THE PROSPECTS OF ARBITRATION IN THE SETTLEMENT OF INTELLECTUAL PROPERTY DISPUTES IN NIGERIA

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Abstract

This article examined the prospect of arbitration in the settlement of Intellectual Property (IP) disputes in Nigeria. In most legal systems, arbitration has become increasingly popular as a dispute settlement mechanism in the field of intellectual property. Countries like the United States of America has instituted mandatory arbitration proceedings aimed at a more expeditious disposition of IP disputes. The aim of this article is to determine the extent to which arbitration is allowed by the legal system in Nigeria with regard to IP disputes. Arbitration is particularly attractive in cases involving intellectual property rights such as patents, trade secrets; as parties may appoint a tribunal knowledgeable in the specialist area of IP. The knowledge, skill and expertise of the tribunal appointed in the relevant subject matter result to the efficient resolution through arbitration of the disputes with less cost for the parties and within a specified time frame. Also, IP disputes are resolved confidentially by the parties. In Nigeria, investors lose billions of naira over issues involving IP theft and piracy. Commendably, the repeal of the 35 year old Arbitration and Conciliation Act of 1988; and the enactment of the Arbitration and Mediation Act 2023 patterned according to the United Nations Commission on International Trade Law (UNCITRAL) model Law of 2006 is a significant development in Nigeria. This recent law is expected to open up the potential of Nigeria as a seat of arbitration and a hub for settling commercial inclusive of IP disputes through arbitration. The article recommends that the new provisions of the Arbitration laws in Nigeria are flexible enough to accommodate arbitration of IP disputes. However, challenges may surface during the Act's implementation, necessitating evaluation and potential amendments to address emerging issues effectively. This would promote settlement of IP disputes by arbitration within Nigeria's borders and align its practices with global standards in International arbitration.

KEY WORDS: Arbitration, Intellectual Property, Settlement, Litigation, Uncitral

1. Introduction

The growing involvement of intellectual assets in today's commerce has inevitably increased disputes concerning intellectual property (IP) rights between private parties in the world and Nigeria is not left out. The World Intellectual Property Organization defines IP as "… creation of the mind, inventions, literary and artistic works and symbols, names, images and designs in commerce."[1] It is the creation of the mind manifested or interpreted in the form that has physical existence and possesses exclusive

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[1] Obtained from the World Intellectual Property Organization (WIPO) web site at <http://www.wipo.int/about-ip.> Accessed on 25th August, 2024.

property rights recognized by the corresponding fields of law. Under IP law, owners are granted exclusive rights to the variety of intangible assets, such as musical, literary and artistic works, discoveries and inventions, words, phrases, symbols and designs *et cetera*, barring any use of the work by other persons without the owner's prior consent.[2]

IP rights have also been defined as property rights in something intangible that protect innovations and reward innovative activities. Such rights are classified into rights ranging from copyright, trademark, industrial designs, patents, utility models *et cetera*. Where a dispute arises as a result of an infringement of the IP rights of the owner, the need to resolve the dispute as quickly as possible often arises and the traditional method employed by disputants is litigation in court. In many cases, such disputes concern parties established in different countries and conducting business across the world. Recourse to state courts to settle such disputes involves a cumbersome enterprise, given the need to conduct parallel proceedings in different countries, the applicability of different procedural and substantive laws to the same dispute and the inability of the judiciaries of many countries to respond in a timely and effective manner to requests for the enforcement of IP rights.[3]

Globally, this traditional method of dispute resolution is gradually giving way to alternative dispute resolution techniques such as negotiation, arbitration, conciliation and mediation.[4] Arbitration being the most attractive thus constitutes an interesting alternative to court litigation in the case of infringements of IP rights that occur in different countries and allows the parties to choose a single law to be applied to the merits of the dispute. The purpose of this article is to determine the extent to which arbitration is allowed by Nigerian laws with regard to IP disputes and its prospect. The article will compare what is obtainable in Nigeria with other legal systems particularly the USA. This is to ascertain the different approaches and the patterns of solutions through arbitration adopted by the US legal system for possible adoption by Nigeria in resolving IP disputes.

