Public-Private Partnership Initiative in Nigeria and Its Dispute Resolution Mechanism: An Appraisal

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Abstract

In the African countries, the provision and supply of infrastructural facilities and the procurement of other public utilities were, until recently, absolutely under the sole control of the government. However, due to corruption, leakage and wastage in the public procurement process, coupled with the lackadaisical attitude of the government officials towards the same, and more importantly, with the realisation and acknowledgment of the skills and competencies of the private sector in building infrastructure, the governments all over the world including those in Africa have begun to divest themselves of their monopoly in the field of infrastructural supplies and development. This rising trend has led to a more resourceful, efficient and smart partnership between the public and private sectors in the matter of infrastructural development, and this recent phenomenon or trend is popularly propagated as Public-Private-Partnership (PPP). It has now come to stay and will intensify over time. This article seeks to examine the definition, ambit, as well as the practical operation of PPPs in the economic development of contemporary states. It has a bias towards dispute resolution covering the various ADR mechanisms with a particular preference for arbitration. It postulates that since disputes are inevitable in all business transactions, and since PPP practitioners are usually sponsored by banks and other financial institutions, there is an urgent need to devise a faster and more efficient mechanism of dispute resolution aside from conventional litigation so that shareholders' funds are not unnecessarily bogged down by prolonged litigation in the courts.

Keywords: Public-Private Partnerships and Dispute Resolution.

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1. Introduction

Governments all over the world have sought for the active participation of private sector in the provision of public infrastructure and services which were traditionally within the exclusive domain of the public authorities. There are various levels of involvement ranging from privatization of erstwhile public enterprises to contracting out of services and, of late, the use of Public-Private Partnership[1] in the provision of social and economic infrastructure necessary for the development of a nation.[2] Privatisation is the commonest of these initiatives and it has been adopted by several countries especially in Europe, Asia and Latin America.[3] Contracting out of government services has also been widespread. Recently, Public-Private Partnerships in infrastructure development have increasingly been of special interest to most developing countries as a sound alternative to traditional public procurement system.

Nigeria and few other African nations[4] have also embraced the Public-Private Partnership initiative as a means of addressing their huge infrastructure deficits and challenges. It is pertinent to point out that in these countries, the provision, management and control of infrastructure used to be within the exclusive competence of the governments, be they central or provincial.[5] This explains the apparent lack of disputes between the private and the public sector since the government was the alpha and omega in the procurement of goods and services.

Unlike the case under the traditional procurement system, the proclivity for disputes arising in PPP projects is now very high. The reason for this is not far-fetched. PPP is a contract or business venture between the public and private sectors. Due to the complexity of PPP contracts, this arrangement involves several other parties like the financiers, operators, construction contractors, the public sector authorities and others who together form a consortium in order to provide the necessary infrastructure development through PPPs. The interests of each party to these mega contracts are seldom adequately protected in the contracts. Thus, conflicts are bound to arise. Effective resolution of these conflicts in PPP contracts is therefore very cardinal. There is, therefore, an urgent need to look beyond the conventional litigious way of resolving disputes in the courts when considering options for PPP dispute resolution because of the copious shortcomings associated with conventional litigation.

This article therefore seeks to explore the newly-imbibed PPP initiative in Nigeria's infrastructure base by looking at its nature, practical application, the SPV as a one-stop shop for PPP operation, risk sharing and management, the various models, the statutory/regulatory framework and its practical application. Of equal importance, this article also

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1 Or "PPPs", as the case may be, if it denotes plurality.

2 B Li and A Akingboye, An Overview of Public Private Partnership, in A Akintoye, M Beck, and C Hardcastle (eds) Public Private Partnerships: Managing Risks and Opportunities (Blackwell Publishing Company: Oxford, 2008), at p. 29.

3 There are several countries that have adopted this politico-economic policy. Prominent among them are China, Brazil, India, Russia, Poland, Argentina, Thailand, Indonesia and Malaysia.

4 These are South Africa, Ghana, Zimbabwe and Mozambique among others.

5 For example, in Nigeria, government had the monopoly of infrastructure provision and control. However, the government has recently started divesting itself of the powers through privatisation and PPPs.

focuses on the aptness, relevance and importance of some of the ADR processes, to wit, negotiation, mediation and arbitration in resolving PPP disputes with a particular bias or slant towards arbitration. It also draws useful lessons from the South African PPP framework and alludes to the rapidly expanding arbitration landscape in Asia to reflect the international best practices with regard thereto. Finally, this article concludes by making suggestions which, if applied by all nations that have adopted the PPP initiative or mantra, will point and lead towards better and brighter development prospects in the sense of reaping more success stories in the near future from PPP practitioners across Africa and elsewhere.

2. The Nature of Public-Private Partnership (PPP) Contracts

Public Private Partnership refers to a contractual relationship in which a government service or a private business venture is funded and operated through a smart partnership between a public authority and one or more private sector companies.[6]

In such an arrangement, the government and the private sector come together to provide and strengthen the infrastructure needs of a country. While the duty of the government is to provide an enabling environment for PPPs to thrive, the private sector in return brings the much needed capital, skills and core competencies which are the prerequisites to a viable and successful PPP project.

The public authority or public sector party to a PPP contract could be a federal, central, regional, state, municipal, local governmental institution or any other entity which is under the public-sector control. However, in Nigeria, it is only the ministries, departments and agencies (MDAs)[7] of these public sector authorities that can enter into PPP contracts with the private sector.[8] While the private sector party is normally a Special-Purpose Company which includes investors, lenders, and companies providing construction and operational services. According to Yescombe, the relationship between the parties is not really a partnership in the legal sense, but it is contractual, being based on the terms of the PPP Contract.[9]

In the words of the Institute of PPP (IP3),[10] PPP is a partnership between the government and an appropriate qualified private sector entity, or group of entities, for the purpose of financing, designing, constructing and or operating an infrastructure or service which would traditionally have been provided via the traditional public delivery system of public procurement.[11] Thus, PPP is a medium whereby both the private and public sectors

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6 See a paper delivered titled "Public Private Partnership: Infrastructure Development As a Vehicle for Economic Development" by Wale Babalakin at the 2nd Mustapha Akanbi Public Lecture delivered at the University of Ilorin Auditorium on July 13, 2009 at p. 6.

