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A Critical Analysis of Arbitration as an Instrument for Resolving Commercial Dispute in Nigeria

Dr. Jacob Otu Enyia
Senior Lecturer, Faculty Of Law, University Of Calabar

Cleverty Afu Njong
Assistant Lecturer, Faculty Of Law, University Of Calabar

ABSTRACT

This paper is a critical analysis of arbitration as an instrument for resolving commercial dispute in Nigeria. The Nigerian courts considering the precarious situation finds itself in the dispensation of justice moreso in the resolution of commercial disputes. The works examine the concept of arbitration, overview of alternatives dispute resolutions (ADR), the legal and institutional framework for the regulation of arbitration in Nigeria, types of arbitration among others. The work underscored the prospects and future of arbitration in the areas of party autonomy, third party funding, and online arbitration, the availability of injunctions and interim reliefs within the framework of arbitration and the upsurge of arbitral institutions. The paper recommends that for arbitration to be properly harnessed and enhanced all hands must be on deck – the parties, the courts, counsel all have a role to play.

Keywords: ADR, Arbitration, Commercial Dispute, Autonomy, Nigeria.

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Introduction

In every facet of human endeavour, disputes are bound to occur. The conundrum lies in the resolution of the disputes. There are several options available to parties in a dispute. Over the years, majority of disputes have been resolved by way of litigation. However, alternative dispute resolution (ADR) mechanisms have gained prominence today in the Nigerian legal system as a result of the frustrations associated with litigations; time and costs and its attendant negative impact on relationships[1]. Alternative dispute resolution just like equity has stepped in to supplement litigation and ameliorate the hardship therein. In view of the matrimony between litigation and alternative dispute resolution (ADR), contracts can now be made bonafide.

Alternative dispute resolution (ADR) refers to all means of methods of resolving disputes outside the courtroom. The Acronym ADR has variously been suggested to refer to as appropriate dispute resolution[2]. Essentially, alternative dispute resolution refers to a range of processes that encourage dispute resolution primarily by agreement of the parties as against a binding decision in litigation. The word "alternative" as used refers to options to litigations which includes negotiation, mediation, conciliation, arbitration and the hybrid processes. Alternative dispute resolution mechanisms are increasingly gaining recognition in Nigeria as appropriate mechanisms for resolving disputes and as such have been institutionalized through the concept of the multi door courthouse. Alternative dispute resolution processes are useful before, during and after litigation. For a long time, individuals, investors and in fact the public have assumed that litigation is the principal mechanism for resolving dispute. This is to say the least fallacious and should be discountenanced so as not to be clog in justice delivery. Civil procedure rules in force in Nigeria contemplate the use of alternative dispute resolution pending trial with the requirement of front loading and pretrial conference. In view of the matrimony between litigation and alternative dispute resolution, there is the need to adopt a multi-track and comprehensive approach to dealing with cases especially those of a commercial nature.

Arbitration as an alternative dispute resolution mechanism is a technique for the resolution of disputes outside the court room. Other forms of alternative dispute resolution include negotiation, mediation, conciliation and the hybrid processes. The preference for arbitration, the adversarial form of alternative dispute resolution is

[1] Efevwerhan, D. I. Principles of civil procedure in Nigeria. Snapp Press, Enugu, 2nd Edition (2013), p. 81

[2] Menkel-Meadow, C. Peace and Justice: Notes on the Evolution and purposes of legal processes. Georgetown Law Journal (2006), pages 5553 - 580

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borne out of the fact that there is party control of the process, it is flexible, it is confidential, and it results in awards which are fair, final and enforceable. Also, decision makers are selected by the parties based on desired characteristics and experience, and so at the end of the day, there is broad user satisfaction. The decision to seek arbitration is sometimes made after a conflict has escalated, but often the parties have a clause in their contract agreement that commits as well as binds them. As high as 90% of all international contracts are governed by an arbitration clause. If as further appears to be the case, the trend to arbitration seems to be increasing, then we are now living through a more violent change of judicial machinery than was present when equity emerged into conflict with the common law courts. Arbitration is mutual in nature between the parties and usually inserted into contract agreements. Where a dispute arises, such dispute is referred to one or more persons called the arbitrators, arbiters and tribunal who reviews the case abinitio and reaches a decision otherwise known as an award that is binding on both parties and enforceable in court.

