

Review

Obstacles facing international commercial arbitration

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Arbitration is a private exercise based on the agreement of the parties and is administered by appointed ad hoc arbitral tribunal or established arbitral centre or institution. International commercial arbitration which is one of the procedures for resolution of international commercial disputes is patronized by many commercial men and women including corporate bodies and states. The essence of this paper is to inquire into the obstacles confronting this international lucrative procedure for settlement of commercial disputes between private individuals, private individuals and state, and between state and state parties. This paper will among others consider the obstacle of national courts, cost of arbitration, nationality of the arbitrators, political instability and unrest, etc.

Key words: Obstacles, international commercial arbitration, law.

INTRODUCTION

MEANING OF INTERNATIONAL COMMERCIAL ARBITRATION

Whereas domestic commercial arbitration is governed and regulated by national laws or municipal legislations, international commercial arbitration is governed by variety of laws, namely, comparative law, conventions, and usage of international trade. Ole Olando claimed that international commercial arbitration is governed by the new *Lex Mercatoria* which he defined as a set of general principles and customary rules elaborated in the framework of international trade without reference to a particular national system of law (Ole, 1985). This position taken by Ole Olando is highly unacceptable

as it is not practically possible for international commercial arbitration to be governed by an autonomous legal regime unconnected with national legal system of the place of entering into an agreement or the venue of its enforcement. Finally as *Lex Mercatoria* lacks the sanctions of national or international law, it is presumptuous to state that international commercial arbitration is governed by it alone when in fact conventions and international law exist on the subject matter (Al-Baharna, 1993). *Lex Mercatoria* exists as one of the commercial customs or trade usages which could apply to international Commercial arbitration subject however to the agreement of the parties as its applicability in any arbitral proceedings is dependent on the agreement of the

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parties¹.

There is no agreement among scholars as to the meaning of international commercial arbitration. For this reason, we have chosen to consider the meaning of the two key terms namely, commercial, and international. According to Redfern and Hunter, the term international is used to underline the difference between an arbitration which is national or domestic and that which in some ways transcend national boundaries and so is international (Redfern et al., 2004). Some scholars and legislations have used two main criteria either separately or conjunctively in determining whether arbitration is national or international. The French code in its Article 1492 used the nature of the dispute in determining whether it is international or national. In that context, arbitration is international if it involves issues of international trade.² The second involves focusing attention on the parties particularly their nationality or habitual place of residence or if the party is a corporate entity, the seat of its central control or management (Redfern et al., 2004). In 1923, the ICC Rules adopted the nature of the dispute as its own criterion whereas in 1927, it altered its rules to cover disputes which contain a foreign element even if the parties are nationals of the same country.³ Using the nationality or residence of the parties may lead to hardship as parties who are of the same nationality or resident within the same state may enter into a contract which by virtue of its objects extends beyond national borders. Austrian Law defined international arbitration to mean “any arbitration agreement concluded outside Austria....” (Werner, 1983).

Article 1 (1)(a) of the European Convention of 1960 define international arbitration agreement as arbitration agreement concluded for the settling of disputes arising from international trade between physical or legal persons having when concluding the agreement their habitual place of residence or their seat in different contracting States. The Belgium and Switzerland legislations used the residence and nationality of the parties as the test of whether a particular arbitration is international or not.⁴

From the above, it is obvious that various legislations and States have used different criteria in arriving at the definition of the term international within the ambit of arbitration. For purposes of this work, we intend to rest our quest as to the meaning of the term international arbitration on what is provided in our own Arbitration and Conciliation Act. Section 57(2) of the Act provides that an arbitration is international if –

(a) the parties to an arbitration agreement have, at the

time of the conclusion of the agreement, their place of business in different countries ; or

(b) one of the following places is situated outside the country in which the parties have their place of business -
(i) the place of arbitration if such place is determined in or pursuant to the arbitration agreement;

(ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; or

(d) the parties, despite the nature of the contract, expressly agreed that any dispute arising from the commercial transaction shall be treated as an international arbitration.