7 Their acronym.

8 See s.1 of the Infrastructure Concession and Regulatory Establishment Act of 2005.

9 E.R.Yescombe, Public-Private Partnerships Principles of Policy and Finance', (Oxford: Elsevier Publishing Ltd, 2007), at p. 2.

10 IP3 is a leading global capacity building firm based in Arlington, Virginia, USA.

11 A Emide, 'The Influence of the Infrastructure Concession Regulatory Commission Act on the Public-Private Partnership in Nigeria'. Retrieved from http://law.lexisnexis.com/practiceareas/International/The-Influence-of-the-Infrastructure-Concession-Regulatory-Commission-Act-on-the-Public-Private-Partnership-in-Nigeria. Accessed on the 15th August 2009.

pool their resources for the ultimate purpose of providing the ever increasing infrastructure needs or deficits for the nation. This is particularly so in the case of developing countries where funding and expertise are lacking.

The advantages inherent in this type of business arrangement are multifarious. The leading ones include the provision of an off-budget mechanism to government for infrastructure development, relieving the public sector of the onerous responsibility for paying for the costs of designing, constructing and the transferring of certain risks to the private sector.

PPPs in the matter and area of infrastructure development by most countries have been justified *inter alia*, on the following grounds:

a. The availability of private capital and other resources to meet the increasing needs for investment in infrastructure services;
b. Efficiency of the private sector in project delivery and operation;
c. The private sector has more access to advanced technology;
d. Sustainable development in infrastructure facilities and services; and
e. The policy shift towards a market economy driven by free enterprise and capitalism.[12]

Consequently, PPP is now gaining more popularity particularly in the developing world whereby it is viewed as a relatively new business relationship that is evolving between both the public and private sectors. In the writers' view, it is not an overstatement to argue that PPPs are here to stay and develop.

3. Stages in PPP Contracts

A complete life cycle of a PPP arrangement is said to be made up of three different phases, to wit, the procurement phase, the construction phase and the operation and maintenance phase. The procurement phase is the period when the concessionaire bids for the project to be executed under a PPP arrangement. The construction stage entails the execution of the contract awarded in conjunction with a cornucopia of other sub-contractors and sub-sub-contractors; while the operation and management stage covers from the period of use of the project for public good up to when the project will be handed back to the public authority.

In practice, a typical PPP arrangement may be quite complex. Usually, it involves various contractual arrangements between a number of parties including the public authority, financier, contractors, project sponsor, project operator, engineers, suppliers, third parties and customers. The partners, through various legally binding contracts or some other mechanisms, agree to share their respective responsibilities arising from financing, implementation, operation and management of a project. This collaboration or partnership is built on the expertise of each partner that meets clearly-defined public needs through the appropriate allocation of risks, resources, rewards and responsibilities. The allocation of these elements and other aspects of PPP projects such as the details of implementation, termination, obligations, dispute resolutions and payment arrangements

[12] Public-Private Partnerships in Infrastructure Development: An Introduction to Issues from Different Perspectives, *supra*, n 6, page 2.

are negotiated among the various parties or partners involved and are documented in a written contract as agreed to by the parties.

It is pertinent to note with regard to the multiple contracts resulting from the above arrangement that amongst the agreements entered into between the concessionaire and the other parties, there are two most important ones out of all the agreements. These are the contract agreement[13] with the financiers and the contract agreement with the government. In fact, the contract agreement with the government forms the basis for the subsequent agreements with the other parties.[14]

Basically, the head contract comprises of an agreement between the public authority,[15] on one hand, and a consortium whose task is to design, finance, operate and maintain the project, on the other. This consortium, in more advanced environments, will be an embodiment of financiers, Construction Company and a facilities management company and, more often than not, the consortium itself will be in the form of a limited company referred to as a Special Purpose Vehicle/Venture (SPV) formed solely for the purpose of carrying out the PPP project.[16]

However, under the Nigerian PPP regime, as shown from the few experiences so far,[17] the SPV is yet to be seen in use. Rather, once the government advertises a certain pivotal infrastructure for concessioning, the interested qualified private sector companies will then submit their applications for consideration. Thereafter, the government will get in touch with the emerging concessionaire after a competitive bidding. A winner will emerge from the process and the government will then execute a proper agreement with the private party. The SPV system and its accompanying advantages are yet to be put to use in Nigeria. Of course, it is a matter of time that the SPV system will be adopted.

4. The Special Purpose Vehicle (SPV)

A Special Purpose Vehicle (SPV) is a separate commercial venture which is a key feature of most PPPs. It is a legal entity which is established between or among the parties undertaking a PPP project. The Special Purpose Vehicle is usually set up by the private party(s) to a PPP transaction. Where the government is interested in the SPV, it may also participate and contribute to the long term equity capital in exchange for shares. Where this is the case, it means that the SPV serves as a joint venture company between the public and private sectors whereby the government, too, would acquire equal rights to the assets within the SPV as other private sector shareholders. The justification for this type of arrangement, from the viewpoint of the government, is that by this, the government's continued interests in the management and operations of the asset will be assured. This may augur well for the business venture.

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13 Before the complex nature of the PPP transaction and the final conclusion of the PPP contracts, different other agreements are also needed. These are sub-contracts under the main PPP agreement and together they form the PPP agreement.

14 Note 12, *op cit*, at p. 67.

15 The name given to this body may vary from country to country.

16 Peter Sheridan, 'PPP In-depth: PFI/PPP Disputes' at p. 1. Retrieved from: http://www.sheridangold.co.uk/articles/pfi_ppp_disputes.pdf. Accessed on 15th March, 2013.

17 The leading ones being the MMA2 and the Lagos-Ibadan Express road amongst others.

It is vital to note that apart from the public and private sectors, a foreign company may equally constitute a part of a joint venture if permitted by the law of the land.[18] Also, an SPV, either solely constituted by the private sector or in alliance with the government/ public sector, will have a contract regulating the relationship between its members. This is referred to as a shareholder's agreement.