Arbitration is regulated by the arbitration and conciliation Act (ACA) 2004[3] in the entire Federation except Lagos State[4]. The ACA draws heavily from the United Nations commission on International Trade Law (UNCITRAL) model law of international commercial arbitration 1985[5].

Under the ACA 2004, and the rules made pursuant to it, applies to any arbitration whose seat is in Nigeria or which parties have agreed will be governed by the ACA 2004. The long title of the ACS states that the purpose of the Act amongst others, is "…to make applicable the convention of the recognition and enforcement of arbitral awards (New York Conventions) to any award made in Nigeria or in any contracting state arising out of International Commercial Arbitration". In addition, the convention on the recognition and enforcement of foreign arbitral awards (New York Convention), which is incorporated as the second schedule to the ACA 2004, is applicable to the recognition and enforcement of arbitral awards out of international commercial arbitration. Notwithstanding, parties are free to choose the rules applicable to the arbitration proceedings and may even chose arbitration rules of a different country or the rules of an international or foreign arbitral institution[6].

[3] Arbitration and conciliation Act, Cap A18, laws of the Federation of Nigeria, 2004.
[4] In Lagos State, Arbitration is regulated by the Lagos State of Arbitration Law 2009.
[5] Section 53, Arbitration and conciliation Act, Cap A18, LFN 2004, refers to the adoption of the UNCITRAL Arbitral rules in international Arbitration
[6] Section 53, Ibid.

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Conceptual Overview of Arbitration

Various definitions of arbitration have been proffered by various authors in their works. However, despite the avalanche of definition of the term arbitration, there exists no universal definition of arbitration. The starting point of understanding the meaning of "arbitration" is the definition given by our existing local legislation. The arbitration and conciliation Act, CAP 18, Laws of the Federation of Nigeria, 2004. According to its long title, it is: An act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation and to make applicable the convention on the recognition and enforcement of foreign Awards (New York Convention) to any award made in Nigeria or in any contracting state arising out of international commercial arbitration. In its interpretative section, the arbitration and conciliation Act 2004[7], defines arbitration to mean "A commercial Arbitration whether or not administered by a permanent arbitral institution". This definition is restrictive in that it applies to the settlement of commercial disputes only and this has steered the course of our work as we also restricted ourselves to the use of arbitration in the settlement of commercial disputes in Nigeria: issues and prospects.

Some authors reflected on arbitration as an alternative dispute resolution in their works. Ezejiofor in his locus classicus, The Law of Arbitration in Nigeria[8]," defined arbitration as "the reference of a dispute or difference between not less than two parties for determination after hearing both sides in judicial manner, by a person or persons other than a court of competent jurisdiction". Ezejiofor's work on arbitration gave us an expository insight into the practice of arbitration in Nigeria and indeed was an indelible consultant in this research. Davidson[9] just like Ezejiofor dwelt on arbitration in general and also observed that arbitration is a form of alternative dispute resolution in which two or more parties agree to submit a dispute to the binding decision of a person called arbitrator who acts in a judicial manner in private, rather than to a court of law. A person acts judicially if a dispute exists; the person hears evidence and contentions of the parties if appropriate and reaches a decision. For example, industrial dispute sessions which do not involve determination by a third person, may not be considered as arbitration in this sense, but rather a form of conciliation or mediation by which the third person assists the disputing parties to reach an agreement, while taking a leaf from Ezejiofor as a renowned and intelligent

[7] Section 57, Arbitration and Conciliation Act, Cap 18, Laws of the Federation of Nigeria, 2004.
[8] Ezejiofor, G. The Law of Arbitration in Nigeria, longman Nig. Plc, Lagos, 1st Edition, (1997), P.1.
[9] Davidson, F. Arbitration W. Green, Edinburge, 2nd Edition, (2012), p. 19.

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author, our discourse was not only centered on arbitration in Nigeria, we took a voyage into discovering the law of arbitration in other jurisdictions (United States and France).

