parties might opt for direct negotiation, proceed to arbitration, or even rely on expert determination—particularly in cases requiring technical evaluation, such as certifications during testing and commissioning in the energy sector.

Litigation is always an option, but it's often only practical when both parties are based in the same jurisdiction. This is largely due to the complexities of enforcing court judgments across borders, along with the high costs and lengthy timelines involved. In Nigeria, litigation presents its own set of hurdles—notably, the often-prolonged court process and the limited enforceability of foreign judgments, which are typically confined to monetary awards. On the other hand, arbitration offers a more globally viable alternative. Nigeria is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which significantly enhances the enforceability of arbitral decisions internationally.

## Drafting Dispute Resolution Contractual Clauses & Provisions:

### Clarity-

As a lawyer who regularly drafts contracts, I've found that the contra proferentem rule—which means any ambiguity in a document is interpreted against the party who drafted it—should always be top of mind. It's a strong reminder that clarity matters. When drafting dispute resolution clauses, the goal should be to keep things simple, clear, and tailored to the specific deal at hand. Copying a clause from another agreement without adapting it to the current context is a common but risky mistake. Companies should consider developing internal guidelines outlining what they want to see in their dispute resolution provisions to ensure consistency and reduce ambiguity.

A well-drafted dispute resolution clause should be broad enough to cover a wide range of potential disagreements, including those you might not anticipate. Using general language like "Any dispute arising from or relating to this agreement..." is a good starting point. From there, it's helpful to define the term Dispute broadly, so you're not caught off guard by unexpected issues down the line. A bit of extra care at the drafting stage can go a long way in avoiding complications later.

## Internationalization of the Agreements

For foreign direct investment (FDI) contracts, it's wise to include international dispute resolution mechanisms right from the start. This could mean opting for arbitration under international rules or relying on protections available through bilateral investment treaties (BITs). Including these provisions helps reassure foreign investors that there's a neutral and enforceable process in place if disputes arise. This approach is especially important when one of the parties is a national of a country that has a BIT with Nigeria, as it can offer additional legal protection and a clearer path to resolving disputes outside the local court system. Planning for this early on can save significant time, cost, and uncertainty later.

### Arbitration Rules-

It is also important to negotiate, introduce, suggest or actually incorporate a set of modern arbitral rules in their dispute resolution clauses. These rules may be institutional or non-administered for an ad hoc arbitration. It is, however, the case that internationally, parties choose the arbitration rules of well established and respected arbitral institution. Prior to reaching a consensus on the set of applicable arbitral rules, it is important for a counterparty to know the dispute settlement institution, its rule, case management mechanism, fee structure etc.

### Seat of Arbitration-

It should be noted that part of the importance of selecting a seat of arbitration is the fact that unless provided for in an agreement, the seat of arbitration determines the procedural law of the arbitration, including enforcement of and challenge of awards and procedure. It is also important to select a favourable or at least a neutral seat because the local courts have supervisory jurisdiction over the arbitration.

### Choice of law-

This law provides the applicable substantive law in interpreting the agreement and not the applicable procedural law, which the seat of arbitration determines. Despite the foregoing, it should be noted that by virtue of the rules of conflict of law, issues bordering on insolvency, land law rights, incorporation as far as the company is incorporated in Nigeria or the property is situated in Nigeria, would be governed by Nigerian law.

### Choice of arbitrator-

Respectable persons should be selected and provisions should be made for the number of arbitrators. It is typical to have one or three. The idea to have three is so that a casting vote can be made by the chairman.



The parties can appoint or give such prerogatives to an institution. It is important for a party to select a reputable arbitrator. This is because in exercising his right to a casting vote, the chair of the arbitral panel, may be disposed to agreeing with the views of a more renowned arbitrator.

### Clarity-

As a lawyer, the writer believes that the 'contra proferentem' rule which is to the effect that "provisions in a document or legislation are interpreted strictly against the maker "should almost always serve as a guiding principle to solicitors and drafters of documents. It is, therefore, the writer's view that, for drafting dispute resolution clauses in documents and contracts, simplicity and clarity are of utmost importance.

"Copying and pasting" the dispute resolution section of a similar agreement without doing more, should be avoided. Corporate bodies may also want to have basic drafting guidelines on what they would like to have in their dispute resolution sections. Such drafting guidelines would typically be dependent on a number of factors, including the "depth" of the pocket of the corporate, core philosophies, the corporate image to be portrayed and the industry or subsector of the energy industry the corporate is engaged with.

In drafting dispute resolution provisions or clauses, the drafting may need to be broad so as to cover every conceivable (and inconceivable) dispute. The language may simply be "Any dispute arising from or relating to..." The term 'dispute' may then be broadly defined.

### Internationalization of the Agreements

For foreign direct investments, it is a good idea for such contracts to be internationalized by including international dispute settlement modes, bilateral investment treaty (BIT) settlements and the likes. The idea of internationalization would be particularly useful, if a party is a national of a BIT signatory with Nigeria and in this regard, the Nigeria-Netherlands BIT is one of the most generous for companies whose shareholders are natural or corporate citizens of Netherlands.

In this regard, it should be noted that "indirect" ownership or stake may even be helpful. In other words, it may be sufficient that the company in Nigeria has an ultimate parent company or shareholder which is Dutch. It is, however, suggested that where indirect shareholding is involved it may be more circumspect for the stake to be a substantial or majority stake.

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### The Nigerian Investment Promotion Commission Act (NIPC Act) and BITs

Interestingly, in Nigeria, to encourage investments, the NIPC Act was enacted. By virtue of Section 26(2)(b), disputes between foreign investors in Nigeria and the FGN are required to be settled by arbitration within the framework of any bilateral or multilateral agreement on investment protection having Nigeria and the investor's home country as parties. Considering that Nigeria's BITs contain self-executing International Centre for Settlement of International Disputes ("ICSID") arbitration clauses, a good argument may exist for a foreign investor whose shareholder(s) is (or are) citizens of a country with a BIT to go the ICSID route without needing to ensure another written consent of Nigeria, as a Contracting State to the Convention.



**Conclusion:**

Given the capital-intensive nature of energy projects, it is absolutely critical to approach the drafting, reviewing, and negotiation of dispute resolution clauses with great care and foresight. A poorly constructed clause can expose parties to significant legal and financial risks. If disputes are not properly anticipated and managed, the economic viability of even the largest projects can be threatened, and risk capital may ultimately be lost. Taking the time to get these provisions right is not just advisable—it's essential for protecting long-term investments.

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