International dispute resolution update

Ifeoma Esom of **TRLPLAW** provides a summary of recent developments in international dispute resolution and investment protection

International dispute resolution has grown to become the prime mechanism for resolving disagreements arising from bilateral or multilateral international transactions.

Using the country's state domestic courts for the resolution of such disputes has proven inefficient and unpopular for a variety of reasons, including the unpredictability of the rules applicable and, where the state whose courts are to be used is a party to the transaction, questions of impartiality. There is also the limited nature of the jurisdiction of national courts in respect of international disputes as regards prevailing conflict of law principles.

The domestic laws of most countries were not designed to provide for international disputes. As a result, alternative dispute resolution methods, particularly arbitration and mediation, have gained a reasonable level of popularity as a means of resolving international disputes, so much so that some have started calling them 'appropriate' dispute resolution methods rather than 'alternative' dispute resolution methods.

Resorting to international dispute resolution mechanisms, such as international arbitration, has arguably grown along with the advance of foreign direct investment into frontier and emerging countries that have, in a bid to attract foreign investment for infrastructural and other developmental projects, signed up to bilateral and multilateral investment treaties.

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Parties to these international investment contracts (including sovereign states) have adopted a number of mechanisms to protect investors' interests and ensure quick resolution of investment disputes. These include the following mechanisms.

International arbitration

Arbitration is a formalised method of settling disputes whereby parties to a contract agree to submit any disputes, differences or claims arising out of their commercial transaction to a person or institution chosen by them (an arbitrator) to determine the dispute in accordance with a body of law chosen by the parties, and arrive at a binding decision termed an award.

It is essentially an informal and voluntary process in which a neutral third party assists disputants to resolve their differences by adjudicating on the matter and giving an award which is binding on both parties and enforceable by the successful party. A dispute cannot be submitted to arbitration in the absence of a valid arbitration or submission agreement between the parties.

Today, arbitration is most commonly used for the resolution of commercial disputes, particularly international commercial transactions. It is also used in some countries to resolve other types of disputes, such as labour disputes, consumer disputes, and for the resolution of certain disputes between states and between investors and states. As the number of international disputes increases, so does the use of arbitration to resolve them.

There are essentially two kinds of arbitration: *ad hoc* and institutional. There are many arbitral bodies, and parties can select one that is best suited to their needs. Some organisations welcome any type of dispute. In contrast, there are organisations that specialise in particular types of dispute, such as those involving investments (eg, ICSID) or that focus on a particular topic, such as intellectual property disputes (eg, the WIPO Arbitration and Mediation Centre), sports-related disputes (eg, the Court of Arbitration for Sport). Some arbitral bodies also specialise in disputes in particular industries (eg, the Society of Maritime Arbitrators). Another factor in selecting an institution is the nature of the party: one institution may be open only to states or member governments (eg, the WTO Dispute Settlement System), while another may be available to states or private parties (eg, the Permanent Court of Arbitration).

The International Centre for Settlement of Investment Disputes (ICSID) was designed to promote the settlement of investment disputes between states and foreign investors who are nationals of state parties to the ICSID treaty. The recognition that private foreign investment is an important element in development has led many nations to make laws and adopt policies aimed at creating a conducive environment for foreign investment.

One pertinent advantage of arbitration is that disputes are heard outside of the courts, before one or more arbitrators in an informal environment and parties are bound by the arbitrators' decision. Arbitration is usually a more informal process than litigation, with the parties choosing the arbitrator and many of the procedural aspects of the arbitral process. International arbitration is often faster and more efficient than international litigation

Bilateral investment treaties

An important source of international dispute resolution methods in contemporary investment law is constituted by bilateral investment treaties (BITs). These are designed to provide guarantees for foreign investors in the specified contracting countries. They do not normally address obligations of investors, although some BITs provide that investments, in order to be protected must be in accordance with the host state's law. The idea of including duties for investors, such as certain human rights, environmental and labour standards, are only beginning to be reflected in practice.

Multilateral treaties

Multilateral treaties exist in specialised areas of investment law. These include the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which provides a framework for the settlement of disputes between host states and foreign investors

through arbitration and conciliation. The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) establishes an international framework for political risk insurance.

The scope of multilateral treaty is not limited to investments but covers a wide range of issues such as trade, transit, energy efficiency and dispute settlement.