Ladan on his part in his book, ADR in Nigeria, processes and enforcement[10] defined arbitration as a process of dispute resolution in which a neutral third party who is not a judge, hears both sides to a case during an informal hearing and then decides who winds and loses.

From the aforementioned authors, we were able to deduce that certain elements ought to be present before a dispute resolution mechanism can regarded as arbitration thus: firstly, there must be an existence of a dispute and parties who have as well envisaged the existence of a dispute in future or gotten into a dispute. Secondly, the parties have voluntarily agreed to refer such disputes to arbitration and thirdly, the decision of the arbitrator would be binding on the parties.

Stachowski[11] observed that as beautiful as arbitration appears, one thing is lacking and that is justice. To the author, "arbitration is not concerned about justice. For if arbitration was concerned about justice, it would permit the common man to administer it in the arbitral process, as the common man is a better administrator of justice than the expert". It is worthy to note at this juncture that complex disputes may require experts. For example, quantity surveying experts, in the case of a construction dispute or expertise in commercial property law, in the case of a real estate dispute can be chosen.

Nwakoby[12] on The Courts and the Arbitral Process in Nigeria reiterated the courts role in ensuring that arbitration process in Nigeria is strengthened and empowered to perform its role in the dispensation of justice with the emergence of the multi door court system which we acknowledge and affirmed in this work.

Ayinla, Adebayo & Ahmed[13] discussed the compartmentalization of ADR and arbitration to show the argument on their distinction. At some point, the authors stated that arbitration and ADR are the same thing and at another point, they say they are strange bed fellows. In blowing hot and cold at the same time as to whether

[10] Stachowski S., Arbitration's use of Experts hinders justice. Pennstate Law of Arbitration Law review (2018) Vol. 10, issue 1.
[11] Stachowski S., Arbitration's Use of Experts hinders justice. Pennstate Law Arbitration Law Review (2018). Vol. 10, Issue 1.
[12] Nwakoby G., The courts and the arbitral process in Nigeria". Unizik Law Journal, Vol. 4. No. 1. P., 20.
[13] Ayinla, Adebayo & Ahmed. An appraisal of the nexus and disparities between arbitration and alternative dispute resolution (ADR). Nnamdi Azikiwe University Journal of International Law and Jurisprudence (2017), Vol. 8 No.1., pp 182-191

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arbitration and ADR are the same thing or not (with due respect). Ajomo and Orojo[14] shares the same sentiments with Ayinla et al as they opined that arbitration is in a curious position when discussing ADR processes and should be left out of the ADR process.

Lucas[15] delved into a regional discuss by x-raying the Asia-pacific regional arbitration. The researcher noted that arbitration is growing in importance because of the general growth of Asian economies; the attractions of neutrality, flexibility, finality and confidentiality; the greater case of international enforcement of arbitral awards compared with court judgment.

Overview of Alternative Dispute Resolution (ADR)

Reiman, Beck, Peter, Zeller, Moses and Engiles[16] researched extensively on ADR in special education and concluded that research in this area is still at infancy. They however, lamented how absence of research in this field. They therefore called on stakeholders across the field of special education on advance special education dispute resolution and to broaden the research that seeks to understand conflict resolution to general. This research effort is specifically thrilling, though our focus is not on special education but it is worthwhile to bring ADR in a seemingly non judicial domain.

Andrew[17] studied 54 situations in which negotiation, facilitation or mediation was applied to a waste management conflict in Ontario or Massachusetts, to empirically investigate several important questions concerning these methods of alternative dispute resolution (ADR). The author employed analysis of case documentation, detailed telephone interviews with 123 ADR participants.

Wilocks[18], carried out an analytical study to establish the existing knowledge that architectural professionals in South Africa have about ADR methods. The author has proven that architectural professionals hardly have any knowledge regarding ADR methods.

[14] Orojo, J. O. and Ajomo, M. A. Law and practice of arbitration, longman press, Enugu, 2nd Edition (2004).
[15] Lucas, B. Alternative dispute resolution for business in developing countries.
[16] Reiman, J. Beck L., Peter M., Zeller D., Moses P., & Engiles A. initial review of research literature on appropriate dispute resolution (ADR) in special education.
[17] Andrew J. S., The role of Alternative dispute resolution in resolving waste management conflicts: A study of cases in Ontario and Massachusetts National Library of Canada Acquisitions and Acquisitions (Thesis). School of graduate studies, University of Toronto (1999).
[18] Willocks, T. Investigating the use of alternative dispute resolution methods in the architectural profession of South Africa (Unpublished M.Tech. dissertation), 2016.