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[2] Iberiyenari Lauretta, 'A brief Analysis of Intellectual Property in Nigeria', available at <http://www.The lawyerschronicles.com> accessed on 4th October 2024.

[3] Vicente Dario Moura, 'Arbitrability of Intellectual Property Disputes: A Comparative Study' (Arbitration International Oxford University Press) 2015, 151-162 at 152.

[4] Adedeji Lanre, 'Dispute Resolution and the Practice of Arbitration', available at http:// www.thelawyerchronicles .com. Accessed on 4th August 2019.

2. Arbitration

Arbitration is the settlement of a dispute (whether of fact, law, or procedure) between parties to a contract by a neutral third party (the arbitrator) without resorting to court action.[5] Arbitration is private justice born out of the parties' will. By including an arbitration clause in the contract, the parties choose to settle their disputes out of court.[6] Arbitration is usually voluntary but sometimes it is required by law.[7] It can be binding, which means the parties must follow the arbitrator's award and the courts will enforce it or nonbinding meaning that either of the parties is free to reject the arbitrator's award and take the dispute to court as if the arbitration had not taken place. However, binding arbitration is more common and preferable by parties to a contract dispute so as to maintain commercial relationships. The exact procedure to be followed if not included in the contract under dispute is governed usually by the country's arbitration laws or in the case of an international arbitration dispute, by the arbitration rules prescribed by the International Chamber of Commerce (ICC).The arbitration process can be particularly useful in disputes which require an understanding of technical knowledge and where privacy is important for instance to avoid disclosure of commercially sensitive information or if there is an international element so as to avoid dealing with multiple legal jurisdictions.

3. How Arbitration is conducted in Nigeria

The Arbitration and Conciliation Act 2023 (ACA)[8] is the Federal or National law governing arbitration in Nigeria. The basic requirement of an arbitration agreement for the conduct of a valid arbitration under the ACA is that an arbitration agreement must be in writing or must be contained in a written document signed by the parties.[9] Any reference in a contract to a document containing an

[5] Culled from <http:www.businessdictionary.com> accessed on 19th November, 2019.

[6] United Nations Conference on Trade and Development New York and Geneva, 2005 *Dispute Settlement: International Commercial Arbitration'*.UNCTAD/EDM/Misc.232/Add.39. R. Caivano's paper on the course 'Dispute Settlement in International Trade, Investment and Intellectual Property.' available at <www.unctad.org>.

[7] This is referred to as mandatory arbitration. For Instance, under Section 107(1)-(3) of the Pension Reform Act 2014, the parties or the National Pension Commission (PENCOM) can refer any dispute to arbitration. Also, under Section 26(1)-(3) of the Act of the National Investment Promotion Commission Act, any foreign investor who registers under the Act is automatically entitled to bring a treaty arbitration under the International Centre for the Settlement of Investment Disputes (ICSID) system. Arbitration provisions contained in such statutes are deemed to be binding on any person to whom they apply.

[8] Cap A18 Laws of the Federation of Nigeria 2004 had been amended by the Arbitration and Mediation Act 2023.

[9] Section 1 of the Arbitration and Conciliation Act 2004(ACA) provided that every arbitration agreement shall be in writing and contained in a document signed by the parties or in an exchange of letters, telex, telegram or other means of communication which provide a record of the arbitration agreement or in an exchange of points of claim and defense in which the existence of an arbitration agreement is alleged by one party and not denied by another.

arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make the clause part of the contract.

This provision presupposes that an arbitration is usually consensual and that an arbitration agreement may either be an express clause in a contract whereby the parties agree to refer future disputes to arbitration, or in a separate document (the Submission Agreement), whereby the parties agree to submit their existing dispute to arbitration. An arbitration agreement may also be inferred from written correspondence or pleadings exchanged by the parties. Additional legal requirements for a valid arbitration agreement are that the arbitration agreement must be in respect of a dispute capable of settlement by arbitration under the laws of Nigeria.[10] The parties must have legal capacity under the law applicable to them,[11] and the arbitration agreement must be valid under the law to which the parties submit to or under the laws of Nigeria.