From the provisions of section 57(2) of the Act, two criteria were combined in defining the term international, namely: the place of business or habitual place of residence, and the subject matter of the arbitration agreement. In addition to this, the Act has made it that once the parties despite the nature of the contract expressly agree that any dispute arising from their commercial transaction shall be treated as international, it shall be so regarded without more. The definition as preferred by the Nigeria Act is wide and embracing.

Commercial

The Model Law on the footnote to Article 1(1) states that, the term commercial should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationship of a commercial nature include, but not limited to the following transactions: any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representatives or agency, factoring, leasing, construction of work, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture, and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road.⁵ Lord Justice Ker criticized this definition as being confusing, unworkable, and unnecessary as it will give rise to litigation at the outset (Lord, 1985). The criticism by Lord Justice Ker is with respect, unfair and unnecessary when considered against the essence and the purpose of the UNCITRAL Model Law. The essence of the UNCITRAL Model Law is to afford States the opportunity of adopting its provisions subject to their need if they have no arbitration law at all and for those who

¹ Section 47(1) of CAP A18 Laws of the Federation of Nigeria 2004,

² Article 1492 of the French Code of Civil Procedure, Decree Law No. 80-500 of 12 May, 1981.

³ I.C.C. Rules Article 1.

⁴ Cap 12 Article 176 Swiss Act on Private International Law, 8th December, 1987.

⁵ This passage appeared as the footnote to Article 1(1) of the Model Law which states that it applies to international commercial arbitration.

have their respective laws to modify them based on the opportunity created by the UNCITRAL Model Law. The States are not under any legal duty or obligation to adopt the provisions of the Model Law verbatim. Section 57(1) of the Arbitration and Conciliation Act defined Commercial in the very language of the UNCITRAL Model Law. The section Provides:-

Commercial means all relationships of a commercial nature, including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co operation, carriage of goods or passengers by air, sea, rail or road.

The definition of commercial in section 57(1) seems encompassing and all embracing. However, mention must be made of the fact that the definition is not exhaustive as it is still subject to the ever – changing models of commercial transactions arising from modern events and development. The definition is also subject to the provisions of section 35 of the Act which provides that this Act shall not affect any other law by virtue of which certain disputes may not be submitted to arbitration; or may be subjected to arbitration only in accordance with the provisions of that or another law. This implies that the term commercial has nothing to do with labour disputes with reference to Trade Dispute Act. This is particularly so because the provisions of section 11(1) of the Trade Dispute Act makes it very clear that the provisions of Arbitration and Conciliation Act do not apply to the proceedings of any arbitral tribunal appointed pursuant to section 8 of the Trade Dispute Act or to any award made by such a tribunal.

OBSTACLES

The Nationality of the Arbitrators

It is not surprising that most developing countries including Nigeria see international commercial arbitration as a process being administered by the developed countries of the world in which the developing countries are placed in a dis-advantageous position. This form of suspicion has placed international commercial arbitration at the door step of the developed world whereas the developing countries are lacking behind. Following this is also the fact that most international commercial arbitration takes place outside the developing countries. This is a serious obstacle as the volumes of commercial activities going on within the developing countries are enormous and most of them are subject to arbitration. Avoidance can never be a solution. The developing

countries have a challenge to position themselves well so as to participate and play their roles well.

This particular obstacle is avoidable because parties to arbitration are at liberty to appoint their own arbitrators and also to specify the venue for their arbitration. There is nothing in any law or legislation that denies the parties the right to specify who their arbitrators should be as this is part of the principles of party autonomy granted by the arbitration practice. Under most of the commercial and investment Conventions, State parties have right to designate their own arbitrators to the Centre. For example, in the case of ICSID, States that are parties to a dispute have an effective remedy at their disposal, namely, to participate actively in the appointment of the arbitrators.

