IS ARBITRATION REALLY A FAST TRACK MEANS FOR INTERNATIONAL DISPUTE SETTLEMENT?

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Abstract

It is an established fact that litigation has been the traditional method for settlement of disputes arising from transactions between parties. However, arbitration has become an increasingly preferred option for settlement of international disputes. The question today is whether the promise of arbitration is real or illusory. In this paper, a comparative analysis of litigation and arbitration is made. The work interrogates whether, despite its popularity as the best means for settlement of international commercial disputes, it can be said that arbitration has absolutely no flaws or disadvantages? This paper attempts to critique and highlight the challenges of arbitration showing why it fails as a fast track means of dispute settlement and what can be done to restore its efficacy.

Key Words: International Commercial Disputes, Shortcomings of Arbitration, Difference between Litigation and Arbitration, Role of National Courts in Arbitration

1. Introduction

> *The arbitration process by mimicking the processes of the courts, and becoming over-legalistic and over-lawyered, has betrayed its birthright by allowing itself to become as slow, as expensive and almost as formal as the court proceedings from which it was intended to offer an escape.*[1] *- Thomas Bingham*

Conflict is a natural phenomenon and unavoidable consequence of human interaction, exacerbated when different languages, countries and cultures come together for international business transactions.[2] Globalization has undoubtedly led to an increased use of arbitration as a method of dispute settlement and regulations have also been established to ensure business transactions and cultural differences are respected, accommodated and free from abuse. In order for arbitration to be an effective means for the resolution of dispute, it relies on the support of national laws, international conventions and the national courts in some case.[3]The sources of international law on dispute resolution are treaties, conventions, international customs, general principles of law recognized by civilized nations, judicial decisions and writings of highly qualified jurists.[4] Litigation has been the traditional means of settlement of international disputes. However, litigation has encountered a lot of problems which make it less attractive to parties with disputes to settle and this has led to the emergence of alternative

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[1] (1995) 61 J. Arb. 3 at 176.

[2]Nardin, T., *Theories of Conflict Management*,(Canadian Peace Research Institute, 1971)

[3] Gordon Wade, Courts and Arbitration: An Irish Perspective, (2013) 79 Arbitration, Issue 1, *Chartered Institute of Arbitrators*) 37.

[4] See Article 38(1) of the Statute of the International Court of Justice.

dispute resolution mechanisms. On the other hand, Arbitration is used all over the world today because of its assumed speed in settling of disputes compared to litigation. The most important difference between arbitration and litigation is the ability of users to tailor processes to serve particular needs.[5] Parties sometimes prefer arbitration for its speed, affordability, convenience and choice of arbitrators among others.

International arbitration is a means by which disputes between parties to international and domestic transactions can be resolved pursuant to the parties' agreement and the choice of independent and non-governmental decision makers by the parties.[6] The questions that arise here are; has arbitration really been the fastest means of settlement of dispute? Has arbitration any shortcomings as a fast track means of settlement of dispute; Is arbitration independent from the national courts? In answering these questions, this paper will critically analyze the relationship between the courts and arbitration, the challenges of arbitration and the role of courts in the arbitration process. The focus will be on the shortcomings of arbitration in comparison to litigation. This will be achieved by a critical analysis of both concepts using case laws and acts relevant to arbitration.

2. The Meaning of Arbitration

Alternative dispute resolution (ADR) has been recognized to be one of the mechanisms for the settlement of dispute. There have been conflicting opinions on exactly what the acronym stands for. Whether it is an alternative to litigation or mediation or conciliation. There is also the question whether this acronym includes arbitration and what exactly does the letter 'A' stands for (Alternative or Appropriate). Considering all the huge debates on this aspect, arbitration will not be considered to be a part of ADR for purposes of this paper.

Arbitration is seen to have consensual and adjudicatory elements. The consensual aspect is seen in the principle of party autonomy while the adjudicatory aspect is viewed from the binding and final nature of arbitral awards which can as well be challenged in court. Also, arbitration has a statutory regime regulating it unlike mediation.[7] In the argument whether arbitration is part of the ADR process, Orojo and Ajumo submit that:

> … arbitration is in a curious position when discussing ADR processes. It is basically a form of adjudication, though like ADR properly so called, it is also an alternative to litigation. The difference…stems from the fact that, in mediation or conciliation, the parties retain the responsibility for and control over the dispute to be resolved and they do not transfer decision-making power to the mediator, whilst in an arbitration, the

[5]T.J. Stipanowich, 'Arbitration: The "New Litigation", (2010) (1) TDM,<https://www.transnational-dispute-management.com/article.asp?key=1521> accessed 12 May 2018

[6] Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd Edition, Kluwer Law International, 2001) 23