If and when this mode is used, the duty is on the consortium which makes up the SPV to deal directly with the authority concerned. It will then enter into various sub-contracts for the performance of the PPP project, usually including a sub-contract with its contractor members for the construction and management of the project, usually for duration of between 25 – 35 years.[19] The SPV's member contractors will also enter into sub-sub-contracts with others, thus making the occurrence of disputes more probable.

In addition, the SPV bears other shoulder-breaking tasks such as approaching commercial bankers for the provision of funding for the project; absorbing the costs of bidding for and winning the project and designing and constructing it; and receiving fixed payments for the duration of the project (mostly between 25-30 years). Such payments received will cover all the bidding costs, capital costs, operating costs, financing costs and the profits of all the PPP players. Although, the SPV mechanism is not always applicable, where it is, it provides a one-stop shop for a proper organisation and execution of the PPP contracts.

5. Risk Sharing and Management in PPP Contracts

Going by the intricacy and sensitivity of the subject-matter of most PPP agreements, risk sharing and management of risks by the participating parties become ineluctable. Should this be a source of discouragement to the various actors? No. Rather, a sound mechanism for effective sharing and management of risks in PPP contracts should be put in place. Where this is accomplished, it will go a long way to checkmate and obviate the unsavoury effects of the likelihood or the existence of risks on the various players in the field of PPP.

The risks inherent in PPP arrangements are multi-faceted. They include political risk (this may arise as a result of change in government policy), technology risk (this arises when technology is not a proven one), construction risk (arises mainly as a result of delays in construction), environmental risk (this may be in form of pollution and other environmental hazards to the society), commercial risk (lower than expected demand for services produced by the project), legal risk (change in law), regulatory risk (change in regulatory regimes), sponsor risk (inability of the sponsor to deliver the project), operating risk (inefficiency in operation leading to higher operating costs) and *force majeure* (risks due to unpredictable natural and man-made events such as flood, earthquake, civil war, etc).[20] Since these are all inevitable risks, it has become an important strategy of PPPs to

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[18] This is permitted in Nigeria. S.54 of the Companies and Allied Matters Act (CAMA) applicable in Nigeria allows an alien that has satisfied the necessary requirements to participate in business in Nigeria.

[19] Peter Sheridan, *supra* n 16 at p.1.

[20] Public-Private Partnerships In Infrastructure Development: An Introduction to Issues from Different Perspectives, *supra* n 6 at p. 57.

make adequate provision for an eventuality in order to share the resultant risks between or among the parties involved.

6. The PPP Models

A wide variety of PPP models have emerged in an attempt to encourage private sector's participation in the provision of infrastructure facilities and services. The compartmentalisation into one model or another is done after an exquisite consideration of the existence of one or all of the following factors:

a. Ownership of capital assets;
b. Responsibility for investment;
c. Assumption of risks; and
d. Duration of contract.

Using the above parameters, PPP models can be classified into four broad categories, namely, *the supply and management contract*, *turnkey projects*, *affermage/lease* and *concessions*. Each of these categories is discussed below.

a. Supply and Management Contract

This is a contractual arrangement for effective management of a part or whole of a public enterprise by the private sector. By so doing, the private sector skills are employed for the effective design and delivery of service, operational control, labour management and equipment procurement. The distinctive feature of this model is that the public sector retains the ownership of facility and equipment. The responsibilities assigned to the private sector are limited as it is not expected to assume commercial risks. In terms of reward, the private contractor is remunerated by the payment of a fee known as the management and services operation fees. This payment is normally performance-based. Although the contract period for this model is usually short (2-5 years),[21] longer period may be used at times for large and complex operational facilities such as a port or airport. Also, this model is common for existing assets in the water and transport sectors.

b. Turnkey Project

Turnkey Project is one of the traditional procurement sources of infrastructure facilities. Under this model, a private contractor will emerge at the end of a highly competitive bidding process to design and build a facility at a fixed fee, rate or total cost. This condition often determines who emerges at the end of the bidding process. The risk involved in the design and construction phases is entirely heaped on the contractor, and for this reason, the scale of investment by the private sector under this model is extremely low and short-termed.

Similarly, the completion of project is unnecessarily delayed since there is no strong incentive on the part of the government for early completion of project by the contractor. This type of private sector participation (PSP) is known as Design-Build.

[21] Perhaps, an example could be cited from Malaysia *albeit* the subject matter is on Nigerian law. The initial management contract for Port Klang in Malaysia with a foreign company was only for three years. The main purpose was to set-up the system so that eventually a local company could take over for a longer period.

c. Affermage/Lease

Under this model, an operator (often referred to as the leaseholder) is exclusively saddled with a somewhat demanding responsibility of maintaining and operating the infrastructure facility and services, though he is not required to make any monumental investment.

However, going by the nature of this model, for more efficacy, it is often combined with other models such as Build-Rehabilitate-Operate-Transfer (BROT). Where this is done, the contract period becomes elongated and, contrary to the known practice, the private sector will be required to make a significant level of investment.

Although the arrangements under affermage and lease are strikingly similar, some minute disparity exists. For instance, while an operator retains the revenue he realises from the customers/users of the facility but makes a specified lease fee payment to the contracting authority under a lease, the arrangement under an affermage is different. In an affermage, an operator and the contracting authority share the resulting revenue from the customers/users of the facility. Usually, the investment risk is borne by the government while the operator bears the operational risk involved in the transaction.

d. Concessions

There is no other model that is as widely used for PPP projects as concessions. Here, the government defines and grants specific rights to an entity (usually a private company) to build and operate a facility for a fixed period of time after which it is expected to transfer same back to government.

In most concessions, government often retains ownership of the facility and or right to supply the services. A concession may be granted to a concessionaire under any of the following two types of contractual arrangement viz., franchise and BOT. These are explained hereunder.

i. Franchise

Under this arrangement, the concessionaire provides services that are fully specified by the franchising authority. The commercial risk is borne by the private sector which may also be required to make investments.

ii. Build-Operate-Transfer (BOT)

In BOT and its other variants (e.g., Build-Transfer-Operate (BTO), Build-Rehabilitate-Operate-Transfer (BROT), Build-Lease-Transfer (BLT), Design-Build-Operate-Transfer (DBOT), Design-Rehabilitate-Operate-Transfer (DROT) and Build-Own-Operate-Transfer (BOOT)), the concessionaire undertakes investments and operates the facility for a fixed period of time after which the ownership reverts back to the public sector.

