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CHALLENGES OF NIGERIA AS A PREFERABLE SEAT OF INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT: Arbitration has over the years gained prominence as a preferred method for dispute resolution especially for cross-border commercial disputes. One of the reasons is that the parties want to resolve their dispute in privacy and obtain an enforceable award as soon as possible. The choice of the arbitral seat during the negotiation of any international commercial arbitration agreement is perhaps one of the most overlooked influential aspects over the course of the arbitral procedures. The importance of a wise choice of an arbitral seat generally has two aspects, one of logistical convenience and the other is of a legal effect. For reason of the crucial legal effects of the place of arbitration, the parties have to be sure that they have chosen the best suitable jurisdiction as the seat of arbitration. The article will further analyse the concept of the seat of arbitration, its role, and importance in international commercial arbitration. It will also examine by reviewing the drawbacks of Nigeria as a preferred seat of international arbitration, particularly on the arbitration legislation and the respective judicial supervision and support in effectively conducting arbitration within the jurisdiction.

INTRODUCTION

The growth and development of international commercial arbitration for settlement of transnational commercial disputes has influenced the

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increase in the use of arbitration as the preferred resolution mechanism for transnational commercial disputes (White and Case, 2018). International commercial arbitration as an alternative dispute resolution is canvased to have the advantages of being private and flexible. The cost and time that can be saved as well as the ability of parties to have disputes resolved by arbitrators and rules chosen by disputing parties makes it attractive to international commercial parties. These advantages are brought into focus when compared to litigation which is fraught with long delays and complex procedures. The likelihood of perceived bias in national courts coupled with the reasons mentioned above made international commercial arbitration a viable option for cross border commercial transaction. One of the key features of arbitration is the binding nature of arbitration agreement, this is recognized by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (NYC) 1958 which requires that the court of the contracting state shall, in the case of parties who have signed an agreement and at the request of one of the parties, refer disputes to arbitration (New York Convention, 1958). Disputing parties not only want an impartial, neutral and subject-specific international expert but also an efficient and arbitration-friendly place. Major international commercial players in global business have become more sophisticated in their understating and appreciation of dispute resolution mechanisms. Some jurisdictions have reformed their legislations in addition to the development of their arbitration infrastructure and pro-arbitration court decisions. The aim of this is to make their jurisdiction an arbitration hot spot (UAE Federal Law No.6, 2018; South Africa International Arbitration Act, No. 15, 2017). Arbitration as a global phenomenon has also found its way into the Nigeria legal order, this is evidenced with the proliferation of arbitral institution, coupled the increasing recognition of arbitration in several legislations dealing with major areas of the Nigerian economy (Petroleum Act, Cap P10 LFN, 2010; Public Enterprises (Privatisation and Commercialisation) Act Cap P38 LFN, 2010; the Nigerian Minerals & Mining Act Cap N167 LFN, 2010, the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act Cap N87 LFN, 2010, the Public Enterprises (Privatisation and Commercialisation) Act Cap P38 LFN, 2010).

Nigeria, as Africa's largest economies and population, its attractiveness to foreign investments includes the oil and gas industry, non-oil economy in the tele- communication and construction industries (https://data.worldbank.org, 2019). The size of the Nigerian economy in the African region even globally portends a bright future for arbitration, coupled with the fact that it has a common law court system that is strongly influenced by English law approaches to contract and commercial law. Arbitration, no doubt offers a vibrant and viable alternative to the notoriously slow litigation/courtroom battle. However, in many respects, litigation still dominates the dispute resolution process in Nigeria, arbitration references are continually increasing owing to the numbers of international commercial transactions and investments. One would have expected that given the numbers of international commercial disputes in Nigeria should ordinarily pave way for Nigeria to become a prominent commercial arbitration hub at least within sub-Saharan Africa. However, despite the general increase in the number of African related disputes, of which Nigeria has a chunk size (LCIA, 2018). It faces challenges in establishing itself as a preferred seat for international commercial arbitration.