[7] Paul Idornigie, *Commercial Arbitration Law and Practice in Nigeria*, (Law Lords Publications 2015)36

> arbitrator has responsibility for controlling the process and making a binding award. In the light of the above, it is submitted that arbitration should be left out of the ADR process.[8]

Arbitration has gradually gained acceptance round the world as a means of settlement of commercial disputes and an alternative to traditional litigation. It is tied to four fundamental principles, namely, the principle of party autonomy, the principle of separability, the principle of arbitrability, the principle of judicial non-intervention or minimal interference and also the principle of *Kompetenz – Kompetenz* which gives the arbitral tribunal the competence to rule on its own jurisdiction. These principles presuppose that the parties have made a decision not to submit to the jurisdiction of the courts but have elected to settle their dispute through arbitration. The courts can only have a minimal supportive and supervisory role to play in the arbitral process.[9] In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.

In addition, other characteristics of arbitration are; arbitration is a consensual process, neutrality in choice of venue for hearing, arbitration is a confidential process and the decision of the arbitral tribunal is final and easy to enforce.[10] In the case of *NNPC v Lutin Investment Ltd*[11], the Supreme Court of Nigeria considered arbitration as;

> 'the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. The arbitrator, who is not an umpire, has the jurisdiction to decide only what has been submitted to him by the parties for determination. If he decides something else, he will be acting outside his authority and consequently the whole of the arbitration proceedings will be null and void and of no effect. This will include any award he may subsequently make'

However, when parties choose to arbitrate it may be in comparison to the court system and the facts of the case. The main reasons are usually hinged on neutrality in choice of venue, party autonomy and enforceability.[12] On the advantage of neutrality, the parties are referring to a forum where the place of dispute resolution is not to the benefit of either party unfairly. In some cases, there is a tendency that the national courts may be biased in favor of a parties' nationality due to national interest. The tribunal chosen by the parties needs also to be impartial and independent. The issue of enforceability is also important; in comparison to

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[8]Orojo JO and Ajomo MA, *Law and Practice of Arbitration and Conciliation in Nigeria*,(Mbeyi and Associates (Nigeria) Limited 1999)5

[9] Paul Idornigie, *Commercial Arbitration Law and Practice in Nigeria*, (Law Lords Publications 2015)49

[10] World Intellectual Property Organization www.wipo.int/amc/en/arbitration/what-is-arb.html

[11] (2006) 2NWLR(Pt 965),50 SC

[12] Nigel Blackaby, Constantine Partasides and others, *Redfern and Hunter on International Arbitration* (6th Edition Oxford University Press 2015) 31

court judgments, arbitral awards fall under the New York Convention[13] which makes enforceability easy for other countries that are signatory to the convention. Therefore, the issue of challenge and appeal is limited and finality is ensured. For the wheels of arbitration to function optimally the national courts should not hinder in its function it is absolutely necessary. Despite the advantages that arbitration has over litigation, there are matters that cannot be handled by arbitration.

2.1 Essential Features of Arbitration

There are specific essential features that should be contained in an arbitration agreement for it to be valid. In any arbitral proceedings chosen by the parties whether ad hoc or institutional, the most important document is the arbitration agreement. It can come in a separate arbitration agreement or it can take the form of a clause inserted in a contract. Generally, parties are advised to insert an arbitration clause in their contract or have a separate document containing same before a dispute arises. In drafting such clauses there are elements that are very important and every arbitration agreement must be liberally construed so as to give effect of the intention of the parties.

a. An arbitration agreement must be in writing between the parties. There is no particular form required as it can be in a single document or two containing all the terms of the agreement. An oral agreement to arbitrate is not recognized in Nigeria.
b. In terms of capacity of the parties, the arbitration agreement must comply with all the requirement of a valid contract. The agreement will be binding on the parties except it is influenced by fraud, coercion or undue influence. The parties must have the requisite capacity for entering a contract or it may be rendered invalid.
c. There must be a common agreement between the parties that in the event a dispute arises or is likely to arise in the contract it will be referred to arbitration. For the contract to be binding there must be consensus ad idem. This will generally include the appointment of arbitrators, the seat and the venue of the arbitration proceedings, the choice of language.
d. An arbitration clause in a contract is usually treated as an independent contract and even if the main contract is illegal or void, it does not make the arbitration clause invalid. This provision gives power to the arbitral tribunal not only to rule on its own jurisdiction but also to decide objection with respect to the existence or validity of the arbitration agreement.