Other requirements like the level of qualification or expertise which the arbitrators should have, the timeline for conclusion of the arbitration and the giving of final award, seat of arbitration, language of the arbitration, number of arbitrators, governing law of the contract, arbitral rules and institutions ought to be incorporated in the arbitration agreement.[12] Parties can choose from a variety of arbitration rules, such as the ICC Rules, London Court of International Arbitration (LCIA) Rules or other international rules. The parties can also choose local rules under the ACA and the Lagos Court of Arbitration Law Rules. Section 6 of the ACA provides the default number of arbitrators as three in the absence of any express agreement of the parties. The default number of arbitrators' under the Lagos State Arbitration Law is a sole arbitrator,[13] but the parties are free to stipulate otherwise by agreement.

The procedure for the appointment of the arbitrators could be specified in the arbitration agreement. In the case of a sole arbitrator, it may be a joint appointment by the parties or the appointing authority and in the case of three arbitrators, each party can appoint one arbitrator and the two arbitrators appointed will then appoint the third arbitrator. Where no procedure for appointment of arbitrators is stipulated in the arbitration agreement, section 7 of the ACA would apply. It is more useful for parties

[10] *Section 48(b)(i) and Section 52(b)(i) of the ACA.*
[11] *Section 48(a)(i) and section* 52(2)(a)(i) of the ACA.
[12] E. Idigbe and B. Biayeibo, 'Nigeria: International Arbitration 2019' available at from <http: www.iclg.com. accessed 19th November 2019.
[13] *Section* 7(3) of the Lagos State Arbitration Law 2009.

to agree on an appointing authority in the case of a multi party arbitration (arbitrations between more than two parties).

4. Intellectual Property

Intellectual Property (IP) is a category of property rights that includes intangible creations of the human intellect. It refers to creations of the mind, inventions, literary artistic works and symbols, names and images used in commerce.[14] Intellectual property is divided into two types to wit: industrial property and Copyright. Industrial Property includes patents for inventions, trademarks, industrial designs and geographical indicators. A patent is an exclusive right granted for an invention - a product or process that provides a new way of doing something, or that offers a new technical solution to a problem.[15] Patents are granted by national patent offices for example the European Patent Office (EPO) and the African Intellectual Property Organization (OAPI) under such regional systems, while copyright covers literary works, films, music, artistic works and architectural design. Copyrights and related rights protection is an essential component in fostering human creativity and innovations thereby giving authors, artists and creators incentives in the form of recognition and fair economic rewards increases their output and can also enhance the results.

Intellectual Property rights are like any other property right as they allow creators or owners of patents, trademarks or copyrighted works to benefit from their own work or investment in the creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions. [16]

5. Arbitrability of Intellectual Property Disputes.

The main obstacle to using arbitration to settle IP disputes is the issue of 'arbitrability'. Traditionally, arbitrability is the question of whether the subject matter of a dispute may be resolved through arbitration arose in relation to certain IP rights. Arbitrability which is the legal amenability of a dispute to be resolved by arbitration is one of the condition precedents for enforcement of an arbitral

[14] World Intellectual Property Organization WIPO Publication No. 450(E)
[15] World Intellectual Property Organization WIPO Publication No. 450(E) at p 5.
[16] WIPO the importance of intellectual property rights was first recognized in the Paris convention for the protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both treaties are administered by the World Intellectual Property Organization (WIPO).

