Managing costs in international arbitration: Covid-19 and economic choices for businesses

*Momoh Kadiri
24 January 2021

Introduction

When the coronavirus pandemic heralded the globe in 2020, little was predictable, let alone known, in terms of the paralysis and crises it would cause given the unquantifiable damage and its impact on global socio-economic livelihood. The scale of the outbreak is unprecedented and quite extraordinary. One stark reality of Covid-19 is that many commercial disputes are bound inevitably to result in court or arbitration proceedings due to the adverse impact of the pandemic. This article does not dwell on specific time-honoured legal principles such as *force majeure*, *frustration*, or *breach of contract*, which may be triggered inevitably by Covid-19. But, bringing or defending arbitration proceedings can be quite a considerable expense, especially in a time of dire economic difficulty. How should businesses respond to such extremely grappling situations including making difficult commercial decisions, and how about dealing with associated risks and costs of arbitration proceedings? This is of significant consequence because, for some businesses, their survival or future viability is wholly dependent on making a complex choice: whether, when, and how to bring or defend claims. This short article briefly highlights some key costs-related issues that typically arise in international arbitration proceedings, and proffers some practical tips that parties may usefully deploy in mitigating such risks; ensuring that the arbitration yields a desirable outcome, and is cost-efficient.

Proliferation of arbitration cases and costs

International arbitration is the most popular dispute resolution method chosen by parties in resolving cross-border disputes[1]. However, the flip side indicates that arbitration comes with relative cost implication for parties to have their dispute adjudicated by arbitration. The proliferation of arbitration cases has exacerbated cumulative costs borne by parties. Parties will doubtless be keen to ensure that they make the right choices; seeking suitable models for funding their claims, especially in the wake of the prevailing economic squeeze.

Incidence of costs in international arbitration

Parties to an arbitration will need to pay the arbitrators' or tribunal's fees, as well as paying fees of their own legal representatives. In contradistinction, the State employs and pays judges to sit and adjudicate litigation cases before domestic courts. So, what factors influence or drive costs in arbitration, and, why is this relevant? How costs in arbitration arise and are borne may conveniently be categorised broadly into two: whether the arbitration is *ad hoc*, or *institutional*. Whereas the

---

*Momoh Kadiri, LL.M (London) Fellow, Chartered Institute of Arbitrators (UK). Momoh is Managing partner, Mitchell Simmonds, a leading specialist arbitration and commercial dispute resolution law firm based in Canary Wharf, London. Email: kadiri@mssolicitors.com

[1] In a leading international survey, 97% of respondents indicated that international arbitration is their preferred method for dispute resolution for cross-border disputes: Queen Mary University of London/White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration survey on International Arbitration,* p.5.

latter has its inherent beneficial advantage by reason of it being independently administered by an experienced secretariat within the selected institution, however, one of its drawbacks lies in the requirement for payment of administrative fees by parties to the arbitral institution that they have selected, which is distinctly generally not the case in *ad hoc* arbitrations. Parties must envisage and adequately prepare to address these issues, and how they impact arbitration costs.

1. ***Drafting and negotiation of the underlying contract, including the arbitration clause/agreement***

Although the arbitration agreement is generally and is often conveniently set out in the "*Dispute resolution*" section of a contract, however, the arbitration agreement requires particular attention; future disputes are likely to make it difficult - if not impossible- to reach agreement when a dispute does crystalize. Parties should unequivocally address relevant matters in advance; doing so expressly and unambiguously: selection of type of arbitration (choosing between *ad hoc* or *institutional* arbitration), the applicable rules (of the institution), nomination of arbitrator(s), the seat or place of arbitration, the governing law[2], as well as deal with any other matter that will one way or the other, have some impact on the arbitration. Likewise, where there are existing safeguards regulating fees of the arbitral tribunal, it would be inappropriate for the arbitrators to request from the parties, sums higher than that expressly stipulated within such agreed institutional rules.[3] Generally, parties must exercise great care when negotiating and drafting the arbitration agreement; recognising that the arbitration agreement is separate and separable from the rest of the main contract to which the agreement is contained. The infamy and notoriety gained by so-called "*pathological arbitration clauses*" must be avoided, as they often lead to delay and cost escalation for parties.

2. ***Selecting counsel for an international arbitration***

Given that most costs typically borne by parties in arbitration are fees payable for the parties' legal representation, parties will be well-advised to give this close consideration in order to make informed choices when selecting counsel, including agreeing fees payable for representation. Although international arbitration was traditionally almost exclusively handled by much larger international law firms, however, by using a lean and dedicated team, smaller boutique law firms are able to provide robust and seamless representation in international arbitration; often at a fraction of the fees that are typically billed by much bigger law firms. Faced with the prevailing unprecedented and dwindling economic conditions impacting on many businesses' bottom lines as a result of the impact of the coronavirus pandemic, businesses that are parties to any on-going or future arbitration cases, will no doubt be keen to exploring any cost-saving avenue for mitigating the costs of such disputes.

