

# Resolving disputes arising out of supply chain disruption in Nigeria's oil and gas market

**15 September 2017**

In this hoganlovells.com interview, Hogan Lovells counsel Jerome Finnis discusses how disparate factors, such as *force majeure* events and changes in law, can provoke disruptions in Nigeria's oil and gas supply chain. He also talks about how some companies and investors seek to protect their interests by including "stabilization" and arbitration clauses in their long-term contracts.

## What types of events have been causing supply chain disruptions in Nigeria's oil and gas industry?

**Finnis:** Just briefly by way of introduction: Nigeria is the largest oil producer in Africa. Production comes from onshore swamp and offshore shallow water fields, as well as deep and "ultra-deep" offshore fields.

Keeping the supply chain moving is a constant challenge. *Force majeure*-type events are common. In particular, sabotage of pipelines by militant groups is a perennial problem, resulting in leaks and prolonged shutdowns. Producers have to be nimble and prepared to find new distribution solutions, for example by developing alternative export routes to get their product to market. That is essential in order to restore all-important cash flows. Without those cash flows, it is impossible to maintain your existing physical infrastructure — let alone invest in further development and production projects.

## What kinds of disputes have you seen arising in the supply chain as a result of these types of disruption?

**Finnis:** Oil producers and suppliers with reduced cash flows can quickly find themselves facing disputes on several different fronts. Common examples are:

- **Nonpayment of cash calls under a Joint Operating Agreement (JOA).** Disputes of this kind often involve audit exercises and detailed consideration of JOA provisions regarding approval of expenditures, work programmes, and budgets.
- **Withdrawal disputes.** Where a joint venture partner wishes to withdraw from a JOA/oil block in order to avoid liability for further expenditures.

We also commonly see:

- **Disputes with tax authorities.** For example, regarding an oil producer's tax status or the

correct application of a particular kind of tax credit.

- **"Overlifting" disputes.** Where a party to a production sharing contract (PSC) claims that another party has taken and sold more than its contractual entitlement of oil from the relevant oil field.
- **M&A disputes.** Where a JV partner agrees to sell its interest in an oil field and the deal fails to complete, or completes but then gives rise to claims for alleged breach of contractual warranties.

## What other kinds of events and factors can result in disputes?

**Finnis:** In-country legislative and/or regulatory change, obviously, is a major concern for foreign investors wherever they're investing. And it's one of the risks that's most difficult to protect against. It could be a change in law, which potentially affects rights and obligations under existing contracts. Or it could be a change in the way in which — as a matter of policy — existing law is interpreted and applied. Of course, changes of this kind can have a domino effect all the way up and down the supply chain.

Sophisticated foreign investors often seek to ensure that they are at least partially protected against these kinds of change by negotiating "stabilization" or "economic equilibrium" clauses into their contracts with state entities. Such clauses commonly provide that, in the event of a change in law or policy that materially and adversely affects the contractor's rights and obligations under the relevant contract, the parties will confer and try to agree on such changes to the contract as will ensure that the contractor is not left worse off as a result of the change. And typically the parties will provide for arbitration as a fallback in case no such agreement can be reached. We've seen a number of high-value disputes being referred to arbitration involving clauses of this kind. What other kinds of events and factors can result in disputes?

## For oil and gas companies operating in Nigeria, are there other major issues that may trigger supply chain disruption?

**Finnis:** Some Nigerian laws and/or contracts provide that, after a certain period of time or upon the occurrence of a trigger event, such as the price of oil going above "X" or going below "Y," a state entity may be entitled to approach the contractor to renegotiate the terms of a long-term contract, whether it is a production sharing contract or another kind of oil and gas contract. In recent years, some of those legislative and/or contractual triggers have been invoked, resulting in attempts to renegotiate long-term contracts.

This is the flip side of the coin to the stabilization or economic equilibrium clauses I mentioned before, where typically it is the contractor that says, well, this has changed, so let's go back to the contract and see what needs to be amended as a result. But in the renegotiation example, it is usually the state entity saying, this is a trigger event, so let's revisit the terms.

We have also seen an increase in procurement disputes, where the government puts a high-value contract out to tender and contractors bid to win that contract. There can be challenges to

the way in which the tender process was conducted and the relevant contract awarded, with unsuccessful bidders trying to challenge the legitimacy of the process.

## Are you seeing trends in Nigeria as to whether arbitration is favored over other types of dispute resolution procedure?

**Finnis:** In the Nigerian oil and gas sector, arbitration is the dispute resolution method of choice and there's a very strong impetus in Nigeria to drive forward the further development of its arbitration laws and arbitration institutions.

## What initiatives are under way in Nigeria to achieve that goal?

**Finnis:** Earlier this year, there was a new body set up called the Association of Young Arbitrators (AYA). One of the goals of AYA is to overcome the perception that arbitration in Nigeria is a "closed shop" and open only to senior practitioners.

Nigerian arbitral institutions are improving their resources and strengthening their credentials to administer arbitrations. For example, the Lagos Chamber of Commerce International Arbitration Centre (LACIAC) recently updated its arbitration rules.

And there is an ongoing project to amend the Nigerian federal arbitration law of 1988, to bring it fully up to date.

Finally, major international arbitral institutions are increasing their focus on improving or expanding their services to attract a greater share of disputes emanating from Nigeria. For example, within the last two years, the International Chamber of Commerce (ICC) has hosted regional conferences in Nigeria dedicated to arbitration.

### **About our online Supply Chain Disruption Tool**

Hogan Lovells has developed an online [Supply Chain Disruption Tool](#) that generates a tailored report containing advice on how best to manage the risk of supply chain disruption in your industry sector. It covers a range of different contract types, geographical locations, and legal systems. Visit the [Supply Chain Disruption Tool](#) to learn more.

### **About Jerome Finnis**

Jerome Finnis advises on all aspects of international arbitration, with a strong focus on oil and gas and Africa-related disputes as a counsel in our International Arbitration Practice Group. He regularly advises on the drafting of arbitration clauses, staying court proceedings in favor of arbitration, applications for interim injunctive relief, and challenges to and enforcement of arbitral awards.

## Contacts



Jerome  
Finnis

Counsel

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