award under the 1958 New York Convention.[17] Article II of the Convention obliges countries to recognize only arbitration agreements over "subject matter capable of arbitration." Where a subject matter is not considered to be capable of arbitration, the agreement to arbitrate may be considered invalid, thus constituting a ground to resist enforcement under Article V (1) (a)-in that the "agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made." IP Rights are territorial as these rights are monopolies granted by states over the use and the commercial exploitation of intangible goods. Therefore, they are basically derived from the legal protection granted by the local sovereign power, which affords the grantee certain exclusive rights to use and exploit the right. That is why national legal systems have often reserved jurisdiction over disputes concerning IP rights to state courts, particularly where the matters of validity and registration are at stake.[18]

However, it is now broadly accepted that disputes relating to IP rights are arbitrable, like disputes relating to any other type of privately held rights. Any right of which a party can dispose of by way of settlement should in principle also be capable of being the subject of arbitration since arbitration is based on party agreement. As a consequence of the consensual nature of arbitration, any award rendered will be binding only on the parties involved and will not as such affect third parties.

Therefore, it is argued that disputes in relation to grant, validity and extent of the IP rights granted should be determined only by the authority which granted the right, or in certain situations, by the courts of that country. This had the effect that rights and entitlements to IP and the legal issues which flowed from those rights could not usefully be referred to or considered by an arbitration tribunal.[19]

Where however the parties enter into arrangements relating to the development, use, marketing, or transfer of the IP rights granted, disputes arising from such 'commercial' arrangements could be arbitrated upon without any controversy arising from the issue of arbitrability. Such matters are regarded as *inter partes* commercial matters and are arbitrable.

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[17] Nigeria is a signatory to the New York Convention (NYC) and has domesticated the NYC by incorporating it as the Second Schedule to the Arbitration and Conciliation Act 1988 (Laws of the Federation of Nigeria 2004 Cap A18). Thus a foreign arbitral Award may be enforced in Nigeria under the Arbitration and Conciliation Act 1988, or directly pursuant to the NYC. See thecase of *Tulip Nigeria Ltd V Noleggioe Transport Maritime* (2011) 4 NWLR (Pt 1237) 254.

[18] Vicente Dario Moura, 'Arbitrability of Intellectual Property Disputes: A Comparative Study' (Supra) at 152.

[19] See The Final Report on Intellectual Property Disputes and Arbitration adopted by ICC Commission on International Arbitration on 28 October 1997: The ICC International Court of Arbitration Bulletin 37 at 1.5.

6. The Prospects of Arbitration in Intellectual Disputes in Nigeria

As earlier stated and as a general principle, IPR are territorial in scope since it is understood that these laws do not apply beyond the country's borders. [20] Although, licensing contracts concerning IP extend rights and obligations beyond a single nation's territorial boundaries.[21] In the event of a dispute, which could involve the laws of many nations, arbitration offers parties a range of valuable advantages over litigation. In fact, arbitration permits concentration of proceedings in the case of infringements that have occurred in different countries and allows the parties to choose a single law to be applied to the merits of the dispute. It is also much effective in ensuring the confidentiality of the proceedings and the expertise of the adjudicators.[22]

The most attractive features of arbitration among others are "enforceability – the New York Convention means that arbitral awards are enforceable in over 150 countries. Flexibility and Party Autonomy[23] as the parties are free to select the process for appointing arbitrators and the procedure adopted to resolve their disputes. This gives the parties control over the process so that it can be tailored to their commercial needs. Neutrality as a feature of arbitration is because since the parties are from different countries, language or culture, arbitration gives them the opportunity to appoint a neutral tribunal to resolve their dispute rather than being in the "home" courts of one of the parties."[24] Also, arbitration offers the parties certainty of the law used to govern the dispute. IP licensing contracts generally involve parties from different countries and these contracts may involve the laws and the courts of several countries, which can create ambiguity in terms of the governing law and the proper jurisdiction.[25] Therefore, one of the primary reasons for including a contractual clause mandating arbitration rather than litigation of any IP dispute is to provide the parties with the certainty that, in the event of a dispute, they will submit their dispute to a single forum for the resolution rather than to potentially several different fora in different jurisdictions.