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All and Geng[19], studied alternative dispute resolution (ADR) and came the conclusion that, ADR is becoming an important part of the legal systems of every country in the world.

Overview of the Legal and Institutional Framework for The Regulation of Arbitration in Nigeria

Abe[20] reviewed the legal framework for the institutionalization of international commercial arbitration in Nigeria taking into cognizance the United Nations commission on international trade law (UNICITRAL), arbitration rules, convention on the settlement of investment disputes between states and nationals of other states (ICSID).

The arbitration and conciliation Act, 2004 equips us with the procedures of handling arbitration matters. A work on arbitration as a dispute resolution mechanism: issues and prospects like ours cannot be said to complete without recourse to the arbitration and conciliation Act. At different avenues in our work, the Act provided a guide especially in our discuss on the arbitral process in this work. For instance, section 4 and 5 provides for stay of proceedings as well as indirect enforcement of the arbitral agreement. The presence of these two (2) similar but different in effect section of the act gas generated a lot of legal controversies amongst even respected and prolific learned writers. I take the liberty to reproduce the two sections Verbatim ad literatim.

Section 4 of the Act provides as follows:

(a) A court before which an action is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.

(b) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued and an award may be made by the arbitral while the matter is pending before the court.

[19] Ali M. & Geng L. Alternative dispute resolution (ADR) in Pakistan: The Role of lawyers in mediation procedure International Journal of Research, (2019) Vol. 06, No. 04.

[20] Abe O. The legal framework for the institutionalization of International Commercial Arbitration in Nigeria: A critical Review, Afe Babalola University: Journal of Sustainable Development Law and Policy. Vol. 1, Issue 1 (2013), pp. 132 – 147.

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Nature And Relevance of Alternative Dispute Resolution (ADR)

Alternative dispute resolution (ADR) is any means of achieving a mutually acceptable solution to disputes: agreed to by the parties without recourse to litigation. It is a broad term used to denote informal procedures for resolving disputes – ranging from negotiation, to non-binding third party intervention (such as mediation) to binding third party intervention (such as arbitration) outside the formal circuit of the courtroom[21]. And because of the informal nature and apparent lack of strict rules in ADR, the parties can agree to incorporate anything into the settlement without any reference to the type of magnitude of any remedy that might have been available under the law.

The acronym ADR has variously been suggested to refer to as appropriate dispute resolution, amicable dispute or not quite mainstream, in Australia for example, ADR has been designated as primary dispute resolution (PDR), while describing litigation as alternative dispute resolution[22]. Willis and Wood noted that "ADR is an irritating and misleading acronym. Alternative to what? Indeed the full panoply of methods dominated under the rubric of ADR includes a variety of processes, which are alternative to court-based means of dispute resolution.

Types of Alternative Dispute Resolution (ADR)

1. **Negotiation**: Is a method of alternative dispute resolution (ADR) that retains power to resolve the dispute to the parties involved. No third party is vested with authoritative decision-making power concerning the resolution of the dispute. Negotiation is the simplest and most utilized form of resolving dispute and a common phenomenon that mankind engages in on daily basis, conducted by a range of communication methods, either verbally or written. It basically consist of discussions between the interested parties with a view to reconciling divergent opinions, or at least, understanding the different positions maintained.
2. **Mediation**: Is a method of alternative dispute resolution (ADR) in which parties work to form a mutually acceptable agreement by jointly procuring the help of a third person (a mediator) to help them in reaching an agreement amicably. Such third party may be an individual or individuals, a state or group of a settlement and must be neutral and impartial.
3. **Arbitration**: the disputing parties refer the matter to a private tribunal or persons for settlement in a judicial manner. The arbitral tribunal or arbitrators

[21] Genn, H. judging civil justice. Cambridge University Press, England (2009), p.80.
[22] Altobelli, T. Reflections on primary dispute resolution, Bond Law Review, (2001). Vol. 13:2, p.1

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are comprised of people knowledgeable in the field of dispute. The decision of the tribunal is called an award which may be enforced by a court where necessary or set aside by the same court for good cause, such as partiality on the part of the arbitrators or an unfair award.

