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AN APPRAISAL OF THE INDISPENSABILITY OF ARBITRATION AND ITS CONTRIBUTION TO CORPORATE DISPUTE RESOLUTION IN NIGERIA

Cali C. Ojimba
Faculty of Law,
Chukwuemeka Odumegwu Ojukwu University,
Igbariam Campus, Anambra State

ABSTRACT

Disputes are common occurrence and part of human society. It is bound to arise at one stage or the other in all human interactions, be they commercial, socio-political, matrimonial industrial or international. Resolution of these forms of disputes without recourse to self-help, court or to prolonged methods of dispute resolution is what arbitration and other forms of Alternative Dispute Resolution (ADR) have come to do. Hence, the contribution of arbitration to dispute resolution cannot be overemphasized. Over (he years, some scholar have interrogated the essence of arbitration when we have series of courts encompassing Customary Courts, Area Courts, Magistrate Courts, Tribunals, State and Federal High Courts, Court of Appeal and Supreme Courts in Nigeria. These scholars argued for exclusion of arbitration from Alternative Dispute is now in danger of suffering the same disadvantage as litigation, namely, increasing delays, exorbitant and disruptive technicalities. Other scholars consistently maintained that arbitration has not lost its simplicity, informality, cheapness and efficiency. However, the aim of this paper is to examine the indispensability of arbitration and its contribution to dispute resolution in Nigeria. The work adopted doctrinal method of data collection and relied on primary sources of data such as statutes, case laws, journals and textbooks to examine the indispensability as well as the contribution of Arbitration 'to dispute resolution in Nigeria. The work found that arbitration offers advantages that litigation from it's very- nature can never provide as arbitration is not a court yet the decision reached by parties in resolving disputes are legally binding. The work therefore recommended that arbitration should continue to be used as alternative for litigation for the fact that the arbitral tribunal is so expertly in the fie Id of the dispute that the entire procedure can be conducted without the intervention of lawyers or other representative with major gains in speed and economy.

Keywords*:* Arbitration Arbitral tribunal, Litigation, Dispute, Dispute Resolution, Indispensability

Introduction

Fundamentally, arbitration is the oldest method dispute resolution. It predates both legal % systems and the courts. In this regard, arbitration is not a modern process. Nwakoby[1] noted that arbitration practice is

[1] G. C, Nwakoby, The Law and Practice of Commercial Arbitration in Nigeria'. Snaap Press Ltd, 2014

as old as the history of human civilization. I; is as old as man himself and has a history that goes back as the middle ages. Particularly, in England, merchants resorted to arbitration to settle trading disputes in the middle, ages long before the King's Court had found the way to enforce contractual obligation[2].

In modern time, arbitration has developed as an established method of resolving dispute just like the contemporary court system. In fact, the best known Alternative method of Dispute Resolution is arbitration. Others are negotiation, mediation and conciliation. These are referred to as alternative dispute resolution methods because they are alternative to litigation.

Before the enactment of the Arbitration and Conciliation Act[3] hi Nigeria, there are different sources of arbitration law in practice. Extra judicial settlement of disputes by arbitration is very popular among Nigerian traditional communities, especially among non-urban dwellers.

Prior to 1988, Nigeria arbitration law was contained almost entirely in the customary law, common law and the enactment of Cap 13 Laws of the Federation of Nigeria 1958. The point established is that arbitration as a form of dispute resolution is divided into domestic and international arbitration. Regardless of the type of arbitration which an individual undertakes, the legal basis of all arbitration is voluntary agreement. In Ankra v Dahra[4] the court held that the voluntary nature of the agreement of the parties to submit a case or dispute for arbitration binding arbitration. In the view of Nwakoby[5], if there is a distinct agreement to appoint an umpire to determine the difference .between the parties and other conditions are present, then there is arbitration. Hence, it is this agreement of the parties to arbitrate that confers jurisdiction on the arbitrator to arbitrate between the parties.

It is pertinent to note that customary law arbitration is oral and is not required to be written. The principle of law is that when the decision or award of customary law arbitration is reduced into writing, it will be referred to as customary award and not an award made pursuant to the Act. T.O Elias[6], described customary law arbitration as a mode of referring a dispute to the family head or an elder of the community for a compromise solution based upon subsequent acceptance by both parties of the suggested award, which becomes binding only after such signification of its acceptance from which either party is free to resile at any stage of the proceedings up to the point of making the award. The position of the law is that a party who has consented to arbitration under the customary law cannot resile from the proceedings midstream or after an award is made unless he can show in evidence that such a right so to resile exists under his

[2] R. Bernstein, 'Handbook of Arbitration Practice, Sweet and Maxwell, London, 1987 page 8
[3] Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 1990 (1956) WA.LR 89
[4] Ibid
[5] Ibid
[6] G.C. Nwakoby, The Law and Practice of Commercial Arbitration in Nigeria'. Snaap Press Ltd, 2014

custom in respect of arbitration. This has gotten judicial notice in *Kwasi v Labi* where the court held that a party to an arbitration agreement under the customary law cannot withdraw midstream.

