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Significance of seat or place of arbitration: *Process & Industrial Developments Limited v Federal Republic of Nigeria* [2019] EWHC 2241 (Comm)

Case review

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Introduction

In *Process & Industrial Developments Limited v Federal Republic of Nigeria*,[1] following a contested hearing on 14 June 2019, on 16 August 2019, Mr Justice Butcher, sitting in the High Court of Justice, Queen's Bench Division, Commercial Court in London, gave judgment and granted the claimant's application. The claimant's application was made pursuant to section 66 of the Arbitration Act 1996,[2] which provides for enforcement of arbitral awards. The claimant, Process & Industrial Development Limited ('P&ID'), had applied, *inter alia*, for an order enforcing a final arbitration award dated 31 January 2017 in the same manner as a judgment of the English Court to the same effect. It is noted that about USD$ 9.6 billion is the amount now stated to be due as payable to the claimant. The defendant, the Federal Republic of Nigeria ('FRN'), unsuccessfully sought to resist P&ID's application, contending that, *inter alia* Nigerian law was the governing law and, notably, that the seat of arbitration was not England but Nigeria. The FRN sought to resist enforcement of the final award on widespread reasons but this article focuses on the most notable and salient issue – what is the seat or place of the arbitration?

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1 [2019] EWHC 2241 (Comm).

2 The UK Arbitration Act 1996 applies where the seat of the arbitration is in England and Wales or Northern Ireland (s. 2(1)).

The facts

The final award upon which the English court's judgment was given was made in arbitration proceedings relating to a dispute between P&ID and the FRN arising out of a Gas Supply and Processing Agreement ('GSPA'). The GSPA, dated 11 January 2010, was entered into between P&ID and the FRN, acting by its Ministry of Petroleum Resources ('Ministry'). By an arbitral Final Award dated 31 January 2017, made by a tribunal consisting of Sir Anthony Evans, Chief Bayo Ojo SAN, and Lord Hoffmann (the 'Arbitral Tribunal'), P&ID was awarded US$6,597,000,000. The majority was comprised of Sir Anthony Evans and Lord Hoffmann, with Chief Bayo Ojo SAN dissenting.

The dispute

By 2012, a dispute had arisen in relation to the GSPA. P&ID contended that the FRN had failed to make available natural gas ('Wet Gas') in accordance with the GSPA. On 22 August 2012, P&ID served its Notice of Arbitration. The arbitration commenced thereafter with the appointment of the Arbitral Tribunal. Whereas the parties' legal representatives expended some considerable time in correspondence arguing about the *seat* of the arbitration, from the author's appreciation of the facts, it is however plain that the Arbitral Tribunal had already at least somewhat indirectly and expressly indicated the *seat* was London, England. This is borne out by the fact that, the Arbitral Tribunal, on two separate occasions, made two unanimous Part Final Awards: First, on 3 July 2014, dealing with its own jurisdiction and some other procedural matters (the 'Part Final Award'); and on 17 July 2015, dealing with liability (the 'Liability Award'). Given the above premises, it was unequivocally and unanimously stated by the Arbitral Tribunal that the seat of the arbitration was London. Thus, both the Part Final Award and the Liability Award stated, at the end: '*Place of arbitration: London, United Kingdom*'.

FRN's earlier applications to Nigerian and English courts

On 24 February 2016, the Ministry of Petroleum Resources of the FRN commenced proceedings in the Federal High Court of Nigeria

(Lagos Division), purportedly seeking the invocation of the Nigerian court's '*supervisory jurisdiction*' in relation to the Liability Award, alleging that the seat of the arbitration was Nigeria. It is noted the application to the Federal High Court was made following the FRN's unsuccessful application to the Commercial Court in London for leave for extension of time to appeal the Part Final Award.[3] The request for extension of time and permission to appeal was dismissed by the English High Court on 10 February 2016, by Phillips J., on the basis that no justifiable reasons had been given to excuse the application being made out of time.