7. PPPs in Nigeria

The unexampled success records of PPP in other climes have served as a catalyst for its adoption in Nigeria.[22] This is, no doubt, a welcomed development going by the

[22] For example, South Africa has adopted the PPP initiative to develop critical infrastructure since the mid 1990s.

innumerable achievements of PPP in infrastructure developments in those climes. It is, however, important to note that even though the application of PPP in infrastructure development in Nigeria is a relatively recent and novel concept, traces of arrangements similar to PPP could be found in some sectors of Nigerian economy. There exists, either expressly or impliedly, arrangements similar to PPP in the oil and gas industry through the joint venture operations of the Nigerian National Petroleum Corporation (NNPC) and the oil majors such as SPDC, TOTAL ELF, Chevron, NAOC, Addax Petroleum which are being administered by NAPIMS among several others.[23]

The above notwithstanding, the first known project that was executed in Nigeria under PPP arrangement is the Murtala Muhammed Airport II project (MMA2) in Lagos which was designed, financed, built and being operated by Bi-Courtney Aviation Services Ltd (BASL). The magnificent success recorded by this project has triggered off more consciousness on the part of both public and private sectors as to the feat a partnership between the private and public sectors is capable of achieving.

With the glistening hope being brought by the MMA2, the federal government has penned down more airports for concessioning among which are the Murtala Muhammed Airport, Lagos; the Port Harcourt International Airport, Margaret Ekpo; and the Mallam Aminu Kano International Airport, Kano; with the belief that this measure will bring about more efficiency and positive results in the aviation industry. The recent concessioning of some seaports in Lagos, Warri and Port Harcourt by the National Council on Privatization under PPP arrangement is further testimony as to the rate and pace at which the country is embracing this kind of infrastructure development initiative.

The achievements highlighted above are not limited to the Federal Government as some state governments, too, are also pursuing various projects under the PPP scheme. For instance, the Lagos State government, which is the leading actor in this regard, has established a special office to coordinate activities of PPP under the state Ministry of Finance. PPP has been used in Lagos for power generation, management of waste disposal, highway and street cleaning and maintenance. In addition, the state has employed PPP for cooperating with the private sector entities for the development, upgrading, rehabilitation, operation and management of state roads, bridges and highway and other infrastructure projects.[24] A leading example in this regard is the Lekki Concessioning Company (LCC) which is to undertake the construction of major roads (Lekki-Epe Expressway) under BOT for a term of 30 years.[25] It is worthy of mention that the Lekki-Eppe Expressway has since been commissioned.

In Rivers State, the state government is employing PPP to address the Public Health and Housing Programmes. Particular mention must be made of the ClinoRiv Hospital built under PPP, transportation (in partnership with Skye Bank), Housing and Entertainment (in conjunction with Silverbird). In Cross River State, the government has just signed a N100 billion project with the American firm, Jack Rouse of Cincinnati for designing a master plan for their theme park project to attract tourism.

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[23] Engr. Saidu Njidda, 'PPP in Nigeria: How Far?' Retrieved from http://www.fpppn.org/pppnigeria.html. Accessed on 17 August, 2009.

[24] *Ibid*.

[25] *Ibid*.

All the foregoing discussion points to a single conclusion-- the use of PPP in infrastructure development in Nigeria has come to stay and will intensify in the years ahead.

8. Statutory/Regulatory Framework for PPPs in Nigeria

Until very recently, there was no national law for controlling PPP contracts in Nigeria. During this period, projects with arrangements similar to those under PPPs came under the control of the Budget Monitoring and Price Intelligence Unit (BMPIU) which was set up in June 2003 to ensure full compliance with prescribed guidelines and procedures for the procurement of capital projects. Although BMPIU did not directly control PPPs, it could be said to be the pioneer unit set up to oversee PPPs at the federal level with regard to contracts that come within its jurisdiction.

With the expansion in the use of PPPs in Nigeria, the Federal Government realised the real need to come up with a separate legal/regulatory framework which will be primarily responsible for controlling and regulating PPP projects in the country. Following this realisation, the government of the late President Musa Yar'Adua set up the Infrastructure Concession Regulatory Commission (ICRC) pursuant to the ICRC Act of 2005 to develop policy and provide institutional and regulatory framework for an effective regulation of PPP programme in Nigeria.

In further response to the ever-growing demands for more effective PPP regulation, the federal government further inaugurated the Project Steering Committee (PSC) for the Nigeria's PPPs in July, 2009.[26] This Committee is entrusted with the task of ensuring greater participation of the private sector in financing infrastructure services in the country. Coupled with this is the task of undertaking a regular review of the policy guidelines and operating procedures issued by the ICRC to ensure that they are coherent and consistent with evolving development strategies and policy thrusts of the Federal Government. The move towards to a statutory regime in regulating PPP undertakings is a most welcoming news to the PPP players. In terms of legal enforceability, guidelines are discouraged because they are far too inferior than an enforceable statutory scheme.

At the state level, too, for example, Lagos state enacted the Lagos State Roads, Bridges and Highway Infrastructure (Private Sector Participation) Development Board Law in 2004. This law provides for a legal and regulatory framework for private sector participation in the development, rehabilitation, upgrading and construction of infrastructure within the state.[27]

Even though most of these laws have been criticised as being insufficient, they nonetheless provide a ready springboard upon which further development, refinement and improvement could be made. After all, the process for continuous improvement never stops in ISO lingo.

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[26] See Idris, Ahmed, "Nigeria: FG Inaugurates Project Committee For PPP" in the Daily Trust, 21 July 2009 at p. 44 retrieved from http://allafrica.com/stories/200907210083.html. Accessed on August 16, 2009.

[27] See "PFI/PPP Projects 2007" published by Global Legal Group with contributions from: A Practical Insight to Cross-border PFI / PPP Projects work www.ICLG.co.uk. Retrieved from http://www.iclg.co.uk/khadmin/Publications/pdf/1027.pdf. Accessed on September 7th, 2009.