How do investment treaties protect investors?
BITs and MITs generally contain similar investor protection. The most common types of protection found in these instruments are:

- protection from expropriation without compensation;
- full protection and security;
- a provision on admission of investments;
- a guarantee of fair and equitable treatment (FET);
- a guarantee of full protection and security;
- a guarantee against arbitrary and discriminatory treatment;
- national treatment (national treatment principle);
- most-favoured-nation treatment (most favoured nation clause);
- guarantees in case of expropriation;
- guarantees concerning the free transfer of payments;
- settlement of disputes between the contracting states; and,
- settlement of disputes between the host state and the investor, including arbitration.

Customary international law
Customary international law also plays an important role in investment protection. The international minimum standards for the treatment of aliens are still relevant in a number of contexts, including denial of justice. State responsibility is another area of international law that is frequently applied in cases involving the protection of investments. International rules on the nationality of individuals and corporations are sometimes important in determining the applicability of treaties.

RECENT DEVELOPMENTS IN DISPUTE RESOLUTION IN NIGERIA

Growth of alternative dispute resolution in Nigeria
The use of alternative dispute resolution (ADR) as a mechanism for settlement of disputes has gained prominence since the promulgation of the Arbitration and Conciliation Ordinance 1914. In recognition of the crucial role of ADR in the settlement of disputes, arbitration and other forms of ADR were given constitutional backing under Section 19(d) of the Constitution of the Federal Republic of Nigeria 1999, as amended, which provides that foreign policy objectives will include respect for international law and obligation and the seeking of the settlement of international disputes by arbitration, mediation, conciliation, negotiation and adjudication. ADR in Nigeria is governed by the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria (LFN) 2004. The Arbitration and Conciliation Act Cap A18 LFN 2004 incorporated the United Nations Commission on International Trade Law (UNCITRAL) model law and the UNCITRAL rules, which set out rules for the conduct of both domestic and international arbitration.

ADR gained popularity in Nigeria as a result of the inadequacies of litigation as a means of settlement of disputes. The unreasonable length of time taken to determine cases in Nigerian courts is a major challenge to litigants. Administrative bottlenecks, unnecessary adjournments and logistic problems, including the fact that judges have to record proceedings in longhand, are some of the causes of the delays in the litigation process in Nigeria. ADR on the other hand encourages expeditious disposal of cases by helping disputing parties to reach amicable settlement without having to go through the rigours associated with litigation. The availability of various types of ADR methods enables parties to resolve their disputes in good time and without the usual rancour associated with litigation.

Like arbitration, mediation or conciliation, ADR provides parties to commercial agreements the opportunity of settling their disputes in a relatively simple and non-complex procedure. Parties enjoy the privilege of choosing the venue for the settlement of their dispute themselves and the venue can easily be scheduled at a time and place convenient to both parties. The cost of mediation is also relatively cheap compared to the cost of litigation. The privacy afforded the party by ADR is another reason parties prefer it to litigation. Proceedings are usually conducted on camera, which gives the parties the opportunity of discussing the issues in dispute freely between themselves without rancour, unlike in litigation where the courtroom is open to the public, except in limited instances where the law permits proceedings to be conducted on camera.

> The Bill would also encourage government interference in private dispute resolution

The Arbitration and Conciliation Act, in recognition of the vital role of arbitration and conciliation in ensuring investors' confidence in the economy, makes provisions for international commercial arbitration. Nigeria has also domesticated the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, popularly known as the New York Convention, and incorporated it into the Act as Schedule 2, which provides for the enforcement of awards obtained in countries that offer reciprocal treatment to Nigerian awards.

The National Alternative Dispute Regulatory Commission Bill 2011
In 2011 the House of Representatives passed the National Alternative Dispute Regulatory Commission Bill (Bill) to establish a commission to regulate ADR in Nigeria.

The function of the commission is to regulate and advise the federal and state governments on the use of ADR mechanisms and to provide rules and regulations for the practice of ADR in Nigeria. The commission is also vested with the duty of accrediting institutions engaged in practical training and skills acquisition relating to ADR.

Although the Bill has passed through the second reading at the senate, it is yet to be passed into law.

The Bill has been widely criticised by stakeholders who oppose the regulation of ADR because, according to them, regulation of ADR goes against international best practices. Another argument put forward in criticism of the Bill is the fact that ADR is neither on the exclusive nor concurrent list of the constitution and therefore the National Assembly cannot legislate on it.