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[20] Bashar H Malkawi, 'Using Alternative Dispute Resolution Methods to Resolve Intellectual Disputes in Jordan' [2012] Vol. 43, No 1, *California Western International Law Journal*, 141-155 at 144.
[21] *ibid.*
[22] Vicente Dario Moura, *supra*, at 152.
[23] See Resolving IP Disputes through Mediation and Arbitration AAA (2006), <http://www.wipo.int/wipo> accessed 23rd November, 2024.
[24] *Nathan Searle, 'Nigeria has many positive features which makes it attractive for International arbitration' The Guardian Newspaper,* (July 9, 2019) 39 - 40 at 40.
[25] Bashar H. Malkawi, *supra*, at 145.

Arbitration tends to provide speedier resolutions of disputes compared to litigation.[26] This occurs because the arbitral proceedings are able to commence without delay or because of the flexibility in administering the proceedings. The speed of the dispute resolution is an important consideration when it involves IPR. This is because litigation can take longer time than the length of time the product is protected. For example, if the dispute concerns a patent that is protected for a period of twenty years, court proceedings can last longer than the period of protection thus, rendering the case or patent useless. The costs of settlements can be significantly reduced through arbitral proceedings as compared to litigation. Finally, arbitration allows for minimal damage to the party or commercial relationship.[27]

There exist different forms of arbitration in Nigeria which include commercial arbitration (domestic, international, ad hoc or institutional) which is the most popular means of Alternative Dispute Resolution (ADR) in Nigeria. Construction Arbitration ranks next followed by Investment Arbitration and lastly, the relatively young Maritime Arbitration.[28] The consciousness of utilizing arbitration in the resolution of commercial disputes is growing and obviously a crucial aspect of the national economy and the judicial system.[29] The relevant law which forms the legal basis of modern commercial arbitration in Nigeria is the Arbitration and Conciliation Act.[30] The Act is described in its recital as "An Act to provide a unified legal framework for the fair and the efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or any contracting State arising out of international Commercial arbitration". The Act does not specifically list disputes that are not arbitrable. The test is whether the dispute can be settled lawfully by way of accord and satisfaction.[31]

The origins of the Nigerian statutory law on arbitration can be traced to the Arbitration Ordinance of 1914. The Ordinance was based on the English Act of 1899 and was applicable to the whole country which was then governed by a unitary system. The Ordinance- based law was later adopted by

[26] Kevin R. Casey, 'The Suitability of Arbitration for Intellectual Property Disputes' [2005] Vol. 71, *Patents, Trademarks and Copyright Journal* 143.
[27] WIPO Arbitration and Mediation Center (ed) , Results of the WIPO Arbitration and Mediation Center International Survey on Dispute Resolution in Technology Transactions, Geneva, 2013, available at <https://www. wipo.int /amc/ en.> accessed on 5th August, 2024
[28] Lanre Adedeji, ' Dispute Resolution and the Practice of Arbitration' available at www.lawyerschronicles.com
[29] Olakunle Orojo and M. Ayodele Ajomo 'Law and Practice of Arbitration and Conciliation in Nigeria'
[30] Cap A18 Laws of the Federation of Nigeria 2004.
[31] See the case of *United World Ltd Inc v MTS* (1998) 10 NWLR (Pt 568) 106.

various States. Nigeria adopted the UNCITRAL Model law in 1988 with the amendment of the Arbitration and Conciliation Act (Federal Act).[32] The Arbitration and Conciliation Act applies to both domestic and international arbitration throughout Nigeria.[33] There has been a draft bill [34] to repeal the current Arbitration and Conciliation Act, and re-enact it based on the UNCITRAL model Law as amended in 2006. Similar proposals are pending for draft legislation based on the 2006 version of the UNCITRAL Model Law to be enacted as a state legislation to cover domestic disputes.