9. Dispute Resolution in PPP Contracts

The discussion on the dispute resolution in PPP contracts will now be looked into. The legal framework for the settlement of disputes is an important consideration in the implementation of the PPP projects. Parties especially the private partners will feel safe and secured where there is a guarantee that disputes arising therefrom can be efficiently resolved.[28] Disputes may arise in all phases of the PPP projects, namely, construction, operation and even at the stage of final handing over of the projects to the public authority.

The legal framework for dispute resolution may be found in a number of statutes and in different rules and procedures of the country concerned. The legal instrument may include tax law, competition law, consumer protection law, laws relating to public procurement, company law, property law, Arbitration and Conciliation law, foreign investment law, acquisition and appropriation law and various other relevant statutes which can aid in the resolution of disputes between or among the parties.

It is important to bear in mind that the settlement mechanisms contemplated in the contract or agreement is in line with the best practices, particularly when large-scale investments from foreign private partners are involved. The commonly used dispute resolution methods include: facilitated negotiation, conciliation and mediation, adjudication by regulatory authority, arbitration and litigation proceedings in the courts. Of all these methods, litigation is the most unsuitable method for settling disputes arising from PPP arrangement except in extreme circumstances. This is because litigation is time consuming, costly and neither of the parties may even be satisfied with the outcome of the proceedings.

The contractual relationships of PPP arrangements suggest that parties to the agreement will be involved in performing various roles in the execution of the project. Undoubtedly, this situation will create a changing and dynamic environment. Moreover, uncertainty of contractual terms and the bearing of risk are bound to create disputes. Irrespective of the degree of complexity of the contractual structures, there are four major identifiable levels of dispute which the SPV partners may likely be faced with. These are-- upstream, intra-parties, downstream and third-party disputes.[29]

Upstream disputes are those disputes between the private sector and the public authority/government. These may involve unilateral actions of the government which may likely affect the policy or the legal and regulatory framework i.e. the issuance of ministerial decisions which result in project cancellations and variations. This change will impact upon the consistency of the PPP network of contracts: it will cause the project company to restructure the downstream substantive contracts, as well as its loan agreements with third-party financiers. These will give rise to disputes.

The second category is the intra-parties disputes. These are the ones which relate to the project performance agreement. Partners may disagree over each partner's financial

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[28] United Nations ESCAP, A Guidebook on Public-Private Partnership in Infrastructure, (United Nations, Bangkok) 2011, *supra* at p 74.

[29] Dimitrious Athanasakis, Effective Dispute Regimes for Large Infrastructure Projects in Greece; paper delivered at the 3rd Hellenic Observatory PhD Symposium on June 14 & 15, 2007.

contributions to the financing of the SPV, or, one partner may go insolvent, and the financial burden falls on the shoulders of the remaining partners.

Downstream disputes may occur from the defaults of the contractors, e.g. where sectional completion is not certified for reasons of the contractors using materials that are substandard or the ones different from the ones specified in the contracts.

Risks in the PPP scheme may also occur by the actions of third parties to the scheme. Financiers often resort to overburden unilateral change of interest rates affecting the process of repayment loans. This kind of financial burden brings along a specific risk. Refinancing the project will amount to pursuance of further deals which may be negotiated on much more burdensome terms than the previous agreements. Clearly, time overruns will amount to lower levels of profitability as returns will be at less percentages and start at a later stage.

Whatever the level of dispute arising, these will have a domino effect upon the progress of the parties' contracts and lead to some interfacing level of liability. But, there is a common decisional thread-- the determination of causation and liability.

Therefore, the existence of a viable and adequate legal framework for the settlement of these disputes which are likely to arise in PPP contracts is vital in the effective implementation of the PPP projects. Private parties (including the concessionaire, financiers and contractors) feel encouraged to participate in PPP projects when they have confidence that any dispute arising between the contracting authority or other governmental agencies and the concessionaire; or between the private parties themselves can be resolved fairly and efficiently without time wasting and incurring of financial losses.

Each PPP contract usually provides for the acceptable modes of settling disputes which must, of course, not be antithetical or obnoxious to the allowed dispute resolution system under the legal framework of the country concerned. The commonly used methods for dispute resolution in PPP contracts include facilitated negotiation, conciliation and mediation, non-binding expert appraisal, review of technical disputes by independent experts, arbitration, and legal proceedings.

Even though most dispute resolution clauses often start with negotiation, as far as the court is concerned, an agreement to negotiate between the parties is unenforceable as it is void for uncertainty.[30] The only advantage of negotiation is that it is believed that tiered dispute resolution provisions (which include negotiation) assist in providing parties with flexibility to try and resolve low value or less important problems/disputes more swiftly and with lower costs and management time than those common under more traditional forms of contract.

Additionally, the pressures created by the security package required by the lenders and banks frequently act as a stimulus to settlement or early resolution of disputes using negotiation. Its failure is, however, that those parties are not legally bound by it and as such if either of the parties is discontented with the outcome of the negotiation, the fact that the contract provides for an agreement to negotiate cannot stop such party from approaching the court.

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[30] Peter Sheridan, *supra* n 16 at p. 8.

Mediation is another dispute resolution option. The only difference between negotiation and mediation is that in the case of the latter there is the involvement of an independent third party known as a mediator. A mediator is a person entrusted with the responsibility of assisting the parties in concluding a settlement which may or may not be binding on the parties. Mediation is, therefore, an advanced negotiation. The effect of a mediation clause in PPP contract is not significantly different from that of a negotiation clause. The determining factor lies in the existence or otherwise of a special procedure to be followed in carrying out the negotiation.

In mediation, the main objective is to resolve the differences between the parties through a negotiated agreement. The mediator does not have the authority to make a binding decision on the parties.[31] The only situation where such decision would be binding is where all the parties have agreed to such outcome. This is because, the mediator has no authority or power except the one given to him by the parties involved. If any of the parties withdraws the authority or power so given, that ends the mediation process. Therefore, if the parties are unable to settle their dispute through this means, they will be at liberty to have their issues dealt with in another way. It is as a result of this that mediation may not be suitable for disputes involving big commercial transactions like PPP contracts because either of the parties may decide to opt out of the mediation process if he or she thinks that the outcome may not be favourable.

