A Counsel in Arbitration

By
Prof Paul Obo Idornigie, SAN, PhD, FCIS, FCIArb, C.Arb
Faculty of Law
Veritas University
Bwari, Abuja
Email: prof@paulidornigie.org
Web: https://paulidornigie.org

Introduction

Let me start by thanking Marcus-Okoko & Co for inviting me to lead discussions on this topic. I must commend the law firm for its capacity-building activities.

As a General Counsel, Bureau of Public Enterprises (BPE), I was the Legal Adviser/Counsel. In this capacity, I drafted several contracts that provided for arbitration as the forum for dispute resolution. As a Chartered Arbitrator, I have handled several arbitral proceedings – domestically and internationally. I have also acted as Counsel in arbitration.

There are several dispute resolution processes. Arbitration is one of them. Quite unlike litigation that is constitutionally and statutorily prescribed, agreement to arbitrate is the fountain of arbitration. In other words, arbitration arises from the agreement of the parties save where it is provided for in a statute or treaty.

Arbitration takes place, usually in private and on a confidential basis, generally pursuant to an agreement between two or more parties. Under the agreement, the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so, agreed, other considerations, after a fair hearing, such decision being enforceable at law. There can be an arbitration clause in a contract or contained in a separate agreement. So we draw a line between arbitration clause (referring to future disputes) and submission agreement (referring to present disputes) – both referred to as 'arbitration agreement'.

In this presentation, therefore, we will interrogate the role of Counsel in arbitration.

Who is a Counsel?

Section 24 of the Legal Practitioners' Act, 2004 defines a "Legal Practitioner" as a person entitled in accordance with the provisions of the Legal

Practitioners Act to practice as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings. A Legal Practitioner is also referred to as a Counsel or an Advocate. In Nigeria, we combine the roles of an Advocate with that of a Solicitor. A Counsel or Advocate has various roles to play in arbitration. These roles can be before, during and after arbitral proceedings.

It is instructive, therefore, that as a Counsel, you can be an arbitrator, a counsel in arbitration or an expert witness – often referred as 'treble-hatting'. All these roles are different but for the purpose of this presentation, we will focus on a Counsel's role in arbitration.

Arbitration Compared with Litigation

Arbitration is a means of resolving disputes pursuant to an arbitration agreement – arbitration clause or submission agreement. It can even be customary though the thrust of this presentation is commercial arbitration.
Arbitration has many distinguishing features and underlying principles –

- principle of party autonomy;
- principle of separability;
- principle of arbitrability – objective and subjective;
- competence of the arbitral tribunal to rule on its own jurisdiction;
- and principle of minimal judicial intervention

It can also be *ad hoc* or institutional. There are several arbitral institutions: some with their own rules like that of the London Court of Arbitration (LCIA), International Chamber of Commerce (ICC) and others without their own rules but adopt the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Other means of resolving civil disputes are litigation, conciliation, mediation and adjudication. The phrase 'Alternative Dispute Resolution' (ADR) is used for all forms of mediation and conciliation. Neither ADR nor the words 'mediation' and 'conciliation' have widely established consistent meanings. For me, it depends on how ADR is defined – is it defined as a dispute resolution process that is non-binding or alternative to litigation. Secondly, how is 'mediation' and 'conciliation' defined – a process that involves a third party intervention that is merely facilitative or evaluative without imposing a sanction?

The major differences between arbitration and litigation include:

- Place of Arbitration
- Principle of Party Autonomy

- Choice of Tribunal
- Tribunal can be of mixed disciplines
- Privacy and confidentiality
- Technical Matters
- Flexibility and informality
- Enforcement/Appeals
- Costs
- Speed at decision-making
- Convenience of the Parties

Certain factors favour international arbitration. They include -

- UNCITRAL Model Law on International Commercial Arbitration, 2006 – as at March 2021, legislation based on the Model Law has been adopted in 85 States in a total of 118 jurisdictions.
- UNCITRAL Arbitration Rules, 2010, as amended
- 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – on 4 March, 2021, Malawi became the 167th State Party to the Convention
- Arbitral Institutions – LCIA, ICC, CIArb
- ICSID Arbitration
- WIPO Arbitration

Arbitration Laws in Nigeria

In Nigeria, the following instruments regulate arbitration:

- Arbitration and Conciliation Act, 2004
- Arbitration Law of Lagos State, 2009
- Arbitration Law of Rivers State, 2019
- Arbitration Law of Enugu State
- Arbitration Laws of the remaining States
- High Court (Civil Procedure) Rules of the various states

Laws Governing International Commercial arbitration

In the case of international commercial arbitration, at least five different systems of law may become relevant during the course of international arbitration. They are:

- The law that determines the capacity of the parties
- The law governing the substance of the dispute – the governing law of the contract – national law, general principles of law, clauses freezing the laws or stabilization clauses

- The law applicable to the arbitration agreement – *lex arbitri* (bearing in mind the principle of separability)
- The law applicable to the place of arbitration – venue for hearing not juridical seat
- The law applicable to place of enforcement

Where the contract involves a state party, the issue of waiving of sovereign immunity may arise.