3. ***Dealing with enforcement issues- what is the value of an (unenforceable) arbitral award?***

Aside from devising strategic and robust steps that enhance or culminate in winning the arbitration, parties and any counsel engaged need to focus on any legal obstacles that may likely impede or impact on the enforceability of the arbitral award. This is important because, an arbitral award that

---

[2] In *Enka v Chubb* [2020] UKSC 38, the UK Supreme Court considered and delivered a landmark judgment on 9 October 2020; as to the correct approach to determining the proper law of an arbitration agreement- the majority holding (in a split decision of 3-2) that in the absence of an express or implied choice intended to govern the contract or the arbitration agreement within it, the governing law is that with the closest connection. In such circumstances the validity and scope of the arbitration agreement is governed by the law of the chosen seat of arbitration, as the law with which the dispute resolution clause is most closely connected.

[3] In *Getma v Republic of Guinea*, in a highly unusual decision published in November 2015, the *Cour Commune de Justice et d'Arbitrage* (CCJA), the Court created under the auspices of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (the Organisation for the Harmonisation of Commercial Law in Africa or OHADA), the CCJA annulled the arbitral award on the grounds that the arbitrators indeed breached their mandate by negotiating directly with the parties over the institution's fees.

is unenforceable is simply of little or no pecuniary value to a winning party and/or the award creditor; a situation often described as akin to "*winning the battle and losing the war*". Although the New York Convention[4] offers a transnational legal framework for the recognition and enforcement of arbitral awards, the difficult reality is that mere adoption of the convention by a particular jurisdiction is not necessarily an indication of voluntary compliance by a losing party. And, it provides no security that an award may not be set aside or annulled by domestic courts clothed with *curial* or supervisory jurisdiction. Enforcement of an arbitral award is a complex and costly legal undertaking that requires proactive and strategic steps to counteract or overcome any legal impediments.

4. *Are the courts and judges supportive of arbitration?*

An arbitral award on its own, absent voluntary compliance by a losing party, is not enforceable; the award requires recognition and enforcement by the courts. The attitude, approach and role of courts and indeed judges, requires careful consideration; particularly in jurisdictions with less developed or developing judicial institutions[5]. Save for substantive jurisdictional grounds[6], or material irregularity[7] touching on lack of due process, which may arise in arbitration proceedings, courts must, in general, be consistent and non-interferent in enhancing and safeguarding both the arbitral process, as well as facilitating enforcement of the arbitral award that is the end product. Parties and their counsel must be alive to these realities, and must be proactive in enjoining judges to strike the right balance when faced with genuine or frivolous applications. Counsel's knowledge of the approach of courts at any jurisdiction where enforcement may be sought is thus key, to say the least.

Conclusion

There is simply no silver bullet that is a panacea for keeping arbitration costs reasonable or manageable. A holistic approach requires taking a number of steps briefly highlighted: paying attention to negotiation and drafting of the arbitration agreement; selecting counsel that will deliver a successful and cost-efficient outcome; keeping enforcement in view; and paying adequate attention to attitude and role of supervisory courts, including where any enforcement may be pursued. These are important steps within a delicate puzzle to making an arbitration successful and cost-efficient. Whereas some relative relief by way of vaccines are now available for treatment of Covid-19 (even as we need to wait to see how effective the vaccines are), however, the unfortunate reality is that the harsh economic impact of the pandemic on businesses and indeed on global commercial activity is very telling and will be for a while – with no immediate respite in sight. Thus, business owners need to take their own destiny in their hands - should they desire to stay afloat in the prevailing economic undercurrent. Businesses must devise a strategic roadmap that leads to recovery; by adopting cost-efficient means to mitigate the risks and costs of any disputes or arbitration claims.

---

[4] The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958

[5] E.g., Whereas Nigeria is a signatory and indeed ratified the New York Convention on 17 March 1970, and also adopted the UNCITRAL Model Law, enforcement however remains a difficult experience given the considerable number of arbitral awards that are frequently challenged or set aside. This results in severe delay which takes an average of 15 years' litigation thereafter. See *IPCO v NNPC* [2017] UKSC 16; [2015] EWCA Civ 1144 and 1145

[6] In England, an arbitral award may be challenged on the grounds of substantive jurisdiction under the Arbitration Act 1996, s.67.

[7] Ibid.s68: an award may be challenged on grounds of serious irregularity affecting the tribunal, the proceedings or the award.