Where a contract provides for mediation as a means of resolving disputes without specifying a procedure to be followed, such mediation clause will have the same effect as a negotiation clause. On the other hand, where the parties have not only agreed to negotiate in good faith (assisted by a mediator) but have gone further to identify a particular procedure (such as the CEDR[32] mediation procedure), the effect will be different. In the latter case, there will be a sufficient certainty for a court to ascertain whether the parties' obligations have been complied with or not.[33]

This distinction is pivotal in that where there is a clear procedure as opposed simply to an agreement to negotiate with no specific procedure; the court can investigate and see whether the specific steps the parties agree to take have or have not been undertaken. Be that as it may, since a mediation is conducted on a without prejudice basis, if the parties are not successful in concluding a settlement, the mediation will be of no effect and cannot be referred to in a court action.

From the above cursory examination of both negotiation and mediation, it is obvious that they are both ridden with problems which go a long way to puncture a hole in their appropriateness to resolving PPP disputes. Litigation is equally not apposite for its time-wasting and cost-gulping propensity. Owing to this, the need to consider other viable options, such as arbitration, becomes necessary. The usefulness and effectiveness of arbitration *vis-à-vis* PPP dispute resolution is considered below.

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31 H Brown and A Marriott, ADR Principles and Practice 2nd Edition, (Sweet & Maxwell, 1999) at Page 129.

32 This is the Centre for Effective Dispute Resolution.

33 See *Cable & Wireless Plc v. IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm), [2003] B.L.R. 89.

10. Resolving PPP Disputes through Arbitration

Arbitration is a mechanism whereby two or more parties agree that their dispute will be decided confidentially by an independent tribunal. To be binding, it is a requirement of the law[34] that the parties must agree that the dispute will be resolved by arbitration. Parties are also at liberty to include any specific requirement they deem fit within the agreement to arbitrate. For instance, the parties may agree that the dispute is to be determined by a single arbitrator, or by a panel of three arbitrators, or indeed fifteen arbitrators,[35] so long as they are agreed on this. It is also within the exclusive discretion of the parties to specify the procedural rules to be applicable, the national law to be used, the language of arbitration[36] and even the country in which the arbitration is to be held.[37]

In Nigeria, Infrastructure Concession and Regulatory Commission Act of 2005 which is the principal law that governs PPP contracts in Nigeria does not provide for how dispute arising from the contract will be resolved. It must be pointed out that there is nowhere in the Act where the procedure for the settlement of disputes is mentioned. The Act merely provides that:

> *"No agreement reached in respect of this Act shall be arbitrarily suspended, stopped, cancelled or changed except in accordance with the provisions of this Act."*[38]

Recourse would, therefore, have to be made to the Arbitration and Conciliation Act[39] which is the main statute applicable for purposes of resolution of disputes arising from PPP contracts in Nigeria. That arbitration provides for a veritable platform for resolving emerging disputes in PPP is a widely conceded fact as shown in its global application in PPP dispute resolution. Its advantages are well documented and this further underscores its appropriateness to PPP dispute resolution. For instance, one of the numerous advantages of arbitration is the ability of parties to have their disputes determined by an independent arbitrator knowledgeable in a particular and relevant specialist area. This will go a long way in ensuring quick disposition of cases before the arbitral tribunal; it is more so when PPP projects encapsulate multifarious technical and specialised subjects.

By so doing, the parties will not need to spend so much time "educating" the arbitrator upon a particular specialised area; comparing with a court which may have no experience in such area and may need considerable assistance from the parties. Invariably, the dispute is resolved more quickly and at a lower cost than equivalent proceedings in the court thereby bringing to the fore another invaluable advantage of arbitration, viz., time saving and lower cost of dispute resolution.

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34 In Nigeria, arbitration is governed by the Arbitration and Conciliation Act 2004 (ACA), Cap 19, Laws of the Federation of Nigeria.

35 See Section 6, ACA, LFN 2004.

36 See Section 18, ACA, LFN 2004.

37 See Section 16, ACA, LFN 2004.

38 Section 11 of the ICRC Act, 2005.

39 *Supra*, n 34.

The fact that a huge sum of investment is often committed to a PPP project makes litigation undesirable. For example, in Nigeria, the MMA2 project gulped a whopping sum of ₦20 billion.[40] Assuming that when some government agencies flout the contractual terms of the agreement between the Federal Government and BASL, the latter has to engage in extensive negotiations to resolve the issue not because its rights have not been violated but because of the fear of protracted litigation that may ensue if those rights are to be pursued and litigated in a court of law.

Another salient feature of arbitration that makes it apt for PPP disputes is that the award issued by an arbitrator or an arbitral tribunal is both binding and final, and may be enforced through the court.[41] Even though the Arbitration and Conciliation Act[42] allows for the setting aside of arbitral awards, it may appear to pose some irreconcilable drawback. However, upon closer perusal and examination of the provisions of the Act, however, this is not in any way a problem. That law does specifically provide for when an arbitral award can be set aside in the following words:

> *A party who is aggrieved by an arbitral award may within 3 months by way of an application for setting aside, request the court to set aside the award in accordance with subsection 2 of this section.*[43]

On the authority of the above subsection, the court will only intervene to set aside an arbitral award on the proof of the party making the application that the award contains decisions on matters which are beyond the scope of submission to arbitration.[44] Even where this is the case, in order to prohibit facetious complaint against arbitral awards, the subsection further provides that only the part of the award which contains decisions on matters not submitted to the arbitral tribunal may be set aside.[45]

The above provision, no doubt, goes a long way in limiting the jurisdiction of the court in off-setting arbitral awards and in discouraging parties from approaching the court for setting aside of such awards since proof is required. This makes it more appropriate to PPP disputes where parties cannot afford the luxury of time wasting.

In other climes, in recognition of the over-burdening effects of risks on the concessionaire, there are statutory provisions making the inclusion of arbitration clause in PPP contracts a non-negotiable. In Greece, for instance, any dispute regarding the implementation, interpretation or status of a PPP contract or ancillary agreement is settled exclusively by means of arbitration.[46] In addition, the arbitration decision is final, irrevocable, not subject to appeal and is a legally executable title.[47] In Russia, the

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40 See the Presentation by Wale Babalakin, *supra* n 6 at p. 11. See also the Guardian Article by Wole Shadare, *supra*, at p. 46.