Salient part of the GSPA

Under the terms of the GSPA between the parties:

- The FRN was to supply Wet Gas at no cost to P&ID, via a government pipeline, to the site of P&ID's production facility.
- P&ID was to construct and operate the facility necessary to process the Wet Gas by removing the natural gas liquids ('NGLs') contained within it, and to return to the FRN lean gas suitable for use in power generation or other purposes, at no cost to the FRN.
- P&ID was to be entitled to the NGLs stripped from the Wet Gas.
- The GSPA was to run for 20 years from the date of first regular supply of Wet Gas by the FRN.

The arbitration agreement

Clause 20 of the GSPA provides, in part, as follows:

> *'The Agreement shall be governed by, and construed in accordance with the laws of the Federal Republic of Nigeria.*
>
> *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*

3 The application was made pursuant to section 68 of the Arbitration Act 1996.

dispute between such Parties under this Agreement. Within thirty (30) days of the notice of arbitration being issued by the initiating Party, the Parties shall each appoint an arbitrator and the arbitrators thus appointed by the Parties shall within fifteen (15) days from the date the last arbitrator was appointed, appoint a third arbitrator to complete the tribunal . . .

The arbitration award shall be final and binding upon the Parties. The award shall be delivered within two months after the appointment of the third arbitrator or within such extended period as may be agreed by the Parties. The costs of the arbitration shall be borne equally by the Parties. Each Party shall, however, bear its own lawyers' fees.

The venue of the arbitration shall be London, England or otherwise as agreed by the Parties. The arbitration proceedings and record shall be in the English language.

The Parties shall agree to appropriate arbitration terms to exclusively resolve any disputes arising between them from this Agreement.'

Arbitral Tribunal's decision on seat of arbitration

As the parties' arguments persisted as to what was the *seat* of the arbitration after the Liability Award, upon P&ID's invitation and request, the Arbitral Tribunal determined that England was the seat of the arbitration and not Nigeria. Thus, on 26 April 2016 the Arbitral Tribunal made '*Procedural Order No. 12*'. It stated at the end: '*Place of arbitration: London*', and was '*signed on behalf of the Tribunal*' by Lord Hoffmann as '*Presiding Arbitrator*'. In reaching its decision the Tribunal stated the following five reasons:

- In light of the Ministry's commencement of proceedings in the Federal High Court in Lagos, it was apparent that there was a dispute between the parties as to whether the Nigerian courts were entitled to exercise supervisory or curial jurisdiction over the arbitration, and that this depended on whether Nigeria or England was the seat or place of the arbitration. It was stated that this is an important question, not only for the purpose of determining the jurisdiction to supervise the proceedings and award, but also for the purpose of the enforceability of the award.
- That the issue of the seat of the arbitration had been first raised by the Ministry in its originating motion in the High Court of Lagos on 24 February 2016; that it had been contested by P&ID

and that the parties had made submissions on it in letters or emails dated 8, 11 and 13 March 2016.

- That P&ID had requested a ruling on seat before the injunction granted by the Nigerian court – The Tribunal considers that it must therefore consider the question of the seat of arbitration for the purpose of deciding the future conduct of the arbitration. The Tribunal has the power to determine its own jurisdiction (section 12 of the Nigerian Arbitration Act)[4] and its opinion on the disputed question may also be of assistance to the Nigerian court.

- That, as to the law, the meaning of the words 'the venue of the arbitration shall be London, England' in the GSPA were to be construed in accordance with Nigerian law, and reference was made to s. 16 of the ACA.[5] The Tribunal concluded that the parties had agreed on the 'place of the arbitral proceedings' within s. 16(1) of the ACA[6] and thus that the Tribunal's power to determine that place was excluded. The question was as to what was the effect of the choice of London by the parties. Having referred to the fact that the ACA was based on the UNCITRAL Model Law,[7] to textbook authority, and to the decision of the Supreme Court of Nigeria in *Nigerian National Petroleum Corporation v Lutin Investments* (2006) 2 NWLR Pt (565) 506, the Tribunal said:

> *'In the opinion of the Tribunal, 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) 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.'*

4 Section 12 of Arbitration and Conciliation Act ('ACA') Cap A18, Laws of the Federation of Nigeria, 2004 (ACA) provides for competence of the arbitral tribunal to rule on its jurisdiction.