2.2 Arbitration and Litigation Distinguished

The courts and arbitral institutions both have separate but connected roles to play in international dispute resolution; they are partners in a competitive collaboration.[14] Litigation is

[13] The New York convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
[14] James Allsop, 'National Courts and Arbitration: Collaboration or Competition? Courts and arbitration as partners in the International dispute resolution project'(2015) 81 Arbitration, Issue 4 *Chartered Institute of Arbitrator)434*.

a word encompassing the use of court processes to resolve a dispute between parties using the rules in that particular jurisdiction with the aim of enforcing or defending their legal right. In the process of litigation, the case is brought to the court and the judge appointed by the court carefully evaluates all the evidence and arguments presented and gives its final decision which is binding on the parties. There are statutory and procedural rules followed by the courts in the settlement of dispute which must be adhered to by the parties.[15]

Due to the high cost and rigidity involved in the litigation process, parties may prefer arbitration or other ADR mechanisms. There are some disputes in specific cases (when the issue in dispute is a legal one) that should ordinarily be referred to litigation while some others may be referred to other ADR mechanisms. The litigation process and arbitration are adjudicatory and adversarial in nature. There is also finality in the award given in arbitration and the judgment of a court which are both binding on the parties. However, both dispute settlement methods still have distinguishable differences which will be discussed hereunder.

a. *Choice and Composition of tribunal:* Parties have the choice to choose the particular arbitral tribunal to handle the case. In their choice, they can take into consideration the professional background, experience, cost and availability of the arbitrator. In a situation where there is a disagreement between the parties, there are provisions in the arbitration agreement, the arbitral rules or statutes for appointment of a tribunal by an appointing authority unlike in the case of litigation where the parties have no choice. In litigation a Judge can be assigned a case on maritime matters and most likely will have no experience in that field. In arbitration, parties also have the freedom to decide on the composition of the arbitral tribunal which could be composed of arbitrator from different disciples and experience.

b. *Privacy and Trade secrets:* Arbitration readily comes to the aid of companies/business men that have trade secrets and confidential information to protect and should be kept away from the public. This is so because arbitration proceedings are held in private while litigation proceedings are usually held in public except in exceptional cases. The ability of a third party to join other parties to an action is well established in litigation but in arbitration which is derived from a contractual agreement of the parties, a third party can only join the arbitration proceedings only with the parties' consent.

c. *Principle of party autonomy:* In arbitration the parties are allowed to choose not only the arbitral tribunal but also the venue and the law in cases of international arbitration. In this choice the parties will take into consideration the most convenient place for the arbitrators, parties and witnesses. In some cases, the place of arbitration in the arbitration agreement may be different from the venue for the hearing.

[15] Hamed Abbaspur, International Contract law- Advantages and Disadvantages of Arbitration, https://www.grin.com/document/263550 accessed 28 May 2018.

d. *Technical matters:* In a case of arbitration where the parties have made a choice in their selection of the arbitrators and the composition of the tribunal, there is an advantage that evidence presented to an expert on a technical matter is usually shorter compared to evidence before a judge who is not an expert in that field.

e. *Representation:* In the case of arbitration, the parties to an arbitral proceeding have no specific restrictions as to their choice of representation. However, Article 3 of the Arbitration rules[16] do suggest that representation should be a legal practitioner while in litigation, the parties can represent themselves or seek the services of a legal practitioner of their choice.

f. *Neutrality in international disputes:* Where the parties are from two different jurisdictions or where the disputes involve states, arbitration may be preferable to litigation because none of the parties may be willing to submit to the jurisdiction of the other party's national court. Arbitration offers parties neutrality in the choice of law, procedure and tribunal. They can choose to appoint an arbitrator from a third country or ask an international arbitral institution to do so (an appointing authority). A state may also be unwilling to submit to the jurisdiction of a foreign court[17] probably for reasons of national sovereignty.

g. *Rules of court and Flexibility:* Arbitration proceedings are generally informal and flexible. Since arbitration is a consensual process, the parties can promptly choose a tribunal that can settle their difference instead of going through the rigors of court proceedings. The parties and tribunal in arbitration are not restricted to the rules of court as in the case of litigation. In litigation the judge's decisions are constrained by statutory and case law and the conduct of the trial is governed by established rules of evidence. In contrast, an arbitrator has considerable flexibility to consider any evidence he/she deems relevant and may issue an award based upon perceptions of fairness or equity and not necessarily on the evidence or rules of law.

h. *Maintenance of personal relationships:* Litigation is clearly a win/lose situation and arbitration may probably end up same way but since it is a consensual process and the parties are allowed to contribute their idea in the whole process that may not be the case. The personal relationship between the parties before the dispute arose is still preserved. Litigation is usually confrontational and sometimes uncompromising.

i. *Enforcement of Award:* It is a lot easier to enforce an arbitral award in another country where the foreign country is a member to the New York Convention of 1958 than it is to enforce a judgment of a court. Enforcement of a court judgment in another country will depend on the nature of the reciprocal convention or treaties or the disposition of the courts. The decision of an arbitral tribunal is final like a court judgment. Whereas, a party can

