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Commercial Dispute Resolution: Has Arbitration Transformed Nigeria's Legal Landscape?

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Abstract:

The adoption of arbitration in the light of its well established attributes promotes confidence levels in the general businesses environment, enhances institutional trust, whilst also developing practical compromise resolution mechanisms. However, Nigeria, a developing economy has not matched policy intent with commercial realities, particularly in terms of broad based integration and utilization of arbitral tools. This trend is not sustainable in the light of the renewed efforts to promote enhanced justice delivery; lower administrative costs and the urgent need to optimize the capabilities of the judicial arm of government. The paper assessed specific arbitral provisions of selected, State High Court Civil Procedures Rules, and on this basis critiqued the arbitral visibility and incorporation relative to established legal processes. Amongst other salient issues, a robust application of arbitration is recommended especially in view of the peculiarities of Nigeria's legal processes, judicial institutions, evolving political and social-economic indicators.

Keywords: arbitration; commercial transactions; dispute resolution; litigation; Nigeria.

JEL Classification: K4; K41.

Introduction

Litigation is the procedure widely utilized for resolving diverse range of disputes and the evidence of such broad based acceptance exists across local and international jurisdictions. The determination of commercial disputes in the regular courts of law, particularly in Nigeria is not time efficient and instructively such systemic delays provide ample opportunities for the distortion of justice delivery. Also, when commercial disputes are subject to protracted litigation, the cost-benefits over the short to medium term are usually in the negative for the affected business

concerns. Thus, in such circumstances, the commercial interests would have suffered appreciable business and other pecuniary losses (Onabanjo).

Commercial litigation in Nigeria is characterized with undue delays which result in court congestion and incessant case adjournments. This is one of the unsavory features of commercial litigation in Nigeria, particularly in busy jurisdictions such as; Lagos, Kano and Rivers States. It is trite that, litigants cannot reasonably predict the tenure of legal disputes once same has been filed. Thus, to circumvent such a negative outcome, identifiable parties, relying on an arbitration clause in a valid agreement, may decide to file a contractual dispute with an arbitration tribunal (Section 2 Arbitration and Conciliation Act 1990).

The basis for advocating arbitration as a mechanism for resolution of commercial disputes in Nigeria among others are; expeditious hearing of commercial disputes; relatively economical mechanism for disposal of commercial disputes; a relatively informal resolution tool to mitigate disputes; reduction of caseload in court; reduction of public expenditures; provision of a more accessible platform for settlement of local commercial disputes; enhances local and international confidence in Nigeria's justice delivery system; and will increase trust levels in Nigeria's commercial spaces. This paper adopted a wholly descriptive-critique approach of existing literature relative to the theme of the paper. Also deployed is deconstructionist outlook on applicable State High Court Civil Procedure Rules and judicial precedents. This approach revealed the extent to which arbitral mechanisms are captured in existing legal structures.

1. Arbitral Mechanism: a Conceptual Overview

Arbitration is a process that is initiated by mutual referral to an Arbitral Tribunal for determination, and is subsequently tabled for final resolution by professional arbitrators other than the court of competent jurisdiction. An arbitral process is based on the written agreement between the parties which provid esexpressly that; where a dispute arises between the parties it shall be decided by a competent Arbitral tribunal. The decision of the arbitrators binds the parties. It is an alternative mechanism for determination of disputes which usually occurs in private, subject to the agreement of the parties (Bernstein 1998). Arbitration agreements are irrevocable except by agreement of the parties or with the leave of a court of competent jurisdiction.

Generally speaking, the parties will typically agree on the numbers of arbitrators that would be involved in the process. However, in situations where no such provision captured in the requisite agreement, the number of arbitrators shall be deemed to be three. In addition, each party shall choose one arbitrator and the two parties shall agree and appoint the third arbitrator. In certain circumstances where the parties' fails to appoint the arbitrator, the court on a written application by either of the disputing parties shall appoint an arbitrator or same by unappointing body such as the Chartered Institute of Arbitrators. Foreign appointing bodies such as; the Institute of Chartered Arbitration London, American International Association New York and Chambers of Commerce in Paris, may also nominate an arbitrator in their respective jurisdictions. It should be noted that, the choice of arbitrator may be contested if there are reasonable grounds as to his impartiality and where the arbitrator's professional qualification is not assured.