The choice of the seat of arbitration serves as a bridge between the dispute and the applicable jurisdiction to the dispute he choice of the arbitration itself and the seat or place where the arbitration will be conducted extends beyond the choice of law (Atlas Power v National Transmission, 2018). To promote a jurisdiction in becoming a desirable seat for arbitration, it is important to understand the significance of the seat of arbitration within the context of international commercial arbitration. In the last decade, Nigeria has made efforts to make an impact on the global arbitration community, especially to display Nigeria's potentials as a viable seat for international arbitration (AALCO, 2000). The current arbitration legislation in Nigeria is the Arbitration and Conciliation Act 2004 of Nigeria (ACA, 2004) which is an adaptation of the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration (Model Law, 1985). However, the provisions of the ACA are far from perfect. Particularly, it will be seen that some provisions of the ACA, providing the framework for arbitration and the case laws when compared with for

example English Arbitration Act 1996 (AA 1996) and its court decisions, are either contradictory or inadequate.

This article consists of five parts; of which this introduction forms Part 1, Part 2 highlights the conceptual clarification of the concept of seat of arbitration. While Part 3 challenges of Nigeria as a seat of international commercial arbitrations. Part 4 draws the curtain on the discussion while making several innovative measures that Nigeria could implement to promote and establish itself as an attractive arbitration seat within the sub-Saharan region.

CONCEPT OF SEAT
SEAT/PLACE/VENUE/FORUM – INCONSISTENT OR MISCONSTRUCTION OF TERMINOLOGY?

Different terminologies used in this concept make it necessary to clarify and understand the concept and the meaning attached to it in law. The expressions 'seat' place' and 'venue; are used differently and distinctly by different national arbitral laws (ACA, 2004; Model Law, 1985) and rules (UNCITRAL Arbitration Rules, LCIA). The question is whether the 'seat' 'place' or 'venue' of arbitration connotes the same meaning and legal implication?

The concept of seat of arbitration is a legal concept and not a geographical one. It is simply the jurisdiction in which arbitration takes place legally. The difference between the geographical and legal location lies mainly in the juristic seat or place of arbitration and the location where proceedings meeting and hearing are held (Union of India v McDonnell Douglas Corp., 1993). In legal terms, seat or place of arbitration refers to the system of law that governs the arbitration proceedings (Born, 2015). The terms seat and place of arbitration are commonly used synonymously. Some notable authors use situs (Williams, Arbitration of International Business Disputes, 2012) venue (Enercon GmbH v Enercon (India) Ltd 2012), and forum to refer to the concept of seat of arbitration. The inexactness of terminology is attributable to the different expressions used by

arbitration laws, (Section 16 ACA 2004) arbitration rules and institutional arbitral rules (UNCITRAL Arbitral Rules, 2013; ICC Rules, 2017).

The Model Law 1985, (Art. 20) without offering any definition, uses the expression 'place of arbitration'. The ACA 2004, mirrors the Model Law as it provides that;

(1)Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of subsection (1) of this section and unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property (S16 ACA, 2004).

In England and Wales, the law seems more instructional as it uses the expression 'seat 'of arbitration and went further to define it as *"the juridical seat of the arbitration….."(*S3 English Arbitration Act, 1996). The English Arbitration Act (AA) in s. 2 (3) (a) and s. 43 confirms the distinction between the legal domicile of the arbitration and the geographical location where the court grants the permission to secure the attendance of witnesses in the United Kingdom provided arbitral proceeding takes place in the UK even if the seat of arbitration is outside the UK (Kaufmann-Kohler, 1996).

The definition offered by the AA 1996, leaves no room for misconstruction or confusion, given the fact that the phrase 'place of arbitration' also means where the arbitration proceedings take place. In fact, as rightly pointed out by Hill, (Jonathan, 2014) Model law (UNCITRAL Model Law 1985) use of place in the context of both juridical and geographical location, (ACA, 2004) potentially adds to the confusion as to which expression is universally acceptable when referring to the juridical location of arbitration. The London Court of International Arbitration (LCIA) Rules 2014, (ICC Rules, 2017) rather than adopt either the use of seat alternatively, place of arbitration, use a place for the geographical location where the arbitral tribunal may hold any hearing and the seat of arbitration to indicate the juridical location.

In line with the opinion of Redfern and Hunter, this article argues that both seat and place of arbitration are often used interchangeably, but that 'seat of arbitration' is supposed to designate juristic place, whereas 'place of arbitration' means the place of hearings (the place where the arbitral proceedings actually take place) (Redfern and Hunter, 2004). The need to distinguish the seat of arbitration from the place where hearings or meetings take place is germane, as pointed out by a commentator, "*that the variety of interpretational problems can be caused by a combination of terminological inexactness and drafting inconsistency*" (Jonathan*, 2014)* .

