

The Role of Arbitration in International Commercial Disputes

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1. INTRODUCTION

Dispute resolution mechanisms have constantly undergone continuous transformation throughout the history of commercial conflicts. The processes of litigation have been acknowledged to prove grossly inadequate and prone to more damage than resolution of conflict by hampering positive future relation and association between the parties to it.

These days, just as there seem to be a global paradigm shift from governmental control to deregulation in all facets of life, there also seem to be a similar shift from placing reliance on strict legal provisions in resolving business or commercial disputes to the use of processes of Alternative Dispute Resolution (ADR), a phrase designed to cover a wide range of processes adopted for the resolution of conflict other than through litigation. These consist of conciliation, mediation, expert determination, adjudication, negotiation and arbitration.¹

However, arbitration has shown to be the most widely embraced process for business disputes especially across national borders and boundaries. As a dispute resolution mechanism, arbitration has long gained prominence among governments and inter/multinational organisations, for instance most contracts now contain clauses that mandate parties to explore arbitration options in the event of a disagreement.

Usually, according to Tweeddale A and Tweeddale K,² for there to be arbitration, a number of factors must be present. One, there must have been an arbitration agreement³ between the parties and this gives the arbitral tribunal its jurisdiction to hear and determine the dispute, otherwise the whole arbitral process will fail. This is usually contained in the contractual agreement between the parties. Two, an arbitration panel must be appointed by the parties. The process of selection may be contained in the arbitration clause or agreement and the mandate of the panel is to hear and determine the dispute between the parties which has been referred to it. Thirdly, a dispute or difference must have arisen. Also, there must be a “judicial process” not necessarily in the form of litigation but there must be compliance with due processes, fairness and impartiality, and there must be a decision in the form of an arbitral award. This is usually final and binding on the parties. In arbitration of international commercial disputes, this is usually put into writing and once the award is made the arbitral tribunal is *functus officio* in respect of the matters decided within the award and the issues are thereafter *res judicata*.⁴

According to Indira Carr, arbitration could be said to be the first step towards privatisation of justice.⁵ This is because it by-passes the rigours of litigating in state courts while ensuring equal enforcement of its award. Arbitration allows its parties to have greater control of matters such as the appointment of arbitrators, the language of the arbitration as well as the place of arbitration. The principles to be applied to issues also need not be attached to any particular national law. The

Arbitration Act 1996 requires all arbitration agreements to be in writing although an oral agreement can still be enforceable under the common law. An arbitration agreement is defined in S. 6 of the same Act as “an agreement to submit to arbitration, present or future disputes, whether they are contractual or not”⁷ although the parties can make the agreement either before or after the dispute has arisen. Arbitration, thus, has proven to be a most widely embraced process for business disputes especially across national borders and boundaries.⁸ As a dispute resolution mechanism, arbitration has long gained prominence among governments and inter/multinational, especially business organisations. Most business agreements or contracts now contain clauses that mandate parties to explore arbitration options in incidents of conflict or disagreement.

This work is aimed to assess the role arbitration has played, is playing and can still play in international business disputes. Part one will focus mainly on the nature and purpose of arbitration in international disputes, look into why arbitration is such a popular and preferred choice of dispute resolution as opposed to other alternatives to litigation, its law and procedure and examine the issues of jurisdiction and choice of law. Part two will deal with the successes and effectiveness of the system, its shortcomings and weaknesses noting historical, political and economic factors which contributed to either, thus examining its significance or the role it has played in international business dispute resolution platforms. The work will thus be concluded on this note and recommendations given for the way forward.

2. PART ONE

2.1. International Arbitration

It is often said that every arbitration is national or domestic in nature as it will definitely be held at a given place and subject to a particular national or domestic law. However, we can still classify some proceedings as either national/domestic or international due to the nature of the dispute, the nationality of the parties and the place of holding the arbitration tribunal.