4. **Conciliation**: conciliation involves a situation where a third party known as a conciliator, is obliged to use his best endeavours to bring the parties in a dispute to a voluntary settlement of their disputes. Conciliation is regulated in Nigeria by the arbitration and conciliation Act. A party wishing to conciliate under the Act shall send to the other disputing party, a request for conciliation containing a brief statement of the subject of the case.
5. **Domestic arbitration**: is one between person's resident or doing business in the same country and the contract is subject to be performed in the same country and subject and to the local statutes, one that is concerned purely with national or domestic matters.
6. **International arbitration**: it is said to be international if the parties to an arbitration agreement have their place of business in different countries or where the subject matter of the arbitration agreement relates to more than one country or where the parties expressly agree that any dispute arising from the commercial transaction between them shall be treated as an international arbitration.
7. **Institutional arbitration**: International arbitrations may either be institutional or ad hoc. A number of organizations, located in different countries, provide institutional arbitration services, often tailored to particular commercial needs.
8. **Ad hoc arbitration**: This arises where the parties in their contract agreement do not refer to arbitration under any rules of commercial arbitration administering agency or institution, but is entered into after a dispute has arisen and because no institution is involved.
9. **Customary arbitration**: arbitration conducted in accordance with the customs, trade practices and usages of a particular community or group of people is called a customary arbitration. It is the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs, elders of their community or religious leaders and the parties are bound by their decision.

The Process of Arbitration

How law addresses arbitration remains a question separate from the nature of the arbitration itself. Much arbitration held in Nigeria will present no issue regarding governing laws as the Nigerian laws will govern all aspects of the arbitration

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including arbitration agreement, the arbitral procedure and the substance of the dispute.

When legal relationships are created through contracts or agreements, there usually exists a medium for the resolution of disputes peradventure dispute arises. Contracts that are to be resolved through arbitration are referred to as arbitration agreements. From time to time, business and commercial decisions are made which often result in breach of the terms of commercial agreements between parties. An arbitration agreement is an agreement by parties to submit to arbitration all or certain disputes which may arise between them in respect of a defined legal relationship or contract whether contractual or not.

Issues and Prospects

That arbitration has a place in Nigeria and has come to stay as a result of elegantly drafted legislations and the proliferation of arbitral institutions, as revealed in this paper. The conundrum lies in the fact that although arbitration has come to make a home in Nigeria, there remain loopholes in arbitral laws, practice and procedures in Nigeria, making the arbitral system in the country untrustworthy and disputants skeptical of setting their disputes outside the courtroom. How much arbitration have been accepted by the populace, utilized, enhanced and projected to even warrant Nigeria being chosen as a seat of arbitration in international arbitration in 2021 leaves much to be desired. Is the case similar to those of other arbitration jurisdiction or seats?

Issues and challenges

The issues and challenges disputants in an arbitration agreement face are largely due to the state of arbitration in Nigeria, whether by legislative drafting or practice. The relevant challenges are herein discussed.

The ingrained culture of litigation

In different quarters, there is a shared belief that arbitration increasingly resembles litigation and one wonders whether arbitration has not now become more procedural than substance. Particularly, arbitral institutions have over the years evolved rules of procedure somewhat akin to High Court procedural rules. Lawyers now produce tons of documents, analyze huge amounts of information as part of the proceedings, interview dozens of witnesses and experts, conduct extensive legal, forensic and painstaking research and prepare comprehensive and voluminous submissions. All these take a lot of time.

Recognition and enforcement of arbitral awards

The recognition and the enforcement of arbitral awards is a very important and critical stage of arbitration under the Nigerian arbitration law. Section 31(1) of the ACA bestows on the High Court, High Court of the FCT and the Federal High Court

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the right to enforce arbitral award and an award may, by leave of the court or a judge, be enforced in the same manner as a judgment or order of court to the same effect and therefore has the same binding effect on the parties.

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