In cases where any of the parties to an arbitration agreement initiates any legal proceedings in any court; any of the arbitrating parties may at any time after appearance, but before filling of pleadings request the court to stay proceedings. The presiding court would make such an order when; it is convinced that there is no satisfactory rationale why the issue should not be submitted to an arbitration tribunal pursuant to the subsisting arbitration agreement. Furthermore, such an order will be made, where the court is satisfied that the applicant is disposed to perform all that is required for the proper conduct of the arbitration proceedings. Hence, the court, may give an order staying the proceedings pending the determination of the arbitral proceedings (See: Komolafe V. Onanuga - Suit No: FSC 138/61 of March 30, 1962). It is pertinent to note that, where an arbitral award is being contested in, the appropriate court order is to stay the proceedings pending the hearing of the substantive matter before the arbitral tribunal.

In the light of the above, some jurisdictions in Nigeria have deemed it pertinent to capture specific Alternative Disputes Resolution provisions as part of their Civil Procedures Rules. These include; Lagos State High Court (Order 25, High Court of Lagos State (Civil Procedure) Rules 2012),the Federal Capital Territory Abuja High Court (S. 259 of the 1999 Constitution of the Federal Republic of Nigeria) and Rivers State High Court, which have made it a mandatory requirement for settlement of non-contentious commercial disputes.

2. Overview of Selected Civil Procedure Rules on Arbitration

In Nigeria, it is a fundamental rule of the legal profession for lawyers to primarily exhaust all avenues for peaceful settlement of disputes concerning their client and other disputants before rushing to the courts. In compliance with

this, the Lagos State Government established the Citizen's Mediation Centre under the auspices of the Directorate for Citizen's Rights a department in the Lagos State Ministry of Justice. Arbitration practice has been established by Order 3 Rule 11 and Order 25 Rules 1-8 of the High Court of Lagos State Civil Procedure Rules, 2012; Order 19 Rules 1-14 of the High Court of the Federal Capital Territory, Abuja Civil Procedures Rules, 2004; Order 25 Rule 1 (2) (c) and Rule 3 (k) High Court of Rivers State Civil Procedure Rules, 2010 and Order 19 High Court of Kano State Civil Procedure Rules, 1988 (Edict). These jurisdictions amended their rules of court to accommodate alternative disputes resolutions mechanisms for accelerated hearing of commercial disputes and for amicable settlement of disputes in their jurisdictions. Many Arbitration bodies and institutions now exist to settle international commercial disputes such as; the International Chambers of Commerce, Regional Centre for International Commercial Arbitration. However, owing to a myriad of factors; there is still a relatively low uptake on the adoption of arbitration, coupled with other alternative dispute resolution options.

The Lagos State High Court Civil Procedure Rules, 2012 provide for accelerated hearing of commercial disputes by compelling lawyers to front-load their pleadings and by requiring the judges to utilize case management system and for replacement of written arguments for oral addresses in certain instances (Adekoya 2007). To further speed up the trial of commercial disputes, Lagos State government has set up a commercial division in its high court for the trial of commercial disputes. Specifically, Order 25 provides in certain respects to entrench the arbitral process by stating amongst others that; certain matters should be resolved at interlocutory stage without going through full trial; gives parties opportunity to choose the most appropriate process of resolving their disputes fairly and speedily. It provides the parties a ready alternative to settle their disputes within the established arbitral structures and processes. This procedure is broadly captured under the 'Case Management' platform. Also, it should be noted that requisite sanctions may be applied if parties fail to participate in the process as directed by the Arbitral Judge.

In the same vein, Order 25 Rule 1 (2) (c) and Rule 3 (k) High Court of Rivers State Civil Procedure Rules, 2010 seeks to accelerate and promote the amicable settlement of commercial disputes. This option is expressly captured under the Pre-trial conference procedure, amongst other avenues by which the parties can resolve a dispute. However, commercial exigencies will usually compel the parties to adopt alternative dispute resolution rather than litigation. It is noteworthy, that the pathways for the parties to successfully resolve their dispute through ADR are not as explicit in comparison to the applicable High Court Rules in Lagos State jurisdiction.

Order 19 Rules 1-14 of the High Court of the Federal Capital Territory, Abuja Civil Procedures Rules, 2004 expressly provides for referral of disputes to an arbitrator for settlement subject to the agreement of the parties or the court in situation when parties cannot agree or when the arbitrator nominated declines to act. It also provides in specific respects to secure a final award about the matter for resolution. This award may be varied or set aside as the Court may deem fit depending on the facts and circumstances of each case.

3. Legal Framework Regulating Arbitration

Arbitration Act 1914 was the first Act regulating arbitration and which subsequently became Cap.13 of the Amended Laws of Nigeria in 1985. As a consequence of the evolving commercial sphere, the Arbitration and Conciliation Decree 1988 was promulgated. It provided amongst others for domestic and international arbitration, but with strict limitation to commercial disputes (Section 57(1)). The extant Nigerian Law on Arbitration is the Arbitration and Conciliation, 2004 which domesticated the United Nations Conventions on the Recognition and Enforcement of Foreign Arbitration Awards 1958.The implication of such is that its provisions are substantially applicable to Nigerian arbitration proceedings. The Arbitration and Conciliation Act is the principal statute regulating the practice of arbitration in Nigeria (Global Legal Sight Legal framework for arbitration in Nigeria 2015).