Arbitration is considered to be international in nature when according to Article 1 (3) of the UNCITRAL Model Law if it falls within the following three ambits:

- i. If the parties to the arbitration have at the time of completion of the agreement, their places of business in different places.
- ii. If one of the following places is situated outside the state in which the parties have their places of business (a) the place of arbitration if determined in or pursuant to the arbitration agreement, (b) any place where a substantial part of the obligation the commercial relationship is to be performed or the place with which the subject matter of the dispute is more closely connected.
- iii. The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.⁹

The resolution of disputes by arbitration under international commercial contracts is widely conducted under the auspices of several major international institutions and rule making bodies. The most popular are the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), the international branch of the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), and Hong Kong International Arbitration Centre.¹⁰

2.2. Distinction Between Domestic And International Arbitration

International arbitration is often affected by several factors alien to domestic arbitration. For instance, different laws are likely to be relevant to an international arbitration process while in domestic arbitration only the national law is put into consideration. Also, in international Arbitration, the chairman of the arbitration tribunal may come from a completely different country from the parties. Further still, the procedure adopted in an international arbitration may

not mirror any domestic litigation procedure, and international arbitration often relies upon conventions to allow enforcement of its arbitral award.¹¹ It is not just the fact that international arbitration arises in the context of international contracts that makes it different. In the international dispute resolution community, it is widely accepted to be a different ball-game entirely, involving different practices and rules, and being represented by a different community of arbitrators and legal practitioners. Although the procedural laws of many countries provide for "international" arbitrations to take place, care must be taken to ensure that an "internationalized" form of a domestic arbitration practice is not confused with genuine international arbitration practice as it exist outside and beyond the rules of any particular jurisdiction.¹² An international arbitration need not have any connection with the state in which the arbitration takes place, other than the fact that it is taking place within the territory of that state.

2.3. Confidentiality In Arbitration Proceedings

Because parties generally choose the place of arbitration and the proceedings are not held in public, Arbitrations are deemed to be confidential most especially since the information disclosed in an arbitration tribunal cannot be disclosed to a third party. However, we must mention that witnesses are not usually subject to the confidentiality obligation and a challenge of an arbitral award in a regular court under S.68 of Arbitration Act 1996 can be heard either in public or in private and there is no assurance that a hearing made in private will not be made public unless it raises an extremely sensitive issue. A good example of this is the case of Department of Economic Policy and Development of the City of Moscow V. Banker's Trust Co Industrial Bank.¹³

Confidentiality is seen as one of the main advantages of arbitration as a dispute resolution system, yet different jurisdictions recognise confidentiality to varying extents. This arises from the notion that private arbitration derives simply from the fact that the parties have agreed to submit any dispute between them to arbitration. It is implicit from this that strangers shall be excluded from the hearing and neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with, or even in consonance with, another dispute. The requirement that arbitration is held in private extends to the documents and any award rendered in the process of the hearing.¹⁴

In international disputes, Arbitrations involving a state and a foreign investor raise different questions. The public interest in such arbitrations means that confidentiality cannot apply in the same way as it does to arbitration between two companies. It is trite that democratically-elected governments must be accountable and open. Keeping proceedings and awards secret does not enhance that openness.¹⁵ However, on appeal the confidentiality is lost but a very insignificant number of cases go on to appeal, and even this risk can be eliminated by inserting into the agreement a clause excluding the right to appeal. This is also an important factor as regards the risk of costs and delays due to appeals in court proceedings. It is, however, true to say that because of this very element, only limited feedback comes to light as to how arbitration is actually conducted especially in international business disputes and this may be seen as a disadvantage.