In the case of *PT Garuda Indonesia v. Birgen (1 S. L.R, 2002) Air* the court distinguished between the place or legal seat of the arbitration, and the venue (Atlas Power & Ors v National Transmission and Despatch Co Ltd, 2018) of the hearing. The court held that the seat of the arbitration remains the same place as initially agreed by the parties even though the tribunal holds meetings or even hearings in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses. In the Nigerian case of *Zenith Global Merchant Limited (Zenith Global) v Zhongfu Int'l Investment (Nig.) FZE & Ors (Zhongfu),* (CLRN*, 2017)* the court held that the seat of arbitration is where arbitration has its legal domicile and symbolizes the jurisprudential connection between the arbitration process and the laws of the nation regarded as the seat. On the other hand, the venue refers to the physical or geographical place where parties have chosen for arbitration proceedings or meetings are to be conducted.

The problem of the inconsistency in terminology by national arbitration laws and arbitral intuitional rules may well be the source of the inelegantly drafted arbitration agreement or clauses that fail to properly designate the seat of arbitration. Whereas, it is typical for the expressions seat and place to either be used as synonymous (Hirsh, 1979), or as a substitute, the expressions 'venue and forum usually do not pose such confusion, as they straightaway connote geographical location of arbitration. However, the expression 'forum' in arbitration may be an awkward expression in arbitration as it is closely associated and connected with the traditional court proceedings. Venue clearly connotes a core geographical sense and gives no doubt as to the intention or meaning to be associated with it.

In practice, it is possible to have more than a venue in more than one country, however, where parties in their arbitration agreement fail to indicate in clear terms the choice of seat, the court in a plethora of cases (Shagang South–Asia (Hong Kong) Trading Co Ltd vs. Daewoo Logistics, 2015) have held the venue to constitute the seat (Russell on Arbitration, 2015). In the recent case of *Process & Industrial Developments Ltd v Nigeria*, (EWHC, 2019) the issue of the legal seat arose in the enforcement proceedings before the English court. Nigeria argued that the seat of the arbitral seat was Nigeria. And the 'venue' as stated in the arbitration agreement was intended to refer only to the physical location of hearings. Nigeria further argued that since Nigeria had been legally seated in Nigeria, Nigeria's court had set aside the award rendering it incapable of enforcement in England. Conversely, *P&ID Ltd* maintained that the seat of arbitration was England and that 'venue' in the arbitration agreement referred to the legal seat of arbitration. The English High Court in its reasoned decision dismissed Nigeria's objection and held that the language in the arbitration clause 'venue of the arbitration shall be London, England' meant that the arbitration was legally seated in England and not merely that the proceedings would be conducted in England. The court in coming to this conclusion made a comparison between the arbitration agreement referred to as the venue of the arbitration and language used in the ACA (ACA, 2004). The reasoning of the English court was that the arbitration agreement provides that the venue of the arbitration shall be London or otherwise as agreed between parties. The agreement did not use the language used in s.16 (2) ACA that states; 'where the tribunal may "meet" or may "hear witnesses' experts or the parties". The court, therefore, stated that if the reference to venues were simply where the hearing was to take place, this would have been an inconvenient provision and one which the parties would have unlikely intended. The English court rejected Nigeria's argument that the venue, as referred to in the arbitration agreement, was in the sense as decided in Nigeria's case of *Zenith Global*. The court further stated that the *Zenith* case was decided long after the conclusion of the agreement between the parties and therefore cannot be used to support their argument.

IMPORTANCE OF SEAT OF ARBITRATION

An important aspect of arbitration agreement or clause in international commercial arbitration is the parties' choice of arbitration seat (UNCITRAL Model Law, 1985). However, despite the criticisms over the debatable constraints and control of the seat over international commercial arbitration, the seat of arbitration, the seat continues to play vital roles in international arbitration for several reasons. In the words of Born, (2015) "…arbitral seat can have profound legal and practical consequences for the parties to an international arbitration, and can materially alter the course and outcome of the arbitral process" (emphasis mine).

The law of the seat of arbitration generally will determine the legal framework of arbitration process, consequently, selection of a particular jurisdiction as the seat of arbitration generally will mean that the lex arbitri shall govern the arbitral process (Redfern and Hunter, 2004). Even though most national arbitration laws, conventions and rules recognises the role of the seat, albeit without expressly providing legal consequences, the role the seat of arbitration varies from one jurisdiction to another. The importance and extent of the scope of the lex abitri dependent on the classification of arbitration in a given country (Hirsh, 1979) as well as which of the theories the seat employs to determine the importance of the seat of arbitration.