We must bear in mind the importance of the place (seat) of arbitration – the juridical seat of the arbitration and not venue for hearing. This choice of seat of arbitration will -

- determine the law governing the procedure as opposed to the substance of the arbitration – issues of arbitrability, appointment and removal of arbitrators, powers of the arbitrators, availability of interim measures, and finality of awards
- determine the national courts that have a supportive and supervisory jurisdiction over the proceedings, including jurisdiction to hear an application to set aside the arbitral award
- affect the enforceability of an award in another jurisdiction

What factors do you consider in determining the seat of arbitration? They include:

- Modern arbitration law (Model Law country) that respects the principle of party autonomy, restricts the role of the local courts and minimizes the grounds upon which an award can be set aside
- How efficient are the courts?
- Provision of infrastructure and security
- Signatory to the 1958 New York Convention

Counsel in Arbitration

Whether domestic or transnational, the role of Counsel include:

<u>Drafting and Negotiating the Agreement</u>

Sometimes, parties to an agreement negotiate them without the involvement of a lawyer and thereafter engage the lawyer to draft. This is not standard practice and should be avoided. A lawyer should be fully briefed on a transaction and thus be involved in negotiating and drafting the agreement. By virtue of the lawyer's

skills and expertise, he will determine what appropriate dispute resolution mechanism to insert – negotiation, mediation, expert determination and arbitration. If it is arbitration, whether it is a domestic arbitration or international. The other factors that the lawyer will consider include:

i. The appropriate arbitration clause – single or multi-tiered
ii. Number of Arbitrators
iii. Procedure for their appointment
iv. Appointing Authority
v. Arbitration Rules
vi. Governing law
vii. Seat of Arbitration
viii. Venue for hearing
ix. Whether the obligations of the parties will continue while arbitration is in progress

Where the contract is silent on the dispute resolution process, the implication is that any dispute will be resolved by the courts. If it is an international transaction, there will be the need to provide for the governing law of the contract.

b. Drafting the Arbitration Agreement – Arbitration Clause or Submission Agreement

Bearing in mind the distinction between an arbitration clause and a submission agreement, it is usually advisable to insert an arbitration clause in the agreement. This is because parties generally will disagree on every issue when a dispute has arisen. However, if the parties agree to submit the dispute to arbitration, they can adopt a Model Arbitration Clause or draft a submission agreement. When drafting a submission agreement, the following factors should be borne in mind:

i. Introductory matters e.g. scope of the submission, notices, calculation of periods, and representation and assistance
ii. Composition of the Arbitral Tribunal – appointment, challenge, replacement, repetition
iii. Arbitral Proceedings – place, language, pleadings and their amendments, jurisdiction, written statements, periods of time, evidence and hearing, interim measures, experts, default, closure of hearing, waiver of rules

iv. The award – decisions, form and effect of the award, applicable law, settlement, interpretation, correction, additional award, costs, and deposits.

There are pitfalls to be avoided. They include:

i. Uninformed tinkering with model arbitration clauses
ii. Equivocation e.g. 'in case of arbitration, the Rules of Arbitration shall apply'
iii. Insufficient specification of the arbitral institution eg the Rules of Arbitration Institution shall apply
iv. Appointing Authority – confirm that the institution is willing to accept such a responsibility
v. Combining irreconcilable procedural laws eg a venue in country X in return for application of the procedural law of country Y. What happens if the law of country X contains mandatory provisions with respect to any arbitration taking place in that country and those are inconsistent with the laws of country Y?
vi. Designation of an applicable law, be it substantive or procedural, that does not exist e.g. the law of the USA or the law of Great Britain.

This may lead to pathological clauses.

c. <u>Stay of Court Proceedings</u>

Where there is a contract that has a clause on arbitration, such a clause is binding on the parties to it. However, where a party instead of initiating arbitral proceedings proceeds to institute court action, the clause can be indirectly enforced by application to the court to stay the court proceedings in place of arbitration.