The English common law is the foremost source of Arbitration law in Nigeria and it is oral. One cardinal principle of arbitration under the common law is that a party can abandon the arbitration proceedings and proceed with an action in a court[7]. It is closely associated with customary law arbitration and there is no decision of courts on how to determine whether a particular agreement is customary law arbitration or one guided by the common law rules. Be that as it may Arbitration under the Act in Nigeria is governed by the provisions of the Nigerian -Arbitration and Coaciliation Act, Cap A18 Laws of the Federation of Nigeria, 2004. The basic principle of arbitration under the Act is that there must be a valid contract in writing to submit differences to arbitration whether such differences are present or future and whether or not an arbitrator is named in the agreement. Hence, section I (a), (b), (c), (2) of the Act Cap A18 of 2004 provide that every arbitration agreement shall be in writing contained.

(a) In a document signed by the parties: or
(b) in an exchange of letters, telex, telegrams, or other means of communication which provides a record of the arbitration agreement; or
(c) In an exchange of points of claim and of defence in -which the existence of an arbitration agreement is alleged by one party and not denied by another
(2) Any reference in a contract to document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.

Summarily put, arbitration is indispensable in dispute resolution and it has contributed resolving in disputes between two or more private persons in their private capacities as natural persons. It can be between state parties, between nations and also between a state party and private person. Thus, the issue of capacity to enter into arbitration agreement is governed by the same principles of capacity as in the law of contract it is purely legal and has a full legal force.

The Concept of Arbitration

Arbitration has been defined by section 57 (1) of the Arbitration and Conciliation Act[8] as a commercial arbitration whether or not administered by permanent arbitral institutions. Orojo[9] while trying to emphasize that litigation is not the means for dispute resolution stated that going to law does not necessarily mean litigating a case in court as there is another way of enforcing a claim, that is arbitration.

Arbitration is the submission of a dispute between two or more parties for decision by a third party of their choice. Ronald Bernstein[10]

[7] T.O. Elias 'Nature of African Customary Law.' 1956, page 212

[8] G. C. Nwakoby Supra
[9] J.O. Orojo, 'Arbitration as a Means of Dispute Resolution" Workshop Paper of Centre of African Law and Development Studies, 15th September 1995
[10] R. Beinstein, Supra

defined arbitration as an agreement of the parties that a dispute between them be settled by a tribunal of their choice. The courts equally have tried to judicially define arbitration. Romilly M.R in *Collins* v *Collins*[11] defined arbitration as a reference to the decision of one or more persons either with or without umpire, of a "particular matter in difference between the parties. For Fulton Maxwell, J: Arbitration is equally a private process whereby a private disinterested person called an arbitrator, chosen by the parties to a dispute, acting in a judicial fashion, but without regards to legal technicalities, applying either existing law or norms agreed by the parties and acting in accordance with equity, good conscience and the perceived merit of the dispute makes an award to resolve the dispute.[12]

Halsbury's[13] Law of England defines arbitration as the reference of a dispute or differences or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. This Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004 definition was affirmed by the Supreme Court in *NNPC* v *Lutin Investment Ltd*[14]. Also an arbitration clause in any agreement constitutes a valid agreement to submit to arbitration and is binding on both parties to the agreement[15]. In the main, the legal basis for an arbitration agreement is contract, that is, the agreement to arbitrate which is crystallized in the submission of points stated for the decision of the arbitrator. The agreement to submit a dispute to arbitration is founded on the legal doctrine *of Pacta sunt servanda*, *bonafide* meaning that agreement shall be performed in good faith.

The Indispensability of Arbitration and Its Contribution to Corporate Dispute Resolution in Nigeria

Contemporary society is fraught with incessant dispute and human being has been preoccupied with the quest to find the best method of resolving the disputes. Litigation in a court of law has proven insufficient inn resolving the disputes due to many factors such as delay, cost, complexity etc. As a result, the essence and place of arbitration in the national and international commercial and business relationships are obvious. One of the indispensability of arbitration is that the arbitral tribunal is so expertly in the field of the dispute that the entire procedure can be conducted without the intervention of lawyers or other representatives, with major gains in speed and economy. Nwakoby noted that Commercial disputes in sell of properties or rent as well as disputes between consumers of a commodity are resolved in this way.[16]

Some scholars have argued that arbitration should be excluded from Alternative Dispute Resolution (ADR) because it is