[16] See Schedule 1 to the Act
[17]Orojo JO and Ajomo MA, *Law and Practice of Arbitration and Conciliation in Nigeria,*(Mbeyi and Associates (Nigeria) Limited 1999)45

generally appeal against a decision of a court, the decision of arbitral tribunal cannot be appealed. However, the parties can ask for the award to be set aside on specific grounds.

j. *Cost:* This is one area that is of major concern in both arbitration and litigation. Sometimes the cost of arbitration far exceeds the cost of litigation. In litigation the judge is appointed and paid by the state, unlike in arbitration where the parties have to provide the cost of the arbitrators and arrange for facilities for the hearing.

k. *ADR Mechanisms:* Only in arbitration can parties have the option to determine the appropriate dispute resolution mechanism suitable for the case such as Mediation-Arbitration or Conciliation. Such options do not exist in litigation as all matters brought before a court go through a particular set of rules and procedure.

3. The Role of Courts in Arbitration

Although arbitration is considered separate and an alternative means of dispute resolution to litigation, the fact remains that arbitration is built on laws and depends on these laws and the judicial system. The courts play a supportive role in the maintenance of arbitration but excess intervention from the courts will undermine the whole essence of arbitration, therefore a balance needs to be established to ensure arbitration remains a viable dispute resolution process. According to Redfern and Hunter;

> The relationship between the national courts and arbitral tribunals swings between forced cohabitation and true partnership. In spite of protestations of party autonomy, arbitration is wholly dependent on the underlying support of the courts ho alone have the power to rescue the system when one party seeks to sabotage it.[18]

Countries which have adopted the UNCITRAL Model Law on International Commercial Arbitration (Model Law), sets out guidelines as to when a court is allowed to intervene in an arbitral process[19]. Specifically, Article 5 of the Model law states that 'in matters governed by this law, no court shall intervene except where so provided in this law'. Also, Section 34 of the Arbitration and Conciliation Act[20] states that 'a court shall not intervene in any matter governed by this Act except where so provided in this Act'. Generally, the courts are involved before, during and after in the arbitral proceedings. The courts play a restricted, supportive and supervisory role over arbitration. Where an arbitral institution is involved the case may be different, as such institution gives the arbitral process some support instead of going to court.

Instances expressly provided for where the courts can intervene in arbitration proceedings

[18] Nigel Blackaby, Constantine Partasides and others, *Redfern and Hunter on International Arbitration* (5th Edition, Oxford University Press 2009) 439
[19] Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rdEdition , Sweet and Maxwell 2010) 538-539
[20] Cap A18, Laws of the Federation of Nigeria,2004

under the Arbitration and Conciliation Act are as follows;

- To stay court proceedings brought in defiance of the arbitration agreement(Section 4 and 5),
- Arbitration agreement irrevocable except by agreement or leave of court. (Section 2)
- To appoint an arbitrator where a party fails to appoint or the parties cannot agree. (Section 7)
- Challenge of Arbitrators/ Failure or impossibility to act (Section 9 and 10).
- Application for setting aside of an arbitral award (Section 29)
- To compel the attendance of witnesses or production of documents (Section 23)
- Setting aside of award in case of misconduct by arbitrator. (Section 30)
- Recognition and Enforcement of Award (Section 31)
- Interim measures of Protection (Section 13)
- Refusal of recognition or enforcement of awards (Section 32 and 52)

In Lagos State, the Arbitration law[21] has its own provisions on instances where courts may intervene in arbitration as follows;

- Power to stay proceedings and make preservatory order (S.6),
- Appointment of arbitrators where the two appointed arbitrators are unable to agree on a presiding arbitrator(S.8),
- Appointment of an umpire(S. 9),
- Power to issue interim measures(S. 21),
- Power to pronounce on the consequence of an arbitrators resignation where the parties fail to agree (S.14).

From the foregoing, the courts in Nigeria have no power to rule on the jurisdiction of the arbitral tribunal. That is a principle known as *kompetenzkompetenz* which states that the arbitral tribunal is competent to inquire into its own jurisdiction. So, any initial challenge on the jurisdiction of the arbitral tribunal should be addressed to the tribunal first and not the court.[22] Other major instances where the courts are involved in the arbitration process will be briefly discussed as follows;

3.1 Agreement to Arbitrate

Since arbitration is a consensual process there is need for an agreement to arbitrate without which there is no arbitration. The arbitration agreement is the cornerstone of the process. In a situation where a party refuses to adhere to the arbitration agreement but goes ahead to seek the enforcement of the contract in dispute in a court, the court must decline to hear the case on the merits or refer the parties to arbitration as long as the arbitration agreement is valid.