Most of the provisions of ICSID Convention regarding the number and the selection of arbitrators are permissive, so that the parties are free to make their own arrangements. The Secretariat keeps a panel of arbitrators, of which four are named by each contracting State and an additional ten are named by the chairman of the Administrative Council. The parties to a dispute may choose arbitrators from the panel or from outside the panel. The problem of the moment is that a number of our developing country members to ICSID have not designated persons to serve on the panel. Another reason is that some States have unnecessarily designated public officials to serve on the panels (Ibrahim Shihata, 1986). The fact remains that public officials may not have the requisite capacity to arbitrate or may not have the time to participate. It must be stated that it is not an act of discrimination that members of developing countries have not participated in most or major international arbitration. The problem is actually with the developing countries and not that of the developed countries.

It must be mentioned that most scholars, investors, and businessmen have failed and refused to pay attention to the study and training as arbitrators. However, effort must be intensified to encourage developing countries to send list of candidates suited to serve as arbitrators on ICSID tribunals and also make special effort to train persons particularly lawyers, in matters concerning the settlement of transnational disputes. There is need to increase awareness on the desirability of experts in arbitration matters in the developing countries (Ibrahim Shihata, 1986). For one to be an expert arbitrator, training is required so as to be acquainted with the laws, rules, and procedures applicable to international commercial arbitration matters. The developing countries should intensify efforts in training skilful men who can handle international commercial arbitration proceedings.

The duration of arbitration proceedings

Some of the advantages of arbitration over litigation are

speed, efficiency, and informality. Parties patronize arbitration because they want their matter to be disposed within the shortest given time. This also explains why arbitral proceeding is not subject to the rules of civil procedure and the Evidence Act. Some scholars and antagonists have criticized arbitration as being too technical and slow because of the long period and duration of its proceedings. In fact, this has made some to see arbitration as litigation by another name. In international commercial arbitration, parties have the right to choose the applicable law to the arbitration.⁶The law as specified by the parties may have limitation period for undertaking any step in the matter. The parties have the right based on the principles of party autonomy to also specify the time for undertaking any step in the proceedings. The duration for the arbitration is then dependent on the parties, the arbitrators, and the applicable law.

It may however be true of the fact that the arbitrators may at certain times delay because of the pre hearing conference but the pre hearing conference need not take unnecessary time. Pre hearing conference is an important aspect of arbitral proceedings. Most arbitration matters have actually ended and got resolved on the strength of pre hearing conference. With respect to ICSID, the new ICSID arbitration rules offer a new procedure in the form of a pre hearing conference which may be called by the Secretary General or the President of an arbitral tribunal. The essence of such a conference is to identify and isolate undisputed facts, thereby limiting the arbitration proceedings to the real issues in dispute. In the same spirit the rules also give the parties the right to request the convening of a pre hearing conference between the parties and the arbitrators in the hope that it will afford them an opportunity to reach an amicable settlement. The essence of the pre hearing conference is not to delay and it is also not expected to take long duration as feared by some commentators. Arbitration is a speedy and efficient procedure for the settlement of disputes.

Cost of arbitration

Section 49 of the Arbitration and Conciliation Act provides what constitutes the cost of arbitration and these include among others:

- i The fees of the arbitral tribunal which must state what each arbitrator is to earn.
- ii The travel and other expenses incurred by the arbitrators.
- iii The cost of other experts and other assistance required by the arbitral tribunal.

- iv The travel and other expenses of witnesses.
- v. The cost of legal representatives ...

From the provisions of section 49, it is obvious that the cost of arbitration is not uniform and should not ordinarily be so particularly when the provision of section 49(2) is considered which stated that the fee of the arbitral tribunal shall be reasonable in amount taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrator and any other relevant circumstances of the case. No two arbitrations can cost the same thing because cost follows certain factors hence cost vary from case to case. It is also to be noted that most arbitral institutes have scale of fees and in which case the arbitrators are not allowed to go contrary to the provisions of the schedule. The cost of international commercial arbitration is rather very short when considered against taking a similar matter before a court in international jurisdiction. One obvious fact is that arbitration is faster when compared with litigation as arbitration is faster hence time is saved. In commercial activities, time is money.