An arbitration proceeding arises from the agreement of the parties. An arbitration agreement may be in form of arbitration clauses in a contract or in form of a distinct agreement (Article 7(2)), signed by the parties which provide detailed record of the transactions. The Lagos State Arbitration Law 2009 regulates all arbitral proceedings within Lagos State, except where parties have expressly agreed that another Arbitration Law will apply. Lagos and Kano States have similarly enacted their own arbitration laws. However, is imperative for these States to take due cognizance of the social, institutional and other contextual realities that may undermine the outcomes of such an undertaking.

The Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention signed June 10, 1985): The Nigerian government assented to this convention on March 17,1970, therefore the convention is binding. However, where recognition and enforcement of any award occurring out of international commercial arbitration are required, Schedule 2 of the Convention shall apply to any award made in Nigeria or in any contracting

State if such contracting State has a reciprocal legislation recognizing the implementation of arbitral awards done in Nigeria in harmony with the prerequisites of the Convention.

UNICITRAL Arbitration are rules designed by the United Nations Commission on International Trade implemented by the United Nations General Assembly in 1976 and endorsed for use in Arbitral proceedings by Member States of the United Nations Laws. One fundamental feature of UNICITRAL Model Law is that it is not a treaty but a model law which serves as guide to member Nations. It incorporates New York Convention of 1958. This rule is acceptable globally for settlement of disputes arising from commercial relationships or contracts and by considering Arbitration Rules in commercial contracts. The rules are amenable it can be designed to meet the needs of arbitral tribunal for commercial disputing parties. The Conventions shall relate only to contractual or commercial transaction related disputes.

It thus suffices to state, that the parties to arbitration agreement must have contractual capacity. That is, they must be recognized as legal persons with valid contractual capacity. Every individual has the legal capacity to enter arbitration agreement except infants, persons that are mentally retarded and bankrupts. This is essential not only for arbitration process but for the enforcement of arbitral awards and orders under the Nigerian Commercial laws.

4. A Judicial Perspective on Arbitration

As established in the case of United Insurance. V. Stocco ((1973) 3 SC II and Re: Quo Vadis (1974) 12S.C 117) an arbitration agreement is binding and enforceable and precludes any of the disputing parties from raising an application to annual the arbitration clause. The arbitration clause refers the disagreements resulting from contract between the parties to arbitral tribunal. It must be clear and unambiguous (Arbitration and Conciliation Act of the Federation of Nigeria 2004); must contain the names of the parties; the numbers of arbitrators to be appointed; the forum or place of arbitration; the applicable law; arbitration procedure; the language of the arbitration and other specific matters. Where any dispute arises as to interpretation of the agreement, rights, responsibilities and liabilities of the parties or any of them in relation to, arising out of or in the performance of the contract, such disputes would be referred to an arbitration. It may also state that an award of an arbitrator shall be a condition precedent to the implementation of any rights under the agreement. The significance is that a party will have no cause of action in respect of a claim outside the clause except an award has been obtained. It is imperative to note that arbitrators are not bound by any formal rule or the Evidence Act.

The case of 'Express Petroleum and Gas Company Limited V. Shebah Exploration and Production' (2008) is also instructive. The matter was instituted by the plaintiff at the Federal High Court in Nigeria and the contention was that the claim was in respect of a foreign award which should not be enforced in Nigeria as provided for under Section 54(1) (a) of the Arbitration Act. The claim was cancelled and the arbitral award was enforced in Nigeria. Generally, arbitration proceedings are confidential and the awards given by the arbitrators are contested most times in the law courts by aggrieved parties to the arbitral proceedings. Arbitration proceedings in Nigeria are confidential except the parties agreed otherwise, and the awards are not made public except where both parties expressly consented.

5. Arbitration Matrix in Nigeria

A considerable number of litigants in Nigeria are still not predisposed tot he adoption of arbitration as a mechanism for the settlement of commercial disputes. This unfavorable situation can be attributed to some of the following issues militating against broader levels of utilization. Hence, the participants in this legal arena must contend with the myriad of issues blurring the visibility and integration of arbitral mechanism into Nigeria's legal landscape. The following paragraphs highlight some of the fundamentals matters in this regard. However, there are some positives in the evolving trend, especially when construed against the historical antecedents of conventional forms of dispute resolution in Nigeria.