[11] 28 UCH 186
[12] F. J. Maxwell, 'Commercial Alternative Dispute Resolution, The Law Book Co Ltd, 1989, 55
[13] Husbury's Law of England, 3rd Ed. 38
[14] G. C. Nwakoby, The Law and Practice of Commercial Arbitration in Nigeria
[15] Snaap Press Ltd, 2014
[16] G. C. Nwakoby, Supra

now in danger of suffering the same disadvantages as litigation, namely increasing delays, exorbitance and disruptive technicalities[17]. These scholars opined that negotiation, conciliation and mediation qualified to be called Alternative Dispute Resolution (ADR). Hence, they stipulated that to refer arbitration as Alternative Dispute Resolution (ADR) would be misleading. Orojo argued emphatically there has developed an increasing consensus in dispute resolution usage that Alternative Dispute Resolution (ADR) comprises the whole body of procedures not properly classified either as litigation or as arbitration. This degree of consensus is now such that we can and should discard any further suggestion that Alternative Dispute Resolution (ADR) is to be understood as including arbitration. As technical as the above remark can be, the best known Alternative Method of Dispute Resolution (ADR) is arbitration. Others are negotiation, mediation and conciliation. Thus; with respect, it is wrong to conceive of arbitration as not being an alternative method of litigation. It is a statement of fact that the modern arbitration process has not lost its simplicity informality, cheapness and efficiency.[18] Its essentials have not changed, its advantage over litigation are still substantial and enormous. Simply put, arbitration is not a court however close its semblance may be to court or litigation. An arbitrator is also not a judicial officer within the provisions of the Constitution[19].

The significance of arbitration which is more than any other method of resolving disputes is that arbitration takes place where two or more persons agree that a dispute or potential dispute between them shall be decided in a legally binding way by one or two impartial persons in a judicial manner that is, upon evidence put before him or them.

Beyond the above intellectual extrapolation, arbitration has contributed a lot and has become an indispensable method of dispute resolution in Nigeria because of the following reasons;

Expertise: One Fundamental difference between an arbitrator and a judge is expertise. This cardinal principle was highlighted in *Thornton* v *shoe Lane Parking* where it was held that that an arbitrator is normally selected for his expert knowledge of a particular trade whereas a judge rarely has any particular experience in commerce let alone the technicalities of the trade in which the dispute has arisen. This is because arbitration gives the parties the opportunity to choose as their arbitrators person(s) experienced in the field in which the dispute arises. A classic example is that a judge or barrister at law 'may be chosen to arbitrate for special fields like oil refinery or engineering dispute and that will be because of his experience and expertise in the preparation for and management of complex disputes. Litigation is becoming burdensome and there abound situations where a single judge presides over disputes

[17] L Street, The Language of ADR: Its Utility in Resolving International Commercial Disputes-The Rowle of Mediator". 1992. Arbiration 18-19

[18] J,0. Orojo Supra

[19] G. C Nwakoby, Supra

regardless his area of specialization. In such situations, Nwokoby averred that the judge who however is not trained in law alone may know nothing in commerce and trading and in which case he is illiterate in commerce and trading but still will want to handle commercial, industrial and engineering matters.

Simplicity of Procedure: In *Gilbert Ash Northern Ltd v Modern Engineering* it can be seen that regular courts is governed by established standards that must be followed and which, in most cases, lead to unnecessary bureaucracy as speed is usually crucified by unnecessary standard procedure. Arbitration has become indispensable because of the simplicity of procedures involved in resolving disputes. The provisions of Evidence Act are inapplicable to arbitration as could be seen from 256(1) of the Evidence Act 2011 and section 1(2) of Cap E14 Laws of the Federation of Nigeria 2004.[20]

Litigation of cases in Nigeria courts can take an extremely long time from initial filing of the claim and pleadings in the court to the delivery of judgment. In some situations, cases last for eight to ten years without any assurance that the parties will ever be heard and their matter determined by the court. In some other cases, the parties who instituted the case may have died due to long adjournments and their names substituted with the second or third generation survivors of their respective families before their matters are determined.

The old adage that justice delayed is justice denied is reaching a compelling and irresistible stage and commercial men and women are not ready to leave their matters in the hands of judges and courts that may never sit and even when the sit, they may never handle any matter with dispatch. Arbitrators do not go on strike while Nigerians courts in most cases go on strike for three or more months.[21]

Confidentiality: it has to be that this duty of confidentiality is implied in every arbitration agreement and need not be stated on the document for it to apply. Over the years users of arbitration know this elementary part of the practice. Colman J applying same in Dolling-Baker had this to say:
If it be correct that there is at least an implied term in agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing.[22] The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent opening the door of the arbitration room to that third party. Similarly witness statements, being so closely related to the hearing, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included[23].