3.2 Enforcement of Award

Another major task of the national courts is the enforcement of the awards by arbitral tribunals. This is a key advantage over litigation as arbitral awards are readily acceptable and

[21] Lagos State Arbitration law 2009
[22]See Section 12(1) of the Act.

enforced easily around the world over court judgment. In countries where there is an effective arbitration regime that have adopted the Model Law or the New York Convention[23] must recognize and enforce awards once an application has been made to that effect. Also if an award contains specifically that no relief should be given to a claimant, then the courts must also recognize the award and dismiss any new lawsuits brought by the claimant. Enforcement procedure of domestic awards at the national level may greatly vary between countries. Under the New York Convention, no review of the award is permitted and the procedure for the recognition of awards is easy.

However, the obligation to enforce these awards is not an absolute one, courts still have the discretion to accept or decline to recognize or enforce foreign awards[24]on grounds such as invalidity of the arbitration agreement, incapacity of the parties entering the arbitration agreement, when the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. Also that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which the award was made.[25]The recognition and enforcement of an award may also be refused on the ground that the subject matter of the difference is not capable of settlement by arbitration under the law of that country or the recognition or enforcement of the award would be contrary to public policy of that country. [26]

3.3 Choice of Arbitration Center

Furthermore, in the choice of an arbitration center the importance of the national courts cannot be overlooked as they play a significant role in influencing parties. This can be seen as the seat of arbitration determines the governing law of the arbitration proceedings such as the availability of interim measures. For instance, in the choice of an arbitration center such as London, it is usually seen as one of the best arbitration center and this is because of the domestic legislations and the courts. England has a modern arbitration act which makes it more arbitration friendly. The courts are very supportive of arbitration processes and do not interfere except when necessary. Even though, the choice of the seat of arbitration is London it does not necessarily mean that the hearings must take place there, the legal advantages are usually considered as important. In addition, the courts can also exercise its powers in favour of arbitration proceedings in cases such as removal of an arbitrator where a case of bias have

[23] Article 35(1), Model Law, Article 3of the New York Convention 1958.
[24] Article 34 Model Law; Article 5 of the New York Convention 1958.
[25] Article 5 Section 1(a-e) of the New York Convention 1958.
[26] Article 5 Section 2(a) (b) of the New York Convention 1958.

been established, challenge of the jurisdiction of an arbitral tribunal, and such other interim measures of protection as may appear to the court to be just.

4. Analysis of the Shortcomings of Arbitration

The assumption that arbitration was way faster than litigation to avoid unnecessary delay has changed over the years. Delay now seems to be part of the arbitration process. Though arbitration is usually viewed as a faster means of settlement of dispute compared to litigation, it has its own short comings that sometimes make the process cumbersome to parties. This position was highlighted in a court proceeding for an appeal against an arbitral award in the High Court of Australia in the case of *Westport Insurance Corporation v Gordian Runoff Ltd (Gordian Runoff).*[27]In this case, Judge Heydon observed that:

> The arbitration process to which the parties had submitted appeared to offer no advantage over conventional litigation in terms of speed, expense or relevant expertise. He said that 'a commercial trial judge would have ensured more speed and less expense' and commented that since secrecy was lost when leave to appeal to the court was sought, 'the proceedings reveal no other point of superiority over conventional litigation'

In recent years, the requirement in international commercial arbitration that parties should have adequate opportunity to present their case has contributed to the delays associated with arbitration which is time consuming and costly. The parties tend to incur more expense at the long run for the time spent deliberating and putting into consideration the availability of the arbitrators. This recent development may be the result of an increased number of commercial disputes which involves complex legal issues, parties that come from different jurisdictions and high value claims. Some of the reasons identified as a challenge in international arbitration has been argued over the years. These include but are not limited to: delay in the appointment of the tribunal, excessive and uncontrolled document production, lack of early decision making by the tribunal on critical issues, delay in award delivery, unavoidable missed appointments and extended deadlines.[28]

Efforts are being made to reduce delays experienced in arbitration such as, Article 17.1 of The United Nations Commission on International Trade Law Rules 2010 (UNCITRAL Rules 2010) which provides that

> 'subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings

[27]*Gordian Runoff* (2011) HCA 37, Heydon J. at (110).
[28] Carol Mulcahy, Delay in Arbitration: Reversing the trend, (2013) 79 Arbitration Issue 1 *Chartered Institute of Arbitrators*) 2

> so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the party's dispute'.

Also, Article 2.1 of the IBA Guidelines on the Taking of Evidence in International Arbitration 2010 provides that 'The arbitral tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence'. When the parties so agree some arbitral rules, national arbitration legislation gives an arbitrator reasonable power and flexibility over the procedural structure of the arbitration proceeding.[29]Other challenges of arbitration will be further discussed.