5 Section 16 of the ACA defines the Place of arbitration.

6 Section 16(1) provides: '*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.*'

7 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

- That in any event, by reason of matters in the course of the arbitration – set out in paragraphs 19–39 of Procedural Order No. 12 – *'the parties and the Tribunal have consistently acted upon the assumption that London was the seat of the arbitration'*, and that *'the Tribunal considers that the Government must be taken to have consented to this being the correct construction of the GSPA'*.

The importance of the concept of *Seat* or *Place of Arbitration* and *lex arbitri*

According to the learned authors of a seminal work on international arbitration,[8] the strength of the seat or place of arbitration theory is that it gives an established legal framework to an international arbitration, so that instead of 'floating in the transnational firmament, unconnected with any municipal system of law',[9] the arbitration is firmly anchored in a given legal system. It is stated that just as the law of contracts helps to ensure that contracts are performed as they should be and not as mere social engagements, so the *lex arbitri* helps to ensure that the arbitral process works as it should. The necessity for such support for (control of) the arbitral process is, of course, reflected in the Model Law, which allows for certain functions (such as the appointment of arbitrators where there is a vacancy) and for certain sanctions (such as the setting aside of an award) to be exercised by the courts of the place of arbitration.

Similarly, a critical issue in any international arbitration is the location of the arbitral seat (or place of arbitration). Given that this article focuses on the concept of the seat or place of arbitration in international arbitration; it considers the practical and legal issues that arise, and the significant implication in connection with the selection of the seat or place of arbitration. The location of the legal seat can have profound legal and practical consequences and can materially alter the course of the dispute resolution.[10] In an

8 Blackaby N, Partasides C, Redfern A, Hunter M *Redfern and Hunter on International Arbitration* 6th edn (Oxford University Press, 2015) 183.

9 *Bank Mellat v Helliniki Techniki SA* [1984] QB 291 301, [1983] 3 All ER 428 (CA).

10 Born GB *International Arbitration Cases and Materials* 2nd edn (Wolters Kluwer, 2015) 599.

English judicial decision of the Court of Appeal, it was said that in international commercial arbitration the place or seat of arbitration is always of paramount importance.[11]

According to a leading author and practitioner in the field of international arbitration,[12] much more significant than convenience and cost is the effect of the law of the arbitral seat, the so-called *lex arbitri* and particularly the arbitration legislation of the arbitral seat, on the arbitration. In most legal systems, the arbitration legislation of a state is territorial in scope, regulating arbitrations that have their seat within the territory of the state but not other arbitrations. The arbitration legislation of the arbitral seat governs a number of 'internal' and 'external' matters relating to arbitral proceedings etc. The external matters potentially governed by the law of the arbitral seat concern judicial supervision of the proceedings by the courts of the arbitral seat. These include, inter alia, arbitrators' competence-competence (also referred to as kompetenz-kompetenz) and the allocation of competence to consider and decide jurisdictional challenges between arbitral tribunals and national courts; annulment of arbitral awards; selection of arbitrators; removal and replacement of arbitrators; evidence-taking in aid of the arbitration; and provisional measures in support of the arbitration.[13]

In most instances, 'external' matters entail affirmative action of the local courts of the arbitral seat, which consider and decide applications seeking judicial intervention in the arbitral process (for example, annulling an award and selecting an arbitrator).

An aggrieved or dissatisfied party only has remedy by timely recourse to the *competent* courts

What is a losing party to do if its grievance is not something that can be put right by correction or interpretation of the award and there is no provision for internal review of the award? There are grounds on which an arbitral award may be challenged before a

11 *Star Shipping AS v China Nat'l Foreign Trade Transp Corp* [1993] 2 Lloyds's Rep 445, 452.

12 Born GB *International Arbitration Cases and Materials* 2nd edn (Wolters Kluwer, 2015) 599.

13 Born GB *International Commercial Arbitration* 2nd edn (Wolters Kluwer, 2015) 599–600.

national court at the seat or place of arbitration. The Model Law[14] provides for each State party to designate the court, courts, or other authority competent to perform the functions laid down by the Model Law, which includes setting aside of awards.[15] Thus, the courts with *supervisory* or *curial* powers or authority are a function of the juridical seat or place of arbitration.