The purpose of locating the seat of arbitration is to identify a State or territory whose laws will govern the arbitral process, as the seat of arbitration generally will determine the legal framework of arbitration process (Seriki, 2014). Consequently, selection of a particular jurisdiction as the seat of arbitration generally will mean that the lex arbitri shall govern the arbitral process.

The *P & ID* case goes to illustrate the fundamental principle of international commercial arbitration that seat provides the legal domicile for the arbitration. The physical location of arbitration does not have the same legal significance with the juridical location. The geographical location of arbitration is decided on the basis of the convenience of the arbitral tribunal and parties and it does not necessarily have to be the same with the legal seat of arbitration. In essence, the case underlines the advantages of

the use of clear terms to designate the intended choice of the legal seat an arbitration in their arbitration agreement in order to avoid unnecessary procedural disputes.

CHALLENGES OF NIGERIA AS A SEAT OF ARBITRATION

LEGISLATIVE PERSPECTIVE

The most influential factors that makes a jurisdiction attractive as a choice seat for international arbitration are a sound legislative framework and a pro-arbitration/pro-enforcement judiciary. While it is trite that party autonomy allows parties to determine the procedure applicable to their arbitration, the national law of the place of arbitration impacts significantly on the arbitration process (Loukas, 2016). It is well established in international commercial arbitration procedure that there are three sets of laws are at play; first, the 'proper law of the contract', this is the law which is applicable to the substantive issues underlying the main contract between the parties. Secondly the law governing the arbitration agreement; the *lex arbitri* (internal) which deals matters internal to the arbitration such as the commencement of the proceedings, composition and appointment of the tribunal members, due process and the formal requirements of the award, Thirdly, is the procedural law- the ,*lex arbitri* (external), this deals with the external relationship between the arbitration and the court. It concerns the issue of the exercise by the courts of their supervisory and support jurisdiction to the arbitral tribunal on matters such as granting of interim and preservative orders, securing the attendance of witnesses, removal of arbitrators and enforcement of the award.

The fundamental importance of the selection of the seat of arbitration is that it is determinative of the law of the arbitration (*lex arbitri).* The seat of arbitration offers arbitration a home base from which arbitration is governed by the law of the place where the arbitration is held. This means that for example, if the seat preferred for the arbitration is Nigeria, the ACA 2004 will, by default, be the lex arbitri. The exception will be where the arbitration is seated in Lagos State in particular, in which case, the

Lagos State Arbitration Law (LSAL) 2009 will be the *lex arbitri* applicable to the arbitration, unless the parties otherwise agree. A good and effective law, must be one that provides clear and predictable standard for judicial support and provisions that ensure fair and effective arbitration processes and procedures. In addition it must respect party autonomy wishes to resolve their disputes through arbitration without undue interference from the court. The ACA 2004 (Military Decree, 1988) regulates arbitration proceedings in Nigeria, it contains Arbitration Rules modelled after UNCITRAL Arbitration Rules and domesticates the New York Convention (ACA, 2004). The Act arguably generally reflects UNCITRAL Model Law principles of party autonomy and flexibility. While it is submitted that the ACA 2004 generally reflects the fundamental arbitration principles of party autonomy, minimal court intervention, fair and equal opportunities of parties and flexibility, however, it is pertinent to examine and ascertain the suitability and adequacy of the thirty years old legislation to modern day contemporary transnational commercial disputes.

This article for want of space, do not intend to analyse the whole provisions of the ACA, but shall for the present purpose, undertake an examination of some sections of the ACA that are crucial in order to access how the ACA presents as a national arbitration legislation that can provide solutions to transnational complex commercial disputes.

It is observed that at the time of the promulgation of the extant law, in 1988 the pre-existing States arbitration laws was not repealed (Arbitration Act, 1960). Consequently, there is a spate of arbitration laws in Nigeria (Bamodu, 2018). Most of the state arbitration laws are based on the English Arbitration Act of 1889, dealing with domestic arbitration only and are inadequate for modern international arbitration practice (Murmansk State Steamship Line v Kano Oil Mills Ltd, 1974). The only state arbitration law that may contend with the ACA and has the potential of being chosen as the *lex arbitri* is the Lagos State Arbitration Law (LSAL) 2009.