The future of arbitration practice in Nigeria and its prospect in respect to Intellectual Property Rights which are basically territorial can be gleaned from the work of the Lagos State Reform Committee drawing largely from the work of the National Committee, which had proposed a Uniform States Bill on arbitration to be recommended to states for adoption. The desire to promote and establish Lagos as a regional and ultimately an international centre is part of the broader efforts to transform Lagos into a leading financial centre, thus motivated the enacting of the Lagos Arbitration Law and the establishment of the Lagos Court of Arbitration Law.[35] The purpose of the Lagos Court of Arbitration Law is to establish the Lagos Court of Arbitration and promote the resolution of disputes in the territory of Lagos State by ADR mechanisms.[36]

The Lagos Court of Arbitration Law established under the law is as an independent dispute resolution centre.[37] In terms of its application, the Lagos Arbitration Law being the first state-enacted arbitration law in Nigeria has significant effect upon arbitration practice in commercial disputes within Lagos and has provided administered arbitration proceedings with the first commercial court of arbitration

[32]Cap A18 LFN 2004. The Act is based on the Model Law and incorporates the UNCITRAL arbitration rules. The Act contains Part II, which reflects Nigeria's treaty obligation under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Nigeria became a signatory to the New York Convention on March 10 1970, adopting both the reciprocal and commercial reservations; The convention was implemented in Nigeria without modification and its full text is set out in the Second Schedule of the Act.

[33] Section 58 of the Act

[34] The Bill was sponsored since 2016 by Senator Andy E. Uba (Anambra South Senatorial District) as the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria, 2004 (Repeal and Re- enactment) Bill, 2017 (SB, 427); Similarly, Senator Monsurat J. A Summon (Oyo Central Senatorial District) sponsored the Arbitration and Conciliation Act (Amendment) Bill, 2016; See the Report on The Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria, 2004 (Repeal and Re-enactment) Bill, 2017(SB,427) of The Senate Federal Republic of Nigeria; National Assembly Committee on Judiciary, Human Rights and Legal Matters.

[35] On 18th May 2009, the Lagos State of Nigeria enacted two new and related arbitration Laws: Arbitration (Law No 10 of 2009) (Lagos Arbitration Law) and (Law No 8 which established the Lagos Court of Arbitration ; from the date of the commencement (May 2009), The Lagos Arbitration Law provides for the resolution of disputes by arbitration in Lagos and applies to all arbitration with Lagos as the seat, unless the parties have expressly agreed otherwise (see section 2).

[36] Section 9 of the law; This Law is an enactment of the UNCITRAL Model Law, and incorporates the 2006 amendments.

[37] Section 63 of the Lagos Arbitration Law 2009.

in the country.[38] Nigerian courts are arbitration friendly and maintain a pro-enforcement bias in relation to the enforcement of arbitration agreements and awards. The Court of Appeal in *Onward Enterprises Ltd v MV Matrix,*[39] held that;

> *Once an arbitration clause is retained in a contract which is valid and the dispute is within the contemplation of the clause, the court will give regard to the contract by enforcing the arbitration clause. It is therefore the general policy of the court to uphold parties to the bargain which they freely entered.*

Further, Nigeria has institutions and arbitration infrastructure that greatly enhance arbitration.[40] Some of these institutions include the Regional Centre for International Commercial Arbitration, Lagos; the Chartered Institute of Arbitrators Nigerian Branch; the Maritime Arbitrators of Nigeria; the Arbitration Commission of the ICC Nigerian Committee; the Lagos Court of Arbitration and the Association of Young Arbitrators in Nigeria. The Association of Young Arbitrators in Nigeria in June 2019 launched the African Arbitration Academy bringing together 30 African practitioners for a three week intensive training in London with leading arbitrators from across Africa and the broader arbitration community thus, stimulating interest in arbitration and creating a forum on how to drive forward arbitration in Nigeria.