The proper place of challenge

Where then is the proper place of challenge of an arbitral award by a party that is aggrieved? Any challenge to the validity or effect of an award must be addressed to the designated competent court of the seat of the arbitration. If the arbitration had its seat in Switzerland, for example, the competent court is the Swiss Federal Tribunal (although the parties may agree to the court of the canton in which the arbitration took place). In France, it is the Paris Cour d'Appel. In England, it is the Commercial Court of the Queen's Bench Division in the High Court of Justice. In the United States, it is the district court (the federal first-instance court) of the seat of the arbitration. There is one notable exception to this general rule, although it is probably more theoretical than real: the freedom of the parties to an international arbitration to decide. However, the New York Convention[16] acknowledges that recognition and enforcement of an award may be refused on the basis that the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[17] Unfortunately, it is noted that some courts have read the reference to *the country under whose law the award was made* to set aside an award that was not made in their own county, but which was governed by the country's substantive law. Thus, in two decisions dating back to the 1980s and 1990s, the Indian courts set aside awards rendered in other states on the basis that the substance of the disputes was governed by Indian law.[18]

14 Model Law art. 6.

15 Art. 34.

16 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). On 31 March 2020, Palau became the 163rd country to become a party to the Convention.

17 New York Convention art V(1)(e).

18 See *Oil & Natural Gas Commission v Western Co. of North America* [1987] AIR 674 [SC]; *National Thermal Power Corporation v Singer*

[*continued on next page*]

Analysis

Clause 20 of the GSPA states: '*The venue of the arbitration shall be London, England or otherwise as agreed by the Parties*'. Given the significant implications of the seat of arbitration as well as the need to make express provision for same within the parties' agreement, it is regrettably noted that better expression and provision should have been stated within the GSPA; to ensure that the place or seat of arbitration, by which reference is made to the *juridical seat of the arbitration,* was also stated and included within clause 20. This is important because, *venue* of arbitration is generally understood to refer to geographic or physical location where the arbitral hearing or proceedings may be held; this is not necessarily synonymous with the seat or place of arbitration.

Although the *lex arbitri* may be inconsequential on the venue of an arbitration, the opposite is the case in respect of the seat or place of arbitration as the significance can have wide-ranging implications, whether in respect of the procedural conduct of the arbitration or in respect of any challenge or appeal arising therefrom. By way of analogy, the seat of the arbitration may be London but parties or the tribunal may decide to hold some or all of the hearings in Paris. In this sense, London remains the seat while Paris is the venue. In consequence, any appeal arising from the London-seated arbitration held in Paris can only properly be challenged by a timely appeal to the Commercial Court in London; an appeal to the French courts would be futile.

Thus, Clause 20 of the GSPA only made reference to venue but remarkably failed to state the place or seat of arbitration. It is reminiscent of the so-called *pathological arbitration clauses*, and parties will be well advised to avoid such mistakes because in practical reality, parties are unlikely to agree much on anything once they are in dispute.

With the above in mind, as well as the facts of this case, it is clear that the Arbitral Tribunal, had by Procedural Order No. 12, decided the issue that the seat of the arbitration was London, England. In the above premises, a number of points need to be made.

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Corporation et al. [1993] XVIII YBCA 403. See also Paulsson J 'The New York Convention's misadventures in India' (1992) 7 *Intl Arb* 18.

Firstly, the judgment of Mr Justice Butcher seems to be in accord with English law, which unsurprisingly, is generally pro-arbitration and adopts a minimalist intervention approach in relation to the recognition and enforcement of arbitral awards. There is also significant respect and deference given to party autonomy and the arbitral process by the English courts. This explains why anecdotal evidence suggests that, the percentage of successful appeals against arbitral awards in the English courts, are the exception rather than the norm. The FRN's case was brilliantly presented and put before the court – a fact that even Mr Justice Butcher expressed admiration and commendation. Rather unfortunately, it appears that the potency and force of the FRN's argument was tempered by the fact that no timely objection or challenge was made by FRN in the course of, and after a Final Award was made. A timely challenge or appeal to the English court by the FRN, following the Liability Award or the Final Award in July 2014 and July 2015 respectively would have carried much force, as *only* the English Court has or had the *supervisory jurisdiction* as far as the *seat* of the arbitration is concerned. Thus, it seems a missed opportunity to test the full force of the argument that the FRN put before Mr Justice Butcher. Also, the earlier applications to the Nigerian Courts (separately, to the High Court, and the Federal High Court, Lagos, Nigeria) by FRN were misdirected and lacked potency; the application or appeal to Nigerian courts simply could not impeach the Liability Award nor the Final Award, given that Nigeria was not the seat of arbitration and Nigerian courts therefore lacked *supervisory* or *curial jurisdiction* to review or nullify the arbitral Awards concerned.