One of the legislative challenge of the ACA is the inherent vagueness of some inelegantly drafted provisions that leaves lacuna in the law. This creates a wide gap between the provisions of the ACA and the UNCITRAL Model Law, one of such is found under Sections 4 and 5 ACA 2004.

Namely, the provisions dealing with anti- suit injunctions and compelling arbitration. Sections 4 and 5 of the ACA 2004 empowers the court to grant anti-suits orders and injunctions to stay court proceedings in respect of matters which are subject to domestic and international arbitration agreements. Section 4 provides that:

> *…. a court which an action which is the subject matter of an arbitration agreement is brought, if any party so request not later than when submitting his These to provisions have created a legal quagmire in the Nigerian arbitration jurisprudence.*

> Section 5 on the other hand, provides that; '*if any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement, at any time after appearance and before any pleadings or taking any other steps in the proceedings apply to the court to stay the proceedings'.*

There is wealth of academic writings that considers the scope, application and interpretation of these two provisions (Olatawura, 2012). While some have argued, that Section 4 of ACA 2004 is mandatory and applicable only to international arbitration and thus leaves no room for courts' discretion. Another strand of arguments insists that s. 5 is discretionary and applies to domestic arbitration. In deference to these two camps, it is appropriate to investigate the intent of these provisions and whether these provisions as argued by Olawoyin (2009) that section 4 of the ACA is consistent with Article II (3) of the New York Convention. Section 5 ACA 2004 on the other hand, is restrictive as the action for a stay of proceedings must by a party to the arbitration agreement, three conditions must be satisfied by the applicant before the court an exercise its discretion and it has been argued to be applicable to domestic arbitration.

A cursory reading of s. 4 and s. 5 ACA may appear that these two provisions are contradictory, in s. 4, the court is mandated to stay proceedings, while s. 5 gives the court discretion on the matter. The applicant under section 4 of the ACA is required to may do so not later than when submitting his first statement on the substance of the dispute s5 requires

that the application must be made after appearance and before delivering any pleadings or taking any other steps in the proceedings.

The manner in which these two provisions were drafted suggest disparity between them, s. 4 mandates the court to stay proceedings and refer parties to arbitration after confirming the existence of a written agreement to arbitrate. On the other hand, s. 5 provides conditions which a party applying for an enforcement of arbitration agreement must fulfil before the court can exercise its power to enforce the arbitration agreement. The argument that s. 4 and s. 5 are not applicable to international arbitration is challenged as the fact that Part III of the ACA which deals with International commercial arbitration provides under section 43 that it applies solely apply to cases relating to international commercial arbitration and conciliation. The apex court approach in *The Owners of MV Lupex v Nigerian Overseas Chartering & Shipping Ltd (MV Lupex*), (NWLR, 2003) clearly shows that the Nigerian Court supports the view that both provisions are applicable to international arbitration. In fact, the court applied s5 to grant an anti-suit injunction preventing a party from breaching an arbitration agreement. In this case, the apex court overruled the decisions of the lower courts that had refused to grant the stay of an action commenced by a party who had agreed to arbitration in London. The Apex Court held that: „*where parties have chosen to determine for themselves that they would refer any of their dispute to arbitration instead of resorting to regular courts a prima facie duty is cast upon the courts to act upon their agreement*" (Mohammed, 2003) The court's non-discussion of s4 and applying s. 5 as the standard to anti-suit grant the injunction suggests that the power of the court in this regard in discretional and not mandatory (Panoromos Bay and Ors. Olam (Nig.) PLC, 2004).

Another section of the ACA of considerable importance that may impact on whether Nigeria is in contention of becoming a preferred seat for international commercial arbitration is the question of arbitrability and public policy. The ACA does not provide for a clear and definitive terms of which matters are arbitrable. One of the grounds for challenging an award under Sections 48 (b) (ii) and 52 (2) (ii) of the ACA respectively is if the subject matter of the dispute is not capable of settlement by arbi-

tration under the laws of Nigeria or that the award is against public policy of Nigeria (ACA, 2004). S35 of the ACA vaguely provides that:

> *"This Act shall not affect any other law by virtue of which certain disputes –*
> *(a) may not be submitted to arbitration; or*
> *(b) may be submitted to arbitration only in accordance with the provisions of that or another law".*