2.4. Nature and Purpose of Arbitration in International Commercial Disputes

In the recent wave of globalisation of international trade, finance and investment, there happens to have been a progressive change in the global legal field. Law is a vital instrument for globalisation. In the global marketplace, the private dispute resolution system in international commerce has proved popular over time. Recently, in many countries, old arbitration laws have been modernised and new arbitration laws have been enacted to respond to the present needs of the international business community in this day and age of globalisation. As such, many countries have followed the UNCITRAL Model Law, which purports to globally harmonise the law and practice in the field. Thus, there has been an increasing trend towards the modernisation

of arbitration laws in international commercial disputes across borders. Since economic globalisation aims at cross-border transactions with minimal interference from the state, the liberalisation of the private justice system through modernised international commercial arbitration is considered to be vital for the purpose. This is the aim of the Model Law in the process of harmonisation and globalisation of the private justice system in international business transactions. For settlement of international commercial disputes, international arbitration has proved effective in the global marketplace. Arbitration in international commercial disputes is believed to contribute to market integration by safeguarding and improving the efficiency of international private transactions.¹⁶

2.5. Policy Issues, Historical, Economical and Political Factors

It must be said at this juncture, that international arbitration is not to be seen as a simple, cheap or quick alternative. Though hearings can be for as short as one week, there is 'a lot of written work before and after a hearing and international arbitration may have other non-monetary advantages over national courts, such as having shorter rules. For example, the ICLA, one of the main arbitration institutions, has rules running to only 30-odd articles. International arbitration serves as the main non-court method for resolving large, complex cross-border commercial disputes, it is divided into two main types: arbitrations which arise out of contractual issues between companies — where they have agreed in the contract to go to arbitration — and those which arise out of a treaty, such as an investment treaty, where companies within the signatory countries agree to arbitration if there are any disputes. The World Bank's International Centre for the Settlement of Investment Disputes (ICSID) has been monitoring the number of new investment treaty arbitrations coming through its door. Until 1999, the number of new cases each year was fewer than ten, but since then the number has shot up, reaching 46 in 2007.¹⁷ However, in both types, international arbitration has come to be seen as the preferred choice of dispute resolution for a majority of large corporations around the world, according to research undertaken by PricewaterhouseCoopers (PwC) and Queen Mary, University of London in 2006, which found that 73% of respondent corporations preferred international arbitration.¹⁸ This growth is a natural by-product of a globalised world, where parties to a commercial deal come from different legal systems with different laws and, therefore, need a dispute resolution process that operates above and beyond national borders.¹⁹

A basic tenet of arbitration in international business disputes is the freedom of the parties to agree to have disputes arising from their contract resolved outside the national court regime resorting to the alternative dispute resolution mechanism as well as using the applicable law of their choice. The legal relationship between the main contract and the arbitration agreement is that they take on separate existences. This is known as the doctrine of separability of the arbitration agreement; a valid arbitration agreement is regarded as a separate and autonomous contract whose validity is not affected by termination of the main contract. The free-standing nature of an arbitration agreement has been judicially approved in several English cases. It is argued here that challenges to arbitration, if mounted over disputes such as arbitrability and the arbitration procedure itself, seem to maintain this separability between the main contract and the arbitration agreement. However, the interpretation of such contracts finds its origin in national law.²⁰

2.6. Law and Procedure in Arbitration of International Business Disputes

The issue of jurisdiction is fundamental to the authority and decision making powers of the arbitrators. Awards rendered without jurisdiction has no legitimacy. The absence of jurisdiction constitutes one of the few recognized factors a court can rely on in setting aside or overruling an arbitral award or decision of an arbitral tribunal. Accordingly it is often better to resolve the issue

of jurisdiction at the initial or early stage as the issue can be visited at any stage of the arbitration tribunal as well as before a state court.²¹

Unlike the jurisdiction in state courts, the jurisdiction of an arbitration tribunal is not determined by a single *lex fori* because of the hybrid character of arbitration. It is usually based on a complex mixture of contractual and jurisdictional elements, that is, the will of the parties as expressed in the arbitration agreement on the one hand, and the different laws applicable to various aspects of the arbitration tribunal on the other hand.²²

To strengthen the jurisdiction of the arbitral proceeding, and to minimize the challenges being used as a tactic to delay or derail the arbitration proceedings most modern arbitration laws make use of different techniques to side-step that. The central elements in those efforts is the recognition of the arbitration tribunal's authority to determine its own jurisdiction or competence by the so-called "competence- competence" principle.