Secondly, Mr Justice Butcher did an extensive analysis of both Nigerian law – as the governing law particularly under the ACA and the applicable Rules – and English law under the Arbitration Act 1996. However, it is noted that both Nigeria and England and Wales are jurisdictions where the respective arbitration legal frameworks are fashioned after the Model Law. As mentioned above, one of the inherent spirits and objectives of the Model Law is that of deference; it provides for each state to designate the court or other authority competent to perform the functions laid down by the Model Law.[19] In light of the above, as the question as to the

19 Model law art 6.

seat of the arbitration had already been determined as England by the Arbitral Tribunal, the proper approach of the Nigerian court should have been to decline jurisdiction and refer the parties to the English court with supervisory jurisdiction to which any appeal ought to have been properly and timely directed, in recognition of, and respect for, the Model Law.

Thirdly, the application that was made by the FRN in 2015 to the Commercial Court was made out of time and Phillips J properly dismissed the application on the basis that it was late. Part of the explanation or reason that was given or pleaded by FRN via the Ministry of Petroleum Resources at the material time is, the delay in appealing the Liability Award with the benefit of instructing solicitors based in England was due to the general elections and change in government in Nigeria in 2015. This explanation seems not only unsatisfactory but simply untenable. That Phillips J found no merit or satisfaction in that explanation is unsurprising. After all, government and governance are not only a continuum but, also, the general principles of state responsibility are taken to be fairly well-known by relevant senior government officials as well as legal counsel retained by the state. Similarly, adequate provisions exist in English law that give proper recognition to the fact that States take time to respond. An example of such recognition can be found in the UK State Immunity Act,[20] which applies to matters involving States and State-controlled entities, allowing States at least two months to respond from the date of service of process on the State's relevant receiving authority served via the Foreign and Commonwealth Office.

Unfortunately, unlike in football (Nigeria's most popular sport by the way), there is no extra-time or '*injury time*' available to States who fail to take appropriate steps as and when required to properly challenge an arbitral award and/or ruling. Making a timely challenge in the wrong jurisdiction may not only be seen as *forum shopping* but could also be perceived as an attempt to circumvent or derail the arbitral process. This behaviour was perhaps exhibited by the FRN, as mentioned above, when the FRN, having failed in the late application in the English court on 10 February 2016, made

20 State Immunity Act, 1978 s 12(2). See *Norsk Hydro v State Property Fund of Ukraine & Others* [2002] EWHC 2120 (Comm). See also *LR Avionics Technologies Ltd v The Federal Republic of Nigeria & Another* [2016] EWHC 1761 (Comm).

an application on similar grounds in the Federal High Court of Nigeria (Lagos Division) on 24 February 2016. There is no gainsaying the obvious that any proper application and/or challenge needed to be made in a timely fashion to the English courts.

Impact of COVID-19 on selection of seat of arbitration *vis-à-vis* venue of arbitration

With travel restrictions and social distancing measures now in place in most parts of the world as a result of the ongoing COVID-19 pandemic outbreak,[21] in-person hearings and meetings in most arbitration cases have been cancelled or rescheduled, with some meetings and hearings being held virtually.[22] Also, it has become necessary for many arbitral institutions to take steps to ensure existing and pending cases are not unduly delayed. Some have issued *guidelines* with arrangements that make provision for virtual meetings and video conference facilities for hearings. Ad hoc arbitral tribunals are also empowered and able to use suitable technology to facilitate and ensure expeditious and timely progress of ongoing cases.