Also of importance is the lack of powers for enforcement of arbitral awards, especially where an aggrieved party against whom an award was made fails to comply with award. This may compel the successful party to further apply to the court for execution of the award. Hence, there is a need for the enlargement of arbitral tribunal powers as regards due enforce its awards and issuing of requisite sanctions for non-compliance. This can be achieved via constructive amendment or reform of the subsisting Arbitration legal framework. Moreover, this is an added legal advantage in the light of the challenges associated with enforcing court judgments in foreign jurisdictions (Foreign Judgment Reciprocal Enforcements Act, Laws of the Federation of Nigeria 2004). An arbitral award on the other hand is more amenable to enforce across international jurisdictions, bearing in mind the adoption of the applicable

international laws. The New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1985 captures detailed the procedure in this regard.

It is noteworthy, that arbitration proceedings may be more expensive than litigation since the parties have to pay the arbitrators subjectt o the total number of the arbitrators engaged for the proceedings. Since the Courts are not paid by the parties, cost of judicial proceedings is limited to summons, listing of cases and professional fees of counsel engaged. There is the need to ensure that cost of arbitration is cheap and affordable. To put it more succinctly, the Federal and State governments need to energize the existing institutions in order to facilitate increased access to arbitration and other alternate means of dispute resolution.

Also, some awards may require judicial confirmation for validity and enforcement in Nigeria. Awards of arbitral panels or tribunals should be made binding automatically irrespective of the nature and circumstances of the commercial subject matter in disputes between the parties. Arbitration only binds the parties and does not cover a third party but subject to the arbitration agreement between parties. Arbitration award should be binding on all the parties, whether a desirable, proper or necessary party to a dispute. Hence, the binding force of an Arbitration award should be construed in certain respects as an exception to the doctrine of privity of contract.

Another major drawback of the arbitral process is that Arbitral tribunal lacks the power to order consolidation of law suits. Unlike in the regular court proceedings where all the relevant parties would usually be ordered consolidate their suits, especially where the subject matter of the various disputes as well as the reliefs sought by the parties are materially similar. On the contrary, arbitral tribunals have no powers to order consolidation notwithstanding the significance to the delivery of justice and fair hearing. The arbitral tribunal has limited powers such as power to compel attendance of witnesses and attachment of bank accounts among others (Section 72 Sheriffs and Civil Processes Act Laws of the Federation of Nigeria 2004).

Arbitration and Conciliation Act Cap. 18 Laws of the Federation of Nigeria, 2004 should be amended to accommodate contemporary commercial innovations and to increase the powers of the chartered arbitrators in Nigeria to order consolidation of actions and to enforce its awards and to compel attendance of witnesses, to impose penalty in form of fines, attachment of bank account of a suspect among others.

There are certain disputes that cannot be resolved through arbitration such as criminal matters, fundamental human rights cases, constitutional matters, traffic offences among others. This is a serious limitation to the jurisdiction or matters that can be heard by the tribunal. There is the need to increase the jurisdiction and powers of arbitrators to be able entertain a broader spectrum of matters subject to the consent of the disputing parties. This is achievable through continuous training of arbitrators on trial procedures, relevance and admissibility of evidence in Nigeria.

Conclusions

This paper appraised the legal framework that regulates arbitration proceedings in Nigeria, especially towards the effective resolution of commercial disputes in Nigeria. The advantages of arbitration as a means of resolving protracted commercial disputes were also considered in detail. Also highlighted, specific commercial cases that was successfully resolved through arbitration.

A more inclusive and robust adoption of arbitration is a viable option for settling commercial disputes. Contending parties are now more willingly to submit their disputes to arbitral proceedings and obtain consequential awards. The recurring question is what does a practicing lawyer in Nigeria benefit having a case in regular court for twelve years or fifteen years, especially when there is a practical, accessible and mutually beneficial alternative. Moreover, it is the role of lawyers to be dispute managers and dispute resolvers rather than agents of protracted litigation.

There is a need for a mandatory training and skill acquisition in mediation, arbitration and other alternative dispute resolution methods for Nigerian judges and lawyers. It is also opined, that the various States in Nigeria should emulate the initiative of the Lagos State government by establishing active Multi-Door Court House facilities in their respective jurisdictions. This will accelerate the hearing of commercial disputes, coupled with the other collateral benefits. Moreover, the maturing legal framework and statutory institutions setup to regulate arbitration procedures in Nigeria attest to the untapped potentials of the Nigerian judicial. This is not to relegate the recurrent internal and external challenges bedeviling the optimal performance of administration of justice (Iyoha *et al*. 2017).

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