4.1 Withholding Documentary Evidence in International Arbitration

Document production in international arbitration is very important. As a general rule, the parties who have submitted their dispute to international arbitration must produce the evidence and documents which they intend to use to support every claim or defense. The failure of any of the parties to produce a relevant document to the arbitral proceedings will ultimately affect the chances of the proceedings being a success. The production of documentary evidence and the legal cost usually attached to it constitutes the major cost of the entire arbitral proceedings.

The production of documents may take time and it is usually an expensive process. Unlike under the domestic court system where the courts may impose fines and use other coercive measures on parties for the production of evidence, there are no immediate measures or remedy available in an arbitral process compelling a reluctant party who fails to produce a document under the arbitral tribunal production order.[30]The arbitral tribunal cannot force but can order a party to produce a particular document, only a domestic court may be able to do so. Since arbitral tribunals cannot give severe sanctions to parties, no party/lawyer would normally be willing to produce a document that would be adverse to its case and thus such document may never be produced. The aggrieved party has the option to ask the arbitral proceeding to draw adverse inference, which may be quit tricky depending on the case and may lead to a challenge.

Usually, the arbitral tribunal will state that it will be guided but not bound by the IBA Guidelines on the Taking of Evidence in International Arbitration[31] which will guide the parties in their request and objections. Paragraph one of the Preamble of the Rules states that …'these rules are intended to provide an efficient, economical and fair process for the taking

[29]See Article 14.2 LCIA Rules and Article 22 ICC Rules.
[30] M.A. Polkinghorne, 'The Withholding of Documentary Evidence in International Arbitration: Remedies for Dealing With Uncooperative Parties'(2005) 5, TDM <https://www.transnational-dispute-management.com/article.asp?key=569> accessed 21 April 2018
[31] The IBA Rules on the Taking of Evidence in International Arbitration. Adopted by a resolution of the IBA Council 29 May 2010 International Bar Association.

of evidence in international arbitration'. It is assumed that each party shall act in good faith in the taking and production of evidence since there is no procedural order under law compelling parties for production.

Under Article 3(1) of the IBA Guidelines on the Taking of Evidence in International Arbitration, it states that each party shall submit to the Arbitral tribunal and to the other parties all documents available to it on which it relies. However, this will be an impossible task for a party where the most important document to the case rest with the opposing party. Furthermore, Article 3(2)-(8) of the IBA Rules,[32] still goes further to explain the procedure of document production request. The counterpart under Article 3(5) equally has a right to object to this request of some or the entire document; it shall state its objection in writing to the arbitral tribunal and the other party. The reasons for such objection shall be any of those set out in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.[33]

Under Article 3.3, it sets out the requirements that must be met before a party can be ordered to produce certain documents. Article 9(2)-(3), sets out exemptions to the production of requested documents. These exemptions are usually frequently invoked by the other party in the request of document production. The arbitral tribunal or the requesting party on the other hand has no way of determining whether an objection raised by the counterparty is actually valid. Under Article 9 (2) (e) of the IBA Rules, there is also the exemption on the grounds of Commercial or Technical confidentiality which is often invoked to prevent production. This also poses problems in the arbitral proceedings just like that of the exemption of legal privileges.

4.2 Inevitable Risk of Litigation before a National Court

Generally, international arbitration gives parties the leverage to opt for a neutral ground for decision making in disputes with parties from different countries. Most local courts lack the competence, resource, experience of handling some international commercial disputes. However, International disputes will inevitably involve the risk of litigation before a national court of one of the parties which may be bias, parochial or unattractive for some reason.[34]An arbitrator who is not independent of the parties or any national/ international government and has any personal/ financial relationship with any of the parties poses more risk of partiality to the issue of favoritism or parochialism of local courts. In addition, an otherwise defective arbitration clause in an agreement can result in judicial proceedings.

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[32] The IBA Rules on the Taking of Evidence in International Arbitration. Adopted by a resolution of the IBA Council 29 May 2010 International Bar Association.
[33] Vivian Ramsay, 'National Courts and Arbitration: Collaboration or Competition? The Courts as Competitors of Arbitration' (2015)81 Arbitration, Issue 4 *Chartered Institute of Arbitrators*) 447.
[34]Gary Born., *International Commercial Arbitration: Commentary and Materials* (2nd Edition, Kluwer Law International, 2001)7

4.3 Anti-Arbitration Injunctions

An anti-arbitration injunction is an order of court which can be issued to restrain a party or an arbitral tribunal prohibiting arbitral proceedings. The courts can issue an anti-arbitration injunction either before the commencement of the arbitral proceedings or after the arbitral proceedings have commenced and can also be granted to stop a party from enforcing an arbitral award.[35] Anti-arbitration injunctions also share some similarities with anti-suit injunctions, while anti arbitration injunctions seeks to stop the commencement or discontinue the arbitral proceedings, anti-suit injunctions seek to stay proceedings in court in breach of an arbitration agreement. Anti-arbitration injunctions are issued to the party and the tribunal to stop the commencement or continuation of arbitral proceedings while an anti-suit injunction is issued to the party that commenced court proceedings in breach of the arbitration agreement.[36] An anti-arbitration injunction may be sought either because the issue in dispute is not arbitrable[37], also the party may claim there was no agreement to submit the dispute to arbitration, the party may claim the arbitration agreement is forged[38], or that the issue for determination is outside the scope of the arbitration agreement, or that proceedings was initiated against a non-party to the arbitration agreement.