In addition, the so-called positive doctrine of "competence- competence", if understood clearly and ineptly also has a bearing on whether courts can decide on the arbitrator's jurisdiction before the arbitration tribunal itself has dealt with the issue.²³

To ensure the enforceability of arbitral awards, arbitrators must consider the domicile of the assets of the litigants to see if there are any possible conflicts between their decisions and the national law of the court where recognition or enforcement is sought. Enforcing states might find that some awards, even though rendered on an objective consideration of a dispute are against their public policy. After all, the award, as it is now, would always be at the mercy of national laws once it is challenged. Accordingly, a national procedural law to which an arbitration dispute is subjected could be seen as a standard by which to accept the validity of an award in another jurisdiction where the award requires recognition and enforcement. Also problems can arise in arbitration of an international commercial dispute if one of the parties to an arbitration agreement is unwilling to accept the decision of arbitrators or entertains second thoughts about the arbitration agreement. However, when this happens it unleashes the forces of the national laws affecting the arbitration agreement, the arbitral proceedings and the award. The national courts then become pivotal in resolving the fallout between the parties to an arbitration agreement.²⁴

3. PART TWO

3.1. Relationship between Arbitration in International Commercial Disputes and National Courts

The judgments in the recent English cases have expressed support for the arbitral system. Huge dicta in the cases regarding the reasonable expectations of business persons highlight the underlying aim of international arbitration to provide a business-friendly method of dispute resolution. The recognition of this reality invites an analysis of how far, beyond the theory and in practical terms, it has been possible for these cases to be dealt with in a way readily understandable by and serving the needs of commercial litigants and whether there are other relevant underlying factors which have contributed to the decision-making.

In the House of Lords decision in *Fiona Trust V. Privalor*²⁵, Lord Hoffmann commented that it is the reasonable expectation of businessmen that they will receive "a quick and efficient adjudication" of their disputes with minimal "risks of delay". In particular, it is most likely that the parties would have intended that all issues arising out of their agreements should be decided in one forum and there would be "no rational basis" for any other view.²⁶

3.2. Merits/ Appeal of Arbitration in International Commercial Dispute Resolution

In international commercial transactions, parties may face many different choices when it comes to including a mechanism for resolving disputes arising under their contract. If they are silent, they will be subject to the courts of wherever a disaffected party decides to initiate legal proceedings and believes it can obtain jurisdiction over the other party. This may not sit well with parties that need to know at the time of entering into their contract that their contractual rights will be enforced. The alternative to silence is to specify a method of binding dispute resolution, which can be either litigation before the domestic tribunal of one of the parties or arbitration. If the parties choose to resolve their disputes in the courts, however, they may encounter various difficulties. The first is that they may be confined to choosing one or the others' courts, as the courts of a third country may decline the invitation to devote their resources to deciding a dispute that does not involve any of that country's citizens, companies, or national interests. The second, and perhaps more significant difficulty, is that judicial decisions are not very "portable" in that it is difficult and sometimes impossible to enforce a court decision in a country other than the one in which it was rendered.²⁷ The ability to resolve disputes in a neutral forum and the enforceability of binding decisions are therefore major advantages of international arbitration over the resolution of disputes in domestic courts.²⁸

Furthermore, parties to international business contracts can decide to site their dispute resolution process in a third, neutral country, knowing that the eventual award can be easily enforced in any country, though with some few exceptions. An international award therefore has substantially greater legal force than a domestic court decision. For most types of international business contract and most of the disputes arising from them, the ability to refer the matter to arbitration can have real advantages²⁹. Summarily, unlike all the other forms of ADR enumerated at the beginning of this work, the part played by arbitration is completely outstanding and noteworthy. Recognising that international commercial clients attach a very great importance to avoiding disputes is one giant stride International Arbitration has taken that is very worthy of note. While good legal advice and management can reduce the risk of disputes arising, as and when they do, the route through which they are dealt with is of an even greater significance.³⁰ And this is where arbitration has become indispensable.