Though the ACA is not the only jurisdiction that do not statutorily provide for matters that are arbitrable and leaves the matter to case law, national laws of some jurisdictions leaves the issue of arbitrability in fluid states either to be determined by recourse to specific relevant laws or to case law (EAA, 1996). The issue of leaving case law to define arbitrability and regulate its application has generated exhaustive discussion on the topic (Mistelis & Brekoulakis. 2009). The case law in this area in Nigeria has not been a helpful good source to draw upon when defining and providing guidance on arbitrability situation (Umeche, 2017). The Supreme Court had initially in *Kano State Urban Development Board vs. Fanz Construction Limited*, (NWLR, 1990) defined categories of issues that are not arbitrable in Nigeria –which include: (a) indictment for an offence of a public nature; (b) dispute arising out of an illegal contract; (c) disputes arising under agreements void as being by way of gaming or wagering; (d) disputes leading to a change of status such as divorce petition; and (e) any agreement purporting to give an arbitrator the right to give judgment. The pertinent question to consider is whether arbitrability is an issue in respect of which the court will intervene to stop the continuation of an ongoing arbitration or as a challenge to set aside arbitral award or at enforcement stage? Additionally, whether in accordance with wordings so s48 which like art. V (2) (a) and (b) of the NYC are enforcement issues bothering on arbitrability and public policy. In the unreported case of *Shell (Nig.) Exploration and Production Ltd & 3 others vs. Federal Inland Revenue Service* (Appeal No. CA/A/208/201, 2016) the question before the court for determination was scope of arbitrability of tax matters and whether the disputes between the parties bothered on tax or contractual disputes were arbitrable. The Court of Appeal upheld the Federal High Court of Nigeria decision

against arbitral proceedings arising out of disputes over a production sharing agreement between the Nigerian National Petroleum Corporation (NNPC) and various oil companies. The appellate court held that tax claims are exclusively reserved for the Federal High Court under Section 251 (1) of the Constitution and to that end, reference of such claims to arbitration was unconstitutional, null and void. While this article agrees with that taxation directly implicates the revenue and therefore touches on a crucial sovereign prerogative, but the concern is that the court indulged and allowed non-party to disrupt the arbitration proceedings on the grounds of arbitrability and public policy (Appeal No. CA/A/208/2012, 2016). This may appear to be contrary to principles of judicial non-interference in pending arbitral proceedings as provided for under s. 34 ACA , art. 5 Model Law and Article II (3) NYC, the latter specifically provides that national courts shall refer the parties to arbitration after ascertaining the existence of valid arbitration agreement. The NYC did not make any further role to the courts during arbitral proceedings as regards arbitration agreement until the review of arbitral awards (Born, 2015).

COURT SUPPORT FOR ARBITRATION

The quality of judicial support and the respect for minimal judicial intervention are essential factors that will determine the attractiveness of a jurisdiction as a seat of arbitration (Allsop, 2018). The judiciary in Nigeria has, over time, been more open to supporting arbitration and enforcing arbitral awards (Baker Marine Nigeria Ltd v Chevron Nigeria Limited, 2003). However, there are cases that suggest that judicial intervention undermines arbitration in Nigeria (IPCO v NNPC 2017) .

The most touted slogan in efforts to show case the potentials of Nigeria as a viable seat for international arbitration is that Nigeria is Model Law jurisdiction, however being a Model Law country is not the only determining factor, London and Paris are notable and popular arbitration seats, yet both are not Model Law country (Appeal No. CA/A/507/2012, 2016). There is no doubt that the ACA ensures that the principle of party autonomy prevails and provides for limited court in arbitral proceedings

by the provision of s34, however the issue to be addressed is the scope, quality and length of time of judicial support of arbitration in Nigeria. While some decisions of the court have been commended as indicating a favourable judicial attitude (NWLR, 2013) and disposition towards arbitration, some judicial decision has raised questions of the ability of the court to give effective and efficient support to arbitration. Of great concern is whether the Nigerian courts still in a subtle manner still holds the view that arbitration agreement amounts to an effort to ouster the jurisdiction of the court. The case of *Panormous Bay v Olam* (NWLR, 2004) concerned a dispute arising out a contract which the parties have agreed to arbitration in London. One of the issues before the court was whether a defendant who seeks to stay court proceedings in deference of parties' arbitration agreement. The court in denying the grant to stay proceeding, held that by s5 ACA, a party applying for stay must do more than stating in the court (affidavit) processes that parties have agreed to arbitrate but must be ready and willing to arbitrate by showing documentary evidence that parties had agreed to arbitrate their dispute. This decision of the Court of Appeal was followed in *UBA v Trident Consulting Company Ltd* (CLRN, 2013) that an applicant controverted deposition of willingness to arbitrate is not sufficient to warrant an order of stay of proceedings in an application for stay of proceedings. These decisions are regarded aberration as it imposes unduly formalistic requirement before a stay of proceeding is granted.