In ICSID for example, attempts are made to keep cost of arbitration to a minimum partly because ICSID receives financial support from World Bank and revenue from the use of its facilities. It is also cheap because ICSID also limits the expenses incurred by the parties to the work performed in relation to individual proceedings. The arbitrator's fee in ICSID is calculated at an established rate. In litigation, there is no schedule of fees as each legal practitioner charges his fees using his own personal barometer. However, the issue of cost as an obstacle in arbitration will be alleviated completely where all the legislations and conventions in international commercial arbitration contain a schedule of fees which arbitrators would be bound to follow. This notwithstanding, international commercial arbitration is cheaper than litigation in international jurisdiction.

NON-ADOPTION OF INTERNATIONAL COMMERCIAL ARBITRATION CONVENTIONS

Some member States of United Nation have not adopted the New York Convention and ICSID Convention. As a result of this fact, the two conventions are not applicable to them though under ICSID such States can use ICSID facilities based on the ICSID added facility provisions but the resulting award will not be enforced using ICSID mechanism or procedure. The worrisome aspects of this fact are that countries that have acceded to these conventions go into commercial engagements with arbitration clauses with these countries that are yet to accede to the conventions. Efforts have to be made to influence the States that have not adopted ICSID to do so seeing that there are a lot of advantages in acceding to it particularly as it is the convention applicable in investment

⁶ Section 47 of Cap A18 Laws of the Federation of Nigeria, 2004.

disputes with the emphasis that courts in the member States have only one duty to perform and that is to enforce the award whereas impeachment is taking out of the hands of domestic courts. Acceding to ICSID convention will boost the flow of investment in a country as it will enhance the confidence of foreign investors in investing in any State particularly as investment disputes are taken out of the hands of the domestic courts and the laws of any particular State. Foreign investors are usually afraid of being subjected to domestic courts in the developing countries as most of them with respect, are guilty of delay and unnecessary adjournments.

Delay by national courts

Arbitration practice will be a meaningless and helpless system of dispute resolution mechanism without the involvement and assistance of the national courts. This is because court involvement in arbitration is inescapable in certain situations and at certain levels. The court will be involved in a situation where parties have failed and disagreed as to who to appoint as an arbitrator. In such a situation, the appointment is done by the court on an application made to it by either party to the arbitration agreement.⁷

Another level of involvement of the court in arbitration practice is at the level of enforcement and impeachment of arbitral awards. Save and except ICSID, arbitration has no mechanism for the impeachment of its own awards as the arbitral tribunal becomes *funtus officio* on making of a final award. Arbitral tribunal generally does not have any mechanism for the enforcement of its award unless by the assistance of the domestic courts.⁸

The relationship of the courts and arbitration in the time past was not a cordial one but with time, the pressure which favoured arbitration as a more efficient, speedy, informal, friendly and less expensive procedure submerged the antagonism hence today, arbitration and courts are partners in dispensing justice (one in the private sense and the other in the public sense as a creation of the State). However, whereas most courts in the developing countries are guilty of delay in arbitration matter, some others are guilty of ignorance. Some judges, with respect, are not knowledgeable and skilful in arbitration process and the resultant effect is that in some cases, awards which are good on their face are often impeached and set aside for reasons which are absolutely doubtful and strange.⁹ In Nigeria, our court system is rather very slow on the issues of enforcement, impeachment of awards and international commercial

arbitration.¹⁰ Some of our lawyers are ill equipped and trained in arbitration practice, hence making it difficult for Nigerian courts to play its premium roles in international commercial arbitration. The enactment of sophisticated arbitration legislation is very good, and development of arbitration centre is ideal but an indispensable element remains that international commercial arbitration cannot function well and efficiently in Nigeria and other developing countries without the assistance of pragmatic, efficient, active and functional courts manned by well trained judicial officers and with the assistance of advocates trained in arbitration practice. There is urgent need to undertake seriously the arbitration law training of judges and legal experts in the developing countries if international commercial arbitration is to thrive well in the developing countries. The few arbitration centres in the developing countries should undertake this task and the time for this is now. While believing that some like the Chartered Institute of Arbitrators of Nigeria is doing it now, others have to join in the business of training our lawyers to imbibe all the necessary arbitration skills. The courts in the developing countries have to position itself well to undertake the tasks imposed on it by the international commercial arbitration conventions and laws.