With the rise of anti-arbitration injunction been granted by courts, it has been argued that such injunctions are aimed at sabotaging the international arbitral system and that the courts in issuing such injunction disregards the principle of judicial non-intervention. These applications for the grant of anti-arbitration injunctions are mostly on objections to the jurisdiction of the arbitral tribunal. The whole purpose of arbitration is defeated once there is an anti-arbitration injunction in place. It creates the uncertainty of having conflicting decisions, creates delay, inefficiency and the extra cost incurred. Parallel proceeding that is initiated in the case of litigation could frustrate the ongoing arbitration which leads to prevention of the final award.

4.4 Arbitrability

The word 'Arbitrability' can simply be defined as the quality of been capable of settlement by arbitration.[39] This is another downside to arbitration because in some jurisdictions certain

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[35] P. Idornigie and E. Moneke, 'Anti- Arbitration Injunctions in Nigeria' (2016) 82 Arbitration, Issue 4 *Chartered Institute of Arbitrators)* 438.

[36] Julian D.M Lew, 'Does National Court Involvement undermine the International Arbitration Processes?' (2009) 24 *American University International Law Review)*489

[37] See the case of Shell Nigeria Exploration and Production and Ors v Federal Inland Revenue Services and Anor (Unreported) Appeal No CA/A/208/2012, the issue that came up for determination was the arbitrability of tax disputes and it was held that tax disputes are not arbitrable. See also Esso Exploration and Production Nigeria Ltd and Anor v Nigeria National Petroleum Corporation, (Unreported) Appeal No CA/A/507/2012.

[38] Sharad Bansal and Divyanshu Agrawal, "Are Anti –Arbitration Injunctions a Malaise? An Analysis in the context of Indian Law" (2015) 31 *Arbitration International)* 613.

[39] Paul Idornigie, *Commercial Arbitration Law and Practice in Nigeria*, (Law Lords Publications 2015) 106

subject matters such as anti-trust disputes, labour, or matter where parties may seek punitive measures are simply not arbitrable and the only option is to litigate. Section 48(b) (i) of the Act, provides that the court may set aside an award if the courts finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria.[40] The Interpretation section of the ACA defines arbitration to mean Commercial Arbitration as;

> 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 of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road.

Therefore, matters falling outside of these are not arbitrable in Nigeria such as tax disputes, void and illegal contracts, fraud, national security disputes and company law disputes.[41] See Section 251 of the Constitution of the Federal Republic of Nigeria 1999 and the case of Nigerian Agip Exploration Limited v NNPC & Anor.[42]

4.5 Cost of Arbitration

In some cases, the costs of arbitral proceedings are more expensive than state sponsored disputes that are before a national court. In a proper litigation setting, it is the duty of the State to provide a judge, registry personnel and the facilities in the court room etc. while the parties to an arbitral proceeding bear all the costs.

According to the Arbitration and Conciliation Act[43], Section 49(1) provides that 'the arbitral tribunal shall fix costs of arbitration in its award'. Section 49(2) provides that 'the fees of the arbitral tribunal shall be reasonable in amount, taking account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case'. Where it is an *ad hoc* arbitration, the arbitral tribunal and institutional arbitration both determine the fees. Unfortunately, International commercial arbitration which is perceived to be a cheaper means of settling dispute is becoming very expensive in terms of fees paid to arbitrators, costs of hiring venues, legal fees, expert witnesses, interpreters, transcribers, transportation and hotel costs. In the determination of the fees paid, the amount in dispute can be considered or it could be on a daily or hourly rate.

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[40] Art 34(2)(b)(i) and 36(a)(b)(i) of the United Nations Commission on International Trade Law (UNCITRAL Model Law) on International Commercial Arbitration.

[41] CO Obi-Okoye "The Question of Arbitrability in Nigeria" in OD Amucheazi & CA Ogbuabor (eds) *Thematic Issues in Nigerian Arbitration Law & Practice*, (Enugu: Mbeyi Publishers), 117.

[42] Nigerian Agip Exploration Limited v NNPC & Anor (2014) 6 CLRN 150-158.