One of the challenges of judicial support in arbitration in Nigeria is the quality of support and knowledge of international commercial arbitration. The quality of the supervision and support of a court at the seat of arbitration are essential characteristics that the court at the seat of arbitration must covet. The lack of international commercial arbitration knowledge and expertise are stated to be one of the reasons that the courts in Nigeria produce decisions that are inconsistent with global arbitration jurisprudence. Notable arbitration jurisdictions, like London, have specialized courts or specialized judicial processes to deal with commercial arbitration, this enables the judges to maintain expertise and consistency in arbitration matter. This can be achieved by the establishment of special commercial courts to handle complex international commercial disputes.

The appellate court system is an impediment that raises concern over the suitability of Nigeria as a seat of international arbitration. Under the court system in Nigeria, appeals from the decisions of the high court (ACA, 2004) lies as a matter of right to the Appeal Court and appeals from the Court of Appeal to the Supreme Court (Federal Constitution of the Federal Republic of Nigeria, 1999). The three-tier appellate system has been open to abuse to the extent that arbitral applications before the courts are subjected to undue delay and made to go through all the tiers of appeal. This has been has one of the main reasons of unwarranted and protracted delays of arbitration matters before the Nigeria courts. Olatawura, (2005) advocated limited appeals of arbitration matters to only the High Courts, he predicated his argument on s. 37 and s. 57 ACA. His suggestion elicited a quick response from Idornigie, (2015) who strongly opposed his suggestion on the grounds that the high courts and the appellate courts are constitutionally and statutorily vested with jurisdictions to entertain arbitration matters. The suggestion of Olatuwura, (2005) may appear as an answer to the problem, however, he seems not to realise the quagmire to which overloaded court dockets have bedevilled even the appellate courts. This situation is further compounded by the abuse of legal practitioners which will be discussed in the section below.

Another case that typifies a major challenge in judicial process in arbitration is excessive delay attributable to the slow process of the legal system. The case of *IPCO v NNPC,* (2017) is an excellent case study of the excessive delay in judicial processes in arbitration award in Nigeria. Arbitration proceedings were concluded within 18 months, award entered in favour of *IPCO* in February 2004. *IPCO* brought enforcement proceedings in accordance with New York Convention 1958 before the English Court in November 2004. Meanwhile, *NNPC* initiated challenge proceedings to set aside the award before the Nigeria court in 2004. The challenge proceedings suffered severe protracted delay before various Nigeria courts. It should be noted that the challenge proceedings 13 years after is still yet to be concluded. The English Court of Appeal to agree with the objective remark of Late Justice Eso while give evidence before the court stated that the 'mills of justice grinds slowly in Nigeria'. The cases of *NNPC v Clifco Nigeria Limited* (LPELR, 2011) and *The Vessel MV Naval Gent & Ors.*

(Naval Gent & Ors.) v Associated Commodity International Limited (ACIL) 2011] (LPELR, 2015), where it took 11 and 15 years for challenge and enforcement proceedings respectively to be concluded before the Nigeria court. For instance, In the *Nigerian National Petroleum Corporation v. Lutin Investments Ltd. & Annor*, 2011] (LPELR, 2006) arbitration proceedings were stalled for 12 years because an interlocutory issue whether an arbitrator could hold proceedings abroad went through the high court and then all the way to the Supreme Court. Thus, the length of time in which to dispose matters in the Nigeria courts notoriously protracted. The average lifespan of a matter in the High Court in Nigeria takes as long as between ten (10) and fifteen years (15) according to survey report, the situation is slightly different in the appellate court but are anything to but pleasant (Akanbi, 2012).