41 See Section 31, ACA, LFN 2004 and also the case of *Ebokan v. Ekwenibe & Sons. Trading Company* (2001) 2 NWLR (PT 696) 44 paragraph F.

42 Cap 19, LFN 2004.

43 See Section 29(1) ACA, LFN 2004.

44 See Section 29(2) ACA, LFN 2004.

45 *Ibid*.

46 Article 31(1) the "PPP Law", Law 3389/2005 applicable in Greece.

47 Article 31(2) of the Greece PPP Law.

Concession Law[48] clearly allows the inclusion of arbitration clauses providing for dispute resolution by an arbitration tribunal or international commercial arbitration.

Provisions such as these are essential to checkmate what may at times be the excesses of the government. Since the government knows that the concessionaire will usually be unwilling to go court because of the fear of time-wasting, and in the absence of arbitration clause in such contract, government tends to contravene the contractual terms with impunity.

Added to the above is the fact that PPP projects are capital-intensive with most parts of the risks involved being shouldered by the concessionaire who is expected to build, design, finance, operate and then transfer the project back to the government within the stipulated number of years. The concessionaire undertakes the construction risk, operational risk, commercial risk, and other forms of risks and, therefore, deserves to be protected against protracted litigation which may delay the recoupment of its invested loaned capital and prejudice its profit earning. The only available effective insulation to the concessionaire is the inclusion of an arbitration clause in the PPP contracts.

11. Dispute Resolution in PPPs in South Africa

Perhaps, it would also be pertinent to survey the ADR landscape in South Africa and Asia.

South Africa has a number of arbitration institutions.[49] One of the most renowned is the Association of Arbitrators (Southern Africa) which was established in 1979 through the initiative of professionals in the construction, legal and other sectors. The association has standard rules which have been amended and modified over time in line with international best practices.[50] The rules have also been adopted by arbitration institutions in Botswana and Namibia for their use[51] in those countries which indicates a degree of regional acceptability of those rules.

The Arbitration Act[52] of South Africa, Module 6 of the National Treasury PPP Manual and the Standardized provision[53] prescribe a detailed procedure for resolving PPP disputes. It is, therefore, important for the parties to incorporate this in the PPP Agreement. It is the requirements of these provisions that all disputes should first be referred to the respective liaison/project officers in order to proffer solutions thereto. If these officers are unable to resolve the dispute within time, then the dispute should then be referred to both the accounting officer of the institution and the Chief Executive of the private party.

If the dispute could still not be settled at this stage, then it has to be referred to an independent mediator appointed by the two parties to the dispute.[54] Where, however, the

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48 No. 115 FZ of 21 July 2005.

49 D W Buttler, 'Development and Practice of Arbitration and ADR in South Africa' in Arbitration and Alternative Dispute Resolution in Africa, C.J Amasike, ed., (Yaliam Press Ltd, Abuja, 2007) at page 84.

50 There were series of amendments to the rules since its 1st draft in 1979. It has undergone not less than five amendments the last of which was in 2005.

51 These are the Botswana Institute of Arbitrators in Botswana and PAMAN (the Professional Arbitration and Mediation Association of Namibia which is based in Windhoek.

52 Act No 42 of 1965.

53 See Part 86 of the Standardised Provision.

54 See also section 11 (1) of the Arbitration Act of 1945 as amended by Act No 49 of 1996.

dispute could still not be settled by the independent mediator, then as a last resort the deadlock will have to be referred to the courts for adjudication and settlement.

12. Arbitration Landscape in Asia

The arbitration landscape in Asia has changed dramatically in recent years with the active involvement of China International Economic and Trade Arbitration Commission (CIETAC). It is one of the leading arbitral institutions particularly in Asia.[55] However, rapid growth in international arbitration in the region has also gravitated very strongly towards Singapore and Hong Kong.[56] The competition between Hong Kong and Singapore is very intense with each trying to outdo the other as the leading international arbitration centre in Asia. The China International Economic and Trade Arbitration Commission together with other arbitration institutions in the region are being increasingly used in cases involving commercial disputes instead of litigation, which is often viewed as time consuming, expensive and inefficient.

Moreover, court judgments are not enforceable across borders to the same extent as awards in international arbitration cases. Aside from common law jurisdictions such as Malaysia, India and Hong Kong, litigation is considerably less prevalent than in the Europe and Africa.[57] But with disagreements or disputes in business and commerce on the rise, arbitration has been considered as an acceptable and popular mechanism for settling commercial disputes.

The increased use of international arbitration has been aided and spurred by the growth of a well-developed cadre of international arbitral specialists who act as counsel and arbitrators, and the increasing acceptance of arbitral awards by domestic legislators and courts. Also, the recognition and enforcement of Foreign Arbitral Awards by all the 148 member states who are signatories to the 1958 New York Convention have also rendered arbitration to be increasingly acceptable and popular in recent years. The increased use of arbitration in Asia has reached a point where statistics suggest that key arbitral institutions in the region now could easily rival some of the main London or European counterparts in terms of case loads and value.[58] For example, according to reports collated by the Singapore's Ministry of Law, after London and Geneva, Singapore

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55 The China International Economic and Trade Arbitration Commission (CIETAC) is one of the major permanent arbitration institutions in the world. It was formerly known as the Foreign Trade Arbitration Commission, CIETAC was set up in April 1956 under the China Council for the Promotion of International Trade (CCPIT) in accordance with the Decision Concerning the Establishment of A Foreign Trade Arbitration Commission Within the China Council For the Promotion of International Trade adopted on May 6, 1954 at the 215th session of the Government Administration Council.

56 The Singapore International Arbitration Centre (SIAC) and The Hong Kong International Arbitration Centre (HKIAC) are the principal arbitration venues in the Asia Pacific with many disputes successfully resolved yearly.

57 Asia's Arbitration Explosion. Retrieved from http://www.ibanet.org/Article/Detail.aspx?ArticleUid=C55383E1-519F-4CD9-8822-BE34CC748D2F. Accessed on 28th June, 2013.