Political and social unrest

The argument has been that international commercial arbitration takes place in the developed countries and is also administered by them. The fact remains that parties to arbitration have the right to specify the venue of their arbitration particularly where the arbitration is administered by an ad hoc arbitral tribunal. There is no duty or obligation on them to specify any particular or specific country. The reason why most arbitral proceedings take place in USA, UK, France, etc is obvious. Arbitral tribunal proceeding is expected to take place where the right of egress and ingress are assured. It is today an open secret that most of the developing countries have one form of unrest or the other hence making some of them unsuitable as venue for international commercial arbitration. The only solution to this is for the heads of governments in the developing world to take steps that will ensure peace in their respective countries. As at the date of writing this paper, some parts of Northern Nigeria are controlled by the Boko Haram militants, Democratic Republic of Congo is burning, Egypt is involved in civil disturbance, Ethiopia

⁷ Section 44 of the Arbitration and Conciliation Act Laws of the Federation of Nigeria 2004.

⁸ Section 51 of the Act.

⁹ *Alhaji Albishir & Sons Ltd. v. BUK* (1996)9NWLR (Pt.470)37

¹⁰ In *Taylor Woodrow v. S.F. GmbH* (1993)4NWLR (Pt.286)127 an application for impeachment of an award filed in 1991 was disposed sometime in 1993. In *Commerce Assurance Co. v. Alli* (1986)2NWLR 404, an application for enforcement and impeachment of an award lasted for eleven years, and in *K.S.D.B. v. Fanz Construction Co. Ltd* (1990)4NWLR (Pt.142)1, an application for the enforcement of an award lasted for thirteen years.

has the same problem, Liberia and Sierra Leon have just finished their own wars, Gaza, Sudan, Irag, Isil, etc are all unsafe for any meaningful arbitration business.

On the other hand, institutional arbitration takes place at such centres designated in the convention. It is not out of discrimination that these centres exist outside the developing countries rather it is the provisions of the conventions that made it so. There is no reason why the developing countries should not participate in the arbitral proceedings in these centres. The main reason for choosing an arbitration venue or forum is neutrality. Parties choose the venue where no one will have a better benefit or preferential treatment than the other. It is often considered that where a state party is involved in arbitration, it is always better to have the arbitration venue outside that State so as not to jeopardize the interest of the other party as it is often envisaged that the State party may amend her laws at any time to the detriment of the other party which may be a corporate entity or national of another State. The major consideration in choosing a venue is neutrality and suitability of the venue and not whether it is developing country or not. The developing countries have the right to also develop their own arbitration centres and make them lucrative. We currently have the AALCO (Asian African Legal Consultative Organization). The Organization has Centres in Africa and Asia (Lumpo Kuala, Nigeria, and Addis Ababa).

Conclusion

International commercial arbitration is an indispensable tool for the resolution of commercial disputes at the international level. It is hoped that efforts should be made to address the obstacles highlighted in this paper so as to ensure wide acceptance of this resolution mechanism popularly referred to as international commercial arbitration. Addressing these obstacles will definitely enhance the benefits of international commercial arbitration in the developing countries particularly among the businessmen and investors. Most of the domestic courts are very slow in handling arbitration matters as shown in *Kano Urban Development Board v. Fanz Construction Co. Ltd*¹¹ where an application for enforcement took thirteen years to be disposed and also in *Commerce Assurance Ltd v. Alli* where an application for enforcement and impeachment took eleven years to be disposed.¹²

Conflict of Interests

The authors have not declared any conflict of interests.

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¹¹ (1990)4 NWLR (Pt.142) 1.

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