Parties to arbitral proceedings have often used the concept of 'misconduct' of arbitrators (ACA, 2004) as provided in the ACA to restrain arbitral proceedings (Guinness Nigeria Plc. v. NIBOL Properties Ltd, 2015). The ACA (2004) also fails to provide for arbitrators' immunity. A draft bill to amend the ACA 2004, Federal Arbitration Act and a Uniform States Arbitration and Conciliation Act (Repeal and Re-enactment) Bill (2017) is currently pending before the Nigerian National Assembly, (2018). However, Lagos State a former capital of Nigeria, often considered as the commercial centre of Nigeria and sub-Saharan region, enacted its own arbitration Law, Lagos State Arbitration Law (LSAL, 2009). Though in some ways similar to the ACA, (2004), as it is modelled after the Model Law. The LSAL is credited for adopting modern arbitration trends and an improvement on some of the deficiencies of the ACA, (2004). The LSAL made novel provisions in the legislation of arbitration in Nigeria, it contains detailed provision for interim measures and how such measures shall be enforced (LSAL, 2009). It also made provisions for consolidation of disputes and joinder of parties and immunity of arbitrators (LSAL, 2009). The LSAL is applicable to all arbitration with Lagos as the seat, unless parties expressly agreed otherwise (LSAL, 2009).

ADMINISTRATIVE AND SUPPORT SERVICES

Beyond the legal and court system, another crucial feature that makes a place attractive as seat of arbitration is what Born, (2015) described as "mundane issues of convenience and cost" (Born, 2015) these soft factors includes hearing facilities, technical support accommodation logistics and other facilities that would aid in smooth arbitral proceedings and hearing.

Given the socio-political developments of Nigeria as a developing nation, these 'mundane issues of convenience and cost' may not necessarily present as mundane but as peculiar challenges of developing countries that cannot be taken for granted. Challenges of power supply, good roads and transportation, telecommunication and public services are factors that bear weight against the reputation of Nigeria as an attractive seat.

The availability and efficacy of legal infrastructures, like legal practitioners' services, translators, interpreters and competent arbitration practitioners with international exposure and affiliations, the proper law of an international arbitration presents a challenge for the viability of Nigeria as a seat of international commercial arbitration. Of particular concern is the notion of Nigerian lawyers' abuse of the cumbersome court processes by filing unnecessary applications in order to deliberately frustrate and complicate court proceedings.

RECOMMENDATIONS AND CONCLUSION

The concept of seat still constitutes a major building block within the international commercial arbitration process. The seat theory therefore cannot be regarded as an out –of date concept, even with universal trend towards delocalisation.

The seat of arbitration plays a significant role in international commercial arbitration as the efficacy and efficiency of the arbitration proceedings and outcome depends a great deal on pro-arbitration approach of both the national arbitration laws and the courts. The selection of a particular place is fundamental and of paramount importance as arbitral seat can have profound legal and practical consequences for the parties to

an international arbitration, and can materially alter the course and outcome of the arbitral process.

Nigeria, appears to have to satisfy the criteria of a viable seat of arbitration as it boost of a national law based on UNCITRAL Model Law, which incorporates the New York Convention on Recognition and Enforcement of Foreign Judgement. The general attitude of the Nigerian courts towards arbitration Nigerian judicial intervention in arbitration has varied over time ranging from suspicion and opposition to open support for arbitration. In order to have efficient judicial support for arbitration, the Courts must be knowledgeable and exhibit expertise of international commercial arbitration of Nigerian courts. The Nigerian judges must be trained in the practice and procedure of arbitration. They must support the arbitration process and adopt a pro-enforcement stance when dealing with enforcement of arbitration agreements

The ACA though based on Model Law the shortcomings of the thirty years old legislation needs to be amended as it contains problematic provisions and proves to be inadequate for contemporary international commercial arbitration.

The need for pragmatic standards for Nigerian arbitration professionals and lawyers regardless of where they operate is to ensure that all matters seated in Nigeria are ethically policed by international standards.

There is no gainsaying that the corruption perception of Nigeria (Corruption Perception Index, 2018) particularly of the recent media headlines of court bureaucracy and allegation of corruption against members of the high and apex court is inimical to the development of Nigeria as an international arbitration seat.

Notwithstanding the challenges discussed above, international arbitration continues to gain prominence in Nigeria. Similarly, while the Nigerian courts are positioned to encourage arbitration, there has also been considerable drive to reform the administration of justice. These reforms are generally seen as a step in the right direction to encourage and assure foreign investors as well as positioning Nigeria as an attractive seat for international commercial arbitration.

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