[20] (1971)1 ALL ER 686 [21]G.C. Nwakoby Supra [22] (1973) 3 ALL ER 195

[21] Ibid
[22] Ibid
[23] (1990)l WLR 1205

Nwakoby[24] scholarly stated that Arbitration so to state is a private process of dispute settlement and confidentiality attaches to the proceedings. This confidentiality which binds the parties, and their successors and assigns, extends not only to documents disclosed but also o documents generated in the course of the arbitration. This covers written submissions and pleadings and also witnesses' proofs and exhibits. The confidence extends to transcripts and notes of evidence and arguments, and also includes the award. It must however be mentioned that the duty of confidentiality is not absolute but qualified. One of such qualifications is consent of the parties. Another is compulsion of the law illustrated in a court order requiring disclosure of prior arbitration documents for the purposes of subsequent court action. A third exception is disclosure with the leave of the court and the fourth is production or disclosure necessary for the purpose of protecting the legitimate interest of an arbitrating party. The point established is that arbitrators, the parties and their advisers have traditionally respected not only the privacy of the hearing but also the confidentiality of the proceedings and documents.

Cheapness and Cost: The cost of arbitration and expense are minimized particularly in respect of domestic arbitration. Filing fees are not paid as an in litigation but this must not be overemphasized particularly with respect to foreign arbitration where the place and seat of arbitration proceedings may be a foreign country and where there would be a possibility of employing translators and experts for the translation of documents into foreign languages. As time is money, arbitration saves time and when the time saved at arbitration is compared with the unnecessary delay one experience in litigation, it will be obvious that arbitration cheaper than litigation both in terms of cost and tune. Hence, it makes arbitration indispensable method of dispute resolution.

Speed and Efficiency: A very significant attribute of arbitration in the resolution of dispute in complex long term contract, business and commercial relationship is the element of speed. This element of speed is defined as the period between the time the dispute arises and the time it is resolved by a neutral third party with a binding award. The importance of this cannot be overemphasized because the longer the time that elapses the more the dispute seems to take on a life of its own, which may be totally out of proportion to the seriousness of the original controversy and the more the business relationship between the parties is strained.

Right, of Choice of Procedure: In arbitration, the parties have wider choice of procedure than in litigation, and each can represent himself or be represented by any one of his choice who may not even be a lawyer. Right of audience is not limited to lawyers as in litigation, and in particular a company or corporation can be represented by its director or manager. Arbitration is acceptable to many States and state Institutions which, for diplomatic reasons may be unwilling to submit to the jurisdiction of a foreign court.

[24] C.C. Nwakoby Supra

Lack of Hostility: Arbitration has the credit of saving the business relationship of the patties. Since it is a voluntary submission of the disputants to arbitral tribunal, the decision of the tribunal shuns brinkmanship and violence, hostility, rancour, and prevents the parties from losing face after the settlement exercise might have been over.

Convenience: Convenience of the parties are considered by the arbitrator and the principle of law is that the arbitrators have the duty to choose the venue or place of arbitration for their convenience. Contrary to arbitration, in the regular court cases are arranged to suit the convenience of the court and counsel. The interest of the litigants and their witnesses are the last things to be considered. During the pre-arbitral meetings, the arbitrator (s) agree with the parties as to issue of convenience of time so as to ensure speed, efficiency and convenience of parties.

Conclusion

Arbitration has come to stay as the best Alternative Dispute Resolution (ADR) and has — become indispensable in that order having contributed significantly to dispute resolution in Nigeria and elsewhere. Alternative dispute resolution methods are today defined in a narrow sense to mean only consensual method of resolution of disputes as distinct from the adjudicatory ones, such as litigation and arbitration. They are presently defined to include only negotiation, mediation and conciliation but as to how far this represents the general position of scholars and writers is a totally different issue. However, negotiation is usually the first step in ADR process. Mediation which is often referred to as conciliation as if the two terms are the same is non-binding procedure. Mediation involves helping people to decide for themselves while arbitration involves helping people by deciding for them. Arbitration is binding and enforceable whereas conciliation and mediation terms which are subject to acceptance of the parties do not. More so, in *Sutcliff v Thackrah*[25] it was settled that an arbitrator is immune from action for negligence but a conciliator or mediator is not so immune. This grant of immunity to arbitrators just like the judges and Magistrates goes a long way to support the view that arbitrators and Judges are partners in the business of dispensing justice; the Judges operates in the public sector and the arbitrators in the private sector.

Recommendation

The work therefore recommended that arbitration should continue to be used as alternative for litigation for the fact that the arbitral tribunal is so expertly in the field of the dispute that the entire procedure can be conducted without the intervention of lawyers or other representative with major gains in speed and economy.

[25] (1974) 1 ALL ER 859