4. CONCLUSION

4.1. Evaluation of the Current System Arbitration In International Business Disputes, Its Weaknesses and the Way Forward

Although ADR techniques are supposed to be cheaper than the cost of litigation, international commercial arbitration can often prove to be more expensive than litigation especially in complex international cases whereby both parties appoint distinguished lawyers and eminent and expensive arbitrators.³¹ Also, because there is no strict application of the rules of evidence, irrelevant and inflammatory materials may be presented to the arbitration panel and time and money is spent on issues which are unnecessary.³² There are, also, situations in which arbitration is not usually preferred; for example, some sovereign States are unwilling to arbitrate, and there seems to be an inclination by bank creditors, and their lawyers, to prefer litigation for disputes arising out of some international loan agreements.³³

It is greatly desirable for the rules and practices of all or most nations to be the same with respect to international commercial arbitration whether those rules and practices concern public policy or not. If such uniformity were already in existence there would of course not be any objection whatsoever against it. The position however as at present is that no such uniformity exists most especially with respect to public policy rules. Thus, this work will propose evolution of uniform

or at least quite similar (including public policy rules) of generally acceptable rules with respect to arbitration of international commercial disputes. Such uniform rules would invariably take the interests of the various nations or at least regions into consideration and would not give the impression of being designed by one set or region of people and made to be adopted or copied by others without the necessary considerations of cultural and historical differences and other present day realities.³⁴

In addition, it may still seem reasonable to fear that some countries especially the developing ones could constitute stumbling blocks to the development of uniform rules of arbitration in international business disputes, especially given the fact that most of these developing countries' started the use of arbitration for the settlement of international disputes very lately and the sometimes less than zealous approach of some of them to arbitration even now.³⁵

As the issue of arbitration in international disputes relates to developing countries one question that comes to mind is whether or not contracts for the exploitation of natural resources which form the bedrock of the national economies of most of those countries should be subjected to arbitration or should be determined only by their domestic courts applying purely domestic laws, even when there are other international parties involved. This question can be taken further and translated into whether such contracts should be governed by those countries' domestic laws or a certain set of general principles of law governing international disputes or an international law of contract. It could be feared that such developing countries are never likely to make such disputes arbitrable. However, there may be some exceptions to this line of reasoning. For instance, Nigeria is a developing country whose economy has up to 90 per cent dependence on oil minerals. Major oil companies of the world operate in the country and indigenous operators are only now emerging but disputes in the oil industry are not only completely arbitrable in Nigeria, the contracts with the operating oil companies promote arbitration and Nigeria made the choice of its own volition.³⁶

Also in the area of confidentiality, there may be limits to it. Even where parties would like to keep their arbitration secret, mandatory legal requirements may compel disclosure of at least certain aspects of the process. Non-parties such as a parent company, an insurer or a guarantor may have legitimate interests in being informed as to the content of a pending arbitration. Any agreement between the parties as to confidentiality will have to address any duty of a company to make disclosure of arbitration proceedings or awards which have an effect on the company's financial decisions. Perhaps the most difficult matter which can undermine the effectiveness of arbitration concerns related disputes and parties. In reality, a dispute may arise with a related entity in the counter-party's corporate family rather than the counter-party which has signed an arbitration agreement.³⁷ Difficult jurisdictional issues can therefore arise. While some countries have existing rules and doctrines for "piercing the corporate veil" and other means of addressing such technical problems, it can often add considerable expense and delay to a process if there is any doubt about the identification of the correct parties to the dispute.³⁸ Finally, this work would end on the note that the major institutions regulating and governing the regulation of arbitration procedures especially in the area of international business disputes should keep the processes and procedure as simple and less complex as possible as opposed to litigation so that the attractiveness of arbitration would not be lost and strive to achieve a more uniform, globally even system of international arbitration to ensure ease of enforcement of awards.

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