This grass root initiative was developed and organized by seven young Nigerian lawyers inspiring a real step change for arbitration in the region and show casing the benefits of arbitration for resolving commercial disputes as well as promoting the growth in the use of arbitration in intellectual disputes in Nigeria.[41]

7. Arbitration of Intellectual Disputes in the USA

As noted earlier, IPR are territorial and therefore country specific. The susceptibility of an IPR issue to resolution by that ADR technique is also country specific as some countries allow resolution of

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[38] See the Arbitration Rules of the Lagos Court of Arbitration (LCA) 2018 : See also Adedoyin Rhodes-Vivour, 'Recent Arbitration Related Developments in Nigeria' [2010] 76 ARBITRATION *Journal of the Chartered Institute of Arbitrators (CIARB),* 130-135.

[39] (2010) 2 NWLR (PT 1179) 530; See also the case of *Continental Sale Limited v R Shipping Inc.,* (2013) 4 NWLR (PT 1343) 67, the appellant , a Nigerian party denied being given proper notice of the appointment of an arbitrator or of the commencement of arbitration proceedings , despite its acknowledgment of a notice of arbitration sent to it by email (for more details please see "Appeal Court Rules on serving arbitration notice by email), the Court of Appeal upheld the High Court decision registering the UK arbitral award in Nigeria.

[40] Dorothy Ufot,'Arbitrating Foreign Investment Disputes in Nigeria; Prospects and Challenges' August 5, 2013 available at <www.proshareng.com> accessed 5th December, 2024.

[41] Nathan Searle, 'The New Arbitration Act before the National Assembly will improve international arbitration in Nigeria' *The Guardian Newspaper* (Tuesday, July 9, 2019) 40.

patent issues by arbitration while others do not.[42] Some countries are very pro-arbitration and arbitrate everything, including patent validity, as long as the validity holding only binds the two parties. Only very few legal systems nowadays exclude arbitration on IP disputes altogether.[43] In any event, that exclusion only operates in certain countries with regard to rights that are mandatorily subject to registration on a public register, such as those that derive from patents.[44] The focus of this section is on arbitration in the jurisdiction of the USA. Although the US is often regarded as a litigious country especially with respect to patent disputes, voluntary arbitration is authorized by the Patent Act and may be pursued by both national and international parties as a remedy for patent infringement.[45] This creates interesting prospects for commerce as a way to avoid some of the uncertainties associated with patent litigation in the United States District courts, particularly the uncertainties of a jury trial having a jury of individuals with little or no technical training. In the absence of contract language to the contrary, all intellectual property issues appear to be the proper subject of binding arbitration in the United States. The statutory basis is the Federal Arbitration Act [46] which was enacted to codify a national policy favoring arbitration and to place arbitration agreements on equal footing with contracts.[47] In so doing, the FAA ensures that agreements to arbitrate are "valid, irrevocable and enforceable," provided that their subject involves" commerce."[48]

Furthermore, as a matter of substantive Federal Law, an arbitration agreement is severable from the remainder of the contract. In other words, the validity of the arbitration clause is to be determined independently of the validity of the contract with each type of challenge being decided separately. This principle is internationally recognized as the doctrine of separability. If the challenge is to the validity of the arbitration agreement itself, for example a question pertaining to the formation of the agreement to arbitrate, the Federal Courts may adjudicate it.

However, the statutory language of the FAA does not permit the Federal Courts to consider challenges to the validity of the contract as a whole, including for instance fraud in the inducement.

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[42] Kenneth R. Adamo,' Overview of International Arbitration in the Intellectual Property Context', Global Business Law Review, Vol. 2, 2011,at 16, available at <https://engagedscholarship.csuohio.edu/gblr/vol2/iss1/4> accessed 5th November, 2024.
[43] *ibid*.
[44] Vicente Dario*, Supra,* at 153.
[45] J Derek Mason, 'Arbitration of Patent Disputes in the United States', LES Japan News , Vol. 52, No 3,2011, available at <www.oblon.com/publications/arbitration-of-patent-disputes-in-theunited-states> accessed 6th December, 2024
[46] 9 U.S.C S 1-14 (2006) The Federal Arbitration Act.
[47] See *Buckeye Check Cashing Inc v. Cardegna* 546, U.S. 440, 443 (2006).
[48] 9 U.S.C. S.3 (2006).