58 In Singapore, for example, the government has been promoting the country as a regional arbitration hub, while the courts have continued to adopt a pro-arbitration, minimal intervention approach. The government has opened Maxwell Chambers in 2010, a purpose built integrated arbitration centre to provide offices for arbitral institutions, arbitrators and counsel, as well as hearing rooms and work spaces for conducting arbitrations.

together with Paris and Tokyo are the most popular venues for arbitration.[59] The Singapore International Arbitration Centre (SIAC) has also been ranked as the fourth most popular global arbitration institution, after ICC-ICA,[60] London Court of International Arbitration, and the American Arbitration Association/International Centre for Dispute Resolution.[61]

Seoul, Sydney and Kuala Lumpur are just three of the other locations in the Asia-Pacific region where the authorities are keenly attempting to draw in lucrative arbitration cases.[62] The global arbitration map is littered with ambitious new international arbitral centres that could not manage to develop a sustainable business. However, it is greatly anticipated that the Asian arbitration landscape will continue to flourish and consolidate in the years ahead with increased trade, investment and population in the region.

From the foregoing account, it can be said that the establishment of arbitral institutions in Asia together with the recognition of their awards will really help in the quick resolution of disputes within the region. PPP disputes are no exception to this trend. Parties to a PPP transaction, particularly the private sector will be most interested in knowing in advance what dispute resolution mechanism has been put in place before committing themselves to providing infrastructures and services through the PPP initiatives. This awareness and development with regard to dispute resolution will augur well for the rapid rise of arbitration of commercial disputes in Asia. And reverting to the future ADR landscape on the African continent adverted to earlier, the writers will also like to speculate that South Africa will lead and set the pace on the African continent with her robust laws and institutional set-up.

13. Recommendations

1) The practice in the advanced nations[63] should be emulated to ensure a further snowball in PPP achievements in Nigeria and other African countries.[64] In England, Greece, America and Australia, amongst others, the government shoulders a bulk of the risks involved. They equally provide guarantees on behalf of the concessionaire whenever the latter attempts to raise funds for the project.
2) It is the duty of the governments to create an enabling environment for PPPs to thrive. Sound legal and institutional frameworks are very cardinal. In some countries,[65] the concessionaires enjoy some forms of tax reliefs or tax breaks in addition to the existence of a sound legal and regulatory framework that has been put in place for PPPs to flourish.

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59 See Asia Arbitration Explosion, *supra*, n 57.

60 International Court of Arbitration of the International Chamber of Commerce.

61 Arbitration Procedures and Practice in Singapore: Overview. Retrieved from http://uk.practicallaw.com/3-381-2028?source=relatedcontent#. Accessed on 16th July, 2013.

62 The Kuala Lumpur Regional Centre for Arbitration established in Malaysia in 1978 is an internationally recognised arbitration centre in the South East Asia. It has a panel of experienced domestic and international arbitrators from diverse fields of expertise.

63 These are the United Kingdom, Australia, Chile, South Africa and a few other countries that have adopted PPPs.

64 Needless to say, South Africa is always the leader of the African countries in terms of any legal and economic development.

65 Examples are United Kingdom, Australia, etc.

3) There should be certainty in the law on PPPs in order to clarify and define the obligations of the contracting parties and the regulatory agencies. Private concessionaires will be most interested and would want to invest more in an environment where there is legal certainty and regulatory stability.
4) Parties to a PPP contract especially the governments should respect and honour agreements voluntarily entered into. Where parties fully respect the agreement, there is likely to be less disputes arising from the transaction.
5) A sound dispute resolution mechanism should be put in place to ensure an effective and quick resolution of disputes that may arise between or among the participating parties.
6) There is an urgent need for a complete overhaul of both the legal and regulatory regimes for PPPs in Nigeria. In respect of dispute resolution, the few existing laws hardly address the problem. The ICRC established under the ICRC (Establishment, etc) Act 2005 has been criticised by a leading Nigerian PPP practitioner:

> "*as having very little effective powers and might end up being largely a monitoring and policy making entity without the capacity to enforce compliances, particularly on the side of the* government."[66]

There is, therefore, an urgent need for a law or laws which will adequately address all the various aspects of PPP including dispute resolution. There is also a need for all the controlling bodies in the field of PPPs to learn the nitty-gritty of the concept as practised in other advanced jurisdictions. It is high-time for the government to realise that PPP is not all about generating funds for the government, it is all about providing infrastructure development for the nation through a formidable alliance with the private sector which in turn will stimulate more economic development for the country, and this is what the government should be more interested in. Since it is called an alliance, there is a presupposition that both parties to the partnership must assume risks and responsibilities.

The overall spin-off effects of the existence of all those measures as discussed in the foregoing in any country is not hard to speculate. For instance, in Greece about 28 projects (worth £2.4 billion) were submitted for evaluation to the PPP Secretariat by public entities. About 16 projects have been approved since March 2007 by the Inter-Ministerial PPP Committee in the education sector, public buildings, justice and culture.[67] The triggered response from the private sector was as a result of the great incentives provided by the government.

14. Conclusion

The on-going wind of change that is blowing across the globe especially in the provision of infrastructures through the PPPs undoubtedly is a most welcomed development. It

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[66] In the words of Mr. Tola Oshobi of BOB & Co, a leading legal practitioner in the field of PPP, in Lagos State, Nigeria in an interview conducted by Mubarak (co-author of this article) on 27th September, 2012.

[67] See Marily Paralika, "PPP Law Brings Positive Change to Public, Private Sectors in Greece" in International Disputes Quarterly Winter 2008 at p. 2. Retrieved from http://www.whitecase.com/idq/winter_2008_6/. Accessed on 16th August 2009.

could easily be touted as the contemporary mantra for socio-economic development. Nonetheless, a lot of commitments are still required especially on the part of the governments in the developing world. If the governments see PPPs as a profit-making enterprise; if guarantees are provided for the concessionaires by the governments; if tax reliefs or incentives are made available to the concessionaires; if the existing legal and regulatory regimes are built upon and constantly consolidated; if a level playing field and an enabling environment are provided; and if arbitration clause is made a compulsory part of PPP contracts, then Nigeria and other African nations can reap and boast of unprecedented economic development in their infrastructure base and achieve the Millennium Development Goals in the not-too-distant future. The same is also true of other regions of the globe with particular reference to the common law countries.[68]

[68] The authors will like to express their sincere gratitude to Grace Xavier for her generous comments on a few aspects of arbitration law covered in this article.