[43]Cap A18, Laws of the Federation of Nigeria, 2004, See also Art 40 of the UNCITRAL Arbitration Rules, 2010 and Arts 36-37 of the ICC Arbitration Rules, 2012

4.6 Delay Tactics by Parties

Arbitration is generally designed to be flexible and accommodate the various needs of the parties to the dispute. Parties who generally engage in delay tactics to stall the regular flow of arbitration defeat the whole essence of arbitration been assumed to be a fast tract means of dispute resolution. Some delay tactics are unavoidable partly because there is no rule prohibiting their use when it will obviously benefit the party who is delaying.

Generally, requesting of excessive amount of documents is only time consuming and costly to the party responding to this discovery request; failure on the part of one of the parties to cooperate with the opposing party and arbitrator could lead to pre hearing meetings; also delays due to lack of preparation and delinquent submission; redundant testimony and parties arguing the merits of the ruling etc. In litigation a judge can control inappropriate behavior of a party through sanctions, dismissal and contempt of court unlike in arbitration where there are no laid out rules for the control of inappropriate behaviors which could frustrate the ongoing arbitration process.

4.7 Multiparty Disputes

It is a bit tricky arranging arbitration in a case involving multiple parties. While a party may agree ex post facto to join an arbitral proceeding, such cooperation is rare once a dispute has arisen. There is also the possibility of multiple parallel proceedings even when all the parties are bound by the same arbitration agreement. Except with the agreement of the parties concerned and the arbitrators, the arbitration agreement or applicable rules can provide for the tribunal to consolidate. The risk of consolidating parallel proceedings in multiparty arbitration is that there is a possibility of an inconsistent award and an inefficient and expensive procedure.

The UNCITRAL Model law and the Arbitration Rules, 2010 do not provide for multi-party arbitration. However, the ICC Arbitration rules 2012 (Art 6.4(i)(ii) and Art 7, The LCIA Arbitration Rules, 2014, The Lagos State Arbitration Law, 2009 all provide for consolidation, joinder of parties, concurrent hearing and multi-party arbitration. Before an arbitral tribunal can consolidate arbitral proceedings there must be an agreement of the parties, a third party (arbitral institution) or an order of court. Parties in drafting the arbitration agreement should be clear enough to provide for consolidation, how the arbitral tribunal will be constituted and the procedure to be adopted by the arbitral tribunal. In the absence of an agreement the arbitral tribunal has no power to join or consolidate.

5. Conclusion

The ever-increasing globalization of cross border trade and investment has unavoidably led to a complex relationship between investors, private parties and states. As some of these contracts /relationships will inevitably break down, parties will have to consider at the outset

what will be the best means of resolving any dispute that will arise. An arbitration agreement must satisfy the legal requirements of a contract such as consensus and capacity of the parties. It must also be in writing, signed by the parties and capable of being settled by arbitration under the laws of Nigeria. Generally, since the Act empowers parties to seek the assistance of courts in specific matters, the courts are willing to enforce arbitration agreements that comply with all legal requirements by staying legal proceedings that have been instituted in violation of an arbitration agreement.

There are concerns and efforts have undoubtedly been made by the Arbitration community on ways to tackle these challenges faced by International commercial arbitration. An early determination of the key issues of the dispute will help in reducing delay as the entire pleading and documents produced may not contain the key issues. Arbitral tribunals should be more willing to give an early ruling on key issues as this may be a positive step and will have a beneficial effect on the cost, the scope and structure of the evidence presented and the quick assessment and conclusion of the case. Probably, if there were few changes in the arbitration rules this will assist arbitrators to confidently apply this.

In the area of document production in a complex case, despite the IBA Guidelines on the Taking of Evidence in International Arbitration that assist parties and tribunals there is very often excessive document production which in most cases may become uncontrollable. The task of overseeing document production, issue of relevance or confidentiality can be delegated to an assistant and this will improve efficiency and lower cost. As illustrated, tribunals shouldn't be afraid to be innovative in its approach as a robust case management will be very influential in reducing delay. This is a responsibility placed on tribunals by the Arbitration rules to devise an appropriate procedure to suit every circumstance of each case.

Many will still consider arbitration as their choice while for some others litigation will be a better option. Arbitration may not always be the right choice for a party in every situation as it has its own drawbacks as well, so parties have to look at the advantages and disadvantages of both methods. Unlike the courts, the arbitral tribunal has no inherent power or jurisdiction. Its authority stems from the parties' contract and backed up by statutes and treaties. The idea of still thinking arbitration is far better and faster than litigation seems to be an illusion. Parties involved in the dispute have to decide which dispute resolution mechanism is best to adopt in a particular case after putting the entire case-specific factors into consideration. This will help in shaping the consideration for a particular system that will most likely result to an optimal resolution of the dispute.