21 On 12 March 2020, the World Health Organization (WHO) announced COVID-19 outbreak a pandemic.

22 Notably, the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce (SCC), International Centre for Settlement of Investment Disputes (ICSID) and others have each issued guidelines on their websites to parties and users. Also, the *Seoul Protocol on Video Conferencing in International Arbitration* released on 18 March 2020 by the Korean Commercial Arbitration Board (KCAB International) provides a useful guide on best practices in conducting arbitration hearings through video conferencing, but it is noted this has been a product of discussions within the arbitral community since 2018 well before COVID-19. Similarly, in the wake of the COVID-19 outbreak, on 16 April 2020, most of the leading arbitral institutions, including the ICC, CRCICA, DIS, ICSID, KCAB, LCIA, MCA, HKIAC SCC, SIAC, VIAC, and IFCAI issued a joint statement, stating, *inter alia 'By jointly enabling international arbitration to deliver some degree of certainty in a volatile economic climate, we seek to jointly contribute to a world better prepared to meet the challenges of the post-corona crisis. Our institutions stand ready to assist to the best of our ability, and welcome parties and arbitrators to reach out and to consult guidelines and information as publishes on our respective websites.'*

Undoubtedly the pandemic has significantly impacted on parties' and arbitral tribunals' ability to safely travel for the purpose of conducting in-person meetings and hearings at previously agreed or designated *venues*. In contradistinction, the *seat of arbitration*, however, in the absence of party agreement, is inextricably fixed to the juridical place with supervisory jurisdiction over the arbitration. The seat or place of arbitration is unlikely to be affected or changed by COVID-19, particularly in respect to arbitrations that are already ongoing or those yet to be commenced. This is important because, the *venue* may readily be affected or changed and/or agreed by parties, including by reason of prevailing circumstances, even when a dispute has already crystallised as is being experienced due to the coronavirus pandemic.

The seat of arbitration, on the other hand, is of greater significance and importance; some of the reasons and benefits for choosing a particular seat are often related to the beneficial assistance to be derived particularly from the courts at the seat or place of arbitration – before, during and post-arbitration – such as enforcement of the award. If anything, it seems that the ability and resilience of the courts at the seat of arbitration to provide needed support in aid of arbitration related cases, in even in the wake of uncertainly and disruptions such as the ongoing pandemic, may also be an added consideration for parties in selection of a particular jurisdiction as the seat or place of arbitration. On this note, whereas many countries are on lockdown, including their judiciary and courts now only able to provide very limited or skeletal services perhaps only in matters of extreme urgency, the English Courts have embraced the challenging situation by taking advantage of technology and have also adopted a COVID-19 protocol in civil cases[23] which allows judges to by conduct hearings remotely. In line with this protocol, the author notes that a string of hearings and judgments have recently been decided by the English Courts, including one that was held in private concerning an application

23 On 26 March 2020 the Judiciary of England and Wales issued a protocol titled 'CIVIL JUSTICE IN ENGLAND AND WALES PROTOCOL REGARDING REMOTE HEARINGS'. The protocol '*applies to hearings of all kinds, including trials, applications and those in which litigants in person are involved in the County Court, High Court and Court of Appeal (Civil Division), including the Business and Property Courts. It should be applied flexibly.*'

for continuing an injunctive relief in aid of two ongoing ICC arbitrations.[24] Another judgment relates to the claimant's application on notice, for a worldwide freezing and ancillary disclosure orders in respect of the enforcement of a £1.5 billion ICC arbitral award.[25] History appears to have been made for the first time in a case before Teare J, in which the High Court in London heard a case over 4 days that was conducted virtually under the auspices of Zoom and broadcast on YouTube. The matter relates to claimant's attempt to enforce an Energy Charter Treaty award of USD 541 million against the Republic of Kazakhstan.[26] The judiciary and courts in African states must learn from the English example by taking proactive initiative and make advantageous use of technology in order to continue to support and sustain the administration of justice, including sustaining the momentum in the development of arbitration on the continent and encouragement of foreign direct investment.

Conclusion

Whereas the FRN's objections were ably and 'attractively' argued by its counsel, Harry Matovu QC, on a multiplicity of grounds, it seems safe to state in conclusion that the most significant issue before the court to which FRN sought to resist and raised objection, concerned the issue as to what was the seat of the arbitration – England or Nigeria? The court disagreed with FRN's objections, finding that the seat of arbitration was England as opposed to FRN's contention that it was Nigeria. Although the question as to the seat or place of arbitration (especially when the latter is used in a *juridical* or *curial* sense) may somewhat be taken as readily ascertainable or as a given when expressly stipulated within parties' arbitration agreement, this case raises the importance of ensuring

24 *A Company v X, Y & Z* [2020] EWHC 809 (TCC) (Heard on 31 March 2020; judgment handed down remotely on 3 April 2020).