The African Bar Association (AFBA) has consulted with a wide range of professional bodies and civil society organisations and the unanimous position is that this bill does not serve the interest of ADR in Nigeria or Africa at large and will send the wrong signals to other countries (especially African countries) about Nigeria's seriousness in advancing the progress made so far in the bid to position Nigeria as a leading investment destination in line with the government's declared transformation agenda.

The Bill would also encourage government interference in private dispute resolution and, if passed into law, would scuttle the progress already made in ADR in Nigeria.

Nigeria has come a long way in embracing international ADR and such a Bill would likely have a negative impact on the gains made so far and adversely affect investors' confidence in the Nigerian economy.

Recent trends in the litigation process

Apart from development of ADR, Nigeria has made tremendous progress in curbing the problem of delays and other inefficiencies that bedevil the litigation process. Lagos, being the centre of commercial transactions in Nigeria, has adopted the procedure of the High Court of England (recommendations of the Lord Justice Woolf Commission) through its advanced case management system involving front loading of court processes. The procedure requires that hard copies of originating processes to be filed in court are not accepted for filing unless they are accompanied by witness depositions and copies of every document that the claimant and the defendant intend to rely on during trial. Generally speaking, frontloading of court processes was introduced to accelerate proceedings by filing arguments and processes that ordinarily used to be taken orally in court in order to reduce the time expended in taking oral arguments and evidence of witnesses. The system also introduced the filing of a pre-action protocol form as a condition precedent to the institution of an action by a claimant. As a result, the claimant is bound to filing the form to state that before approaching the court, attempts had been made through mediation, conciliation, negotiation, and so on, to settle the matter, and that those attempts were unsuccessful. The claimant must also make a full disclosure of information relevant to the issue in dispute. The innovations in the High Court Rules of the Lagos State have been replicated in the High Court Civil Procedure Rules of most states in the country.

The High Court of Lagos State has also introduced fast track procedures to reduce the time spent on litigation and accelerate the hearing process. These procedures reduce the time spent on litigation in cases that qualify for fast track, to a period of nine months. A case qualifies for fast track if the claim is for a liquidated sum of at least N100,000,000 ($500,000), or where the claim is for a liquidated sum of less than N 100,000,000 but the claimant is a non-Nigerian citizen or where the claim involves a mortgage, charge, or securities.

The judiciary information system was created to enable e-filing of court processes in the Lagos State High Court. The Lagos State Judiciary has connected its courts to the internet through the court automated information system. The e-filing system allows litigants to file processes anywhere they may be and to obtain updates on the status of the case.

At the appellate level, in 2013, the court of appeal introduced a fast track procedure through the Court of Appeal Practice Directions 2013. This procedure applies to appeals arising from cases of terrorism, rape, kidnapping, money laundering, corruption and human trafficking, and interlocutory appeals challenging the ruling of the lower courts on an interlocutory application. The fast track procedure reduces the time for transmitting and filing of records of appeal from the lower court.

Future key developments in dispute resolution in Nigeria

In light of all of the above, we envisage that the use of ADR methods will continue to increase and that more court-connected ADR and walk-in ADR centres will be created. We also expect the establishment of more multi-door courthouses, that is, ADR facilities annexed to the formal courts, for the purpose of settling disputes amicably through ADR. At the moment, these multi door courthouses only exist in Lagos, Abuja and Kano.

The use of electronic devices for the recording of court proceedings will also increase, which will drastically reduce the amount of time expended on litigation.

The Lagos Court of Arbitration, established as a private sector-driven initiative in 2009, seeks to place Lagos on the international arbitration map and increase the facilities for international arbitration in Nigeria.

The Lagos State Government has also taken steps to secure the place of this private initiative by backing it up with a state law seeking to improve upon the provisions of the Arbitration and Conciliation Act LFN as encompassed in the Lagos Court of Arbitration Law, which came into effect on May 18 2009.

It is envisaged that Nigeria's other major commercial hubs, including the federal capital, Abuja, will in due course follow suit and establish ADR institutions to provide additional support and facilities for ADR in Nigeria.

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Ifeoma Esom, a partner at TRLPLAW Solicitors & Advocates has over 14 years experience in litigation and dispute resolution. She is a prolific and tenacious litigator who has vast experience in commercial and civil practice and corporate dispute resolution, representing high-profile banking institutions and corporate organisations in both the high courts and appellate courts. She advises on all aspects of Nigerian litigation practice and procedure with areas of specialisation in commercial litigation, banking, corporate recovery and insolvency practice, company and partnership dispute resolution, corporate restructuring and employment matters.

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