The issue of a contract's validity is to be considered by the arbitrator in the first instance.[49] Accordingly, the FAA provides that if any issue that is subject to an arbitration clause is brought in a proceeding before any court of the United States, the court shall, upon application by one of the parties, stay the trial of action until the arbitration has been conducted in accordance with the terms of the agreement.

Further, in the USA, the Patent Act was amended in 1982 to recognize voluntary arbitration as a course of remedy for patent disputes relating to the validity or infringement.[50] This provision has also been extended by the courts to include interference claims and the question of inventor ship. The Patent Act specifies that arbitration of patent disputes, awards by arbitrators, and confirmation of awards shall be governed by title 9 of the FAA to the extent that it is not inconsistent with Section 294 of the Patent Act.[51] Any decision rendered by the arbitrator referred to as an "award" must be reported to the Director of the US Patents and Trademarks Office (USPTO), an agency within the Department of Commerce. There must be separate notice given for each patent involved in the proceeding and each notice must set forth the names and addresses of the parties as well as the name of the inventor and the patent owner, must designate the number of the patent and must contain a copy of the award.[52]

The award shall be unenforceable until the Director receives notice thereof, upon receipt of the notice, the Director is required to enter the notice in the Patent's prosecution record. However, as regards copyright and trademark issues in the United States, there is no statutory authority for binding arbitration, although United States courts have held that Federal Law does not prohibit binding arbitration of copyright validity or infringement where such issues arise out of a contract dispute.[53]

8. Conclusion

This article x-rayed the prospects of arbitration in the settlement of IP disputes in Nigeria. The common infringements of IP proprietary rights identified take the form of piracy, counterfeiting, unauthorized or unlicensed use, patents infringements and unfair competition. These activities violate

[49] *Buckeye Check Cashing Inc v. Cardegna* (2006) *supra.*
[50] 35 U.S.C S.294 (2006) Pub. L. No 97-247 xx strat.xx
[51] 35 U.S.C S. 294(b).
[52] 37 CFR 1.335 (2010) filing of notice of arbitration awards.
[53] See David W. Plant 'Arbitrability of Intellectual Property Issues in the United States' published workshops of the Worldwide Forum on the Arbitration of Intellectual Property Disputes March 3-4 1994, Geneva Switzerland, available at <www.wipo.int/amc/en/events/conferences/1994/plant.html.> accessed 7th October, 2024.

the proprietary rights of IP owners and make it impossible for them to reap the benefits of their inventions and hence, hamper the growth and development of intellectualism, innovation and the entire creative industry. Where such violation or infringement of IP rights occur, arbitration is definitely a viable method of dispute resolution and has, in principle, clear advantages compared to litigation.

For Nigeria to become an important economic hub both in the West African Sub region and in the African continent, protection of the rights subsisting in IPs created in the country is not only strategic to the nation's current drive to develop its non-oil sector but also central to the overall economic growth and development goals. Commendably, Lagos State has enacted an Arbitration law; patterned according to the UNCITRAL model law and established the Lagos Court of Arbitration Law with its Rules in 2018 to further increase the prospects of arbitration in Nigeria in respect to IPR. It is recommended that other states in Nigeria follow the same example.

The amended Nigeria Arbitration Act incorporating the UNCITRAL Model law revised provisions is therefore a welcome development and a laudable achievement. It has further refined the law and among other things to make it more attractive as a dispute settlement mechanism in the field of IP. A comparison with the position in the US becomes constructive to this article as apart from the fact that the US has special IP jurisdictions, it has successfully arbitrated and implemented IP settlements within its national framework.

Also, although the US Patents and Trademarks Office is an agency within the Department of Commerce, it is operationally independent and is only subject to the policy direction of the Secretary of Commerce in carrying out its functions. Due to the peculiarities of the Nigerian socio-political system, a similar independent structure as the USPTO is advocated for the country.