25 *ArcellorMittal v Ruia and others* [2020] EWHC 740 (Comm) (Heard on 3 and 4 March 2020; judgment handed down on 30 March 2020).

26 *National Bank of Kazakhstan v Bank of New York Mellon* [Claim No. FL-2018-000007) (Heard on 26, 27, 30 March 2020 and 1 April 2020; judgment reserved). See 'London court holds first virtual trial in Kazakh enforcement dispute' *Global Arbitration Review (GAR)* 2 April 2020.

attention to detail by making comprehensive provision. This case highlights not only the importance of ensuring that the dispute resolution and/or arbitration agreement is carefully and robustly negotiated and drafted; it equally underscores the imperativeness of ensuring that the seat or place of arbitration is carefully selected and not confused or misunderstood as being synonymous with the *venue,* which represents the geographic or physical location where arbitral hearings are held.

Also, it is equally instructive to note that, any objection or challenge, including any appeal as to the proper interpretation and/or decision by the Arbitral Tribunal on the question of the seat of arbitration, needs to be raised timeously by the relevant disputing or aggrieved party before the appropriate *supervisory* or *curial* courts at the seat of the arbitration. A late or mistaken application to the wrong court is not only liable to dismissal but the cost implication for the party concerned can be astronomically significant. The FRN, as expected, was unable to resist P&ID's application on this occasion because the combined effect of the relevant Civil Procedure Rules[27] in conjunction with the Arbitration Act 1996[28] is that the procedure to enforce an arbitration award in the same manner as the judgment of the court is usually a summary procedure that is made often without notice to the respondent party.

That judgment was given in favour of P&ID is certainly not the end of the matter. At the time of P&ID's application, it is stated that the outstanding sum due to P&ID is estimated at USD$9.6 billion, which is about a quarter of Nigeria's foreign reserves at the last quarter of 2019, as well as a third of Nigeria's 2019 total budget. Also, daily interest on the award is about USD$1.3 million, which explains the scale of the Final Award. Clearly, this raises significant concern for the FRN as sovereign State and as expected, it has recently sought to resist enforcement of the judgment and/or the Final Award before the English court, notably on the grounds that the GSPA was allegedly tainted by corruption and lack of due process in Nigeria, at the material time of the contract.

27 CPR r 62.18 provides generally for applications for permission to the Court to enforce an arbitral award in the same manner as a judgment or order, which may be made without notice in an arbitration claim form.

28 Arbitration Act 1996 s 66 provides for leave of court with respect to the enforcement of an arbitral award.

An additional concern for the FRN in this case is that this issue was an inherited burden from the previous regime but the quantum of the award seems to continue to generate controversy within Nigerian as well as in international arbitration circles. However, it is hoped that this case will provide an incentive for the well-informed, including the government to address the underlying issues that have come to the fore as well as being able to take steps to prevent similar occurrences in the future. Attention to detail both in negotiating and drafting of commercial contracts, including any arbitration agreement is quite an important task that parties and their advisers must take very seriously. The outbreak of the prevailing COVID-19 pandemic appears to introduce an additional complexity for parties, arbitral tribunals and institutions, and the general public. Parties and counsel would be well advised to give careful thought to these vital matters in the selection of their seat or place of arbitration.

What next?

Whereas this award is the largest recorded in the public domain against Nigeria, experienced practitioners know very well that unless a party is able to successfully take practical steps to find assets in order to execute an award or judgment, how much it is really worth is something that may be more fanciful than real. The record USD$50 billion that was awarded against the Russian Federation in 2014 by the Permanent Court of Arbitration in *Yukos Universal Limited (Isle of Man) v The Russian Federation*,[29] after ten years of long, drawn-out proceedings and huge legal costs, has yet to be enforced. It will therefore be interesting to see, from both sides, how the enforcement and next steps unfold.

29 PCA Case No. 2005-04/AA 227.