This is provided for in sections 4 and 5 of the Arbitration and Conciliation Act. Section 4 is mandatory while section 5 is discretional. Subsection (2) of section 4 provides thus:

> *(2) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.*

In the case of section 5, the applicant for stay must not take a step in the proceedings before applying for a stay. A step in the proceedings include:

- Application to the court to order pleadings[1]
- Defending the action without asking for a stay[2]
- Filing a counter-claim[3]
- Motion to strike out the case so that the matter can go to arbitration

Similarly, Article II (3) of the 1958 New York Convention provides that:

> *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration,* ***unless it finds that the said agreement is null and void, inoperative or incapable of being performed.***

What this means is that where the arbitration agreement is valid and effective, a court should order a stay of court proceedings in favour of arbitration.

d. Preparing the Notice of Arbitration

When a dispute has arisen and a counsel is formally appointed to represent a party, being involved in an arbitration as a counsel is like being involved in other adjudicatory matters. Thus the counsel should take full instructions on the particulars of the parties – **names, addresses, contracts, and those of the other party and the counsel; particulars of the arbitration agreement – a copy of the substantive contract including the arbitration agreement**. In practice, the letter of appointment of counsel will include all these; and particulars of the dispute. Again this can be contained in the letter of instruction.

If the provisions of the Arbitration and Conciliation Act are applicable, Article 3 of the Arbitration Rules provides for what should be contained in the **Notice of Arbitration** –

- a demand that the dispute be referred to arbitration,
- the names and addresses of the parties,
- a reference to the arbitration clause or the submission agreement,
- a reference to the contract out of or in relation to which the dispute arises,
- the general nature of the claim and an indication of the amount involved, if any,

[1] *Kano State Urban Development Board v. Fanz Construction,* (1990) 4 NWLR [Pt 142] 1.
[2] *Union Merchants Ltd v. Odeh Trading* (1962) WNLR.
[3] *Chemia Products Ltd v. Idowu* (1963) 2 All NLR.

- the relief or remedy sought and a proposal on the number of arbitrators if not already agreed.

Where the arbitration is institutional, the rules of the institution provide for what should be contained in the **Request for Arbitration** eg LCIA Rules 2020, Art 1, ICC Arbitration Rules 2021, Art 4.

d. Attending the Preliminary Meeting

When the arbitral tribunal is properly constituted, a Notice and Agenda for a Preliminary Meeting is usually served on the parties and if the lawyers are known, on the lawyers. It is the duty of the lawyer to represent his client at the Preliminary Meeting where the following will take place:

- Confirmation of the appointment of the arbitrators – whether the arbitral tribunal is properly constituted
- Disclosure of independence, impartiality and availability
- Date of commencement of the arbitral proceedings
- Appointment of Registrar
- procedural matters,
- jurisdictional issues,
- pleadings,
- costs of arbitration,
- deposit for costs,
- pre-hearing review/hearing
- time table for the hearing and other relevant issues discussed.

Thereafter an Order for Direction or Procedural Order is issued. In the course of the hearing, there can more of such orders.

e. Conducting the Arbitration

After the Preliminary Meeting, a Pre-Hearing Meeting/Review is usually held. Again it is the duty of counsel to be present at the meeting. As in litigation, the counsel will prepare the pleadings – point of claim, point of defence/counter claim, reply to defence and defence to counter claim, notice to produce or to produce documents, interrogatories, bundle of documents and filing at the appropriate time. It is not good practice to file out of time or seek for extension of time.

f. The Role of Court: Before, During and After

In arbitral proceedings, various applications are made to court. They include:

i. Appointment of Arbitrator
ii. Application to revoke arbitration agreement
iii. Application for staying of court Proceedings
iv. Application for Interim Measures
v. Application to challenge jurisdiction
vi. Application for removal of arbitrator
vii. Application to order attendance of witness
viii. Application to set aside an award
ix. Application to enforce an award or refuse enforcement.

It should be noted that the relationship of the lawyer to the arbitrator is substantially the same as his relationship to a judge in the court. The lawyer's conduct should be characterized by candour and fairness as enshrined in the Rules of Professional Conduct in the Legal Profession, 2007. Thus, it is unprofessional and dishonorable to deal other than candidly with the facts in taking the statement of witnesses, in drawing up affidavits and making other documents and in the presentation of cases.

Above all, the lawyer should prepare his case including legal argument and present the same with diligence. There may be other functions including applying to set aside or enforce an award. A Counsel should be conversant with the provisions of the laws or rules on setting aside or enforcement and the procedure to be adopted – motion ex parte or motion on notice. The procedure can be ascertained from the various High Court (Civil Procedure) Rules.

Concluding Remarks

In this presentation, we have examined the role of Counsel in arbitration. In all these, preparation and understanding the law and practice of arbitration is key.

A note of caution: in drafting arbitration clauses, we should be mindful of pathological (or inchoate) arbitration clauses as they imperil arbitral proceedings. We must stress also that the support to be given by the Legal Adviser starts from when negotiating and drafting the contract, inclusion of standard dispute resolution clauses and when there is a dispute, advising on the best forum.

Once again, we wish to commend the law firm of Marcus-Okoko & Co for this initiative. It is worthy of emulation.

Thank you for your attention.

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