

# The New Practice (TNP)

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### Sanctity of Arbitration Agreements: Important Lessons from The Supreme Court's Decision in NNPC V Fung Tai Engineering Company

a contract that required disputes between them to be resolved by arbitration. A dispute arose and was referred to arbitration. On conclusion of the arbitral proceedings, the arbitral tribunal published its award in favour of Fung Tai and directed NNPC to pay \$17,505,000.00, ₦22,854,184.00, plus interest to Fung Tai.

NNPC did not pay the sums awarded to Fung Tai but rather offered to pay a lesser sum of \$6,259,958 in full and final settlement of its debt to Fung Tai. Fung Tai initially accepted the offer but wrote a letter to NNPC, on the same day NNPC made the offer, withdrawing its acceptance and insisting on the full payment of the arbitral award. NNPC subsequently paid the sum of \$6,259,958 which Fung Tai regarded as payment on account, and still demanded the balance.

NNPC subsequently applied to the Federal High Court to set aside the arbitral award while Fung Tai asked the same court to enforce the arbitral award. The Federal High Court, in its judgement, ordered the enforcement of the arbitral award and dismissed NNPC's application to set it aside the award. Dissatisfied, NNPC appealed to the Court of Appeal which dismissed the appeal. NNPC then appealed to the Supreme Court.

#### Basis of the Supreme Court's Judgement

The Supreme Court, while dismissing NNPC's appeal, made several pronouncements that re-affirmed the sanctity of arbitration agreements. In the court's reasoning, NNPC's challenge to the arbitral award had essentially invited the court to sit on appeal against the arbitral award. Notwithstanding that the applicable law at the time permitted courts to intervene in arbitration proceedings and even set aside arbitral awards in specified circumstances, the Supreme Court stated that litigants should not be allowed to challenge arbitral awards on flimsy grounds, simply because it did not favour them.

The Supreme Court also condemned the attitude of litigants who procured the assistance of lawyers to challenge good arbitral awards on spurious grounds. The court stated that legal practitioners had a duty to respect and comply with arbitral awards. There was also a corresponding duty on the court to not allow itself to be used as a tool to set aside good and legitimate arbitral awards.

The Supreme Court held that where parties submit to arbitration, the consequence is that, unless there is an express contrary provision in the submission, the arbitral award operates as a final judgement. The sanctity of arbitration agreements means that where parties enter a contract that contains an arbitration clause, the court ought to give regard to the voluntary

contract of the parties by enforcing the arbitral award.

In the limited circumstances where parties may challenge an arbitral award in court, the Supreme Court admonished that courts are not permitted to review the issues in dispute already decided by an arbitral tribunal and replace the tribunal's position with the court's views on both the facts and law. Simply put, the courts must abstain from interfering with arbitral proceedings or awards except in the narrow situations provided for under the enabling arbitration law.

#### Key Takeaways from the Decision

The Supreme Court made remarkable pronouncements which strengthen the jurisprudence and the practice of arbitration in Nigeria. It is noteworthy that NNPC formulated several issues for determination, in its appeal.

NNPC challenged the jurisdiction of the Federal High Court to enforce the arbitral award and questioned the legality of the arbitral proceedings (which it had participated in) on the basis that Section 12(1) of the NNPC Act required suits

against NNPC to be commenced within twelve (12) months after the act, neglect, or default complained of occurred; while Section 12 (2) of the same statute required any party wishing to sue NNPC to give one (1) months' pre-action notice. The apex court, in response to NNPC's arguments, stated that this provision did not apply to arbitration because arbitral proceedings were different from court proceedings.

Furthermore, NNPC challenged the decision of the Federal High Court to enforce the arbitral award on the ground that Fung Tai had agreed to a lesser sum of money i.e. \$6,259,958. The Supreme Court however found that Fung Tai had withdrawn its acceptance of NNPC's offer on the same day, before it could be accepted. Therefore, there was no concurrence or agreement between NNPC and Fung Tai to accept the sum of \$6,259,958, in full and final satisfaction of the arbitral award.

NNPC also challenged the award of interest on the dollar portion of the award. The Supreme Court however found that it was the intention of the parties, under their contract, that delayed payment of the contract sum would attract interest at the prevailing Central Bank of Nigeria's interest rate at the date of such payment. This contractual provision did not distinguish between Naira and Dollar debts. Accordingly, the award of interest by the arbitral tribunal was justified.

Regarding the issue of jurisdiction, NNPC asked the Supreme Court to determine whether the Federal High Court possessed the jurisdiction to enforce an arbitral award predicated on a simple contract. The Supreme Court held that even though Section 251(1) of the Constitution did not expressly give the Federal High Court the jurisdiction to entertain matters relating to simple contracts, the same provision of the law permits the National Assembly to enact a law that confers additional jurisdiction on the Federal High Court. Accordingly, Section 31 of the Arbitration and Conciliation Act had extended the jurisdiction of the Federal High Court to the enforcement of arbitral awards.

#### Conclusion

The Supreme Court of Nigeria is regarded as a policy court. Its decision in NNPC v Fung Tai is significant because it strengthens Nigeria's position as an arbitration-friendly jurisdiction.

The decision is also a strong statement on Nigeria's receptiveness to arbitration as the preferred means of commercial dispute resolution. It bodes well for the Nigerian economy because it reassures foreign investors that their wishes on how their disputes should be determined will be respected by the Nigerian courts.

In its recent decision in Nigerian National Petroleum Corporation v Fung Tai Engineering Company, the Supreme Court came out strongly in favour of arbitration by re-affirming the sanctity of arbitration agreements and the limits to the courts' intervention in arbitral proceedings.

#### Why Arbitration?

Black's Law Dictionary defines arbitration as: "a dispute resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute. The parties to the dispute may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organisation select the third party."

One of the unique features of arbitration is that the parties, of their own volition, choose to have their dispute determined outside the court system. The parties have the liberty to determine how the proceedings are to be conducted – this is often referred to as "party autonomy". The proceedings are a private affair – they are not open to the members of the public. It is an efficient means of dispute resolution, devoid of the ceaseless adjournments and technicalities that characterise court proceedings. Arbitration is also significant because it promotes public policy. This public policy finds expression in the notion that the settlement of disputes advances the interest of society because there should be an end to disputes.

In Nigeria, arbitration is increasingly the preferred means of resolving commercial disputes. In 2017, the erstwhile Chief Justice of the Federation, Justice Walter Onnoghen, instructed courts in Nigeria to insist on enforcing arbitration clauses by declining jurisdiction and awarding substantial costs against a party who commences a suit in breach of an arbitration agreement.

Notwithstanding the remarkable features of arbitration, it has been the practice of litigants, aided by their lawyers, to challenge arbitral awards on the flimsiest grounds, even when the award is patently sound. The Supreme Court, in NNPC v Fung Tai, condemned the attitude of litigants who frustrated the opposing party from reaping the benefits of an arbitral award.

#### Facts

The parties, NNPC and Fung Tai, entered into

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